

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

CRIMINAL APPEAL NO.AAU 065 of 2017
[In the High Court at Suva Case No. HAC 435 of 2012]

BETWEEN:

MOSESE NATUWAWA SAUKITAKALI
Appellant

AND:

STATE
Respondent

Coram: Prematilaka, JA

Counsel: Mr. T. Lee for the Appellant
Mr. M. Vosawale for the Respondent

Date of Hearing: 29 January 2021

Date of Ruling: 01 February 2021

RULING

- [1] The appellant had been indicted in the High Court of Lautoka on one count of indecent assault contrary to section 154(1) of the Penal Code, one count of rape contrary to section section 149 and 150 of the Penal Code and one count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009 committed at Navua in the Central Division. The victim was 09 years old at the time of the first incident indecent assault and the appellant was her mother's *de facto* partner at the time of the commission of the offences.
- [2] The information read as follows.

'FIRST COUNT
(Representative Count)
Statement of offence

INDECENT ASSAULT: *Contrary to Section 154(1) of the Penal Code, Cap 17.*

Particulars of the Offence

MOSESE NATUWAWA SAUKITAKALI, *from the 1st day of January 2004 to 31st December 2004 at Navua in the Central Division, unlawfully and indecently assaulted A.B.*

SECOND COUNT
Statement of Offence

RAPE : *Contrary to Section 149 and 150 of the Penal Code, Cap 17.*

Particulars of Offence

MOSESE NATUWAWA SAUKITAKALI, *between the 1st day of January 2006 to the 31st of December 2006 at Navua in the Central Division, had unlawful carnal knowledge of A.B., without her consent.*

THIRD COUNT
(Representative Count)
Statement of Offence

INDECENT ASSAULT : *Contrary to Section 212 (1) of the Crimes Decree 44 of 2009.*

Particulars of Offence

MOSESE NATUWAWA SAUKITAKALI *from the 1st day of January 2012 to the 31st day of May 2012 at Navua in Central Division, unlawfully and indecently assaulted A.B.*

[3] The brief facts as could be gathered from the judgment are as follows.

[5] *Prosecution case was based primarily on the evidence of the 21 year old complainant. She was born on 1st August 1995. According to her, the accused is the de facto partner of her mother and since 2004; they lived with the accused in his house. During 2004, whilst asleep she felt the accused touching her body and her breast. He threatened her not to tell this to her mother who also slept next to the accused.*

[6] *In relation to the count of Rape, the complainant said in 2006, she returned home from school hoping to attend a party. After she had a shower, she returned to the bedroom to dress up. Then she was put on the bed by the accused and inserted his fingers into her vagina. Then he inserted his penis into her vagina. She was in pain and was crying. She hated what he did to her. Thereafter, she washed herself up as she felt blood in her vagina. She was threatened by the accused with a cane knife, not to reveal this.*

[7] *The 3rd count referred to an incident where the complainant was sleeping and the accused, having laid himself on top of her, touched her body and*

breast. She ran to her mother, who was at a neighbour's house at that time, and informed her of what happened.

[9] Her mother said in evidence that in 2004 she saw the accused touching the breast of the complainant in one early morning and she slapped him for what he did. Then in 2012, the complainant was beaten by the accused and they decided to lodge a report against him. She was unemployed at that time and had nowhere else to go.

[10] The accused in his evidence denied all three charges and said that the complainant had spent a night with a boy called Pita and he had beat her up for that, upon her mother's permission. He came to know about the allegation against him of Rape and pregnancy only in 2012 when the Police arrested him.

[4] At the conclusion of the summing-up on 29 September 2016 the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors in his judgment delivered on 30 September 2016, convicted the appellant on all counts and sentenced him on the same day to 03 years of imprisonment on count 01 and 03 and 13 years of imprisonment on count 02 (all sentences to run concurrently) subject to a non-parole period of 10 years.

[5] The appellant's untimely application for leave to appeal against conviction and sentence had been filed on 10 May 2018. The delay is 06 months and 10 days. The Legal Aid Commission had tendered amended notice of appeal against conviction and sentence along with written submissions on 05 October 2020. The appellant's affidavit had been filed on 20 November 2020. The state had tendered written submissions on 24 November 2020.

[6] 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, **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.

[7] In **Kumar** the Supreme Court held

'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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?

[8] **Rasaku** the Supreme Court further held

'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of

time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'

- [9] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

'(a).....

