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

CRIMINAL APPEAL NO.AAU 084 of 2016
[In the High Court at Suva Case No. HAC 015 of 2015]

BETWEEN	:	**TOMASI BULAGO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**30 June 2020**
Date of Ruling	:	**02 July 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on six counts of rape and a single count of sexual assault allegedly committed at Nasinu in the Central Division contrary to section 207(1) and (2) (b) and (3) and 210 (1)(a) of the Crimes Decree. 2009 respectively.

[2] The information consisted of the following counts.

COUNT ONE

(Representative Count)

Statement of offence

Rape: *Contrary to Section 207 (1) & (2) (b) & (3) of the Crimes Decree 2009.*

Particulars of offence

TOMASI BULAGO *between the 1st day of February 2010 to the 27th day of August 2010 at Nasinu, in the Central Division, penetrated the vagina of TK, a child under the age of 13 years with his finger*

COUNT TWO

(Representative Count)

Statement of offence

Rape: *Contrary to Section 207 (1) & (2)(c) & (3) of the Crimes Decree of 2009.*

Particulars of offence (b)

TOMASI BULAGO *between the 1st day of January 2011 and the 27th day of August 2011 at Nasinu, in the Central Division penetrated the mouth of TK, a child under the age of 13 years with his penis.*

COUNT THREE

(Representative Count)

Statement of offence

Rape: *Contrary to Section 207 (1) & (2)(a) & (3) of the Crimes Decree of 2009.*

Particulars of offence (b)

TOMASI BULAGO *between the 1st day of January 2011 and the 27th day of August 2011 at Nasinu, in the Central Division had carnal knowledge of TK, a child under the age of 13 years.*

COUNT FOUR

(Representative Count)

Statement of offence

Rape: *Contrary to Section 207 (1) & (2)(a) of the Crimes Decree of 2009.*

Particulars of offence (b)

TOMASI BULAGO *between the 1st day of January 2012 and the 31st day of December 2012 at Nasinu, in the Central Division had carnal knowledge of TK, without her consent.*

COUNT FIVE

(Representative Count)

Statement of offence

Rape: *Contrary to Section 207 (1) & (2)(a) of the Crimes Decree of 2009.*

Particulars of offence (b)

TOMASI BULAGO *between the 1st day of January 2013 and the 31st day of December 2013 at Nasinu, in the Central Division had carnal knowledge of TK, without her consent.*

COUNT SIX

(Representative Count)

Statement of offence

Rape: *Contrary to Section 207 (1) & (2)(a) of the Crimes Decree of 2009.*

Particulars of offence (b)

TOMASI BULAGO *between the 1st day of January 2014 and the 31st day of October 2014 at Nasinu, in the Central Division had carnal knowledge of TK, without her consent.*

COUNT SEVEN

(Representative Count)

Statement of offence

Sexual Assault: *Contrary to Section 210 (1)(a) of the Crimes Decree of 2009.*

Particulars of offence (b)

TOMASI BULAGO *between the 1st day of February 2010 and the 31st day of December 2013 at Nasinu, in the Central Division unlawfully and indecently assaulted TK by touching her breasts.*

[3] At the conclusion of the trial on 06 June 2016 the assessors' opinion was unanimous that the appellant was guilty of the first count (agreed by the trial judge) and the majority opined that the appellant was guilty of the seventh count (agreed by the trial judge). They were unanimous that the appellant was not guilty of the fourth and fifth counts (agreed by the trial judge). The majority opinion of the assessors was that the appellant was not guilty of the sixth count (agreed by the trial judge). The assessors were directed not to consider the second count and the trial judge found him not guilty of that count at the conclusion of the prosecution case. The assessors unanimously decided that the appellant was not guilty of the third count but the trial judge disagreed and convicted him on that count.

[4] Therefore, the appellant stood guilty of the 1st, 3rd and 7th counts and was so convicted on 07 June in the judgment delivered by the trial judge who sentenced him on the same day to an aggregate sentence of 13 years, 06 months and 25 days with a non-parole period of 11 years, 06 months and 25 days.

[5] The appellant had signed a timely appeal against conviction and sentence on 25 June 2016 (received by the CA registry on 07 July 2016) and preferred additional grounds of appeal on 12 July 2018. The Legal Aid Commission had filed amended grounds of appeal against conviction and sentence on 21 March 2019 along with written submissions. The state had tendered its written submissions on 30 June 2020.

[6] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[7] Further guidelines to be followed when a sentence is challenged are given in **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.*

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

Appeal against Conviction

1. *THAT the conviction was unreasonable and cannot be supported by the totality of the evidence, giving rise to a grave miscarriage of justice, in particular, to the following:*

   (a) The guilty verdict regarding Count 7 was unreasonable or inconsistent; and

   (b) The guilty verdict regarding Count 1; Count 3 and Count 7 was unreasonable or inconsistent; and

   (c) Failing to give cogent reasons as per the "totality of circumstances test" regarding the issue of the delay in making a complaint.

Appeal against Sentence

2. *The Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*

   (a) "double counting" an aggravated feature to enhance the sentence; and

   (b) Not properly considering the mitigating factors to adequately decrease the sentence

01st (a) ground of appeal

[9] The appellant argues that since the learned trial judge had acquitted the appellant on Counts 2, 4 and 5 alleged to have occurred during the period 01 January 2011 and 31 December 2013 he could not have convicted him on count 07 which has allegedly taken place between 01 February 2010 and 31 December 2013. The 2nd count relates to the period in January to August 2011, 04th count relates to the period of January to December 2012 and the 5th count relates to the period of January to December 2013. Thus, it is clear that the duration of the 07th count commences well prior to that of counts 2, 4 and 5 though ends with the same date as in count 5. In other words, the 07th count covers an additional period of 11 months prior to 01 January 2011

(beginning of the period in count 2) going back to 01 February 2010. Therefore, on that ground alone the appellant's argument cannot be sustained.

[10] The learned judge in the judgment has revealed that according to the complainant's clear evidence the incident of sexual assault of touching her breasts (07th count) had taken place between 01 February and 27 August 2010.

> *'17. Two assessors have found the accused guilty of the seventh count where it was alleged that the accused sexually assaulted the complainant by touching her breasts between 1st February 2010 and 31st December 2013.*
>
> *18. Complainant clearly said in her evidence that the accused touched her breast on the night he inserted his finger inside her vagina for the first time. This was during the period between 1st February 2010 and 27th August 2010. That touching of the complainant's breasts was unlawful, indecent and sexual in nature. Therefore, I agree with the majority decision of the assessors that the accused is guilty of the seventh count of sexual assault.'*

[11] This is the time period covered in the first count of rape where the appellant was convicted and the first incident of sexual assault referred to in count 7 had happened exactly on the same occasion (it had happened on two other occasions in 2013) as the act of rape referred to in count one. In paragraphs 15 and 16 of the judgment the learned trial judge had explained clearly as to why he had decided to find him not guilty of counts 4 and 5 (*i.e.* due to the vagueness in the complainant's evidence on the incidents of rape but not due to any lack of credibility of her testimony) while in paragraph 12 of the judgment it is stated that the trial judge had acquitted the appellant of count 02 because there was no evidence to substantiate the said charge.

[12] Further, the complainant's evidence on the rape and sexual assault charges (01st and 07th counts) that had taken place between 01 February and 27 and August 2010 had been referred to in paragraphs 40, 41, 73-79 and 98 of the summing-up. Thus, this ground of appeal cannot be sustained.

[13] Therefore, the verdicts on counts 2, 4 and 5 on the one hand and the verdict on count 7 are not inconstant and can stand together and it cannot be said that no reasonable assessors or a judge properly directed could have arrived at the guilty verdict or that

the verdicts cannot be reconciled on any rational or logical basis. These verdicts are not obnoxious to the principles set out in **Balemaira v State** [2013] FJSC 17: CAV0008 of 2013 (06 November 2013) and **Vulaca v State** [2013] FJSC 16: CAV0005.2011 (21 November 2013)].

01(b) ground of appeal

[14] The appellant argues in the same breath that guilty verdicts on counts 1, 3 and 7 are unreasonable and inconsistent. As already pointed, count 01 relates to the period between 01 February and 27 August 2010. The period in count 03 is between 01 January and 27 August 2011. The period covered in count 7 is 01 February 2010 and 31 December 2013.

[15] As already discussed the assessors in unison and the trial judge agreed that the appellant was guilty of count 01. Paragraphs 40, 41 and 73-79 of the summing-up and paragraph 9 – 11 of the judgment deal with in detail the evidence on count 01.

[16] The assessors opined that the appellant was not guilty of count 3 which was related to the year 2011 and the learned trial judge disagreed and convicted him. Having referred to the complainant's evidence on this count in paragraph 42 of the summing-up, the learned trial judge had directed the assessors further as follows.

> *81. With regard to the third count, the prosecution says that the accused inserted his penis inside the complainant's vagina on multiple occasions during the period between 1st January 2011 and 27th August 2011. According to the prosecution, the first incident took place when the accused came to her house on a day when she was alone at home, during daytime.*
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> *82. Accused says that one Ana was staying with the complainant and her family in 2011 and Ana was at home during daytime. He said the allegations made regarding incidents in 2011 did not happen and he was mostly based in Denarau at that time. Second and third prosecution witnesses also said that one Ana was living in the same house with the complainant.*
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> *83. Considering all the evidence, if you are satisfied that the prosecution has proved beyond reasonable doubt that the accused penetrated the vagina of the complainant at least on one occasion during the period between 1st January 2011 and 27.*

[17] The timeline in count 2 (alleged rape committed by penetrating the mouth of the complainant which she had denied happening at the trial though admitting that the appellant did attempt to make her indulge in it) is the same as in count 3. Thus, the complainant had given no evidence of an actual act of the appellant having penetrated her mouth with his penis (if she was lying she could have easily done so). In disagreeing with the assessors the learned trial judge had reasoned out (coupled with count 2) why he accepted the complainant's evidence on the rape count in count 3 allegedly occurred during the same period as in count 2 and stated as follows in the judgment:

> *'13. I am unable to rule out the possibility of the assessors forming an adverse inference against the complainant due to the reason that she did not come up to proof with regard to the second count. Since the time of offence of the second count and that of the third count is the same, such an inference is capable of leading them to disbelieve the complainant on the third count. It was the complainant's evidence that after the accused penetrated her vagina with his penis for the first time in the year 2011he told her to suck his penis and she did not do it. The court and the assessors noted the unsuccessful attempts made by the prosecutor in questioning the complainant about accused penetrating her mouth with his penis and the complainant's firm response that she did not suck the accused's penis. It is not for this court to question the basis of bringing the second count against the accused or whether there was sufficient evidence in the first place to charge the accused with the second count. That was a matter entirely within the discretion and the good judgment of the prosecution.*
>
> *14. That said, I accept the evidence of the complainant when she said that the accused penetrated her vagina with his penis that particular day between 1st January 2011 and 27th August 2011,on which she was alone at her house. Accordingly, I am satisfied that the elements of the third count have been proved beyond reasonable doubt. Therefore, I am unable to agree with the unanimous opinion of the assessors that the accused is not guilty of the third count.'*

[18] One cannot say that the learned judge's reasoning is illogical or irrational. In as much as the assessors could have come to their conclusion on count 3, it was also possible for the trial judge to have disagreed with them and decided otherwise because in Fiji the trial judge is the sole judge of facts.

[19] In **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held that

> *"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."*

[20] **Noa Maya v. The State** [2015] FJSC 30: CAV 009 of 2015 (23 October 2015] Keith. J reiterated:

> *"21...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[21] In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court again held on the role of assessors and the judge as follows.

> *'58. 'In Noa Maya v. The State [2015] FJSC 30; CAV 009. 2015 (23 October 2015] his Lordship Sir Keith, J said at paragraph 21:*
>
> *"...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[22] The period in count 07 on sexual assault commences on the same day as in count 01 (*i.e.* 01 February 2010) on the first act of rape, however, it goes beyond 27 August 2010 (the end of the period of the first count) until 31 December 2013. Nevertheless, according to the complainant's evidence, the first act of sexual assault had happened on the same day as in the first act of rape which is referred to by the trial judge in paragraphs 40, 41,46, 97 and 98 of the summing-up and paragraph 18 of the judgment. It appears that the information had expended the time period for the 07th count from the 01st count because in addition to several acts of the appellant having touched the complainant's breasts in 2010 it had happened on two occasions in 2013 (see paragraph 46 of the summing-up). Therefore, I do not find the verdicts in counts 01, 03 and 07 to be inconsistent verdicts within the legal context set out in ***Balemaira*** and ***Vulaca***.

01(c) ground of appeal

[23] The appellant raises the issue of delay in reporting the acts of sexual abuses that had happened over a period of time as the basis of this complaint. According to him, there was a delay of some 04 years for the first complaint to be made after the initial acts of sexual abuse (sexual assault and digital rape) between February and August 2010. The last act had supposedly had taken place between January and October 2014. The first complaint with police had been lodged in October 2014.

[24] The appellant relies on **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) where it was held

> '[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-
>
> > *"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."*

[25] However, the delay in reporting the acts of sexual abuses does not feature in the summing-up or the judgment. It appears that the appellant had not challenged the credibility of the complainant on the basis of delay thus preventing the learned trial judge from addressing the assessors in the summing-up and himself in the judgment on that issue. The appellant was defended by counsel at the trial. Lack of any motive attributed to the complainant to have falsely implicated the appellant in a series of acts of sexual abuses over a long period of time is also intriguing. Had the defense counsel raised the question of delay even at the very last stage of closing addresses that would have prompted the trail judge to have directed the assessors on the issue of delay in the summing-up. The fact that the complainant had not been confronted with the question as to why she had not reported these acts of sexual abuses going on since

2010 until 2014 may have prevented her from presenting an explanation for the assessors and the trial judge to consider whether it was satisfactory and credible.

[26] Therefore, it appears that the complainant had not been afforded an opportunity, either deliberately or otherwise, from explaining whether she made the complaint at the first available opportunity within a reasonable time (according to the appellant's written submissions the last sexual act was said to have occurred in October 2014 and the complaint was also made in October 2014) or if not whether there was a reasonable explanation for the delay since February 2010.

[27] On the other hand it does not appear that the appellant's trial counsel had sought any redirections on the alleged omission in the summing-up on the issue of delay in reporting. Therefore, technically the appellant is not entitled even to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[28] The appellant has not refereed to me any authority to buttress his argument that in a situation such as this the trial judge has a duty or is obliged as a matter of law to raise the issue of delay in reporting with the assessors and take it up himself on his own in the judgment. Perhaps, if the appellant decides to renew his appeal before the full court he may attempt to convince the court of any merits of his argument with legal authorities.

[29] Therefore, there is no reasonable prospect of success in this ground of appeal too.

02(a) ground of appeal

[30] The appellant complains that the learned trial judge had double counted the aggravating factors and added 06 years on account of them. I find that breach of trust arising from the appellant being the complainant's stepfather's elder brother is one factor and there is no double counting. Using the authority the appellant exercised over the complainant as a provider and an elder and exploiting her vulnerable position (the complainant being without proper parental care and protection) could have been counted as two separate features but counted as one. On the other hand the trial judge had deducted 04 years for no previous convictions and the appellant being 55 years

and having 05 children. In my view, the appellant who had sexually exploited the complainant (under 13 years of age till 2011) continuously for 04 years should not be treated as a first offender and did not deserve any discount on account of such consideration. Moreover, the appellant did not deserve any deduction on account of his age of 55 (not being a young or immature offender) and being a father of 05 children because they were only personal circumstances.

[31] Therefore, if any error had occurred in sentencing it had favoured the appellant. The ultimate sentence is fully justified in all circumstances of the case. This is not a single act of rape but a campaign of rape over 04 years.

02(b) ground of appeal

[32] The appellant argues that the learned trial judge had taken his having no previous convictions and age as mitigating features but not given adequate discount. I have dealt with this under the previous ground of appeal. Perhaps, in my view as pointed out above he did not deserve any discount on account of both.

[33] **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) it was held

> *'[60] A reduction of 2 years was allowed for the Petitioner's mitigating factors. The mitigation was identified as that he was 40 years old with a 5 year old son from a previous marriage and that he was looking after a 53 year old mother. In addition it was acknowledged that his business and properties had been taken over by his brother, "and that he was remorseful." In the circumstances, the allowance of 2 years was over-generous as was noted by the Court of Appeal. His responsibility for his 5 year old son and 53 year old mother was in reality of little mitigatory value.'*
>
> *"Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years. There can be no fault in the sentencing approach of the learned Judge referred to above (in para 13), save as to say we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve."*

[34] In **Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006)** the Supreme held

> *'This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence.'.*

[35] Therefore, these grounds of appeal against sentence have no reasonable prospect of success in appeal for the reasons set out above.

[36] Thus, there is no reasonable prospect of success in the appellant's appeal against conviction and sentence.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL