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

CRIMINAL APPEAL NO.AAU 135 of 2020
[In the High Court at Lautoka Case No. HAC 216 of 2019]
[Magistrate's court at Ba case No. 427of 2006]

BETWEEN	**:**	**NARSIMLU PERMAL**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. Luisa Latu for the Respondent**
Date of Hearing	**:**	**17 August 2023**
Date of Ruling	**:**	**18 August 2023**

RULING

[1] The appellant had been charged with a single count of rape under the Penal Code Cap. 17 at the Ba Magistrate's Court. The victim was his 10 year old biological daughter. The charges was as follows:

FIRST COUNT

(Representative count)
Statement of Offence
RAPE*: Contrary to section 149 and 150 of the Penal Code, Cap 17.*

Particulars of Offence
NARISMUL s/o PERMAL between 16th May 2006 and 31 day of August 2006 at Vaqia, Ba in the Western Division, had unlawful carnal knowledge of 'PP', without her consent.

[2] The prosecution case was mainly based on the testimony of the complainant PP and her mother. The prosecution also led the appellant's self-incriminatory cautioned interview. The appellant gave evidence in his defence. On 15 November

2019 the learned Magistrate found the appellant guilty of rape and he was convicted accordingly. The case was then sent to the High Court for sentencing pursuant to section 190 (1) of the Criminal Procedure Act.

[3] The sentencing High Court judge had summarised the facts as follows.

> 4. *The brief facts are as follows:*
>
> *(a) The victim in the year 2006 was 10 years of age and a class 5 student living with the accused her father and her mother.*
>
> *(b) On 30th August, 2006 at about 8.30pm the victim was sleeping with her mother but when she woke up she noticed that she was sleeping in the room of the accused. By this time the accused had removed her pants and panty, the accused then removed his pants took out his penis and inserted it into her vagina. The victim wanted to shout but the accused held her mouth and threatened her with a kitchen knife that if she told her mother, he will kill her. The victim got scared, it was painful when the accused inserted his penis into her vagina. The victim did not consent to what the accused had done to her.*
>
> *(c) Next day the victim's mother saw stains on the victim's panty upon questioning the victim told her mother about what the accused had done to her. The matter was reported to the police, the victim was medically examined upon investigation the accused was arrested caution interviewed and charged.*

[4] The appellant in person had untimely appealed against conviction and sentence. The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14;

CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The delay is about 09 months which is very substantial. The appellant has stated that his lack of knowledge and COVID restrictions were the reasons for the late appeal. However, many an appellant in person do file timely appeals or out of time appeals at least within 03 months in this court. I do not think that the reasons adduced by the appellant could account for this long delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] The grounds of appeal urged by the appellant are as follows.

Conviction:

Ground 1

THAT the appellant ground of complaint is that the Judge failed to summarise the evidence. The summary of facts that the learned Judge delivered the sentence from the guilt of the founding by Magistrate Court and with expert evidence produced to the Court. There was no assessor involved in this case only both 2 single Magistrate and Judge.

Ground 2

THAT the learned Judge erred in law to notice that there was inadequate evidence to support the guilty of offence and standard of proof was not presence for convictions.

Ground 3

THAT the learned Judge erred in law that to take into consideration that any person who enters the witness box to give evidence is liable to have his story tested and even destroyed because he is exposed to cross-examination which happen in this case.

Ground 4

THAT the learned Judge erred in law not taking into consider that the trial is not an enquiry into the truth of an issue but is concerned simply with the narrower question whether the prosecution had proved its case against accused beyond doubt.

Ground 5

THAT the learned Judge erred in law the nature of the charge and evidence in this case was such that we should suggest that it would have been better for the Judge to avoid any hyperboles and to aim to sum up the case in an unemotional way as possible.

Ground 6

THAT the appellant submits that the learned Judge and trial Magistrate erred that both the proceedings were unfair, biased and prejudiced and breached his constitutional right to a fair trial guaranteed under section 15 (1) of Constitution of Fiji

Ground 7

THAT the appellant contends that the learned Judge erred in law not taking into consideration that in this matter appellant's Legal Aid was present for the Trial proper.

(i) That the learned trial Judge erred in law and in fact when he failed to fully properly consider the issue of delayed reporting of the complaint thus questioning the credibility of the victim and the veracity of the complaint.

(ii) That the learned trial Judge erred in law and in fact when he failed to fully and properly consider the issue of delayed reporting and the apparent weariness in this evidence in light of victims grandfather Chandrika Prasad.

Sentence:

Ground 1

THAT the learned Judge erred in law and in fact by taking starting point on the higher end of the tariff which led the sentence to be harsh and excessive.

Ground 2

THAT the non-parole fixed for a first offender in this matter is to near to the head sentence which is 14 years to serve than to get 1/3 remission from correction authority.

01st ground of appeal

[8] Contrary to the appellant's assertion, the learned Magistrate had in detail dealt with the totality of evidence and accepted PP's evidence as reliable and credible. Her evidence was buttressed by her mother's evidence and medical evidence. What the mother saw on PP's panty was consistent with PP's evidence as to what happened

after the last act of sexual intercourse by the appellant. The appellant's cautioned interview was also c consistent with PP's narrative (see paragraphs 9-21 of the judgment). At the same time the magistrate had disbelieved the appellant's denial (see paragraphs 21 & 22 of the judgment).

[9] The nature of the enquiry to be carried out by the High Court under section 190(3) of the CPA is to ascertain the facts found by the magistrate, as well as any other facts, which may be relevant to the determination of the proper sentence. The argument that somehow section 190 creates some form of mechanism for the procedure by which the conviction was reached to be reviewed – in addition to an appeal under section 190(4) – falls away [vide **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)]. Thus, the learned High Court judge had not and need not have revisited the conviction before meeting out the sentence.

02nd ground of appeal

[10] Having considered all the evidence, the magistrate found that the prosecution had proved its case beyond reasonable doubt (see paragraphs 23 of the judgment). Earlier the magistrate had reminded herself of the presumption of innocence and standard and burden of proof (see paragraphs 06 of the judgment).

03rd ground of appeal

[11] In fact, the magistrate did consider what was elicited by the appellant in the course of his cross-examination of PP and her mother (see paragraphs 10 & 13 of the judgment). However, the appellant's cross-examination had not been able to shake the foundation of PP's and her mother's evidence. They had come out of the cross-examination largely unscathed.

04th ground of appeal

[12] As argued by the appellant, the magistrate's endeavour had been not to go in search of the truth but whether on the evidence presented by the prosecution it had proved the case against the appellant beyond reasonable doubt. Having considered the totality of

evidence including the appellant's evidence and the demeanour of PP, the magistrate had answered this question in favour of the prosecution.

05th ground of appeal

[13] The appellant had misconceived that somehow the learned judge of the High Court was considering the evidence for the purpose of revisiting the conviction to satisfy himself of its legality. It is very clear that the magistrate throughout the judgment had maintained a neutral and sober stance and not driven by emotions because this was a case of child rape where the alleged rapist was the father and the victim was his biological daughter.

[14] Whatever the High Court had mentioned was only for the purpose of the sentence and not for the convection. He had no legal mandate to revisit the conviction (see ***Nadan***).

06th ground of appeal

[15] I see no breach of the appellant's constitutional rights either at the trial into his charge of rape or at the sentencing hearing in the High Court.

07th ground of appeal

[16] The legal principle relating to delayed reporting is set out in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018). In **Prasad v State** [2020] FJCA 231; AAU02.2018 (20 November 2020) it was held

> *'[21] The credibility of a witness is not diminished simply because his or her complaint is late until and unless he or she is impeached on the footing that either he or she has complained belatedly due to the sinister motive of implicating the accused falsely or the delay enabled fabricating false allegations, embellishments or afterthought as a result of deliberation and consultation. Delayed reporting should be a trial issue for the judge to address the assessors and himself on. It should not be simply taken up as an appeal point for the first time for want of any other legitimate grounds of appeal. If the delayed complaint is made a live issue at the trial it has be assessed by using "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) and appropriate directions should be given to assessors. If not, it has to be*

assumed that the defense has no issue with the complaints not made within a reasonable time and seeks no explanation for the delay.'

[17] From the judgment, I do not find that the appellant had challenged PP's evidence on the basis of deliberate delay in reporting the alleged sexual abuse. However, I do find that PP had given clear evidence as to why she was scared to come out with the acts of sexual abuse by the appellant earlier. It appears that even on the day when she revealed it to her mother, it came about as result of the mother's observation of some white marks on her panty. I do not think that the delay had been caused by any intentional or conspirational plan by PP and her mother. To me, PP had fully explained the reasons for the delay.

8th ground of appeal (sentence)

[18] The appellant complains of the sentencing judge having taken the starting point at 13 years resulting in a harsh and excessive sentence. According to **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff for juvenile rape is between 11 to 20 years' imprisonment. The complainant was 10 years of age at the time of the incident and a child.

[19] The trial judge had set out the aggravating factors of the case and then why child rape had been treated very seriously warranting heavy sentences before picking the starting point of 13 years considering 'objective seriousness'. In **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) Keith J said that

[41] ……..The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had therefore fallen into the trap of double-counting,…..'

[20] In **Kumar v The State** [2018] FJSC 30 Keith J had earlier said that if judges choose to take as their starting point somewhere in the middle of the range that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be. Lower [end] of the tariff for the rape of children and juveniles is long

and they reflect the gravity of these offences which also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided.

[21] As stated in ***Nadan*** the difficulty is that I do not know whether all or any of these aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting when he added further 06 years to the starting point for aggravating factors.

[22] 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)]. The approach taken by the appellate court in an appeal against sentence 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)].

[23] Due to these reasons, I think it is best that the full court may revisit the sentence and decide the propriety of the sentence.

09th ground of appeal

[24] The appellant complains about the non-parole period of 14 years to go with the head sentence of 16 years and 09 months. The gap between the non-parole period and the head sentence is 02 years and 09 months.

[25] Thus, by no stretch of imagination could it be said that the non-parole period is too close to the head sentence as to deny him a chance of rehabilitation. There is no merit in this ground of appeal.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed on the 08th ground of appeal.

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