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

CRIMINAL APPEAL NO.AAU 0005 of 2020
[In the High Court at Suva Case No. HAC 246 of 2017S]

BETWEEN	:	**VAKENI DONU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**24 March 2021**
Date of Ruling	:	**25 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka with two counts of rape contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009 committed at Draubuta, Tokatoka, Tailevu in the Eastern Division on 02 August 2017. The victim was 09 years old at the time of the incident and the appellant was 21 years of age. They were closely related. The appellant's mother was the complainant's father's sister.

[2] The information read as follows:

*"**First Count**"*

Statement of Offence (a)

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence (b)

VAKENI DONU*, on the 2nd day of August 2017, at Draubuta, Tokatoka, Tailevu in the Eastern Division, penetrated the anus of MLR, a child under the age of thirteen years with his penis.*

*"**Second Count**"*

Statement of Offence (a)

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence (b)

VAKENI DONU*, on the 2nd day of August 2017, at Draubuta, Tokatoka, Tailevu in the Eastern Division, penetrated the vagina of MLR, a child under the age of thirteen years with his penis."*

[3] At the end of the summing-up on 03 April 2019 the assessors had unanimously opined that the appellant was not guilty of the charges levelled against him but guilty of attempted rape in respect of both counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on the same day, convicted the appellant for attempted rape on both counts and sentenced him on 04 April 2019 to 03 years of imprisonment on each count and ordered the two sentences to run consecutively with a non-parole period of 05 years of imprisonment.

[4] The appellant's untimely notice of appeal against conviction and sentence had been tendered by the appellant on 20 January 2020. The delay is about 08 ½ months. The Legal Aid Commission had filed a notice of motion seeking enlargement of time, the appellant's affidavit, amended notice of appeal and written submissions against conviction and sentence on 07 October 2020. The state had tendered its written submissions on 11 November 2020.

[5] Grounds of appeal urged on behalf of the appellants are as follows:

Conviction

Ground 1

The trial judge had erred in law and in facts by convicting the appellant for attempted rape for both counts when the totality of the evidence does not support it.

Sentence

Ground 01

The learned trial judge erred in his sentencing discretion by imposing a sentence that is harsh and excessive in the circumstances of the case in that:

(i) The learned trial judge had not considered section 22(1) of the Sentencing and Penalties Act;

(ii) Making the sentence consecutive on reasons that is reflected in the aggravating factors; and

(iii) No justified reasons for the sentence that falls outside the sentencing tariff of attempted rape.

[6] The trial judge had summarized the prosecution evidence as follows in the sentencing order:

2. The brief facts of the case were as follows. On 2 August 2017, the date of the incident, the female complainant (PW1) was 9 years old. She was a class 4 student at a primary school in Tailevu. She lived with her parents and 3 brothers aged 8, 6 and 3 years old. She was the eldest in her family. The accused was 21 years old at the time. His mother was the complainant's father's sister. The accused and the complainant were first cousins, and their families lived next to each other in the same village.

3. After school on 2 August 2017, the complainant was peeling potatoes in their family kitchen. She went out to get water. The accused then grabbed her and carried her to a nearby bush. She tried to escape to no avail. The accused later told her to take off her clothes. She did so under duress. The accused then told her to kneel down on her hands in a "dog like standing position". He then tried to insert his penis into her anus. The complainant said it was painful. However, the accused could not insert his penis into the complainant's anus because it was small. Then the accused ordered the complainant to lie on the ground on her back facing up. He then tried to insert his penis into her vagina. Again, the accused was unable to insert his penis into the complainant's vagina because it was small. There was redness around the vaginal area.

4. The matter was reported to police. An investigation was carried out. The complainant was medically examined at CWM Hospital on 4 August 2017. He appeared in the Nausori Magistrate Court on 7 August 2017 charged with raping the complainant……"

[7] 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

[8] 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?'*

[9] ***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.'*

[10] 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.'

[11] 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.'

[12] 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

[13] The delay is about 08 ½ months and very substantial.

[14] 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.'*

[15] 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

[16] The appellant's excuse for the delay in his affidavit is that he had prepared his appeal papers and handed them over to prison authorities to lodge them with the Court of Appeal registry but he later got to know that they had been misplaced. He then had to prepare another set of appeal appeals. However, the appellant had not come out with this explanation in his initial application for leave to appeal against conviction and sentence filed in person. He had been defended by a counsel and the appellant had not explained as to why he had not sought his assistance or contact Legal Aid Commission until the lapse of 08 ½ months. Therefore, the appellant's explanation is not convincing and acceptable.

Merits of the appeal

[17] 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."*

[18] 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 very substantial delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

01st ground of appeal

[19] It is clear from the evidence as summarised in the summing-up that the assessors had acquitted the appellant of rape because there was no convincing evidence to prove the element of penetration in both charges of rape. Neither the evidence of the victim nor the evidence of the doctor had established penetration. However, the assessors had obviously entertained no doubt of the incident where the appellant had unsuccessfully tried to insert his penis into her vagina and the anus.

[20] The trial judge in agreeing with the assessors had stated as follows in his judgment:

> 6. *On my analysis of the case, I agree with the three assessors' opinion. The complainant described the events leading up to the alleged rape by the accused. I accept her evidence on that. She said, when cross-examined by defence that the accused's penis did not penetrate her anus and vagina, at the material time. This view was supported by doctor Tigarea's evidence, where he said, that the medical examination result of PW1, confirmed that there was no evidence of her anus and vagina been penetrated, at the material time.*
>
> 7. *I accept PW1's evidence that the accused attempted to rape her anally (count no. 1) and vaginally (count no. 2), at the material time. He did not succeed in raping PW1 because PW1's anus and vagina appeared small.*
>
> 8. *Given the above, I accept the three assessors' unanimous opinion and find the accused not guilty as charged on count no. 1 and 2, but guilty of the lesser offence of attempting to rape PW1 anally and vaginally on 2 August 2017. I acquit him of the charges in count no 1 and 2, but convict him of attempting to rape PW1 anally (count no. 1) and vaginally (count no. 2), on 2 August 2017.*

[21] Therefore, there is no merit at all of this ground of appeal and it is vexatious and I would dismiss it under section 35(2) of the Court of Appeal Act.

Sentence

01st ground of appeal

[22] 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.*

[23] The gist of the appellant's contest on the sentence lies in separate sentences of 03 years on each count being made to run consecutively. The trial judge had taken **Aunima v State** [2001] FJLawRp 50; [2001] 1 FLR 213 (27 June 2001) as having laid down the sentencing tariff for attempted rape as ranging from 12 months and to 05 years of imprisonment under section 151 of the Penal Code where the offender was statutorily liable to imprisonment for seven years with or without corporal punishment. Currently attempted rape is set out in section 208 of the Crimes Act, 2009 where the maximum statutory sentence is imprisonment up to 10 years. Despite the increase in the sentence for attempted rape under the Crimes Act, 2009 both counsel stated that still the sentencing tariff for attempted rape is taken to be from 12 months and to 05 years of imprisonment.

[24] It must be remembered that in **Aunima v State** (supra) the sentencing tariff for attempted rape was set to be from 12 months to 05 years in the context of the maximum sentence under section 151 of the Penal Code being 07 years and the victim appearing to have been an adult. However, under section 208 of the Crimes Act, 2009

the maximum sentence is 10 years and the matter under appeal here is a case of attempted rape of a child of 09 years old.

[25] It appears to me that given the judicial thinking and allied developments in all fronts that have taken place in the last decade or so in the sphere of sentencing tariffs regarding rape of juveniles as articulated in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)] and **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018), there may be a need to revisit the sentencing tariff for attempted rape set under section 151 of the Penal Code (as ranging from 12 months and to 05 years of imprisonment) and reconsider whether it is appropriate in the current context for child or juvenile attempted rape under 208 of the Crimes Act, 2009. This is matter for the state to consider and seek, if necessary, guidelines from the appellate court as to sentencing tariff for child and juvenile attempted rape under the Crimes Act, 2009.

[26] Be that as it may, the appellant's argument is that the trial judge was wrong to have made both sentences consecutive so as to make the total sentence 06 years which is outside the range of sentence for attempted rape as currently applicable.

[27] It is now well settled that under the Sentencing and Penalties Act, 2009 the *'default'* position is that every term of imprisonment must, unless otherwise directed by the court, be served concurrently [vide **Vukitoga v State** [2013] FJCA 19; AAU0049 of 2008 (13 March 2013)]. This is the complete reverse of the position under section 28(4) of the Penal Code.

[28] In the full court, I had the occasion to consider a similar complaint in **Sauduadua v State** [2019] FJCA 86; AAU0053.2016 (6 June 2019) and section 22(1) of the Sentencing and Penalties Act, 2009:

> *'[39] Section 22(1) of the Sentencing and Penalties Act, 2009 reads as follows*
>
> *'Concurrent or consecutive sentences:*

> *22. — (1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.'*
>
> *[40] It is clear that the imprisonment imposed on the appellant does not come under sub-section (2) of section 22. Therefore, the justification for the consecutive sentence should be considered under section 22(1) itself. It looks as if the words 'unless otherwise directed by the court' in section 22(1) permits the trial judge to make a sentence consecutive to another sentence even when section 22(2) does not apply. The issue is in what circumstances the discretion vested in the trial judge by those words should be exercised and whether the discretion exercised in this instance could be justified.*

[29] The trial judge's reasons for making the two sentences of 03 years each consecutive are found at paragraph 12 of the sentencing order:

> *'[12] Because the offences relate to an attack on a child, and the need for deterrence, I make the above sentence consecutive to each other, making a final total sentence of 6 years imprisonment.'*

[30] Upon a perusal of the sentencing order, I find that the trial judge had picked the starting point at 03 years and added 03 more years for aggravating factors and reduced 01 year and 08 months for the period of remand and 01 year and 04 months for being a first offender thus arriving at the final sentence of 03 years for each of the offences. Two of the aggravating factors identified by the trial judge were *'breach of trust'*, *'sexual offences against a child'*. Under *'breach of trust'* the judge had said:

> *'[7]……You have to understand that this kind of behaviour cannot be tolerated in society, especially in a village setting. You will have to serve a prison sentence, as a warning to others.'*

[31] Similarly, under *'sexual offences against a child'* the trial judge had stated as follows:

> *'[8] The courts had repeatedly said in the past, and it will say again that, it will not tolerate the sexual abuse of children in our society. Our children are the future of this country. The court expects children to grow up in our society without been repeatedly abused. You will have to serve a prison sentence as a warning to others.'*

[32] Therefore, clearly the trial judge had already considered the fact that the attack was against a child and the need for deterrence as part of aggravating factors in enhancing the sentence by 03 years. Thus, the judge had erred in law and fact in making the two sentences consecutive based on the same considerations resulting in the appellant having to serve a sentence of 06 years instead of 03, if both sentences were to run concurrently. This may even be considered as another form of double counting. This, in my view, clearly constitutes a sentencing error.

[33] There is another aspect to this issue. That is the totality principle. The totality principle depends on the sentence for each of the offences committed in the one transaction having been correctly determined [vide **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The totality principle requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interest of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct [vide **Rawaqa v State** [2009] FJCA 7; AAU009.2008 (8 April 2009)].

[34] Although the default position in relation to concurrent and consecutive sentencing has been reversed by section 22(1) of the Sentencing Decree, the totality principle is still relevant to the final sentence imposed.

[35] I do not see from the sentencing order that the trial judge had given his mind to the totality principle in making the two sentences run concurrently.

[36] However, 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).

[37] When the ultimate sentence of 06 years is viewed in the light of what I have stated regarding the current sentencing tariff for attempted rape not having been set in the context of section 208 of the Crimes Act, 2009 and the victim being a child or juvenile, I do not think that there is a great deal of error with 06 years of imprisonment though it sounds marginally on the high side in the facts and circumstances of this case. However, the ultimate sentence is a matter for the full court to decide along with possible sentencing guidelines on applicable tariff under section 208 of the Crimes Act, 2009 particularly when the victim is a child or a juvenile, if the state decides to pursue it before the full court.

Prejudice to the respondent

[38] While an extension of time would not prejudice the state as far as the conviction is concerned, it would cause immense mental trauma to the victim who may still be a child to relive her experience in court once again if there is to be a fresh litigation. However, it would not apply to the matter of sentence.

Orders

1. The ground of appeal against conviction is dismissed in terms of section 35(2) of the Court of Appeal Act.
2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL