IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 45 of 2020
[In the High Court at Labasa Case No. HAC 58 of 2018]

BETWEEN : **PETARIKI LESUMA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **03 December 2021**

Date of Ruling : **06 December 2021**

RULING

[1] The appellant had been indicted in the High Court at Labasa on one count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed on 11 June 2018 at Savusavu in the Northern Division.

[2] The information read as follows:

'Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

PETARIKI LESUMA *on 11 June 2018, at Savusavu in the Northern Division, penetrated the vagina of* ***M.V.****, with his penis, without her consent.*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 20 June 2019 to 14 years and 01 month of imprisonment (after the remand period was deducted) with a non- parole period of 12 years and 01 month.

[4] The appellant in person had sought enlargement of time to appeal against conviction and sentence (03 July 2020) on the basis that his appeal was out of time. The Legal Aid Commission has tendered an application for enlargement of time to appeal with amended grounds of appeal against conviction and sentence and written submission on 09 November 2021. The state had tendered its written submissions on 11 November 2021.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[6] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[7] The delay of the appeal (over 11 months) is very substantial. The appellant had stated that his lack of knowledge in law and appellate procedure and failure of his counsel to visit him after the sentence were the reasons for the delay. Thereafter, with the

assistance of some inmates he had filed his appeal papers. However, more than 11 months delay cannot be accepted having regard to the reason adduced. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal filed out of time to be considered arguable there must be a real prospect of its success in appeal**. The aforesaid guidelines are as follows:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[9] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

Ground 1 (Conviction)

THAT the Learned Trial Judge erred in fact and in law when he did not independently assess all the evidence adduced during trial and in not doing so resulted in the conviction being unsafe and further causing a grave miscarriage of justice.

Ground 2 (Sentence)

THAT the sentence imposed on the appellant is harsh and excessive.

[10] The trial judge in the judgment had summarized the prosecution evidence and defense position as follows:

> 5. *The prosecution alleges that the accused in the pretext of discussing about the relationship of the complainant and her boyfriend, started a conversation with the complainant on the night of 11th of June 2018. He then took the complainant to the bedroom and asked if he could hug her. The complainant did not say anything, but started to cry. The accused then hugged her. Thereafter, the accused kissed the lips of the complainant and sucked her breast. He had pressed his penis on the vagina of the complainant on the top of her short. He had then removed the short and undergarment of the complainant and inserted his penis into her vagina without her consent.*
>
> 6. *The accused admitted every events that have taken place up to the allegation of insertion of his penis into the vagina of the complainant in the admitted fact. The accused denies that he penetrated into the vagina of the complainant with his penis. Therefore, the main issues that the court has to determine is whether the accused inserted his penis into the vagina of the complainant without her consent.*
>
> 7. *The complainant has not shouted or alarm the others who were sleeping in the house when this incident took place. She was afraid that the accused might have a knife or something and would do something to her if she tries to shout or alarm others. She had tried to push the accused when he tried to insert his penis into her vagina. Moreover, she had cried when this incident was taking place. The complainant said that she did not go out and informed her grandfather, who was sleeping in the living room, after this incident took place as she knew the accused was still in the living room. I accept the explanation given by the complainant.*

01st ground of appeal

[11] The appellant submits that the learned trial judge had not independently assessed the evidence in the judgment and he had not substantially considered the defense case. Law does not require the trial judge to undertake such an exercise when he agrees with the assessors as his summing-up becomes part and parcel of the judgment when he directs himself according to the summing-up and therefore, the judge is not expected to repeat everything he said in the summing-up in the judgment (vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021). The appellant has no complaint about the summing-up where the trial judge had fully canvassed the evidence including the appellant's denial of penetration.

[12] The applicable law is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021).

[13] The appellant had admitted all events that had taken place except the allegation of insertion of his penis into the vagina of the complainant or the act of penetration in the admitted facts. Thus, the trial judge had correctly remarked that the main issues that the court had to determine was whether the appellant inserted his penis into the complainant's vagina without her consent. The trial judge had examined the evidence in the judgment in that context and ben satisfied of the fact that the appellant had penetrated the complainant's vagina beyond reasonable doubt.

