IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 001.2017
(On Appeal from Court of Appeal No: AAU 0039.2013)

BETWEEN : **APOLOSI DOMONA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Chief Justice Anthony Gates, President of the Supreme Court**
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court

Counsel : **Mr. M. Fesaitu for Petitioner**

Mr. F. Babitu for the Respondent

Date of Hearing: **7 July 2017**

Date of Judgment: **20 July 2017**

JUDGMENT

Gates, P

[1] I have read the draft judgment of Ekanayake J. I agree with its conclusions and reasoning and the orders proposed.

Chandra, J

[2] I agree with the reasoning and conclusions of Ekanayake J.

Ekanayake, J

Introduction

[3] The petitioner, Apolosi Domona by his undated document addressed to the Supreme Court of Fiji at Suva (which appeared to have been received by the Registry of the Supreme Court on 7/2/2017) along with a motion of 7/2/2017, has sought leave to appeal from this Court against conviction and sentence. The Court of Appeal by its judgment of 30/9/2016 whilst affirming the conviction had substituted a sentence of 13 years with a non parole period of 12 years.

[4] The petitioner has submitted the following 3 grounds of appeal for consideration of this Court:

1) *THAT the Learned Trial Judge erred in law and fact when he did not consider in his judgment the serious doubt that arose from the admission of the complainant under cross-examination of the state witness relating to this allegation.*

2) *THAT the Learned Sentencing Judge erred in law when he imposed a sentence outside of the accepted tariff.*

3) *THAT the Learned Sentencing Judge erred in law when he did not separately deduct the three (3) months remand period from the total sentence after considering the aggravating and mitigating factors.*

[5] The petitioner was charged in the Magistrates' Court at Tavua on the following charge:

CHARGE

(Complaint by Public Officer)

Statement of Offence (a)

***RAPE**: Contrary to Section 149 and 150 of the Penal Code Cap.17.*

Particulars of Offence (b)

***APOLOSI DOMONA** on the 25th day of September 2006 at Tavua in the Western Division had unlawful carnal knowledge of **S.T.** without her consent.*

[6] The petitioner had pleaded not guilty to the charge in the Magistrate's Court. After trial he was found guilty and convicted for the charged offence of rape by the Magistrate as per the judgment dated 18/4/2012.

[7] Case being transferred to the Lautoka High Court for sentencing, the learned High Court Judge by his sentencing order of 19/3/2013 sentenced the petitioner to 18 years imprisonment with a non-parole period of 16 years.

In the Court of Appeal

[8] Being aggrieved by the above the petitioner had preferred an appeal to Court of Appeal against conviction and sentence. On the 12th March 2015, the Appellant had filed amended grounds of appeal. Those grounds were as follows:-

1. *That the Learned Magistrate erred in law and fact when he did not consider in his judgment the serious doubt that arose from the admission of the complainant under cross examination of State witnesses relating to this allegation.*

2. *The Learned Sentencing Judge erred in law when he gave a sentence that was outside of the accepted tariff.*

3. *The Learned Sentencing Judge erred in law when he did not separately deduct the 3 months remand period from the total sentence after considering the aggravating and mitigating factors.*

[9] By the ruling of the single Judge dated 1/5/2015 the Court of Appeal had granted leave to appeal on the above 1 – 3 grounds stated in preceding paragraph 8.

[10] After a full Court hearing, the Court of Appeal by their judgment of 30/9/2016 whilst dismissing the appeal against conviction substituted a sentence of 13 years with a non parole term of 12 years.

[11] This is the judgment which has been now assailed by the petitioner in this Court.

Special Leave to Appeal

[12] Petitioner's document seeking special leave (mentioned in preceding paragraph 2) was filed on 7/2/2017. The impugned Court of Appeal judgment was pronounced on 30/9/2016. Time prescribed for lodgement as prescribed by Rule 5 of the Supreme Court Rules 2016 had lapsed on 11/11/2016. Thus this application is late by about 2 months and 27 days.

[13] Under Section 98 (3) of the Constitution, the Supreme Court derives exclusive jurisdiction, to hear and determine appeals from all final judgments of the Court of Appeal. Section 98 (3) thus reads as follows:-

> "(3) The Supreme Court—
>
> *(a)* is the final appellate court;
>
> *(b)* has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal; and
>
> *(c)* has original jurisdiction to hear and determine constitutional questions referred under section 91(5)".

[14] Section 7 of the Supreme Court Act No.14 of 1998 also becomes relevant.

> "7 (1). In exercising its jurisdiction under Section 98 [formerly section 122] of the Constitution with respect to special leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstance of the case-
>
> (a) refuse to grant special leave to appeal;
>
> (b) grant special leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or
>
> (c) grant special leave and allow the appeal and make such other orders as the circumstances of the case require.
>
> Section 7(2):-
>
> In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

(a) a question of general legal importance is involved;

(b) a substantial question of principle affecting the administration of criminal justice is involved; or

(c) substantial and grave injustice may otherwise occur.

[15] The above Section 7(2) which relates to criminal matters would show that the Supreme Court must not grant special leave to appeal in a criminal matter unless the court is satisfied that a question of general legal importance is involved, or a substantial question of principle affecting the administration of criminal justice is involved or substantial or grave injustice may otherwise occur.

[16] What has to be examined now is whether the petitioner has offered any explanation for this delay. Neither in his document received by this court on 23/10/15 nor in his submissions is any explanation given.

[17] Time and again the decisions in this jurisdiction have re-affirmed the position that the criteria stipulated in Section 7(2) of the Supreme Court Act No. 14 of 1998 are extremely stringent and special leave to appeal should not be granted by this Court as a matter of course.

[18] The following observations were made by this Court in **Dip Chand v State**; CAV 004 of 2010 (9th May 2012) would strengthen the above principle:

> *"....Given that the criteria is set out in Section 7 (2) of the* Supreme Court Act *No. 14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course the fact that the majority of the grounds relied upon by the Petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the Petitioner of crossing satisfying (sic) the threshold requirements for special leave even more difficult."*

Enlargement of Time

[19] Although the Petitioner has lodged this application for special leave outside of the prescribed period of 42 days, no reasons were submitted explaining the delay. It is noted that in the above application he has even failed to move for enlargement of time. However, to avoid any probable injustice that would be caused to the petitioner this Court will proceed to consider granting enlargement of time. When inquired from the petitioner's counsel at the hearing also no reasons were placed before Court. Thus this Court concludes that the Petitioner has totally failed to offer any excuse or reason for the delay.

I opt to cite the principle of law enunciated by the Judicial Committee of Privy Council in **Ratnam v Kumarswamy** (1964) 3 All.ER 933 at 935, which was to the following effect:-

> *"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion."*

[20] Further, in a Full Court decision of New South Wales namely **R. v Albert Sunderland** [1927] 28 SR (NSW) 26; which also being a case involving an application for extension of time after conviction, the court held as follows:

> *"... (2) – that in view of the delay in applying "very exceptional circumstances would have to be established before the court would be justified in granting the application."*

[21] The factors that have to be examined in determining whether the interests of justice require allowing extension of time in enlargement of time applications were laid down in **Kamlesh Kumar v State**; Criminal Appeal No. CAV 001.2009; by His Lordship The Chief Justice, Gates as follows:-

Appellate courts examine five factors by way of a principled approach to such applications. Those 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 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?

[22] If I am to advert to the length of the delay here – the delay is not a day or two, but a delay of about 2 months and 27 days. It is an unexplained substantial delay.

[23] The Court will now proceed to examine whether there is a ground of merit justifying the appellate court's consideration.

[24] The 3 grounds of appeal submitted to this Court by the Petitioner were the grounds considered by the Court of Appeal in the impugned judgment.

[25] In considering ground 1 raised in the Court of Appeal (which is same as the 1st ground raised here), their Lordships having extensively dealt with it in paragraphs 22 and 23 of the Judgment had concluded that the complainant has categorically stated that on the day in question the petitioner raped her without her consent.

[26] In paragraph 23, their Lordships having considered the complainant's answers to Court and her evidence in entirety had arrived upon the above conclusion.

[27] On the above footing they had proceeded to conclude that there was no merit in the above ground 1, by which it was alleged that there was a serious doubt in evidence of the complainant with regard to the allegation of rape.

[28] Paragraph 14 of the Court of Appeal judgment amply demonstrates that the learned Judges in concluding that had duly considered the following:-

(a) What the complainant meant by the word 'rape' as stated by her under Item 12 - the history recorded in the Medical Evidence Form- P Exhibit 4 was that - 'they were together intimating';

(b) The evidence given by the complainant in examination-in-chief and in cross-examination;

(c) Her evidence in re-examination more particularly to the effect that correct position was that she was raped by the petitioner without her consent.

[29] The thrust of the submission of the petitioner's counsel was that the complainant in examination-in-chief and cross-examination has stated that on the day in question, that is 25/9/2006, the petitioner had only tried to insert his penis into her vagina. But in re-examination she has confirmed that the petitioner had intercourse with her and the act was committed without her consent.

[30] As per the birth certificate marked in complainant's evidence, her date of birth was 18/4/92. She had been only 14 years at the time of the alleged incident. When considering her evidence one has to be conscious of the fact that the evidence given was in relation to an incident alleged to have been committed on her when she was a young child aged 14 years. During her re-examination she has clarified her earlier testimony and specifically said that in the night of the day in question the petitioner raped her without her consent. Testimony of a witness has to be considered in entirety. When her entire evidence is considered I am unable to conclude that the Court of Appeal erred in arriving at their findings spelt out in paragraph 23 of the judgment that there is no merit in the ground which alleged that there was a serious doubt in the complainant's evidence.

[31] Prosecution witness no. 2 had been Dr. Janice Brown. She had examined the complainant on 4/10/2006. The report prepared by her was marked as P1 Exhibit 4. In that report in Item 12 under - 'History related by the patient', it is stated that;

> *"Patient has some social problems. Sometime in 2004 her mother left home to her parent's everytime there was a fight with the husband (father of the patient). He repeatedly touched her private parts and also penetrated her with his fingers and her breasts, until last Monday night; 25/9/06 he had sexual intercourse with her. He threatened to kill her if she told anyone".*

Under Item 14 of the report, the doctor has stated that;

> *'Examination shows that hymen was broken long time ago, this may be consistent with penetration with finger. Also it is possible that she has had recent sexual intercourse but it did not cause any lacerations'.*

[32] Lavenia Tinai, the aunt of the complainant who was her immediate neighbour has stated in his testimony that on 25/9/2006, when she was going to the Loloma festival with her children and the complainant at the bus stand having met the petitioner the complainant had to return home with him. The next morning when she saw the complainant crying and upon being questioned she had divulged that the petitioner had sexual intercourse with her in the previous night. This witness only had reported the matter to the village committee and they had taken her to the police station.

[33] She had admitted that she was the village traditional nurse. But she has been performing the traditional conception method of "Veivakasilimi". According to her evidence (at page 140) this was a procedure carried out by inserting her fingers into vagina of women. In cross examination she had categorically denied that she had performed this procedure on the complainant.

[34] It is noted that the caution interview of the petitioner was marked as evidence in the prosecution case consequent to a ruling made by the Learned Magistrate after a voir-dire that it was made voluntarily and as such it was admissible.

[35] Having examined the evidence in its entirety my considered view is that the reasons spelt out in paragraphs 32 to 34 of the Court of Appeal judgment in concluding that the complainant's evidence was credible, rejection of the petitioner's evidence together with the defence of alibi and for finding him guilty, appear to be correct. As such I conclude that no error has been occasioned by dismissing the 1st ground of appeal, which is same as ground 1 raised here.

[36] What awaits consideration now is where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? For the reasons I have already enumerated in the preceding paragraphs there are no grounds of appeal that will probably succeed.

[37] Whether the respondent will be unfairly prejudiced will largely depend on the facts and circumstances of each case and on the evidence on record. Having considered all the material I am inclined to the view that if time is enlarged the respondent will be unfairly prejudiced.

[38] Now, I turn to grounds 2 and 3 submitted to this Court which are on the sentence. Those are - that the sentence imposed was outside of the accepted tariff and that the Sentencing Judge erred in law when he did not separately deduct the 3 months remand period from the total sentence, after considering the aggravating and mitigating factors. As per paragraph 7.3 of petitioner's written submissions dated 9/6 2017, since 13 yrs of imprisonment falls within the accepted tariff for rape the ground 2 was withdrawn.

[39] When considering ground 3 above Section 24 of the Sentencing and Penalties Decree 2009 would become relevant. Same is reproduced below:

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*

[40] As per the sentencing order of the Learned High Court Judge dated 19/3/2013, he had picked 16 years as the starting point. Having considered the aggravating factors which were set out in his judgment, sentence was increased by 4 years, making it 20 years. Thereafter in view of the mitigating factors itemized in paragraph 13 of his judgment he had reduced the sentence by 2 years and arrived upon a head sentence of 18 years. For the reasons given in his judgment he had fixed the non-parole period at 14 years.

[41] At this juncture I am mindful of the pronouncement of this Court in **Koroitavalena v State** [2014] FJCA 185; AAU0051.2010 (5 December 2014) at paragraph 24 to the effect that:

> *"The period spent in remand before trial should be dealt with separately from the mitigating factors when imposing a sentence and cannot be subsumed in the mitigating factors as argued by the Respondent. The period being not substantial has no effect in giving effect to the provisions of section 24".*

In the same case it was held that the law requires a separate deduction of the period spent on remand from the sentence but not as part of mitigating factors, unless otherwise ordered by Court.

[42] The 3 months remand period had been already considered as one of the mitigating factors by the trial Judge when deducting 2 yrs. As per paragraph 48 of the judgment of the Court of Appeal it is clear that they were mindful of the same.

[43] However, it is seen from paragraph 51 of the judgment, the Court of Appeal had been inclined to the view that in future, the time spent in remand must not be considered as a mitigating factor and it should be considered separately as stipulated by law. The head sentence had been reduced from 18 yrs to 13 years and the non-parole period had been reduced from 16 to 12 years by the Court of Appeal. This is a substantial reduction. The remand period had been already taken into account when fixing the head sentence by the trial Judge. The Court of Appeal has now reduced the head sentence. Anyway the remand period here does not seem to be a very substantial one. Thus I am convinced that no miscarriage of justice has been occurred.

[44] In view of the above, I conclude that the Court of Appeal has not committed any error by substituting the present sentence. Thus ground 3 submitted in this Court against sentence should fail.

[45] Viewed in the above context, the application for enlargement of time lacks merit. Based on the above analysis, I am not satisfied that the grounds submitted to this Court fulfilled the threshold criteria enumerated in Section 7(2) of the Supreme Court Act No. 14, 1998.

[46] For the above reasons, the application for special leave to appeal is also refused.

Orders of the Court:

1. The application for enlargement of time is dismissed.
2. The application for special leave to appeal is also dismissed.
3. The judgment of the Court of Appeal dated 30th September, 2016 is affirmed.

.....
Hon. Chief Justice, Anthony Gates
President of the Supreme Court

.....
Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

.....
Hon. Madam Justice Chandra Ekanayake
Judge of the Supreme Court

Solicitors

Office of the Legal Aid Commission for the Petitioner

Office of the Director of Public Prosecutions for the Respondent.