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

CRIMINAL APPEAL NO.AAU 69 of 2020
[In the High Court at Lautoka Case No. HAC 174 of 2015]

BETWEEN	:	**ALTHAEUS WILSON TOMASI**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, ARJA**	
Counsel	:	**Mr. A. Rayawa for the Appellant**	
	:	**Mr. L. J. Burney for the Respondent**	
Date of Hearing	:	**14 July 2021**	
Date of Ruling	:	**16 July 2021**	

RULING

[1] The appellant, 27 years old, had been indicted in the High Court at Lautoka with one representative count of rape of his 10 year old step-daughter contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009 committed at Lautoka in the Western Division between 01 October 2014 and 30 November 2014.

[2] The representative count in information read as follows.

'Statement of Offence

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

Particulars of Offence

Althaeus Wilson Tomasi between the 1st day of October 2014 and 30th day of November 2014 at Lautoka in the Western Division penetrated the vagina of HS aged 10 years with his penis.

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was not guilty of rape. The learned trial judge had disagreed with the assessors' opinion, convicted the appellant of rape and sentenced him on 25 September 2019 to a sentence of 15 years, 11 months and 02 weeks of imprisonment with a non-parole period of 11 years.

[4] The appellant in person had purportedly settled and signed his appeal papers against conviction and sentence on 30 September 2019 but it had not made its way to the registry of the Court of Appeal. His attorneys had filed the notice of appeal on 07 August 2020 after more than 09 months out of time accompanied by an affidavit seeking enlargement of time. Appellant's written submission had been tendered on 17 November 2020 and the state had tendered its written submissions on 04 January 2021. Both parties had consented in writing to this court delivering a ruling at the leave to appeal (or enlargement of time) stage on the written submissions alone without an oral hearing in open court.

[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 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?

[6] 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).

[7] It is clear that the delay is substantial and appellant's explanation is that his Legal Aid Lawyer had failed to lodge his appeal as promised and the correction centre too had failed to do the same regarding the appeal he settled in person. His private lawyer had not been allowed to meet him in the correction centre in the first attempt. Needless to say, that these explanations are unsubstantiated. Thus, the appellant has not satisfactorily explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]. The respondent had not averred any prejudice that would be caused by an enlargement of time to the state.

[8] The guidelines to be followed 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 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.

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

Conviction and sentence

1. The Learned Trial Judge erred in law in failing to give cogent reasons for rejecting the Assessors Unanimous finding of not guilty in his Lordships Judgment.

2. That the Learned Trial Judge erred in law and in fact in failing to adequately consider the evidence and the law in his Judgment.

3. That the Learned Trial Judge erred in law and in fact in failing to adequately consider the mitigating factors when passing sentence that was unduly harsh and excessive.

[10] The trial judge had summarized the prosecution evidence coming from the victim who was the sole witness as follows in the sentencing order.

> *2 The complainant is your stepdaughter. She was 11 years old and you were 27 years old at the time of the offence according to the amended admitted facts. You were living with the complainant's mother, the complainant and her two younger brothers. Between 01 October 2014 and 30 November 2014, on one Saturday you called the complainant to your room when the complainant's mother was not at home. You closed the door and made her lie next to you. You removed her clothes and inserted your penis into her vagina. The complainant screamed in pain. The following Saturday you made her lie next to you and covered yourself and the complainant with a blanket. You removed her pants and inserted your penis into her vagina. Once again during the same period, you called her to your room and removed her underwear. You started rubbing your penis on her vagina. The complainant said you did not fully insert your penis into her vagina. You told the complainant not to tell anyone about the incidents after the second and third incidents. The complainant was afraid to complain to her mother. After sometimes when her grandmother started living with them, the complainant informed the grandmother about the incidents. The matter was later reported to the Police.*

[11] The appellant had elected not to give evidence or call any witnesses. His position in cross-examining the victim had been that the allegations were fabricated.

01st and 02nd grounds of appeal.

[12] Both grounds are based on the premise that the trial judge had not given cogent reasons for overturning the unanimous opinion of the assessors by failing to adequately consider the evidence particularly in regard to the element of penetration.

[13] In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) the Court of Appeal stated

> *[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the*

*trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]'*

[14] On a perusal of the judgment, it is clear that the trial judge had embarked on an independent analysis and evaluation of the evidence presented by the prosecution in a comprehensive manner and the victim had given clear evidence that on the first two occasions the appellant had indeed insisted his penis fully into her vagina. The trial judge's reasons for overturning the assessors' not guilty opinion are cogent and can withstand independent judicial scrutiny.

[15] The trial judge had also expressed his view of the credibility of the victim as follows.

'17 I have observed the demeanour of the complainant and I am satisfied that she is a reliable witness who testified with clarity. The complainant was well composed and confident when she gave evidence. She gave evidence in a very consistent and a convincing manner. Although she was cross examined at length by the counsel for the Accused, her credibility and consistency were not shaken. The defence could not create any doubt in the prosecution case. I accept the evidence given by the complainant as truthful and reliable evidence.'

[16] In **Fraser** the Court of Appeal further said

[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

*[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. 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 and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and*

***Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].*

[17] Therefore, the judgment taken alone as well as in conjunction with the summing-up support the trial judge's decision (he being the ultimate judge on fact and law) to disagree with the assessors and convict the appellant.

[18] Therefore, there is no reasonable prospect of success on the first and second grounds of appeal.

03rd ground of appeal (sentence)

[19] The counsel for the appellant has not made any submissions on the sentence appeal to demonstrate that the trial judge had committed a sentencing error.

[20] The trial judge had correctly identified the sentencing tariff for juvenile rape as 11-20 years of imprisonment as set out in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) which increased the previously existing tariff of 10-16 years set in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and confirmed in **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. He had picked 12 years as the starting point and added 04 years for aggravating factors to make it 16 years and with no mitigating factors being shown the trial judge had only reduced 02 weeks for the period of remind to impose the final sentence of 15 years, 11 months and 02 weeks of imprisonment with a generous non-parole period of 11 years in consideration of rehabilitation of the appellant.

[21] 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 (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). It cannot be said that the sentence is harsh or excessive and the sentence imposed on the appellant does not fit the crime.

[22] Thus, the appellant has not demonstrated any sentencing error and his appeal against sentence has no real prospect of success.

Orders

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

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