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

CRIMINAL APPEAL NO.AAU 87 of 2020
[High Court at Suva Case No. HAC 336 of 2017S]

BETWEEN	**:**	**SHEIK ZOHAIB SHAH**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	**:**	**12 October 2022**
Date of Ruling	**:**	**14 October 2022**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of rape of a male child under 13 years contrary to section 207 (1) and (2)(a) and (3) of the Crimes Act, 2009 and one count of abduction of the same person with intent to have carnal knowledge contrary to section 211(1) of the Crimes Act, 2009 committed on 02 November 2017 at Nasinu in the Central Division.

[2] The appellant had admitted the summary of facts and pleaded guilty to both counts. The trial judge had sentenced him to 15 years of imprisonment on count 01 and 03 years of imprisonment on court 02, both to run concurrently with non-parole period of 14 years.

[3] The appellant's appeal against sentence is late by about 01year, 01 month and 13 days.

[4] The trial judge had summarised the evidence against the appellant as contained in the summary of facts as follows:

> *"1. The accused is Sheik Zohaib Shah of Lot 24 David Street, Davuilevu housing. He was born on the 3rd of November, 1993. He was 23 years old at the time of the alleged offence.*
>
> *2. The complainant in this matter is A R of Davuilevu housing. He was born on the 12th of August, 2011. He was 6 years old at the time of the alleged offence.*
>
> *3. The complainant and the accused are not related. The accused and the complainant reside in the same neighborhood at Davuilevu housing.*
>
> *<u>Count 2 – Abduction of a young person with intent to have carnal knowledge</u>*
>
> *4. On the 2nd of November, 2017 at around 8.00 am, the complainant was about to leave for school when he left his home to buy cookies from a nearby shop. The complainant's parents waited for the complainant at their home when the complainant went to the shop.*
>
> *5. The accused was at his home when he saw the complainant was returning to his home from the shop. The accused then called out to the complainant to come to his house. The accused then opened the gate of his house and the complainant went inside the house of the accused.*
>
> *6. The accused brought the complainant into his house intending to have carnal knowledge of the complainant.*
>
> *7. At the time the accused did this, he did not have the permission of the complainant's parents to take the complainant into his house.*
>
> *<u>Count 1 - Rape</u>*
>
> *8. The accused took the complainant to his bedroom and told the complainant to take off his pants which he then did. The accused then made the complainant lie down on his bed. The accused then took a bottle of coconut oil, placed some on his own hands and rubbed it on the anus of the complainant.*
>
> *9. The accused then took off his pants and inserted his penis into the anus of the complainant while the complainant was lying down with his legs up. The complainant felt it was painful and began to cry when the accused was inserting his penis into his anus.*

10. *After a few minutes, when the accused was done, the complainant wore his clothes and went home.*

11. *The complainant then returned to his home around 8.30 am that same day. He then told his mother about what the accused had done. The matter was then reported to the Nakasi Police Station.*

12. *The complainant was medically examined on the 2nd of November 2017 at the Medical services Pacific clinic by Dr. Elvira Ongbit whereby superficial abrasions were found all over the anal opening. There was also deep abrasions and slight bleeding at the 12 o'clock and 7 o'clock position at the anal opening [medical report not included herein].*

13. *The accused was interviewed on the 2nd of November, 2017 by DC 5052 Shalvin Narayan at the Nasinu crime office. He was interviewed in the Hindi language. The accused admitted to calling the complainant to his home and taking him into his bedroom at the alleged time at Question and Answer No. 28 to 30, 37 and 38 of the Record of Interview. The accused also admitted to laying the complainant down in his bedroom, pouring oil on the complainant's backside and inserting his penis into the anus of the complainant at the alleged time at Question and Answer No. 31 to 33 of the Record of Interview. The accused made these admissions out of his own free will, voluntarily and without oppression [caution interview not included herein]."*

[5] The State also had submitted the appellant's antecedent report and victim impact statement which were unchallenged by the defence.

[6] 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? (vide **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).

[7] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[8] The delay of this appeal is substantial. The appellant's explanation is that he lacked legal knowledge to draft and file appeal papers in time and that he was taken to different correction centres following his sentence. He was represented by counsel at the trial and the sentence order clearly states that he could appeal within 30 days. Thus, the reasons for the inordinate delay are not acceptable. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against 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.

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

> *'Ground 1*
>
> *The Learned Trial Judge erred in principle by not considering relevant factors whilst sentencing the appellant resulting in a harsh and excessive sentence.*
>
> *'Ground 2*
>
> *The Learned Trial Judge erred in principle by accounting for aggravating factors in selecting the starting point which amounted to double counting.*

Ground 01

[10] The appellant's counsel argues that the trial judge had not exhaustively discussed the factors relevant to sentencing set out on **Ram v State** [2015] FJSC 26; CAV12 of

2015 (23 October 2015). Particular focus is made to the appellant having done the offending alone and only once during a short time.

[11] These are only guidelines and should be considered in the context of the overall gravity of the offending. Not making a reference to all factors mentioned in ***Ram*** does not amount to a sentencing error. Comparing sentences meted out in other cases also do not provide a sound basis to challenge a sentence as has been done by the appellant's counsel.

[12] Summary of facts including the medical report demonstrates the gravity of the offending. Appellant's antecedent report and victim impact statement, though available to the trial judge, had not been relied upon in the process of sentencing. If considered, they certainly would have enhanced the criminality of the offender and offending. The appellant having done the offending alone and only once during a short time carry little weight in the facts of this case as far as the gravity of the offending is concerned.

02nd ground of appeal

[13] The second complaint is based on alleged double counting as highlighted by the Supreme Court in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019). In ***Kumar*** it was held that when judges take as their starting point somewhere within the range, they will have already factored into the exercise at least *some* of the aggravating features of the case and if the same features are once again counted as aggravating factors to enhance the sentence, it could amount to double counting. It was also held that many things which make a crime so serious have already been built into the tariff and if sentencing judges treat as aggravating factors those features of the case which already have been reflected in the tariff itself that may also constitute double counting.

[14] The complaint here is that when the trial judge selected 13 years as the starting point he may have already considered at least some aggravating factors already mentioned

and then when the trial judge added 05 years for aggravating factors, he may have unwittingly indulged in double counting. Similarly, it is argued that considering rape of a child as an aggravating factor also amounts to double counting as tariff of 11-20 years for child rape as set in **Aitcheson** v **The State**, Criminal Petition CAV 012 of 2018 (02 November 2018) include the fact that offending is against a child.

[15] There may be some merits in the above arguments. However, 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). 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).

[16] The trial judge had made some pertinent remarks in the sentencing order as follows:

> *6. The rape of children in our community is always a serious matter. It is basically an attack on a nuclear family, the basic unit in our society. It undermines the safety and welfare of the family. It puts untold pressures and heart aches in the parents and the members of the family. Consequently the lawmakers of this country had prescribed the maximum penalty of life imprisonment for those found guilty of the rape of a child (see section 207 (1), (2)(a) and (3) of the Crimes Act 2009). The highest court in the land, the Supreme Court, had set a tariff of a sentence between 11 to 20 years imprisonment, for those found guilty of the rape of a child: (see **Gordon Aitcheson** v **The State**, Criminal Petition CAV 012 of 2018, Supreme Court of Fiji, delivered on 2 November 2018). The final sentence will depend on the aggravating and mitigation factors.'*

[17] The appellant's sentence is well within tariff and no sentencing error has been established. The ultimate sentence is not harsh or excessive.

[18] Therefore, none of the appeal grounds has a real prospect of success.

Order:

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

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