[14] Having thus considered the evidence the trial judge had remarked in the judgment:

> 8. *I observed the way and the manner the complainant gave evidence, where she was coherent, straight and maintains the consistency during the course of giving her evidence.*
>
> 9. *In view of these reasons, I accept the evidence given by the complainant as reliable, credible and truthful evidence. Therefore, I do not find any cogent reasons to disagree with the unanimous option of guilty given by the three assessors. Accordingly, I am satisfied that the prosecution has successfully proven beyond reasonable doubt that the accused has committed this crime as charge.*
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> 10. *In conclusion, I find the accused guilty of rape contrary to Section 207 (1) and (2) (a) of the Crimes Act and convict to the same accordingly.*

[15] Therefore, there is no real prospect of success in this ground of appeal.

<u>02nd ground of appeal</u>

[16] The appellant argues that the trial judge had not considered the appellant's mitigation and also his first offender status.

[17] The trial judge had dealt with both aspects as follows in the sentencing order:

> 12. *The learned counsel for the defence in her mitigation submissions discussed about your family and personal circumstances, which has not much mitigatory values.*
>
> 13. *You are a first offender. However, there is no evidence or facts before the court about your general reputation in the society and also no information about any significant contribution that you have made to the community. In view of these factors, you are only entitled to a meager discount for your previous character.*

[18] Sentencing tariff for child/juvenile rape was set at 11-20 years in **<u>Aitcheson v State</u>** [2018] FJSC 29; CAV0012.2018 (2 November 2018). The trial judge had set out aggravating circumstances as follows:

> 9. *According to the victim impact report, the complainant has been going through an adverse emotional and psychological trauma due to this incident. Her life style has adversely changed after this incident. Therefore, I find the level of harm is substantially high in this offending.*
>
> 10. *You have called the complainant into the sitting room when she was trying to sleep in her bedroom while others at home was sleeping. You have then started a conversation in the pretext that you wanted to know about her relationship with her boyfriend. You have then taken her into the bedroom and forcefully committed this offence on her when she was crying. You have unleashed this disgraceful sexual assault on the complainant when she was afraid and keep on crying. It appears that you have quickly planned to commit this offence when you found an opportunity where the complainant had no prospect of escape or seek assistance. Hence, I find the level of culpability in this offending is substantially high.*
>
> 11. *You have blatantly breached the trust that the complainant reposed in you as her uncle. Moreover, you have breached the trust that your own brother, the*

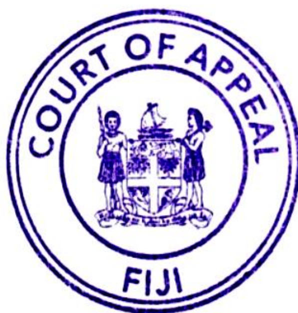
father of the complainant, had in you by committing this crime to the complainant. Actually the complainant explained in her evidence that she treats you as her father. She thought that you were asking about her relationship with the boyfriend in order to advise her about such matter. Moreover, the age difference between you and the complainant is substantially high. You were 42 years old and the complainant was 16 years old when this incident took place. I consider these grounds as aggravating factors.

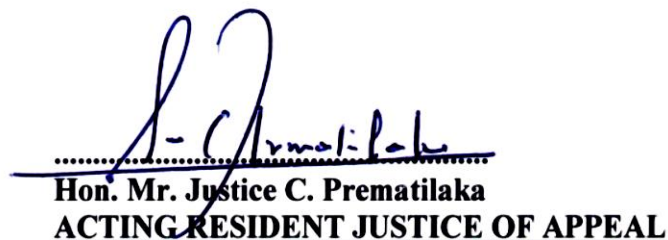
[19] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[20] Considering the gravity of the offending, I do not think that there is a sentencing error or a real prospect of success in the appeal against sentence.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.





Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL