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

CRIMINAL APPEAL NO. AAU 051 of 2020
[In the High Court at Suva Case No. HAC 149 of 2014]

BETWEEN	:	**PENISONI LAGILAGI**	
			Appellant
AND	:	**THE STATE**	
			Respondent
Coram	:	**Prematilaka, RJA**	
Counsel	:	**Appellant in person**	
	:	**Mr. S. S. Seruvatu for the Respondent**	
Date of Hearing	:	**05 July 2023**	
Date of Ruling	:	**06 July 2023**	

RULING

[1] The appellant stood charged and convicted for two representative counts of indecent assault contrary to section 212(1) of the Crimes Act and another count of rape upon a 09 year old girl, contrary to section 207(1) and (2)(b) and (3) of the Crimes Act. The charges are as follows:

> ***'First Count (Representative count)***
>
> ***Statement of Offence***
>
> ***INDECENT ASSAULT****: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***PENISONI LAGILAGI*** *between the 28th day of April, 2014 and 2nd day of May, 2014 at Ra in the Western Division, unlawfully and indecently, assaulted RT.*

Second Count (Representative count)

Statement of Offence

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

Particulars of Offence

***PENISONI LAGILAGI** between the 12th day of May, 2014 and 31st day of October 2014 at Nadi in the Western Division, unlawfully and indecently assaulted R T.*

Third Count

Statement of Offence

***RAPE:** Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 44 of 2009.*

Particulars of Offence

***PENISONI LAGILAGI** on the 01st day of November 2014, at Nadi in the Western Division, penetrated the vagina of R T, a 9 years old girl, with his finger.'*

[2] The assessors had expressed a unanimous opinion that the appellant was guilty of all counts. The learned High Court judge had agreed with the assessors and convicted the appellant accordingly and sentenced him on 14 October 2019 to an aggregate period of 15 years' and 11 months imprisonment with a non-parole period of 10 years.

[3] The appellant had lodged in person an untimely appeal against conviction and sentence on 14 July 2020.

[4] 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).

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[6] The delay is 07 months which is substantial. The appellant has not stated reasons for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

[7] The victim, her aunt and a doctor gave evidence for the prosecution while the appellant had opted to remain silent but was defended by counsel.

[8] The grounds of appeal against conviction and sentence are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to direct himself and the assessors about the evidence contained in the caution interview of the appellant in respect of its truth and or credibility and the weight to be given to the confession.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge may have fallen into an error of law when His Lordship gave improper and insufficient direction to himself and the assessors on the Burden and Standard of Proof.*

Ground 3

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to direct himself and the assessors on the inferences to be drawn from primary fact in the evidence.

Ground 4

THAT the Learned Trial Judge may have fallen into an error of law and in fact when His Lordship failed to direct himself and the assessors on the inconsistencies and discrepancies in the evidence of the complainant.

Ground 5

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship gave insufficient and inadequate directions to himself and the assessors on medical evidence incompetent findings which is inconsistent with the complainant's complaint.

Ground 6

THAT the Learned Trial Judge erred in law and in fact in the summing up paragraph 42 on the explaining of the law regarding corroboration a complaint by the victim cannot be regarded as corroboration: RV Coul Thread, 24 CR, APP R.44 ***Corroboration Section 2 – (2) Paragraph 20-47***

Ground 7

THAT the Learned Trial Judge erred in law and in fact when he failed to fully and properly consider the issue of delayed reporting of the complaints thus questioning the credibility of the victim and the veracity of her complaint.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when highly considered the victims evidence referred to the judgment on paragraph 7 should not the Judge explain and give an analysis of the evidence to the assessors.

Ground 9

THAT the appellant was seriously prejudiced at the trial when the Learned Trial Judge considered the evidence given to court was not meritous and unreliable in those circumstance the appellant constitutional rights as stated in section 15 (1) was breached section 15 (1) states "every person charged with an offence has the right to a fair trial before a court of the whole court system and community at large as guilty before the court case started."

