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

CRIMINAL APPEAL NO.AAU 0096 of 2020
[In the High Court at Suva Case No. HAC 426 of 2018S]

BETWEEN	:	**KEMUELI WAQA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in Person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**09 November 2021**
Date of Ruling	:	**15 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of rape (of 08 year old victim) contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act, 2009 committed at Vatukalo, Ovalau, in the Eastern Division on 24 October 2018.

[2] The information read as follows:

*'**COUNT ONE***

Statement of Offence

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

Particulars of Offence

***KEMUELI WAQA**, on the 24th day of October, 2018, at Vatukalo, Ovalau, in the Eastern Division, penetrated the anus of **PK**, a child under the age of 13 years, with his finger.*

COUNT TWO

Statement of Offence

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

Particulars of Offence

***KEMUELI WAQA**, on the 24th day of October, 2018, at Vatukalo, Ovalau, in the Eastern Division, unlawfully and indecently assaulted **PK**, by licking her vagina.'*

[3] The appellant had pleaded guilty to the information on 01 March 2019. The summary of facts had been presented on 15 March 2019 followed by a sentencing hearing. What followed had been recorded as follows in the sentencing order.

> *'3. The Court then checked with defence counsels, on whether or not the accused was admitting all the elements of the offence of rape in count no. 1. Defence Counsel, on behalf of the accused, admitted that the accused inserted his finger into the complainant's anus, while she had her underwear on, on 24th October 2018. The accused admitted that his finger went into the complainant's anus, with part of her underwear, at the material time. The complainant was 8 years old, thus the prosecution does not need to prove non-consent by the complainant, nor guilty knowledge on the part of the accused. As a result of the above, the court found the accused guilty as charged on count no. 1, and convicted him accordingly.'*

[4] The prosecution had entered a *nolle prosequi* on the second count and the High Court judge had acquitted the appellant of sexual assault.

[5] The summary of facts read as follows:

> *"...**BRIEF BACKGROUND:***
>
> *It was alleged that on the 24th of October, 2018, Kemueli Waqa, 36 years old of Vatukalo, Ovalau penetrated the anus of one PK, 8 years old of Vatukalo Ovalau with his finger.*
>
> *The accused, Kemueli Waqa is related to the complainant, PK. He is her uncle.*
>
> ***OFFENCE:***
>
> *On the 24th of October, 2018 at about 3pm, PK went to a cassava patch near the village to pick mangoes. As she arrived at the cassava patch Kemueli Waqa was there. He then forcefully pulled her by the hand towards the mango tree, made her sit on his lap and removed her under garment and inserted his finger into her anus.*
>
> *When he inserted his finger into her anus, she felt pain. Kemueli told her not to scream.*
>
> ***CAUTION INTERVIEW AND THE CHARGE:***
>
> *The accused was arrested on the 6th of November, 2018.*
>
> *The accused was then interviewed under caution. The accused admitted to inserting his finger into the complainant's anus Q. 27 to Q. 30.*
>
> *The accused also made admissions in Q. 11 of the Charge Statement on the 7th of November, 2018.*
>
> *The accused was then charged for one count of Rape contrary to section 207(1) and 2(b) and 3 of the Crimes Act of 2009. And he was produced in Nausori Magistrates Court on the 8th of November, 2018..."*

[6] The appellant had admitted the victim impact statement and pleaded in mitigation. The learned judge had convicted the appellant and sentenced him on 03 May 2019 to 11 years of imprisonment with a non-parole period of 10 years.

[7] The appellant in person had sought enlargement of time to appeal against conviction and sentence (18 August 2020) followed by additional grounds of appeal, submissions and additional submissions. The state had tendered its written submissions on 25 October 2021.

[8] 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 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, 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?

[9] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[10] The delay of the appeal (being 1 year and 2 ½ months) is very substantial. The appellant had stated that he was not given a copy of the summing-up and judgment but only the sentencing order by the High Court. There was no trial and the only decision handed down by court was the sentencing order which he had been provided with. He had also stated that he was a layman and found it difficult to file an appeal to the Court of Appeal. The appellant had been represented counsel (two) from the Legal Aid Commission and could have obtained services from the LAC. Thus, his explanation for the delay has no merits. His appeal is clearly the result of an afterthought. 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.

[11] The grounds of appeal urged by the appellant are as follows:

Conviction

Ground 1

THAT the Learned Trial Judge erred in law and fact when he failed to include in his judgment that the length of delay of 5 weeks and 8 days for the accused case causing so much risk in regards to false statements given to police on the particular day the alleged offence reported.

Ground 2

THAT the Learned Trial Judge erred in law and fact when police reported the offence provided no pertinent witness on behalf of the prosecution to give reasonable doubt on the alleged offence happen, neither the complainant nor the parents proceeded during the trial to state witness so therefore a substantial miscarriage of justice occurred.

Ground 3

THAT the Learned Trial Judge erred in law and fact when he failed to include in his judgment that the allegation reported was inconsistent to the medical report relayed by the doctor to further indicate a serious injuries happen to the victim as she was 8 years old therefore a substantial miscarriage of justice occurred.

Ground 4

THAT the Learned Trial Judge failed in his independent analysis of evidence and a substantial miscarriage of justice occurred.

Additional grounds of appeal

1. *Victim impact statement was not given to the appellant before the trial.*
2. *Appellant was not given an opportunity to give evidence on the Victim impact statement.*

Sentence

Ground 1

THAT the counsel for the appellant had caused a bias to the appellant whereby counsel submitted a mitigation submission not satisfactory given by the appellant to his counsel whereby the Learned Trial Judge had neglected to consider those mitigating factors as appellants counsel kept that knowledge from the Learned Trial Judge.

Ground 2

THAT the Learned Trial Judge erred in law and fact in his sentencing discretion when he accepted false facts in his judgment pertaining to the aggravated factors as relayed in submission of ground 3 and therefore a reduction in sentence is valid.

01st, 02nd, 03rd and 04th grounds of appeal

[12] The matters raised by the appellant under all appeal grounds against conviction are based on various factual scenarios independent of what had been stated in the summary of facts admitted by him. They relate to alleged delay in reporting, want of evidence given by the complainant and her parents, alleged inconsistency of the prosecution evidence with medical evidence and the absence of independent analysis of evidence by the trial judge.

[13] Basically all the above grounds are misconceived. In **Masicola v State** [2021]; AAU 073.2015(29 April 2021), the Court of Appeal said:

> *'[24] ……guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (see R v Murphy [1975] VR 187) and a valid plea of guilty is one that is entered in the exercise of a free choice (see Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).'*

[14] To start with, I am satisfied that the appellant's guilty plea was unequivocal, voluntary and the result of his free choice given what the trial judge had stated in the sentencing order as quoted above. He had 15 days to revisit his decision from having pleaded guilty until sentence hearing but gone ahead regardless.

[15] The appellant's plea of guilty had been premised upon an unconditional and unqualified acceptance of the summary of facts. However, to be fair by the appellant I shall see whether the appellant's grounds of appeal could be sustained *vis-à-vis* the summary of facts.

[16] What material a trial judge should consider in the case of a guilty plea had been discussed in a number of decisions. In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said that the primary source of a guilty plea is the summary of facts.

> *[22] Where, as here, the defence counsel indicates to prosecuting counsel that his client will plead guilty, the defence will wish to see the summary of facts. If the facts are accepted by defence counsel's client, the Accused, the plea can proceed. If not, the case must proceed on a not guilty plea and a trial must take place……'*
>
> *'[27] .....Disclosure statements can be relied on by the sentencing judge or by the appellate court, but great care must be exercised not to incorporate into the Summary of Facts, matters not necessarily accepted by the Accused when he or she entered a plea of guilty ....'*

[17] In **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021) the Court of Appeal said:

> *'[27] ……..the Supreme Court had approved limited use of disclosure statements (without, however, going on a voyage of discovery looking into the case record and drawing inferences) but disapproved over reliance on them as they are, without a trial, unsworn and untested (unless an agreed fact) and also because, procedurally, upon a plea no formal evidence is taken and the plea cannot be taken as an admission of the bundle of disclosure witness statements:'*

[18] The trial judge had obviously examined only the summary of facts and in fairness to the appellant I have in addition examined the appellant's cautioned statement referred to in the summary of facts and admitted by the appellant. I am satisfied on the strength of both of them that the only outcome that would have come out was a conviction for digital rape.

[19] I shall now consider whether any complaint could be made by the appellant on his decision to plead guilty possibly on the advice by the trial counsel. The Supreme Court in ***Samy*** also had usefully referred to the role of the defense counsel and the trial judge *vis-à-vis* a guilty plea in the matter of a plea as follows:

'*[21] Frequently it can happen that after an offence has been committed, about which an Accused person feels deeply ashamed, that various explanations are given to the police or to the court. Subsequently an Accused can retract some or all of those explanations. It is not for a court to inquire into the advice tendered by counsel to his client…… But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client.....'*

[20] Earlier in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter that:

*'[26] The responsibility of pleading guilty or not guilty is that of the accused himself, but it is the clear duty of the defending counsel to assist him to make up his mind by putting forward the pros and cons of a plea, if need be in forceful language, so as to impress on the accused what the result of a particular course of conduct is likely to be (vide **R. v. Hall** [1968] 2 Q.B. 787; 52 Cr. App. R. 528, C.A.). In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms. Taylor LJ (as he then was) in **Herbert** (1991) 94 Cr. App. R 233 said that defense counsel was under a duty to advise his client on the strength of his case and, if appropriate, the possible advantages in terms of sentence which might be gained from pleading guilty (see also **Cain** [1976] QB 496).'*

[21] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

[22] Given the summary of facts and the cautioned statement, I do not see even a semblance of 'flagrant incompetence' on the part of the appellant's trial counsel in this instance in advising the appellant to plead guilty to the information [see **Swain** [1988] Crim LR 109, **R v Birks** (1990) 48 A Crim R 385; (1990) 19 NSWLR 677, 688–9, Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681, **Masicola v State** (supra) and **Nasilasila v State** [2021] FJCA 138; AAU156.2019 (3 September 2021)].

Additional grounds of appeal

[23] These grounds are equally misconceived. Victim impact statement is relevant only for the trial and there was no trial and no prejudice was caused to the appellant by him not being given it before the trial. I have examined the victim impact statement and it is dated 14 March 2019; prepared obviously after the appellant pleaded guilty and in preparation for the sentence hearing. Thus, it was available prior to the trial stage anyway.

[24] The appellant upon being given a copy of the victim impact statement before the sentence was meted out had not raised any objection to the contents therein. Had he chosen to do so, there was nothing to prevent him from challenging it by any method of his choice. Thus, the appellant should be taken to have admitted it or acquiesced in it.

01st and 02nd grounds of appeal (sentence)

[25] Firstly, the appellant submits that the trial counsel had not placed all migratory factors he handed over to the counsel before the trial judge. However, he had not submitted what other additional mitigating factors had had in his possession in addition to what was placed before the trial judge.

[26] The trial judge had picked the starting point at 12 years in the sentencing range of 11-20 years of imprisonment as per **Aitcheson v State** [2018] FJSC 29; CAV0012.2018

(2 November 2018). The judge had added 03 years for aggravating factors including breach of trust though 'rape of a child' and 'offending against the child' could be considered as inbuilt in the tariff itself. The trial judge could have enhanced the sentence further for the 28 years' age difference between the victim (08 years) and the appellant (36 years) but not done so. The rest of the mitigating factors were personal circumstances carrying little weight [see **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014)].

[27] The learned High Court judge had deducted 06 months for the remand period of 05 months and 25 days though not separately deducted from the final sentence. The judge had also given a generous discount of 3 ½ years for the guilty plea despite it having been tendered 03 ½ months of the first call date. Thus, the final sentence became 11 years of imprisonment.

[28] There are no sentencing errors capable of having a real prospect of success in appeal.

[29] 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)].

[30] The appellant's ultimate sentence lies at the lowest point of sentencing tariff for child/juvenile rape. The final sentence is such that the full court may consider revisiting the sentence for enhancement in terms of section 23(3) of the Court of Appeal Act if it were to consider the sentence appeal.

[31] Section 35(2) of the Court of Appeal Act gives a single judge power to dismiss a frivolous or vexatious appeal. In my view, both conviction and sentence appeal are

frivolous. Therefore, this application for enlargement of time should be dismissed under section 35(2) of the Court of Appeal Act .

Order

1. Application for enlargement of time to appeal against conviction and sentence bearing No. AAU 0096 of 2020 is dismissed under section 35(2) of the Court of Appeal Act .

.....

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