

**IN THE COURT OF APPEAL, FIJI**

**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 0063 of 2023**

**[Suva High Court Case No: HAC 074 of 2021]**

**BETWEEN** : **ATESHWAR PRASAD**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Mataitoga, P**

**Counsel** : **Singh A.K for the Appellant**  
: **Kumar R for the Respondent**

**Date of Hearing** : **21 January, 2025**

**Date of Ruling** : **10 April, 2025**

**RULING**

[1] The appellant [Ateshwar Prasad] was charged at Suva High Court with one count each of Rape [sections 207(1), (2)(a), (3) Crimes Act], Sexual Assault [sections 210(1)(a) & (2) Crimes Act], Abduction of a Person under 18 years of age with intent to have carnal knowledge [section 211(1) Crimes Act] and Wrongful Confinement [section 286 Crimes Act] committed on 21 July 2018 at Navua. The charges are as follows:

**COUNT 1**

**Statement of Offence [a]**

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

**Particulars of Offence**

*ATESHWAR PRASAD, on the 21<sup>st</sup> day of July 2018, at Navua in the Central Division had carnal knowledge of ANSHIKA RIYA KUMAR, a child under the age of 13 years.*

**COUNT 2**

**Statement of Offence [a]**

**SEXUAL ASSAULT:** *Contrary to Section 210 (1) (a) and (2) of the Crimes Act 2009.*

**Particulars of Offence**

*ATESHWAR PRASAD, on the 21<sup>st</sup> day of July 2018, at Navua in the Central Division unlawfully and indecently assaulted ANSHIKA RIYA KUMAR, a child under the age of 13 years by kissing her mouth and vagina.*

**COUNT 3**

**Statement of Offence [a]**

**ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE:** *Contrary to Section 211 (1) of the Crimes Act 2009.*

**Particulars of Offence [b]**

*ATESHWAR PRASAD, on the 21<sup>st</sup> day of July 2018, at Navua in the Central Division abducted ANSHIKA RIYA KUMAR, a child under the age of 13 years, with intent to have carnal knowledge of the said ANSHIKA RIYA KUMAR.*

**COUNT 4**

**Statement of Offence [a]**

**WRONGFUL CONFINEMENT:** *Contrary to Section 286 of the Crimes Act 2009.*

**Particulars of Offence [b]**

*ATESHWAR PRASAD, on the 21<sup>st</sup> day of July 2018, at Navua in the Central Division wrongfully confined ANSHIKA RIYA KUMAR, a child under the age of 13 years.'*

- [2] The High Court judge found the appellant guilty and on 07 July 2023 sentenced him to an aggregate sentence of 13 years' and 10 months of imprisonment with a non-parole period of 10 year. Before the remand period was deducted, the sentence stood at 18 years of imprisonment. The appellant now appeal against sentence.
- [3] The appellant's appeal against sentence is untimely.
- [4] The appellant filed an Application for Enlargement of time to seek leave of the court to appeal against sentence.

***Law and Relevant Consideration***

- [5] Section 35(1) of the Court of Appeal 2009 gives power to a single judge of the court to enlarge time to appeal.
- [6] In exercising the power granted under section 35(1) of the Court of Appeal Act 2009, the Supreme Court in **Rasaku v State [2013] FJSC 4** stated

*“[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in Ratnaumarasamy [1964] [1964] [3 All ER 933](#) at 935 at 935:*

*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 aken there must be some material upon which the court can exercise its discretion.*

*Similar sentiments were expressed in Revici v Prentice Hall Incorporated and Others [\[1969\] All ER 772](#) by Edmund Davis LJ at page 774 –*

*.....the rules are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something*

*which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted.*

*[19] Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavour to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court.*

[7] The Supreme Court in **Kumar v State, Sinu v State [2012] FJSC 17 (CAV001/2009)** set out the factors that appellate courts must consider when assessing an application for enlargement of time to appeal, as:

- i) the reasons for the failure to file appeal on time;
- ii) the length of the delay;
- iii) Whether there is ground that has merit justifying the appellate court to consider;
- 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.

### ***Summary of Evidence at Trial***

[8] The trial judge summarised the evidence as follows in the sentencing order:

*‘The facts are as follows. At the time of the offending, the complainant was 12 years old. She lived with her mother in Navua. The accused is from the same community. He is a businessman and owns a family service station.*

*On 21 July 2018, the complainant was walking back to her home from Navua town with her sister when the accused stopped his vehicle and offered them a lift. The vehicle was being driven by the accused’s friend.*

*The complainant and her sister knew the accused as a family friend. They took the offer for a lift and got into his vehicle. They drove to a shop and the accused bought them fish and chips. After buying them fish and chips the accused invited them to show his farm.*

*They drove to a remote location. The two men were seen drinking beer in the vehicle. When they arrived at the remote location the complainant’s mother called and told the accused to bring the girls home.*

*As they were driving, the accused pretended that his vehicle was stuck. He made the complainant’s sister and his friend get out of the vehicle and give it a push. On the third occasion when the vehicle got stuck the complainant wanted to get out of the vehicle as well but the accused insisted she remain inside. As soon as the complainant’s sister and the accused’s friend got out of the vehicle, the accused drove off with the complainant leaving*

*behind the complainant's sister and his friend at the remote location.*

*The accused took the complainant to his house and got her inside the house to help him pack his bag. When the complainant entered a room the accused locked the room and prevented the complainant from leaving. He pushed her on a mattress and forcefully removed her clothes. He sexually assaulted her by kissing her on her lips, breast and vagina and then penetrated her vagina with his penis.*

*The complainant resisted him but he managed to restrain her by taking a knife and placing it on her neck. While the complainant was inside the accused's house, her sister came and confronted the accused and threatened to report him to police when she saw the complainant half naked and in a distressed condition inside the house.*

*The accused tried to settle the matter but the complainant's sister went ahead and reported the accused to police. On the same night the complainant was medically examined and the doctor found a lesion on the complainant's breast and redness on her perineal.'*

### ***Assessment of the Application***

#### *Reason for the Delay*

- [9] In this case the delay was 14 months. The appellant in his affidavit sworn on 5 October 2024 but filed in Court of 4 December 2024 gave the following reasons for the delay in making the application: i) my counsel was away overseas for medical treatment; ii) advised by current counsel that I have an arguable appeal because judge made errors of law and facts; and iii) the judge did not consider my rehabilitation factor in crafting the sentence passed against me. The reasons for the delay are inadequate on its own for the court to grant enlargement of time.

#### *Merit of Grounds of Appeal*

- [10] In his written submission the appellant submit two specific factors that he alleged the trial judge erred in: i) these are that in developing the sentence and selecting 12 years imprisonment as the starting point of the sentence, he double counted on factors taken in consideration regarding aggravation and ii) the rehabilitation factors required as a principle under section 4 of the Sentencing & Penalties Act was not adequately accounted for. As regards the claim for double counting, this arose in the context of the selection of starting point of the sentence. In this case it is not in dispute that the trial judge relied on the correct tariff sentence of 11 – 20 years imprisonment

recommended by the Supreme Court in **Aitcheson v State [2018] FJSC 29 (CAV 0012 of 2018)** to guide his sentence determination. At paragraphs 17 and 18 of the Sentence Ruling its state:

*“[17] I pick an aggregate term of 12 years imprisonment and add 6 years for the aggravating factors. There hardly any mitigating factor to reduce the sentence.*

*[18] The accused is sentenced to an aggregate term of 18 years imprisonment.”*

[11] In this case the trial judge chose to approach the sentencing by passing an aggregate sentence, which he is allowed to do under section 17 of the Sentencing & Penalties Act, where the offenses are founded on the same facts. When the trial judge stated that he picked an **aggregate** term of 12 years imprisonment, he was NOT selecting a starting point of the sentence from the tariff band of 11 – 20 years referred to in **Aitcheson** (supra). The aggregate sentence is for all the 4 counts of charges for which the appellant was found guilty, convicted and sentenced. In that context, double counting is not a relevant consideration because the sentence passed by the court is inclusive for all the offences the appellant was convicted with. Even if the sentence was not aggregate sentence 12 years imprisonment as the starting point, would be a on the lenient side given the proven facts in this case.

[12] On the claim of lack of consideration of the sentence towards the rehabilitation of the appellant. There were no evidence led by the appellant to demonstrate honest remorse for his actions. The Court of Appeal in **Koroivuki v State [2013] FJCA 15 (AAU 018/2010)** the court observed:

*“In the present case, there was a total lack of contrition by the appellant. The prospect of genuine rehabilitation becomes less significant when the offender takes no responsibility for his action. There is no error by the trial judge in failing to apply rehabilitation as one of the purposes of sentence in this case.”*

[13] The fact of this case showed total lack of contrition and common decency by the appellant. The aggravating factors recounted by the trial judge at paragraph 16 of the sentence judgement, shows the brazenness of the appellant in breaking the position of

trust he was in regarding his relationship with the victim. I find no error in the trial judges sentence judgement in this case.

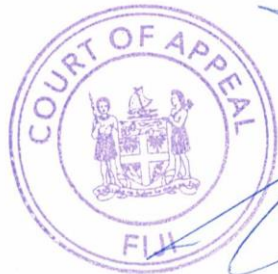
*Any other ground which may succeed on Appeal*

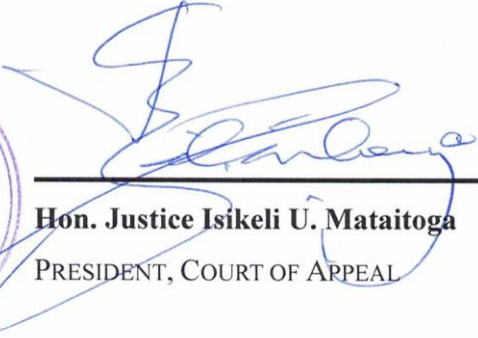
[14] The appellant's submission on this factor was argued together with the factor dealing with: whether there is merit in the grounds of appeal that warrants consideration by the full court.

[15] In conclusion, the case for the appellant's application for enlargement of time to appeal against sentence have not be made successfully.

**ORDER:**

1. Appellant's Application for Enlargement of time to Appeal against sentence is refused.



  
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**Hon. Justice Isikeli U. Maitoga**  
PRESIDENT, COURT OF APPEAL