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

CRIMINAL APPEAL NO. AAU 0017 of 2019
In the High Court at Lautoka HAC 183 of 2017

BETWEEN : KRISHNEEL CHANDRA

Appellant

AND : THE STATE

Respondent

Coram : Prematilaka, RJA
Mataitoga, JA
Qetaki, JA

Counsel : Mr M. Fesaitu for the Appellant
Mr R. Kumar for the Respondent

Date of Hearing : 7 September, 2023

Date of Judgment : 28 September, 2023

JUDGMENT

Prematilaka, RJA

[1] I have read the draft judgment of Mataitoga, JA and agree with the proposed Orders.

Mataitoga, JA

[2] The appellant had been charged in the Magistrates Court at Lautoka on one count of rape of a 12 years old child, contrary to section 149 and 150 of the Penal Code committed between 1 and 31 October 2009 at Lautoka in the Western Division. The particulars of the charge read as follows.

> *"Krishneel Chandra, between 1st October to 31st October, 2009 at Lautoka in the Western Division, had unlawful carnal knowledge of "SP" without her consent"*

[3] At the end of the trial, the Magistrate had found the appellant guilty as charged and referred the case to the High Court for sentencing. The learned High Court judge had sentenced him on 27 November 2017 to a sentence of 11 years, 8 months and 18 days of imprisonment with a non-parole period of 9 years.

Right of Appeal from High Court in its Appellate Jurisdiction

[4] The appellant may appeal to this court pursuant to section 22 (1) of the Court of Appeal Act on any ground which involves a question of law only.

[5] The appellant's grounds of appeal and supporting submission received in the Court Registry on 7 June 2021 were:

Against Conviction:

(i) the learned Magistrate erred in law and fact in stating that the evidence of the complainants mother corroborated the evidence of the complainant thus prejudicing the appellant;

(ii) the learned Magistrate erred in law and fact in not fully and properly analyzing the evidence of delayed reporting and in not doing so, prejudiced the appellant

Against Sentence

(iii) The sentence imposed by the High Court was harsh and excessive.

[6] The right to appeal to the Court of Appeal under section 22(1) which governs appeal from the High Court in its appellate jurisdiction, to the Court of Appeal is restricted to question of law only. It is noted that the grounds of appeal submitted is alleging errors of both law and fact by the Magistrate. This is the result of incorrect reliance by the counsel of the appellant on section 21(1) of the Court of Appeal Act as relevant basis for right to appeal. I will discuss this further later in the judgment.

Delay in Filing Appeal & Requirements of Enlargement of Time

[7] The appellant had appealed against conviction and sentence in person 1 year and 24 days out of time. The Legal Aid Commission had subsequently filed an application for enlargement of time to appeal against conviction and sentence with the appellant's affidavit and written submissions on 7 June 2021. The State had tendered its written submissions on 10 December 2021.

[8] 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? **Rasaku v State** [2013] FJSC 4; CAV 009 of 2013

[9] The delay of the appeal is substantial. The appellant had stated in his affidavit that he handed over his timely appeal on 3 December 2017 to the officials at Lautoka Correction Centre who had failed to lodge it with the Court of Appeal Registry. Then, he had filed another set of appeal papers signed on 21 Januarys 2019 which had reached the CA Registry on 30 January 2019. However, I do not find any mention or reference to the alleged timely appeal therein. Thus, there is not much credibility in the explanation given for the delay. Indeed, the explanation is self-serving without proper proof that what is alleged was factually the case. It is not acceptable.

[10] Nevertheless, is there is **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits: **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.

[11] The 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 **Naisua v State** [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). For a ground of appeal untimely 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 real prospect of its success in appeal

Assessment of the Ground of Appeal

[12] The approach of the court will take for its determination is to analyze the legal issues that closely resonate with the submitted grounds of appeal. In this way the court will enjoin the jurisdiction mandate provided by Section 22(1) of the Court of Appeal Act. The grounds of appeal urged on behalf of the appellant against conviction and sentence are set out in paragraph 5 above.

Corroboration Evidence of Mother

[13] The first ground of appeal against conviction alleges that the Magistrate erred in law in stating that the evidence of the complainant's mother corroborated the evidence of the complainant prejudicing the appellant. The relevant passage in the Magistrate's Judgement is paragraph 11 [page 55 of Court Record] which states:

> "*the mother of the victim corroborated the evidence given by the victim. She confirmed that they went to catch crabs with the accused and victim. She further confirmed that the victim and the accused were not in her vicinity for about half hour and only after she start calling the victim's name they came back. Further she corroborated the fact that the victim informed about the incident only after two weeks and the victim was scared to report it.*"

[14] The passage quoted above from the Magistrate judgement, the appellant have not specifically showed what is the error of law complained. It is as if, the use of the word 'corroborated' by the Magistrates in that context is of itself an error of law. It would be a violation of section 129 of the Criminal Procedure Act 2009 if the Magistrate had stated what he said in paragraph 11 of his judgement was a statement corroborating the alleged act of sexual violation by the appellant on the victim. That was not the case here.

[15] The second issue that was not addressed at all in the submission of the appellant relavant to the claim made for this ground, is the nature of prejudice that was suffered. It was alleged but not verified and supported.

[16] Ground 1 fails as having no prospect of succeeding. It is dismissed.

Delayed Reporting

[17] Ground 2 submitted by the appellant against conviction states:

> *"THAT the learned Magistrate erred in fact and in law in not fully and properly analysing the evidence of delayed reporting and in not doing so, prejudiced the appellant."*

[18] The court will review the judgement of the Magistrate regarding how he addressed the evidence of delayed reporting and if there an error of law involved. It is important to establish if the claim by the appellant has any basis based on the evidence at the trial. To ascertain that relevant passages of the Magistrate's judgement on delayed reporting must be reviewed.

[19] Paragraphs 6 and 7 covers reason for the delay in reporting by the victim:

> *"6. However the victim gave evidence that she did not immediately complain about this incident to her mother as she was afraid that her mother would hit her. The victim had complained only about 2 weeks later. The victim tendered a medical report marked as Prosecution Exhibit 1. I have perused the medical report. As per the medical report the hymen was not intact and*

it states that 'impression is possibility of introduction of blunt object which includes possible sexual intercourse'.

7. During cross examination, the Defence Counsel asked as to why she did not mention in her testament that the Accused held her neck. The victim said that the she informed everything to the Police Officer. Further she was asked as to why she delayed complaining to her mother. The victim said that she was scared of her mother and thought that she would assault her. The Defence Counsel suggested that the victim demanded money from the accused to withdraw the complaint. However she denied the suggestion put by the Counsel. When the Defence Counsel put to her that she told the court a made up story, the victim said that 'I have no mention in coming to court and lying in court sir. Once a girl loses respect she will not gain it back."

[20] Paragraph 9 covers evidence of the Victim's mother:

"9 The prosecution witness, Saroj Shaneela Devi gave evidence that victim is her daughter. She said that the date of birth of her daughter is 22nd October 1997. The birth certificate of the victim was tendered as Prosecution Exhibit 2. She said that she can recall in October 2009 she went to catch crabs with the Accused, her daughter and a few other persons. The witness said that the victim and the Accused were far aware in the mangrove. She further said that since her daughter was away for about half an hour she started calling her name. She said that then the Accused came with the daughter and brought some crabs. The witness said that her daughter looked sad after they returned. She said after two weeks she was told that the Accused toucher her and put his finger into her vagina. Further she said that her daughter told her that the Accused made her sit on his penis. After that the witness had reported the matter to the Police."

[21] From the above passages of the judgement, the Magistrate had indeed been fully conscious of the delay and considered it in detail as seen from paragraphs 6, 7 and 16 of the judgment. From those passages of the Magistrate's judgement, the victim's explanation for the delay had been that she was scared that her mother would assault her. The threats referred to by the Magistrate at paragraph 16 appear to relate to the time of the incident. Holding the victim's neck tightly and threating to kill her if she yelled out would have undoubtedly instilled enough fear in her not to disclose the incident promptly to her mother.

[22] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:

> *"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."*

The above test was adopted by this Court is **State v Serelevu** [2018] FJCA 163

[23] By applying the totality of circumstances test, what should be examine whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay. The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time but the surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case.

[24] Given all the surrounding circumstances and the explanation for the delay, there is no merit in the appellant's submission. This ground of appeal is dismissed.

Ground 3 – Harsh and Excessive Sentence

[25] Ground 3 submitted by the appellant is against sentence. It states;

> *"THAT the sentence imposed on the appellant is harsh and excessive."*

[26] During the hearing of this appeal before the full court, there were ground submitted for the appellant to substantiate the grounds that the sentence was harsh and excessive.

[27] The appellant complains that the sentence of 11 years and 08 months is harsh and excessive. Following **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the High Court judge had adopted the sentencing tariff for juvenile rape of 10-16 years though the commission of the offence had happened in the year 2009. When the

appellant was convicted and sentenced in 2017, the above tariff had come into operation.

[28] The sentencing judge had commenced the sentencing process at 10 years and after making adjustments for aggravating and mitigating factors and the period of remand the final sentence had been set at 11 years, 8 months and 18 days. The sentencing process adopted is correct. There was nothing meritorious in the claim of the appellant as regards the sentence.

[29] In the hearing before the singe judge. State Counsel brought to the notice of the court that the appellant had endured a long wait from 2009 to 2017 to have the case against him concluded in the Magistrates court and another 04 months for the sentence. Altogether it had taken more than 8 years for the judicial system to deal with the charge against him. The state counsel submitted that usually, unless the appellant's own conduct had substantially contributed to the delay, such delay on the part of the justice system deserves a discount in the sentence which must be reflected in the final sentence.

[30] Although, the sentence itself is well within the tariff and in the totality of the evidence in this case, the final sentence is not harsh and excessive. However the systemic delay of 8 years delay in the trial of the appellant is unacceptable. The Court requested State Counsel to submit a statement filed in the court registry covering the reasons for the delay. That submission was made and the court is grateful for the assistance.

[31] The fact remains that a systemic delay of 8 years violates the right of an accused person, as section 14 (2) (g) of the Constitutions, provides that

> *"Every person Charged with an offence* ***<u>has the right –</u>***
> *(g) to have the trial begin and conclude without unreasonable delay."*

[32] In discussing the above issue the Supreme Court in **<u>Nalawa v State</u>** [2010] FJSC 2 states at paragraphs 20 and 21 as follows:

> *"20] Most common law jurisdictions recognize the right of an accused person to a fair trial without unreasonable delay. That right is set out in Article 8 of the Universal Declaration of Human Rights to which Fiji is a party and in the International Covenant on Civil Political Rights, Article*

9(3). Fiji has not ratified this Covenant but the provisions of it have been incorporated in successive Constitutions in Fiji since 1970.

[21] Although Fiji has not had any Parliament for some years, the existing Government has shown its willingness to respect the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights by its passing of the Crimes Decree, 2009 which incorporates the International Covenant on Civil and Political Rights. The Courts here have shown at all levels their respect for the rights of accused persons to a fair trial, that is a trial according to law. This includes the right to counsel, the right to disclosure, the right to adequate time and facilities in order to prepare a defence, the right to remain silent, and the right to trial without delay."

[33] In light of the above principles there has to be a recognition in the sentencing that there was an unacceptable delay in this case, which violated the right of speedy trial of the appellant. Systemic delay is acknowledge by counsel for the respondent.

[34] Ms Ruakles Uce, Counsel for the respondent have filed a detail submission on this issue of systemic delay and provided a table setting out in detail the dates, particulars for the delay, what may have caused it etc. in this case. The court was greatly assisted with this and express its gratitude to Ms Uce.

[35] In **State v Pio** [2017] FJHC 177 and **State v Visawaqa** [2017] FJHC 178 the High Court stated that '*due to the systematic delay in concluding the case, the court declines to fix a non- parole period.*'

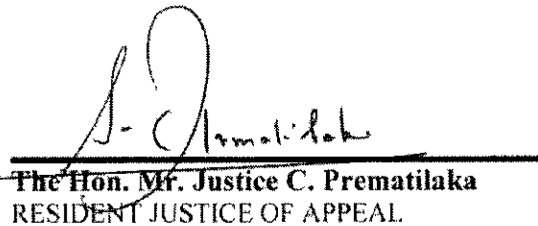
[36] In this case due to the systematic delay caused in the finalization of the appellant's case, the sentence passed in the High Court will be vacated and new the sentence substituted without fixing a non-parole period. The new sentence is 11 years 8 months 18 days imprisonment effective from 27 November 2017, without a non-parole period.

Qetaki, JA

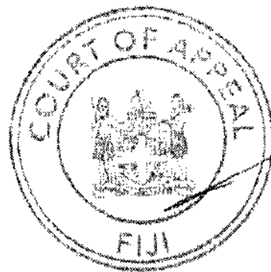
[37] I agree with the judgment, its reasoning and the orders made.

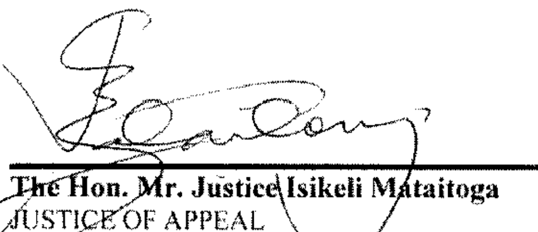
Orders

1. *Enlargement of time to appeal against conviction is refused.*
2. *Enlargement of time to appeal against sentence is allowed.*
3. *Sentence in the High Court is quashed.*
4. *A Sentence of 11 years 8 Months and 18 days Imprisonment effective from 27 November 2017 is imposed on the appellant without a non-parole period.*

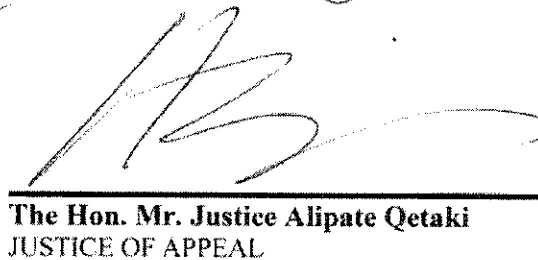


The Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL





The Hon. Mr. Justice Isikeli Mataitoga
JUSTICE OF APPEAL



The Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

SOLICITORS:
Office of the Legal Aid Commission, Suva, for the Appellant
Office of the Director of Public Prosecutions, Suva, for the Respondent