IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 06A OF 2017

BETWEEN: DEEPAK VISHAL RAJU

APPLICANT

AND: STATE

RESPONDENT

Counsel : Applicant in Person
: Mr. A. Singh for Respondent

Date of Hearing : 12th October, 2017
Date of Ruling : 17th October, 2017

RULING

INTRODUCTION

1. This is an application for leave to appeal out of time from a judgment and sentence of the Lautoka Magistrates Court dated 25th October, 2016. On that day the Court found the Applicant guilty and was convicted after a trial-in-absentia of one count of Sexual Assault contrary to Section 210 (1) (a) (i) of the Crime Act 2009.

2. On the same day, the Applicant was sentenced to 3 years' imprisonment with a non-parole period of 2 years.

3. Being dissatisfied with the said judgment and sentence, the Applicant filed his grounds of appeal on the 22nd of January, 2017 in the Lautoka High Court

Registry. In his written submission, the Applicant added some new grounds of Appeal.

4. The Applicant was supposed to file his appeal on or before the 22nd of November, 2016. However, the Applicant was out of time by almost 2 months.

THE LAW

5. Section 248 of the Criminal Procedure Act lays down the procedure to be followed in filing appeals in the High Court:

> *248 (1) Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against –*
>
> *(a) It shall be presented to the Magistrates Court from the decision of which the appeal is lodged.*
> *(b) A copy of the petition shall be filed at the registry of the High Court; and*
> *(c) A copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.*
>
> *(2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
>
> *(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include –*
>
> *(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
> *(b) any case in which a question of law of unusual difficulty is involved;*
> *(c) a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;*
> *(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the*

record, within a reasonable time of applying to the court for these documents.

6. The principles for an extension of time to appeal are settled. The Supreme Court in ***Kumar v State; Sinu v State*** [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

> *"Appellate courts examine five factors by way of a principled approach to such applications. These 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 courts 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?"*

7. In ***Rasaku v State*** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21];

> *"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 endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court."*

Reasons for Delay

8. The Applicant in his application states that he was on bench warrant and was not aware of what was happening in the case. He further states that he was arrested and admitted to Fiji Correction Services at Natabua on 29th of December, 2016, 64 days after sentencing. According to him he had filed a timely appeal however the Fiji Correction Services had failed to file the same in the High Court Registry on time. He was only aware of the delay when he had enquired about it from the Fiji Corrections Services.

9. At paragraphs 22 and 23 of the Sentencing Ruling, the learned Magistrate stated:

"The sentence will be effective on the date when the accused is arrested by the police."
"28 days to appeal is from today. If the bench warrant executed after 28 days, there is no right to appeal as the 28 days have lapsed".

10. According to Section 23(1) of the Sentencing and Penalties Act, a sentence of imprisonment commences on the day that it is imposed. However, the Applicant was not present in court to start his prison term on the day it was imposed. Therefore, his sentence came into effect on the day when he was arrested by the police [S 23(2)].

11. According to Section 248 (1) of the Criminal Procedure Act, every appeal shall be filed within 28 days of the date of the decision appealed against. Therefore, 28 days appeal period should be counted from the date of the sentence which is 25th October, 2016. However, the Magistrates Court or the High Court has discretion, at any time, for good cause, to enlarge the period of limitation prescribed by this section.

12. The claim by the Applicant that he filed a timely appeal is not substantiated. When the blame was put on the Fiji Correction Services for the delay, the Court called a report from the OIC Natabua Correction Centre. The report dated 21st August 2017 filed in response confirmed that the appeal was filed on 22nd January, 2017. This is further confirmed by the fact that Notice of Appeal filed by the Applicant with his signature is dated 22nd January, 2017. Therefore, there is no evidence to support Applicant's claim that he had handed his appeal papers over to officers at Correction Services prior to 22nd January, 2017.

13. In support of his application for leave to appeal out of time, the Applicant complains that he was on bench warrant and was not aware of what was happening in the case. The short answer to that complaint is that this was a matter entirely of the Applicant's own making.

14. When the Applicant was first produced before the Magistrate on the 25th September, 2014, he was enlarged on bail with a warning for him to be present in Court on the next court day. He was present on 23rd February, 2015 when disclosures were served on him. When he pleaded not guilty to the charge, the hearing was fixed for 29th April, 2015. The Applicant failed to appear in Court thereafter forcing the Magistrate to try the case in absentia.

15. The learned Magistrate at paragraphs 2 and 3 of his judgment had mentioned Article 14(2) (h) (i) of the Constitution of the Republic of Fiji and Section 171 (1) (a) of the Criminal Procedure Act under which he derived his power to try the case in absentia. He was satisfied that Applicant had chosen not to attend Court despite proper warning or notice.

16. I am satisfied that Applicant was warned adequately by the presiding Magistrate of the risks of his not appearing for his trial but he chose to ignore such warnings. The Applicant had waived his right guaranteed under Article 14(2) (h) (i) of the Constitution of the Republic of Fiji. He has not offered any good reason for his absence from Court but it is clear that he came to Court only because he was arrested on a bench warrant.

17. In this respect his case is in many ways similar to that of ***John Yogendra Singh v. The State*** Criminal Appeal No. AAU0025/99S, a decision of the Court of Appeal on the 24th of May 2001. At page 3 of its judgment the court said this:

> *"We see the issue as really one of public policy. Should the Court entertain an appeal from a person who is deliberately evading its jurisdiction and thereby flouting its orders? The answer can be found in the following statement of the practice of the Court of Criminal Appeal in R. v. Flower [1966] 1 QB 146, 151:*
>
> *".... The practice of this court where an appellant escapes, and for that reason is not present when an appeal is called on, is either to adjourn the appeal or dismiss it, according to the justice of the case."*

18. The reasons advanced by the Applicant for delay do not show a good cause warranting an enlargement of time.

WHETHER THE APPEAL HAS ANY PROSPECT OF SUCCESS

19. The Applicant is appealing his conviction and sentence. He has filed his petition of appeal on number of grounds. He has added some new grounds in his submission received by this Court on 6th October 2017. The submission filed by the State has not responded to additional grounds and only dealt with original grounds filed on 22nd January, 2017. I will consider all grounds filed by the Applicant.

APPEAL AGAINST CONVICTION

Ground 1: That the Learned trial Magistrate erred in law and in fact in not directing to the medical report findings that the injuries sustained or inflicted to the victim as alleged by the victim and other witnesses

20. As per the Judgment at paragraph 8, the medical report was tendered through the mother of the victim, Ropheshni Ronita Lata (PW.2). The medical report did not show any injuries. However, the doctor in her professional opinion had noted that she does not rule out sexual abuse.

21. The victim was 8 years old at the time of the offence. He stated in his evidence that Accused rubbed his erected penis on his buttocks. Learned trial Magistrate had believed evidence of the child witness. It has to be accepted that a sexual assault does not necessarily entail bodily injuries. It is not the burden of the prosecution to prove that a victim of a sexual offence had received any injury. No corroboration from an independence source is required to bring home a conviction in a case of sexual nature. Hence this ground does not have any merit.

Ground 2: That the Learned trial Magistrate erred in law and in fact in not considering an alternative lesser offence in respect of all the circumstances of the case

22. The evidence pertaining to the charge of the Sexual Assault was overwhelming. There was no reason for the learned trial Magistrate to consider a lesser offence when there is clear evidence to make out a charge of Sexual Assault. The learned trial Magistrate relied on direct evidence of the victim and that of his mother (PW.2) to convict the Applicant on the charge of Sexual Assault. PW.2 had seen the Applicant when he was trying to assist the victim to pull up his pants. Upon being questioned, the victim complained of the assault to her mother. The Applicant was not present to challenge the evidence of any of the Prosecution witnesses. This ground of appeal is misconceived.

Ground 3: *That the Learned Magistrate erred in law and in fact sufficiently on the issue of malice aforethought argued in conjunction with the issue of standard of proof*

23. The learned trial Magistrate was satisfied beyond reasonable doubt that Applicant's act of rubbing his penis on victim's buttocks was intentional. This is

the only inference that could have been drawn from the facts proven by the prosecution. There is no logic behind this ground. This ground is likely to fail.

Ground 4: ***The learned Magistrate erred in law and in fact when he released police exhibit (evidence) to the Complainant before the trial date was even set thus contravening Section 155(a) and Section 156(1) subsection 3(A) of the Criminal Procedure Act.***

24. Section 155 of the Criminal Procedure Act deals with preservation or disposal of property that are involved in criminal proceedings. Section 156 deals with disposal of stolen property. There is no logic in this ground.

Ground 5: ***The learned Magistrate erred in law by granting the prosecution's application for trial in absentia and thereafter taking up the case for trial in absentia.***

25. Article 14(2) (h) (i) of the Constitution of the Republic of Fiji and Section 171 (1) (a) of the Criminal Procedure Act provide for trial-in-absentia when the trial magistrate or judge is satisfied that the accused had chosen not attend Court despite proper warning or notice. This issue has already been dealt with at paragraph 16 above.

26. In case of ***R v O'Hare*** [2006] EWCA Crim 471, [2006] Crim LR 950, the Court said:

> *"We have taken into account that the Appellant was 18 at the time. Nonetheless we are sure that the Appellant appreciated that by absconding the trial was likely to proceed in his absence. As he made no attempt to contact his solicitor from Ireland, he plainly appreciated that his solicitor would be unable to put forward a case on his behalf at trial and arrange representation for him. In those circumstances, we consider that the Appellant waived his rights."*

27. In ***R v Jones (Anthony)*** [2002] UKHL.5 Lord Nolan said:

> *"First, in common, I believe, with all of your Lordships, I would hold that under English law the discretion of the trial judge to proceed with the trial in the absence of the defendant exists in principle (subject to the satisfaction of all the appropriate safeguards) not only after but before the trial has begun, though naturally it will have to be exercised with even greater care in the latter case. ..."*
>
> Lord Bingham of Cornhill said:

"The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor."

28. I perused the Court Record and evidence led in the trial to satisfy myself that a fair trial had been ensured by the presiding Magistrate when he tried the case in the absence of the Applicant. In that process, I found no evidence that the learned trial Magistrate had reached an unjust outcome or drawn a negative inference from the absence of the Applicant. The learned Magistrate had directed his mind to the presumption of innocence in favour of the Applicant and the burden of proof on the Prosecution to prove the charge beyond a reasonable doubt. There is no merit in this ground of Appeal.

Ground 6: ***The learned Magistrate erred in law by allowing the prosecution to tender the caution interview of the Applicant in evidence without conducting a trial within trial in order to determine the admissibility of the caution interview of the Applicant.***

29. The learned Magistrate at paragraphs 15 and 16 of his judgment took into consideration the caution statement of the Applicant in coming to his conclusion as to the guilt of the Applicant. He observed: *"This was fixed for trial and till that date the accused did not dispute that his statement was taken under duress or force. I hold this statement was taken fairly and it is admissible as evidence".*

30. In ***Rokonabete v The State*** [2006] FJCA 40; AAU0048.2005S (14 July 2006) the Court of Appeal held:

"Whenever the court is advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. ***When the accused is nor represented, a trial with a trial must always be held.*** *At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led. [p24]*

It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. ***If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done".*** *[p25] (emphasis added)*

31. Applicant was not represented at the magistracy. The court did not ask the Applicant if he was challenging the confession and explain the grounds upon which that can be done. In this context, even though the Applicant at the pre-trial hearing had not indicated his intention to challenge the confession, the learned trial Magistrate ought to have conducted a trial within trial to decide the admissibility of the confession before proceeding to trial proper.

32. Learned trial Magistrate clearly fell into error when he failed to conduct a trial within trial before acting on the caution interview. However, failure to hold a trial within trial was not sufficient to have caused a miscarriage of justice in this case because there was sufficient evidence to convict the Applicant without the confession. Given the fact that no corroboration is required to prove a sexual assault, victim's evidence, (supported by his mother) was sufficient to bring about a conviction. Therefore this ground has no merit.

APPEAL AGAINST SENTENCE

33. It is well settled that a sentence imposed by a lower court should be varied or substituted with a different sentence on appeal only if it is shown that the sentencing judge had erred in principle or where the sentence imposed is excessive in all the circumstances.

34. The Fiji Court of Appeal in ***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999) observed:

> *"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the*

reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499).

35. ***In Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal observed:

> *"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.*

Ground 1: ***That the Learned Trial Magistrate erred in law that he mistook the fact and imposed the Sentence which is wrong in principle in all the circumstances of the case***

Ground 2: ***That the Sentence was harsh and excessive***

36. I will address both grounds together.

37. The Applicant has not specified the so called mistakes of facts or wronged principles.

38. The maximum penalty for Sexual Assault is ten years' imprisonment. Tariff was fixed by Madigan J in ***Abdul Kaiyum*** HAC 160 of 2010 that the range of sentences should be between two and eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.

39. Madigan J in ***State v Laca*** [2012] FJHC 1414; HAC252.2011 (14 November 2012) referred to the United Kingdom's Legal Guidelines for Sentencing and

categorized sexual assault offending into three categories to justify sentencing within the tariff of two to eight years.

> *Category 1 (the most serious)*
>
> *Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.*
>
> *Category 2*
>
> *(i) Contact between the naked genitalia of the offender and another part of the victim's body;*
>
> *(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*
>
> *(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.*
>
> *Category 3*
>
> *Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).*

40. Rubbing of penis of the man on buttocks of the victim falls within category 2 above. The learned Magistrate considered as aggravating factors the vulnerability of the child victim and the breach of trust situation to arrive at a sentence of 3 years' imprisonment with a non-parole period of two years.

41. The sentence is within tariff and proportionate to the harm cased to the victim and culpability of the offender. The sentence is neither excessive nor harsh in the circumstances of the offence.

42. The non-parole period has been fixed in accordance with Section 18 of the Sentencing and Penalties Act and principles set out in ***Tora v State*** [2015] FJSC 23; CAV11.2015 (22 October 2015)

> *"The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although*

there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

43. In my view the non-parole term of two years on a head sentence of 3 years promotes or facilitates conditions which might assist the rehabilitation of the Applicant. A non-parole term of two years represents a balance between rehabilitation and deterrence in this case. Therefore, there is no merit for this ground.

CONCLUSION

44. The delay is unreasonable in the circumstances. There are no grounds of appeal which merit serious judicial consideration that they will most probably be successful in appeal. Therefore, application for leave to appeal out of time in respect of Lautoka criminal case No. 510 of 2014 is refused.

HIGH COURT OF FIJI LAUTOKA

Aruna Aluthge
Judge

AT LAUTOKA
17th October, 2017

Solicitors: **Applicant in Person**
Office of the Director of Public Prosecution for Respondent