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

CRIMINAL APPEAL NO.AAU 89 of 2019
[In the High Court at Suva Case No. HAC 52 of 2018]

BETWEEN	:	**PETERO ULUILAKEBA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**09 December 2020**
Date of Ruling	:	**10 December 2020**

RULING

[1] The appellant had been indicted in the Magistrates Court at Taveuni on a single count of rape contrary to section 149 and 150 of the Penal Code, Cap 17 committed between 01 January 1995 and 31 December 1998 at Taveuni in the Northern Division. When the alleged sexual abuse began the appellant was about 40 years old and the victim was 8-9 years of age. Since then the alleged campaign of sexual abuse and rape had supposedly continued for 10 years. The appellant is the victim's step farther.

[2] The particulars of the charge were as follows.

> *'Petero Uluilakeba between the 1st day of January 1995 to the 31st day of December 1998 at Taveuni in the Northern Division, had unlawful carnal knowledge of CD.'*

[3] After trial, the learned Magistrate in the judgment delivered on 16 February 2018 had found the appellant guilty and convicted him as charged. The case was referred to the High Court for sentencing and the High Court on 09 August 2018 had sentenced the appellant to 16 years of imprisonment with a non-parole period of 13 years.

[4] The appellant's application for enlargement of time had been filed by the Legal Aid Commission on 26 July 2019 seeking extension of time accompanied by his affidavit and notice of appeal. Therefore, the appellant's appeal is out of time by over 10 months. The Legal Aid Commission had also filed written submissions on 16 September 2020. The state had responded by its written submission on 23 October 2020 only regarding the grounds of appeal on sentence but not on conviction grounds of appeal. It had not fulfilled the promise to this court to file supplemental submissions on conviction grounds of appeal later.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State: Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[6] In ***Kumar*** the Supreme Court held

> *'[4] 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?*

[7] ***Rasaku*** the Supreme Court further held

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

[8] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> *"(a)……*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*
>
> *(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.*
>
> *(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where it is necessary to enable substantial justice to be done, that the breach will be excused."*

[9] Sundaresh Menon JC also observed

> *"27…… It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time."*

[10] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a ***'real prospect of success'*** *(see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal... ...'*

Length of delay

[11] As already stated, the delay is over 10 months and very substantial.

[12] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

'In ***Julien Miller v The State*** *AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.'*

[13] However, I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'

Reasons for the delay

[14] The appellant's excuse for the delay is that he did not know the appeal process and he came to know that he could appeal from his inmates at prison. This is not a good excuse at all.

[15] In **Qarasaumaki v State** [2013] FJCA 119; AAU0104.2011 (28 February 2013) the Court of Appeal said

'[4] ..... The Notice is late by 3 ½ months and the reason for the delay is that the applicant was unaware of the statutory 30-day appeal period. The delay is significant and ***the applicant's ignorance of the law and its procedures is not a good excuse*** *(****Rasaku's*** *case at [31]).*

Merits of the appeal

[16] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[17] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[18] The grounds of appeal against conviction and sentence urged on behalf of the appellant were as follows.

> *(i) 'THE Learned Trial Magistrate failed to warn himself on the evidence of uncharged acts led at trial and had considered such evidence in assessing and analysing the case in convicting the Appellant, thereby causing a substantial miscarriage of justice.'*
>
> *(ii) The Learned Trial Magistrate erred in law and facts by not placing a fair, balanced and objective manner in dealing with the evidence led at trial, placing more emphasis on the prosecution case.'*
>
> *(iii) The Learned Sentencing Judge took into account irreverent maters when sentencing the Appellant.*
>
> *(iv) The Learned Sentencing Judge did not deduct the time spent in remand separately.*

[19] The appellant's written submissions indicate that the second ground of appeal would not be pursued and the counsel for the appellant confirmed it at the leave to appeal hearing.

[20] The Magistrate had summarised the evidence of the complainant and the appellant in the judgment as follows.

*8. **CD in her evidence** stated that in 1995 she was at Qeleni, Taveuni with her mother and step father and four siblings. Her step father is Petero Uhilakeba who is the accused and she identified the accused and she identified the accused in court. In 1995 she was in class 8 and it was a challenging time in her life as she was under sexual abuse from the accused. She said that happens when she was in class 1. The accused penetrated his penis into her vagina when he was 8 or 9 years old and in class 3 or 4. It continued to happen until she was in form 6. The accused did that to her like twice a month depending on his relationship with her mother. She said in a year it will be more than fifty times. The accused told her that he is a sex maniac and he did that to her because her mother does not satisfied him. The accused told her if he tells anyone he will kill her. She cried when the accused did that to her and she beg him to stop and he never. Few incidents he has knife beside him and once the accused punched her. Their house is at the end of the village and next to the bush and that where the accused rape her. She did not report because of the fear from the threat from the accused that he will kill her, her mother and siblings if she tells anyone. She had the courage to report this in 2015, when she joined the Women Movement.*

*9. **The Accused in his evidence** state that he knew CD when he was 1 year and 7 months old. He denies having sexual intercourse with CD. He touched CD's breasts, vagina and he always rub his penis on top of her vagina but he did not penetrate into her vagina. He removed CD's clothes and he rubbed his penis on top of CD's vagina. He did that to satisfy himself because of the difficulty he face with CD's mother who is his wife. CD did not like it. He was doing it to CD in 1999 when CD was 9 years old and in class 3 until she reach form 6. He stated that CD and God is his witness. He took her to the bush and away from home. He orally threatened CD because he knows that what he did is wrong. He denied using the cane knife and punching CD on the mouth.'*

[21] When the trial commenced the complainant was in her late thirties and the appellant in sixties.

01st ground of appeal

[22] The appellant's argument is that evidence has been led on uncharged acts and the Magistrate had considered them in convicting the appellant causing him substantial miscarriage of justice. The evidence complained of is the evidence of the complainant that the appellant at times had a knife beside him and once he had punched her.

[23] There is nothing to indicate that the appellant had in any way used the knife on the complainant and it is doubtful whether he could have been charged with keeping it beside him anyway. Thus, the evidence on the knife cannot be treated as evidence of an uncharged act.

[24] The appellant could perhaps have been charged separately for having punched the complainant. Therefore, the evidence of the appellant having punched the complainant once could be considered as evidence of an uncharged act.

[25] It appears from the judgment that the Magistrate had stated the evidence of the appellant having punched the complainant as part of the general narrative of her evidence. There is not even the slightest indication that the Magistrate had relied on that piece of evidence to convict the appellant.

[26] At no stage had the appellant taken up the position that the complainant had consented to acts of sexual intercourse. His evidence consisted of an admission of having engaged in various other sexual activities with the complainant but not having penetrated her vagina. Therefore, the evidence of the appellant having allegedly once punched the complainant presumably to scare the complainant in order to obtain her compliance was not contradicting his denial *vis-à-vis* the charge of rape in as much as he was not charged with any other acts of sexual abuse other than rape. Therefore, the single piece of evidence challenged by the appellant regarding the punch on the complainant seems to have had little impact on the appellant's conviction. That evidence did not take the prosecution case any further than the rest of the complainant's evidence carried it. The Magistrate had not relied on it to convict the appellant and clearly he did not have to.

[27] When a complaint is made on evidence being led on uncharged acts, how such evidence should be treated at a trial before assessors and the judge had been discussed in a few decisions.

[28] **Senikarawa v. State** [2006] FJCA 25; AAU0005.2004S (24 March 2006) it was held:

> *"The learned judge admitted evidence of uncharged acts by the appellant against the complainant. The question of admissibility of such evidence is tested by the broader principle of whether the probative value of the evidence outweighs the prejudice to the accused.* ***R v. Boardman*** *[1975] AC 421.* ***Pfennig v. R*** *[1995] HCA 7; (1994-95) 127 ALR 99.*

[29] Goundar J in **State v Nayacalagilagi** [2009] FJHC 48; HAC165.2007 (17 February 2009); stated:

> *"If the jury inadvertently hears inadmissible evidence, any prejudice could be avoided or dispelled by a clear warning to disregard the evidence and enable a fair trial. However, if the circumstances are such that the prejudice to the accused could not be dispelled by a warning to the jury, a mistrial is declared as an appropriate remedy to ensure a fair trial for the accused."*

[30] In **Vesikula v State** [2018] FJCA 176; AAU70.2014 (23 October 2018) the Court of Appeal approved the approach taken in **State v Nayacalagilagi** (supra).

[31] **Rokete v State** [2019] FJCA 49; AAU0009.2014 (7 March 2019) the Court of Appeal one again dealt with a complaint of leading evidence of an uncharged act by the prosecution.

> *'[35] Once again the appellant complains of an alleged non-direction by the trial Judge with regard to an uncharged act on the evidence of his having escaped from Ba Police Station during interview. Admittedly, this had not been raised by the counsel for the appellant when the trial Judge asked for any redirections. The appellant relies on **Senikarawa v State** AAU0005 of 2004 S: 24 March 2006 [2006] FJCA 25 and **Vesikula v State** AAU0070 of 2014: 23 October 2018 [2018] FJCA 176 in support of his argument. The litmus test for leading evidence of an uncharged act is whether the probative value of the evidence outweighs the prejudice to the accused.*

[32] In the context of the complainant's evidence in the case it is clear that the evidence of the appellant having punched her had come out naturally as part of what had happened over a period of 10 years. It was part and parcel of the narrative of the complainant. It was part of *res gestae*. The counsel for the appellant too had not requested the Magistrate to discard that evidence probably because it was treated as so trivial by the defence as well. Therefore, I do not agree that it has caused a miscarriage of justice leave aside it being substantial.

[33] Therefore, there is no real prospect of success in appeal.

[34] As to the appellant's complaint that the complainant's evidence had covered a period of time of 10 years beyond the period of 04 years and such evidence should be treated as evidence on uncharged acts. While this appears to be true, it had not taken the appellant by surprise as he himself had vividly described in his evidence his sexual conduct towards the complainant during those 10 years short of penetration of her

vagina. Thus, no real prejudice had been caused by the prosecution not having amended the charge to cover a longer period of 10 years after the complainant's evidence. The defence for obvious reasons had raised no objection at any stage of the trial, for the appellant himself did not challenge the decade of his sexual activities on the complainant though he denied having raped her.

[35] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

03rd ground of appeal

[36] The appellant complains that the trial judge had taken irrelevant matters into account in sentencing the appellant. The alleged irrelevant acts are use of violence (knife and punching). The presence of a knife and the punch on the complainant just on one occasion were not part of the offence the appellant was charged with. Though the knife had not been used against the complainant its presence beside the appellant would have instilled fear on the complainant. The single punch would have been inflicted to extract obedience and compliance from the complainant not only on that occasion but on future occasions as well. The trial judge was entitled to consider them as aggravating features. The appellant was well aware that he was being implicated for acts of sexual abuse of the complainant for a period of 10 years and his own evidence demonstrated it, for he had admitted committing various other sexual activities on the complainant during the decade.

[37] Therefore, there is no sentencing error or a real prospect of success on this ground of appeal.

04th ground of appeal

[38] The appellant's criticism is based the High Court judge having not given a discount separately for his period of remand except a reduction of 01 year collectively for previous good character and 03 months remand period. However, in **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016) the Supreme Court stated that

> *"[10] However section 24 does not cast any burden on the Corrections Department. The burden is cast upon the court. The provision is mandatory. For the court **shall** regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless a **court** otherwise orders."*

[39] **Domona v State** [2016] FJCA 110; AAU0039.2013 (30 September 2016) followed ***Sowane.***

> *"[50] In a recent judgment of the Supreme Court in **Apakuki Sowane** CAV 0038/2015 it was held that the law required a separate deduction of the period spent on remand from the head sentence but not as part of mitigating factors, unless otherwise ordered by the Court.*
>
> *[51] In view of the principle laid down in the above judgment, I am of 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. In the instant case the Appellant has spent 3 months in remand.*

[40] However, in **Rogers v State** [2017] FJCA 134; AAU0032.2011 (30 November 2017) Court of Appeal addressed a similar complaint as follows.

> *"[23] Time spent in custody while on remand is a relevant factor in sentencing. There is a statutory obligation on the courts to consider the remand period in sentence, created by section 24 of the Sentencing and Penalties Act 2009. While the courts are obliged to consider the time spent in custody while on remand, no precise formula is required to discount the remand period. Recently, this Court in Maya v State unreported Cr App No AAU0085 of 2013; 14 September 2017, said at [13]:*
>
> *... the methodology used for discounting does not involve an error of principle (Qurai v State unreported Cr App No CAV24 of 2014; 20 August 2015). Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors. Unlike a recent*

decision of this Court in Domona v State unreported Cr App No AAU0039 of 2013; 30 September 2016, in Sowane v State unreported Cr App No CAV0038/2015; 21 April 2016, the Supreme Court did not prefer one method over the other (see, [16]).'

[41] I think the flexible judicial approach taken in ***Rogers*** is preferable to any rigid application of section 24 of the Sentencing and Penalties Act, 2009. Therefore, there is no sentencing error involved. In any event, the appellant should never have been considered as a first offender or a man with a previous good character. An offender who had indulged in a campaign of sexual abuse for a decade could never have been considered to be someone of previous good character. Thus, in lieu of 03 months of remand period the appellant had received an undeserving 01 year discount.

[42] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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).

[43] Given the facts of this case and the victim impact report I have no doubt that the sentence imposed on the appellant fits the gravity of the crime committed by the appellant.

[44] This ground of appeal has no real prospect of success in appeal.

Prejudice to the respondent.

[45] There may not be prejudice to the state as respondent *per se* by an extension of time but most certainly the complainant would be prejudiced and adversely affected in case there is to be a new trial given what she had undergone in the past as revealed by the victim impact statement referred to in paragraph 10 of the sentencing order and also the time that had lapsed since the commission of the offence.

Order

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

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI