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

CRIMINAL APPEAL NO.AAU 62 of 2022
[In the High Court at Lautoka Case No. HAC 205 of 2018]

BETWEEN	**:**	**ISIKELI NASAKU**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. S. Lavo for the Appellant**
	:	**Ms. S. Naibe and Mr. T. Tuenuku for the Respondent**
Date of Hearing	**:**	**16 August 2023**
Date of Ruling	**:**	**17 August 2023**

RULING

[1] The appellant had been charged in the High Court at Lautoka on the following counts of rape.

*'**THIRD COUNT***
Statement of Offence

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

Particulars of Offence

***ISIKELI NASAKU,** on the 18th day of October, 2017 at Lautoka, in the Western Division, penetrated the vagina of "SN" with his penis without her consent.*

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

> ***ISIKELI NASAKU,*** *on the 18th day of October, 2017 at Lautoka, in the Western Division, penetrated the vagina of "SN" with his penis without her consent.*

[2] The trial judge had decided to call for a defense only in respect of the 03rd count. The assessors had opined that the appellant was guilty of that count of rape. Having agreed with the assessors, the trial judge had convicted the appellant accordingly and sentenced him on 20 January 2021 to a sentence of 15 years and 09 months imprisonment with a non-parole period of 13 years.

[3] The appellant had lodged an untimely appeal against conviction and sentence.

[4] The appellant in person had untimely appealed against conviction and sentence. 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 for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999), **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499). For a ground of appeal timely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[6] The delay is about 01 year, 03 months and 02 weeks which is very substantial. The appellant has stated that his counsel's negligence and incompetence and his transfer from Lautoka Maximum center to Medium Correction center was the reason for the late appeal. His co-accused had in person filed his appeal in time. I cannot find any material to substantiate the appellant's assertions. 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.

[7] The sentencing order has summarised the evidence as follows.

> *2. 'The brief facts were as follows:*
>
> *The first accused is the victim's maternal uncle, on 16th October, 2017 the victim who was 16 years of age after finishing her Fiji Junior Examination went to the house of the first accused to spend her school holidays.*
>
> *3. The next day the first accused asked the victim whether she had sexual intercourse. The victim responded she had not, at this time the first accused came close and touched the top portion of the victim's breast and her vagina from on top of her clothes.*
>
> *4. The victim was afraid because her uncle wasn't supposed to do what he had done. She did not consent to what the first accused had done to her.*
>
> *5. On the 18th the second accused the grandfather of the victim (from her mother's side) came to the house of the first accused. During the night the first accused told the second accused to lie down beside the victim, when the light was switched off the first accused said whatever he was going to do to his wife, the victim and the second accused will have to do as well.*
>
> *6. The second accused did everything the first accused told the second accused to do to the victim. The second accused removed the victim's clothes and started sucking her breast and licking her vagina. Thereafter the second accused forcefully inserted his penis into the victim's vagina and had sexual intercourse with the victim for about 4 to 5 minutes. The first accused aided and abetted in the rape of the victim by the second accused.*
>
> *7. The victim did not consent to what both the accused persons had done to her. The matter was reported to the police after the victim told her mother about what had happened to her.'*

[8] The grounds of appeal urged by the appellant are as follows.

> ***Conviction:***
>
> ***Ground 1***
>
> *THAT the learned Judge erred in fact and in law in misdirecting the assessors and the prosecution to look and rely for any corroborated evidence of the appellant which violates statutes and common law.*
>
> ***Ground 2***
>
> *THAT there was a grave injustice caused by the learned trial judge because the very important directions with having reference to the evidence of the case had not been left with the assessors which is a serious non direction that is tantamount to a misdirection of serious nature.*
>
> ***Ground 3***
>
> *THAT the learned trial judge when he came to a decision in upholding the guilty verdict of the assessors when he failed to analyse all the facts before him.*
>
> ***Ground 4***
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> *THAT the learned trial judge failed to make independent assessment of the evidence.*
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> ***Ground 5***
>
> *THAT there was a miscarriage of justice when the learned judge upheld the guilty verdict of the assessors.*
>
> ***Ground 6***
>
> *THAT the assessors did not adequately consider the Medical Report of the complainant.*

Ground 1

[9] The appellant had misconceived the trial judge's directions at paragraphs 147 and 148 on corroboration which were in reference to the his evidence as an accomplice in so far as he was implicating the co-accused. There is no breach of section 129 of the Crimes Act, 2009.

Ground 2

[10] The appellant's complaint is on paragraphs 165 and 166 of the summing-up which he contends is superficial and inadequate so far as telling the assessors that it was

sufficient for the defence to create a reasonable doubt in the prosecution case. However, at paragraph 168-171 the trial judge had made this position absolutely clear. I do not think there was any doubt on the element of penetration as testified to by the complainant either.

[11] If the counsel for the appellant had thought that this direction was so inadequate he should have raised it with the trial judge by way of a request for redirection. He had failed to do that and as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018) the failure to do so without any cogent reasons would disentitle the appellant even to raise this complaint in appeal with any credibility.

Grounds 3

[12] The prosecution had not relied on the medical report. However, if it was favourable to the appellant his counsel could have led that in evidence. As for the complaint that the appellant in fact did not do what his co-accused wanted him to do, what matters is not whether the appellant simply did (as emphatically demonstrated by the complainant) what his co-accused wanted him to do but whether he knew that the complainant was not consenting or was reckless whether she was consenting or not. The appellant as an adult had no business to invade the complainant's body and finally penetrate the vagina of the complainant simply because his co-accused wanted him to do it. On the other hand the evidence of the complainant was very clear that she was against any sexual invasion of her either by the appellant or his co-accused and against her will both indulged in acts of sexual abuse of her.

[13] The trial judge had thoroughly examined the totality of evidence and arrived at a conclusion against the appellant in his judgment. 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 **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

Grounds 4

[14] ***Fraser*** as quoted above sets out a trial judge's duty when agreeing with the assessors. The trial judge has adequately complied with his duty when agreeing with the assessors in the judgment. Having seen and heard the witnesses, the trial judge was entitled to reject the appellant's evidence as lacking in credibility, whose own testimony to a larger extent coincided with that of the complainant except his denial of having committed acts of sexual abuse on her. She was emphatic that the appellant indeed sexually abused her and the credibility of her version was enhanced by recent compliant evidence of her mother and prompt reporting the matter to the police.

Grounds 5

[15] Neither the assessors nor the trial judge had encountered any reasonable doubt in the prosecution case which resulted in the conviction of the appellant. I think it was open to the assessor to find the appellant guilty on the totality of the evidence [See **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) at para [8] to [24] and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) at para [36] to [44]. The trial judge too could have reasonably convicted the appellant on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

Grounds 6

[16] No medical report was produced at the trial and therefore the assessors need not, could not and should not have considered such a medical report.

Sentence

[17] The sentence of 15 years and 09 months had been imposed in view of the conviction of the appellant for rape. If the rape conviction is lawful there is no merit in the challenge to the sentence. According to **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff for juvenile rape is between 11 to 20 years' imprisonment. The complainant was 16 years of age at the time of the incident and a juvenile.

[18] In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. 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 the appellate court in an appeal against sentence 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)].

Orders

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

COURT OF APPEAL FIJI

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