(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.

(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.

(d) 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.

(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused.'

- [10] Sundaresh Menon JC also observed

'27..... It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'

- [11] Under the third and fourth factors in **Kumar**, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

*'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a **'real***

***prospect of success'** (see **R v Miller** [2002] QCA 56 (1 March 2002) on any of the grounds of appeal.....'*

Length of delay

- [12] As already stated the delay is over 06 months and substantial.
- [13] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

*'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.'*

- [14] However, I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'

Reasons for the delay

- [15] The appellant's only explanation for the delay is that he had no knowledge to prepare his appeal and had to seek assistance from the prison inmates I drafting the appeal belatedly. However, the appellant had been defended by private counsel at the trial and he had explained why he could not get him to lodge his appeal within time. In any event, the appellant had not stated as to why it took him over 06 months to tender his appeal even in person. Therefore, there is no acceptable explanation offered by the appellant for the delay.

Merits of the appeal

- [16] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."

- [17] Therefore, I would proceed to consider the third and fourth factors in **Kumar** regarding the merits of the appeal as well in order to consider whether despite the

very substantial delay and the absence of a convincing explanation, the prospects of the appellant's appeal would warrant granting enlargement of time.

[18] Grounds of appeal urged on behalf of the appellant are as follows.

Conviction

1. *The learned trial judge had erred in law and in fact when he mentioned the following which portrays a lack of impartiality and ultimately depriving the appellant of his right to a fair trial*

'The acts of touching of her body and breast in 2004 and also of touching of her body and breast by the accused, after mounting on top of the complainant in 2012, are undoubtedly indecent acts by right minded persons, as it was so offensive to current standards of modesty ad privacy.

2. *The learned trial judge had erred in law and in fact when he inadequately directed on the issue of delay*

Sentence

3. *The learned trial judge erred in principle by considering extraneous factors in the aggravating factors thereby enhancing the appellant's sentence,'*

01st ground of appeal

[19] The impugned paragraph under this appeal ground is in fact paragraph [15] of the judgment. The trial judge had directed the assessors on the same issue as follows in the summing-up.

'[39] The accused is also charged with two counts of Indecent Assault as the 1st and 3rd Counts on the Information. In proving an allegation of Indecent Assault, the prosecution must prove beyond a reasonable doubt that the accused unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is indecent if right minded persons would consider the act indecent. As to whether the act of touching the breast of the complainant after touching her body is indecent, you have to consider what right minded persons would think of this act. Was the act so offensive to current standards of modesty and privacy as to be indecent?'

[20] I do not find anything objectionable in the direction of the trial judge on the indecent assault in the summing-up. He had expressed his agreement in paragraph 15 of the judgment with those sentiments in agreeing with the assessors. I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal to arrive at some common principles regarding the duty of trial judges when they agree and disagree with the assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017

(3 September 2020) and **Waininima v State** [2020] FJCA 159; AAU0142 of 2017 (10 September 2020), **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and a few other rulings. I do not intend to repeat the same exercise here. However, my conclusions were subsequently summarized in **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020) and **Tui v State** AAU129 of 2019 (29 January 2021) as follows.

[12] *There still appears to be some gray areas flowing from the past judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.*

[13] *What could be ascertained as common ground 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 a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written 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 a 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)].*

[21] Therefore, the trial judge had every right to express his view of the indecent assault on the complainant by the appellant at paragraph 15 of the judgment. It was not unfair and had not affected the right to a fair trial as alleged by the appellant. There is no merit whatsoever of the appellant's complaint that the trial judge had devoted one paragraph in the judgment to the appellant's case as that single paragraph (*i.e.* paragraph [10]) had captured the gist of his case. In any event the trial judge had addressed the assessors in detail of the appellant's evidence at paragraphs 47 and 48 ad 84 of the summing-up.

[22] I also observed in the same analysis on the interplay between the summing-up and the judgment *vis-à-vis* a trial judge's role as follows.

[15] *In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.*

[16] *This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide Rokonabete v State [2006] FJCA 85; AAU0048.2005S (22 March 2006), Noa Maya v. The State [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) and Rokopeta v State [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).'*

[23] Therefore, there is no real prospect of success in appeal of the first ground of appeal.

02nd ground of appeal

[24] The appellant complains that the trial judge had failed to determine what and when the reasonable time was for the complainant to have reported the matter to the police. It is clear from the summing-up that the trial judge had alerted the assessors to the issue of delayed reporting. The evidence reveals that the complainant had reported the act of indecent assault in 2012 relating to the third count soon after the incident and her mother (PW2) had confirmed that in her evidence. Thus, there was no delay at all in relation to the third incident. It is also revealed by PW2 that she had seen the first incident of indecent assault in 2004 and had slapped the appellant for what he had done but did not want to take it further as she was unemployed and had nowhere to go. In other words it is clear that her helplessness and dependence on the appellant dissuaded PW2 from reporting it to the authorities. The rape incident had been reported to the police only in 2012 after the appellant had beaten the complainant.

[25] The trial judge had addressed the assessors on the issue of delay in paragraphs 56-65 and said in particular as follows

[56] In relation to the incidents relevant to the 1st and 2nd counts, it was elicited during cross examination that she complained about it for the first time on 22nd October 2012 while making a report to Navua Police. It is clear that the incidents allegedly took place in 2004 and 2006 were reported only in 2012 and therefore, the complainant was describing events which took place a long time ago.

[57] The complainant did not disclose the 1st incident to her mother. She also did not disclose the 2nd incident to her brother who was with her at the time, to her mother or later at school, to her teachers.

[58] In explaining her failure to complain soon after the alleged acts, the complainant said that she was threatened by the accused with death by showing her a cane knife. She took his threat seriously. She was 9 years in 2004 and 11 years in 2006. Prosecution evidence is that her family was dependent on the accused for support. Even after these incidents the complainant continued to live in his house as they had no other place. It is for you to consider these factors and decide whether her conduct under such circumstances is probable and therefore acceptable as an explanation for the delay.

[26] Applying “*the totality of circumstances test*” as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), I do not think that there is any basis in the above circumstances to impeach the trial judge’s directions to the assessors of the belated complaints. It is no part of the trial judge’s duty to determine what a reasonable delay is in any given situation as delay is a relative concept depending on the totality of circumstances of the case.

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

03rd ground of appeal

[28] The appellant’s argument is that the trial judge may have already considered the first to third aggravating factors when he picked the starting point of 12 years but had later added another 03 years for the aggravating features including the same factors.

[29] The appellant’s complaint sounds more as an allegation of double counting than anything else.

[30] The trial judge in the sentencing order has guided himself according to **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) where the sentencing tariff for juvenile rape was set between 10-16 years of imprisonment (later in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the sentencing tariff for juvenile rape was enhanced and fixed between 11 to 20 years). He had identified aggravating factors and prescribed the sentences of 03 years each for the two indecent assault charges and 15 years of imprisonment for the rape charge after starting the sentencing process at 12 years and made all sentences concurrent. After deducting the remand period the final sentence had come down to 13 years.

[31] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the ‘starting point’ in the two-tiered approach to sentencing in the face of criticisms of ‘double counting’ and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. The Supreme Court also stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[32] The Supreme Court advanced this proposition in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) stating that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. The Supreme Court also said that the lower [end] of the tariff for the rape of children and juveniles is long and the many things which make these crimes so serious have already been built into the tariff and therefore judges should not treat as aggravating factors those features of the case which will already have been

reflected in the tariff itself. If they do, that would be another example of ‘double-counting’, which must, of course, be avoided.”

- [33] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.
- [34] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.
- [35] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:
- [30]Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed ‘somewhere in the middle of the range’ of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **Naikelekelevesi** and **Koroivuki** may provide useful tools to navigate the process of sentencing thereafter.*
- [36] The trial judge had not specifically indicated what factors he had considered in selecting the starting point at 12 years but set out the aggravating factors he had used to enhance the sentence. However, I do not think that except perhaps the third aggravating feature the trial judge had double counted the aggravating features in enhancing the sentence though it is still not clear what factors had been taken into account in picking the starting point at 12 years.
- [37] In any event, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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).
- [38] The ultimate sentence of 13 years imposed on the appellant is well within the sentencing tariff and not disproportionate to the gravity of the crimes committed by the appellant.

[39] Therefore, the appellant has failed to demonstrate a sentencing error having a real prospect of success under the sole ground of appeal against the sentence to deserve enlargement of time to appeal against sentence.

Prejudice to the respondent

[40] Though an extension of time would not prejudice the respondent directly, any fresh proceedings would cause a great deal of inconvenience to the complainant.

Order

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

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL