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

CRIMINAL APPEAL NO.AAU 145 of 2017
[In the High Court at Lautoka Case No. HAC 228 of 2016]
[In the Magistrates Court at Nadi Case No. 64 of 2009]

BETWEEN	**:**	**TIMOCI VULUMA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	**:**	**16 November 2021**
Date of Ruling	**:**	**17 November 2021**

RULING

[1] The appellant had been arraigned in the Magistrates court at Nadi with one count of rape contrary to section 149 and 150 of the Penal Code committed on 26 January 2009 at Sabeto in the Western Division.

[2] At the end of the trial, the learned Magistrate had convicted the appellant as charged. The case had then been transferred to the High Court at Lautoka for sentencing in terms of section 190(1)(b) of the Criminal Procedure Act where the learned High Court judge had sentenced him on 24 November 2016 to 12 years of imprisonment with a non-parole period of 09 years.

[3] The appellant had appealed in person against conviction and sentence out of time (04 October 2017) followed by subsequent amended grounds of appeal. Thereafter, the

Legal Aid Commission had sought enlargement of time to appeal accompanied by an affidavit, amended grounds of appeal and written submission filed on 10 February 2021. The state had tendered its written submissions on 16 November 2021.

[4] 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?

[5] 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)].

[6] The delay of the appeal (almost 09 ½ months) is substantial. The appellant had stated that he received the judgment and the sentencing order late and thereafter he lost them inside the prison. Then, he managed to file his current appeal in person. The appellant had not explained how he managed to file his hand written appeal on 04 October 2017 if he had lost the said documents. I am not convinced of the genuineness of his explanation for the long delay. Yet, 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 on behalf of the appellant are as follows:

Conviction

Ground 1

THAT the Learned Magistrate may have erred in law and fact in not cautioning himself that the medical report was inconclusive thereby casting a reasonable doubt on the element of penetration.

Ground 2

THAT the Learned Magistrate may have erred in law and fact in not cautioning himself of the manner of the recent complaint being made thereby casting a doubt on the credibility of the witnesses.

Ground 3

THAT the Learned Magistrate may have erred in law and fact to convict the appellant without regard to the totality of evidence.

Sentence
Ground 1

THAT the Learned Trial Judge may have erred fact and law to allow extraneous or irrelevant matters to guide or affect him in arriving at the final sentence.

[8] The sentencing judge had summarized the evidence as follows:

> *'[3] The victim was 12-year-old Class-five student at the time you committed this offence. She was your neighbor. She was at home folding clothes when you entered her house. You dragged her to your house and to your bedroom forcibly when her mother was away. You undressed her and penetrated her vagina with your penis. She did not like what you did and it was a painful experience for her. She was bleeding. After raping the victim, you threatened her not tell anyone and watched her when she confronted her mother. You were engaged in this incident when victim's younger sisters were watching. Victim was a much younger person than you. You later visited the victim and her family with your wife seeking traditional forgiveness.'*

[9] The appellant's position in his evidence had been that he was sexually impotent and could not commit the alleged act.

01st ground of appeal

[10] The appellant joins issue with the statement of the Magistrate that the medical report *inter alia* has confirmed the evidence of the victim's evidence. The doctor had found a small superficial cut below the vagina of the victim and her hymen was not intact. She was not a virgin. He argues that the injury could have been caused by other means and the medical report was inconclusive. These are purely trial issues and should have been canvassed during the trial and cannot be taken up as appeal points.

[11] The victim had given clear evidence that the appellant inserted his penis into her vagina and it was painful. She had found blood on her skirt and washed it later. As the Magistrate had correctly remarked that corroboration was no longer required in sexual offences whether by medical evidence or otherwise. Even if the medical report was inconclusive it could not necessarily affect the victim's evidence.

[12] Thus, there is no real prospect of success in this ground of appeal.

02nd ground of appeal

[13] The appellant submits that the Magistrate should have cautioned himself in the manner in which the 'recent complaint' had been made to the mother by the victim in that the latter first denied it but later admitted the that she had been raped after the mother assaulted her.

[14] After raping her, the appellant had threatened the victim not to tell anybody as to what happened and he had even kept a constant watch over and gestured to her not to divulge anything to the mother (by walking around the house) when the mother confronted the victim upon her return home and after she was told by the victim's two sisters as to what they saw inside the room. As a result the victim had first denied any incident but when the mother assaulted the victim in the night she had come out with the incident. The Magistrate had stated that the mother's evidence *inter alia* had further confirmed the victim's evidence. Thus, it is clear that it is the appellant's

threatening and persuasive conduct that had prevented the victim from coming out with the incident in the first instance.

[15] A recent complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence [vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)].

[16] It does not appear that the Magistrate had strictly treated the mother's evidence relating to what the victim divulged to her as recent complaint evidence but treated the whole of her evidence as confirming the victim's evidence. The rest of the mother's evidence comprises of the fact that the appellant came with his wife in the same night to tender a traditional apology and she found the victim with the appellant and his wife coming back from the police station on the following morning. According to the victim, the appellant and his wife had taken her to the police station and asked her to tell the police that she was in love with the appellant and wanted to marry him.

[17] Therefore, there was no need for the Magistrate to have directed himself on the typical recent complaint evidence direction as highlighted in **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) and **Raj v State** (supra) *i.e.* recent complaint evidence is not evidence of facts complained of, nor is it corroboration; it goes to the consistency of the conduct of the complainant with the evidence given at the trial. It goes to support and enhance the credibility of the complainant but not the truth of the complaint.

[18] Thus, there is no real prospect of success in this ground of appeal.

03rd ground of appeal

[19] The appellant submits that the Magistrate had not paid due regard to the totality of evidence in convicting the appellant.

[20] The appellant had floated several hypotheses as to what made the victim came out with the rape allegation. The mother confronted the victim based on what her other two daughters had seen as to what was going on between the appellant and the victim inside his bedroom and informed her upon her return. The two siblings of the victim had seen the appellant and the victim on his bed in his room. When the sisters were bathing the appellant had taken the victim forcefully into his house and bedroom where he had raped her. Having initially come up with a denial the victim had informed the mother as to what happened. Medical evidence had shown the victim's hymen to be not intact and the doctor had found a small superficial cut below her vagina.

[21] The appellant's subsequent conduct does not point to his innocence. In the same night, the appellant and his wife came to offer a traditional apology which was rejected. Not stopping at that they had taken the victim to the police station without her mother's knowledge and forced her to tell the police that she was in love with him and wanted to marry him.

[22] The appellant's claim to have been sexually impotent had no credibility at all.

[23] I formulated the following test for dealing with a complaint of the conviction being '*unreasonable or cannot be supported having regard to the evidence'* as follows in **Nautu v State** [2021] FJCA 192; AAU132.2019 (3 November 2021):

> *'[12]……. The question for an appellate court would be whether or not upon the whole of the evidence acting rationally it was open to the Magistrate to be satisfied of guilt beyond reasonable doubt; whether or not the Magistrate must, as distinct from might, have entertained a reasonable doubt about the accused's guilt; whether or not it was 'not reasonably open' to the Magistrate to be satisfied beyond reasonable doubt of the commission of the offence.'*

[24] On a perusal of the totality of evidence, I am of the view that upon the whole of the evidence acting rationally it was open to the Magistrate to be satisfied of guilt beyond reasonable doubt. I cannot say that the Magistrate must, as distinct from might, have entertained a reasonable doubt about the appellant's guilt and I cannot also say that it was 'not reasonably open' to the Magistrate to be satisfied beyond reasonable doubt of the commission of the offence.

[25] Thus, there is no real prospect of success of this ground of appeal.

[26] Accordingly, the appeal itself has no real prospect of success on any of the conviction grounds [vide **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019)].

01st ground of appeal (sentence)

[27] The appellant contends that the trial judge had allowed extraneous or irrelevant matters to guide or affect him in arriving at the final sentence. His main complaint is based on alleged double-counting.

[28] The trial judge had stated that the sentencing tariff for child rape was settled as 10-16 years (*vide* **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014)] and that the courts in Fiji had imposed sentences up to 13 years' imprisonment to juvenile rape offenders under the Penal Code [*vide* ***State v Marawa*** [2004] FJHC 338; HAC0016T.2003S (23 April 2004)]. The judge had picked the starting point at 11 years considering the objective seriousness of the offending. He had then added 03 years for aggravating factors and deducted 02 years for mitigating factors making the final sentence 12 years.

[29] Considerable age gap (33 years), breach of trust and instilling fear in the victim not to divulge the offending were legitimate aggravating factors not taken into consideration in picking the starting point. However, the trial judge had erred in considering lack of remorse and repentance as an aggravating factor [vide **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018)]. However, the appellant's subsequent conduct of taking the victim to the police station without any knowledge of her

mother in an attempt to get her to subvert the course of justice would have been a serious aggravating factor but not taken into account by the trial judge.

[30] Therefore, enhancement of the starting point by 03 years is fully justified even without lack of remorse and repentance erroneously considered by the trial judge.

[31] Thus, there is no double counting as articulated by the Supreme Court in **Senilolokula v State** (supra), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018), **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019).

[32] 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)].

[33] I see no real prospect of success in the appellant's appeal against sentence which is on the lower side of the tariff for child rape.

Orders

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

COURT OF APPEAL FIJI

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