Ground 10

THAT the Learned Trial Judge erred in law and fact when convicting the appellant as the conviction was unreasonable and cannot be supported when

considering the totality of the evidence adduced that there was no beyond reasonable doubt thus resulting in a substantial miscarriage of justice.

Sentence

Ground 11

THAT the Learned Trial Judge erred in law and in fact for directly applying section 18 (1) of the Sentencing Penalties Act (as amended) on the decrees 2009 without making any enquiry hearing whether it was mandatory to impose a non-parole sentence on the appellants case place refer to Jone Vakacegu HAC 119 of 2016.

Ground 12

That the sentence is harsh and excessive in all the circumstances of the case.

Ground 1

[9] The prosecution had not relied on the appellant's cautioned interview and it was not marked as an exhibit at the trial and therefore, no directions on the cautioned interview was required. Justice Gates in the Supreme Court said in **Lepani Temo v The State** Criminal Petition No: CAV 0008 of 2020 (29 June 2023):

> *'[37] .....A bundle of disclosures are not evidence in a trial unless referred to by a witness, without objection which has been accepted by the court, and which have been formally marked as exhibits.'*

Ground 2

[10] The trial judge had fully addressed the assessors on standard and burden of proof at paragraphs 16 and 17 of the summing-up.

Ground 3

[11] The trial judge had adequately addressed the assessors on how to deal with the evidence led at the trial and the relevant evidence itself throughout the summing-up and in particular at paragraphs 1- 6, 9, 10 and 14 of the summing-up.

Ground 4

[12] The inconsistency highlighted by the appellant is that the victim had stated that the appellant put his finger into her vagina whereas PW2 (aunt) had seen the appellant putting his hands on the side of the victim's pubic area or private part. There is no inconsistency of these evidence; one being the victim's direct evidence and the other what PW2 had seen from a distance. It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]

Ground 5

[13] Medical evidence did not rule out a penetration of the victim's vagina by finger and it established that the hymen of the victim was not intact. The doctor had explained that strenuous physical activities or any form of penetration of the vagina, could lead to hymen not being present. She had not ruled out that a finger can cause the hymen being not intact and said that it would depend on the size of the finger, the amount of force and also the amount of resistance by the victim. She said further said that she examined the victim about 9 days after the alleged incident and by that time lacerations or abrasions could have healed. Thus, medical evidence was not inconsistent with the victim's evidence.

Ground 6

[14] There is no error in the trial judge informing the assessors at paragraph 42 that in our law no corroboration is needed to prove a sexual offence and the prosecution can solely rely on the evidence of the complainant only without any supporting evidence whatsoever in sexual offences.

[15] Justice Gates in the Supreme Court in **K.N.P. v The State** Criminal Petition No: CAV 0017 of 2020 (29 June 2023) said of corroboration and section 129 of the Criminal Procedure Act, 2009 as follows:

> *'[31] .....There is no longer a requirement for corroboration in cases of this nature.*
>
> *[33] This means that in such trials held subsequent to the coming into effect of the CPA 2009 judicial officers will not be required to warn assessors of the danger of convicting without corroborative evidence. This applies to those trials held subsequent to the commencement date of the CPA including those with allegations of a sexual nature relating to offences committed before the commencement date. The Law now accepts that there is no inferiority of a witness by reason of the witness being a child, a woman, or the victim of a sexual offence. This ground fails.'*

Ground 7

[16] Both the summing-up and the judgment suggest that delay in reporting had not been canvased as a trial issue. It appears that the victim had not been afforded an opportunity, either deliberately or otherwise, from explaining whether she made the complaint at the first available opportunity within a reasonable time (the complaint was also made within 09 days of the last incident) or if not whether there was a reasonable explanation for the delay. In any event, the victim had stated why she did not come out with what the appellant did earlier on several occasions and she has satisfied "the totality of circumstances test" explained in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

[17] On the other hand it does not appear that the appellant's trial counsel had sought any redirections on the alleged omission in the summing-up on the issue of delay in reporting. Therefore, technically the appellant is not entitled even to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

Ground 8

[18] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) it was held that:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements 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)]'*

[19] The trial judge had discharged his burden more than adequately in agreeing with assessors as follows in the judgment:

> *6. The complainant gave evidence regarding three other incidents allegedly happened between 12 May 2014 and 31 October 2014. She said that in those three incidents the Accused touched her vagina.*
>
> *7. Although the complainant was cross examined at length by the defence counsel the evidence of the complainant could not be challenged. She gave evidence in a very convincing manner. I am satisfied that she gave credible and truthful evidence in respect of the first and second counts. Further I am satisfied that the separate incidents that she related to are sufficient to prove the elements of indecent assault. I accept the evidence given by the complainant. Accordingly, I decide that the prosecution has proved the first and the second counts beyond reasonable doubt.*
>
> *8. The complainant gave evidence regarding an incident which allegedly occurred on 01 November 2014. She gave evidence that the Accused inserted his finger into her vagina. It is an admitted fact that the complainant was 9 years at the time of the alleged offence. Therefore, consent is not an issue as far as the third count of rape is concerned. Her evidence could not be discredited by the defence. Although it was suggested by the defence that no such incident took place, the complainant consistently confirmed that the Accused penetrated her vagina with his*

finger. I have observed the demeanour of the complainant and I am convinced that her testimony is credible and reliable. She gave clear and consistent evidence. I am satisfied that the prosecution proved the third count beyond reasonable doubt.'

Ground 9

[20] This ground of appal is so incoherent that no proper complaint against conviction could be made out of it. No constitutional rights of the appellant had been breached at the trial.

Ground 10

[21] It appears that on the totality of evidence available to them it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt [vide **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and trial judge could have reasonably convicted the appellant on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. Thus, the verdict cannot be said to be unreasonable or one cannot say that the verdict cannot be supported having regard to the evidence either.

Ground 11 (sentence)

[22] The trial judge had stated in the sentencing order as follows:

'[14] No specific submissions were made on your behalf on setting a non-parole period in this case apart from pleading for a minimum sentence with a non-parole period in your mitigation submissions.

[15] ..... I have taken into account the nature and circumstances of offending, the aggravating factors and your personal circumstances. You have committed these offences in domestic context, and you committed the offences against a child. Undoubtedly the domestic violence nature of the offences makes this an exceptional case to consider a non-parole period. Having borne in mind the interest of the society as well as of the victim, I think it fit to set a non-parole period in this case.

[23] Thus, it is very clear as to why the trail judge decided to impose a non-parole period.

Ground 12

[24] The tariff for child rape is 11 years to 20 years [**Aitcheson v State** [2018] FJSC 29; CAV 0012.2018 (2 November 2018)]. The trial judge had set out the method of calculation of the sentence as follows:

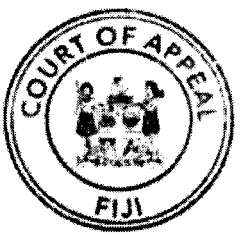
> *11. Having considered the objective seriousness of the offences I pick a starting point of 13 years. For the aggravating factors I add 4 years. For your personal circumstances I deduct 6 months. Now your aggregate sentence is 16 years and 6 months imprisonment.*
> *12. You had been in remand custody for this case for 7 months. I deduct seven months pursuant to section 24 of the Sentencing and Penalties Act as any period of time spent in custody should be regarded as a period of imprisonment already served by the offender.*
> *17. In the circumstances, you should serve an aggregate sentence of 15 years and 11 months imprisonment. You are eligible for parole after 10 years.*

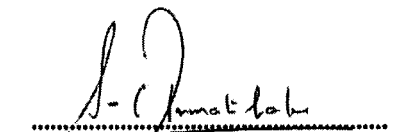
[25] Thus, there is no sentencing error demonstrated in the sentencing process.

[26] There is real prospect of success in any of the grounds of appeal.

Orders of the Court:

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
RESIDENT JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent