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

**CRIMINAL APPEAL NO.AAU 0106 of 2017**
**[In the High Court at Lautoka Case No. HAC 02 of 2014]**

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| **BETWEEN** | : | **ELIA LUTUNASOBASOBA** |
| | | ***Appellant*** |
| **AND** | : | **STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, JA** |
| **Counsel** | : | **Ms. S. Nasedra for the Appellant** |
| | : | **Mr. R. Kumar for the Respondent** |
| **Date of Hearing** | : | **01 September 2020** |
| **Date of Ruling** | : | **02 September 2020** |

# RULING

[1] The appellant had been indicted in the High Court of Lautoka on a single count of rape committed at Lautoka in the Western Division on 12 December 2013 contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009.

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

> *"Elia Lutunasobasoba on the 12th day of December 2013, at Lautoka in the Western Division penetrated the vagina of Salanieta Tanumi with his penis, without the consent of Salanieta Tanumi"*

[3] At the conclusion of the trial on 12 November 2015 the assessors' unanimous opinion was that the appellant was guilty of rape as charged. The learned trial judge had agreed with the assessors in his judgment delivered on 13 November 2015, convicted the appellant and sentenced him on 17 November 2015 to 11 years of imprisonment with a non-parole period of 09 years.

[4] The appellant's untimely appeal against sentence had been signed on 17 September 2018. The delay is 02 years and 09 months. However, he had tendered an application to abandon his appeal against sentence in Form 3 on 03 May 2019 but changed his mind and indicated to court on 20 November 2019 that he wished to pursue the sentence appeal. The Legal Aid Commission had filed an application for extension of time to appeal against conviction and sentence along with written submissions on 19 June 2020. Therefore, the appeal against conviction is out of time by 04 years and 06 months. The state had tendered its written submissions on 17 July 2020.

[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] Under the third and fourth factors in ***Kumar***, test for enlargement of time now is **'real prospect of success'**. I would rather consider the third and fourth factors in ***Kumar*** first before looking at the other factors which will be considered, if necessary, in the end. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

[9] 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 filed out of time to be considered arguable there must be a real 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.*

[10] Grounds of appeal urged on behalf of the appellant are as follows.

> *1. That the learned trial judge erred in law and in fact when he failed to consider that there was a reasonable doubt raised in the state's case through the evidence of PW3 – Luisa Veki.*
>
> *2. That the learned trial judge erred in law and in fact when he failed to give a separate discount for the appellant's time spent in remand.*

[11] The learned trial judge has summarized the facts of the case as follows in the judgment.

> *'7. The prosecution alleges that the accused came into the room while the victim was picking her mattress, pillows and the blanket to sleep. He then offered her $10 if she did some bad things with him. She refused his offer. The accused then pushed her on to the bed and came on top of her. He covered her mouth from one of his hands and removed her pant and undergarment from other hand. He pressed her thighs with his legs, preventing her from escaping. He then removed his pant and penetrated into her vagina with his penis. The accused in his defence denies this allegation and stated that he only kissed her, but never had sexual intercourse.*

*8. Accordingly, it appears that the prosecution and the defence are presenting conflicting versions of event, which actually took place between the accused and the victim in private. The accused denied having sexual intercourse, but admitted that he kissed the victim as she requested him to do so. The adopted mother of the victim, in her evidence stated that she saw the accused was lying on top of a girl when she looked at his room. She further stated that she heard a sound of the girl, which was like that she was trying to scream when her mouth was gagged. The medical findings of the Doctor confirmed that the victim had a forceful sexual intercourse or penetration of blunt object into her vagina within last 24 hours prior to her medical examination conducted on 13th of December 2013.'*

***01st grounds of appeal*** *(against conviction)*

[12] The appellant contends is that the only reasonable inference that can be drawn from the evidence of Luisa Veki (as set out in paragraphs 25 and 26 of the summing-up) that the appellant and the complainant were inside the room at least for 07 minutes while the witness and her friend were waiting outside is that the sexual intercourse, though rough and forceful, was consensual.

[13] Paragraphs 25 and 26 of the summing-up are as follows.

*'25. The third witness of the prosecution is Luisa Veki. She is the adopted mother of Salanieta. She recalls that she went to the town and her husband went to church leaving Salanieta at home on the morning of 12th of December 2013. When she returned home, Ms. Veki found that the front and back doors of the house were closed. She opened the back door as it was not locked and heard a radio was on. She went to the room, where the radio music was coming. It was the room of Lemaki. She looked into the room through the curtains, and found the accused was lying on top of a girl. The girl was under him and was spreading her legs. She did not recognise the girl at that time and though that could be the wife of the accused or his girlfriend. She heard that girl was screaming like hmm hmmm. She was scared and went to call her friend. She got back with her friend in 2 minutes and asked her friend to see the room and find out who is the girl. That lady too was scared and they waited at the door of the room for about five minutes. Then she saw Salanieta came out of the room. She asked Salanieta what she did inside the room. Salanieta only replied it was only Elia. She did not say anything apart from that. She then told Salanieta wait for her father to come home and she will tell everything to him. She told Salanieta that she saw what they were doing inside the room.*

*26. Ms. Veki in her cross examination stated that the accused was dressed in a three quarter pant when she saw him lying on top of the girl. From what she observed from the door, it appeared to her that Elia and the girl was having sexual intercourse.* ***The sound that she heard was like that someone was trying to scream while the mouth was gagged****. Ms. Veki further stated in her evidence that Salanieta did not respond to her friend when she asked her what did Elia do to her.* ***Salanieta only cried****. Ms. Veki has not heard any sounds coming from the room, while she was waiting outside the room for about five minutes. Salanieta did not say anything even after she stops crying. Ms. Veki stated that she was angry with what Salanieta and Elia did inside the room.'*

[14] The evidence of Luisa Veki should be considered along with the evidence of the complainant as described in paragraphs 23 and 24 of the summing-up.

*'23. Salanieta recalls that her father went to church and mother went to wharf on the morning of 12th of December 2013. She went to her friend's place to play. After a while, she came back home and found the accused was having his tea. The accused asked her who else at home. She replied that only they were at home. She then went inside the room as she wanted to take the mattress, pillow and blanket to sleep. While she was inside the room, the accused came and told her that he will get paid in the evening, and he can give her $10 if she does bad things with him. She refused that. At that point, the accused pushed her on to the bad and came on top of her.* ***He covered her mouth from one of his hands.*** *He removed her pant and undergarment with his other hand. He then removed his three quarter pant up to his knees and inserted his penis into her vagina. She stated in her evidence that* ***she pushed him and wanted to shout, but could not do so as her mouth was gagged by the accused with his hand.*** *He put his legs around her thighs and prevented her to get away. He kissed her neck and touched her breast. He then got off and she too put her pant and undergarment on. She then went out of the room, where she found her mother was standing at the living room. She wanted to tell her what the accused did to her, but she was told by her mother that wait till her father come home. She then went to have her bath. While she was having her bath, the accused came to her and told that he was going to work.*

*24. During the cross examination by the learned counsel for the accused, Salanieta stated that the accused was in a blue colour three quarter pant, which he removed only to his knee level. She denied that she first went to the room and called the accused into it. Furthermore, she denied that she started to kiss the accused.'*

[15] Thus, it is clear that Luisa Veki in fact corroborates several aspects of the complainant's evidence, particularly the fact that the complainant was being subjected to a forcible act of sexual intercourse.

[16] Medical evidence even further corroborates the complainant's version as narrated by the trial judge in paragraph 20 of the summing-up. The complainant had been medically examined on the day after the incident of rape.

> *'20. Dr. Naiguleve in her evidence explained the medical findings that she found during the examination. She has found 5 mm laceration and blood clots at the base of the vaginal vault. The hymen has perforated at a 6 'o clock position. She further found a mild erythema around vaginal vault. Dr. Naiguleve formed her opinion based on her findings, where she stated that the injuries she found could have occurred within last 24 hours prior to the examination. The damage of the tissues of the hymen could have occurred with a blunt force trauma, either due to a sexual intercourse or penetration of a blunt object.'*

[17] The learned trial judge had given his mind to these matters in the judgment in paragraph 7 and 8 as quoted above.

[18] On the contrary, the appellant had taken up the position that he did not have sexual intercourse with the complainant but only kissed her after she made advances on him. The judge had stated the appellant's stand as follows in the summing-up.

> *'28. The accused in his evidence denied having any sexual intercourse with the victim. He stated that the victim came and wakes him up while he was sleeping on the morning of 12th of December 2013. He then got up and started to have his breakfast. The victim called him into the room while he was having his breakfast. He then went into the room, where she asked his mobile phone for her to listen music. She then hugged him while he seated on the bed. Then she started kissing him. While they were kissing each other, she pushed him away and said that her mother was standing at the door. The accused denied the allegation and stated that he only kissed her and never had sexual intercourse.*

[19] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal pronounced the following helpful observations which are relevant to this case.

> *'It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.'*
>
> *'Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical*

*evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*

*It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*

*We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[20] I think quite rightly, the assessors and the trial judge had accepted the prosecution case and rejected the appellant's version of events. On the evidence led by the prosecution no reasonable assessors or judge could and would have failed to find the appellant guilty of rape as charged.

[21] Not only does this ground of appeal not have a real prospect of success but it does not carry any prospect of success.

***02nd ground of appeal*** *(sentence)*

[22] The appellant's complain is that his period of remand had not been given a separate discount by the trial judge. It appears that the remand period of 04 months and 13 days had been subsumed in the discount of 01 year given to mitigating factors. In paragraphs 8 and 9 of the sentencing order the trial judge had dealt with these matters.

*7. You were 30 years old and the victim was 13 years old at the time of this incident took place. By virtue of your age and the position in the house, you were in a position of trust and responsibility. Instead of discharging such a responsibility with care and maturity, you chose to abuse that trust by committing this crime. You exploited the vulnerability and naivety of the victim, when she was alone at home with you. I consider these factors are aggravating circumstances of this crime.*

*8. I now turn on to mitigating factors for you. You have no previous convictions. You are 33 years old and married with five children. The learned counsel for the defence submitted in her mitigation submissions that you are the sole breadwinner for your family and especially your children need your assistance. You have spent 4 months and 13 days in remand prior to this sentence.*

*9. Having considered the above mentioned aggravating factors, I increase 2 years to reach 12 years of interim imprisonment period. In considering the mitigating factors which I discussed above, I reduce 1 year to reach the final sentence of 11 years imprisonment for the offence of rape.'*

[23] In **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017) the Court of Appeal where the period of remand was significant dealt with a similar complaint as follows.

> *'[12] Furthermore, there is no error of law regarding the method the learned trial judge used to discount the appellant's remand period. Sentencing is not a mathematical exercise. Sentencing involves an exercise of discretion involving the difficult and inexact task of weighing factors to arrive at a sentence that fits the crime (Koroicakau v State unreported Cr App No CAV0006 of 2005S: 4 May 2006). The relevance of the remand period to the exercise of that discretion is provided by section 24 of the Sentencing and Penalties Act 2009. Section 24 reads:*
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> > *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 matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.*
>
> *[13] There is no ambiguity in the wording of section 24. It clearly sets out the sentencing court's obligation to consider the remand period in sentence. In the present case, the sentence was reduced to reflect the remand period. The appellant's argument is that the method that was used to make the reduction is incorrect. However, 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]). The principle that the Supreme Court endorsed was stated at [14]:*
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> > *... the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. In doing so it is not necessary to make exact allowance for days and even weeks spent on remand. It depends upon its total significance. (per Gates CJ)*

[24] Therefore, it is clear that there is no sentencing error in principle in the method adopted by the trial judge in including the period of remand of 04 months and 13 days as part of the overall mitigating factors. In fact it appears that out of the so called mitigating factors only two *i.e.* 'no previous convictions' and the period of remand could have been legitimately considered for a discount of the sentence as the others are only personal circumstances.

[25] The trial judge had followed the sentencing tariff applicable to juvenile rape *i.e.* 10-16 years of imprisonment [vide **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) which is now 11- 20 years of imprisonment - **Aicheson v State** [2018] FJSC 29; CAV0012.2018 (02 November 2018)]. He had started the sentencing process at the lowest end of the tariff of 10 years and added only two years for serious aggravating factors and reduced 01 year for two mitigating factors including the period of remand ending up with a generous final sentence of 11 years of imprisonment. In my view, if the matter of sentence reaches the full court this is a fit case for it to consider acting under section 23(3) of the Court of Appeal Act to enhance the sentence on the appellant.

[26] This ground of appeal has no prospect of success at all.

[27] The delay is inexcusable and very substantial and the reasons are simply unconvincing and unacceptable. However, an enlargement of time may not prejudice the respondent.

**Order**

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

COURT OF APPEAL FIJI

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