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

CRIMINAL APPEAL NO.AAU 016 of 2019
[In the High Court at Labasa Case No. HAC 14 of 2017]

BETWEEN : **KISO CAMA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Appellant in person**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **27 July 2021**

Date of Ruling : **30 July 2021**

RULING

[1] The appellant had been indicted in the High Court of Labasa on two counts of rape of his stepdaughter; the first count being a representative count of oral rape in 2015 when she was 13 years old and the second count being a representative count of carnal knowledge of the same girl in 2016 when she was 14.

[2] The appellant had been originally charged with one count of rape by inserting his tongue into the complainant's vagina, a representative count of rape by inserting his penis into her mouth and another representative count of penile rape. The state had later withdrawn the first count. The appellant had accepted the summary of facts and pleaded guilty to the second and third counts and he had been sentenced on 25 May 2017 to 13 years in imprisonment with a non-parole period of 10 years.

[3] I find the following paragraphs in the sentencing order regarding the summary of facts:

> *'3. The facts proffered by the prosecution and agreed to by the accused are as follows:*
>
> *4. In early 2015 the victim Lucy (not her real name) moved into the accused's home, Lucy's mother having entered into a relationship with him. On many occasions in the course of that year, at times when the mother was away from the home the accused would force Lucy to perform indecent acts on him, forcing her head onto him. She would complain and say that it hurt her mouth but he would insist.*
>
> *5. On two different dates in October 2016 the accused raped Lucy, once in his room in the house and once on the plantation. On Christmas Eve of that year the accused found Lucy alone at home doing cleaning chores. He told her to undress whereupon he raped her on the kitchen floor.*
>
> *6. During Police investigations the accused admitted the offences, saying that "bad intentions" were the reason. He told the Police that he knew it was wrong, but he always forced her.*

[4] The appellant had intimated his intention to appeal (without mentioning whether it is against conviction or sentence or both) by his letter dated 10 June 2019 which seems to have reached the CA registry on or about 03 July 2019. Thus, even his first intimation to appeal is out of time by more than 02 years. His grounds of appeal against sentence had reached the CA registry on 13 October 2020 while the grounds of appeal against conviction along with submissions had reached the CA registry on 15 December 2020. His explanation for the delay is contained in the documents named 'attached submission' (13 October 2020) and possibly the 'notice of late appeal' (15 December 2020). Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or *via* Skype.

[5] The state had filed written submissions on 13 January 2021.

[6] 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?

[7] 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)].

[8] It is clear that the delay in the appeal is between 02-03 years and very substantial. The appellant has attributed the long delay to the alleged failure on the part of his counsel and even court to provide him with 'disclosures' after he was sentenced and his lack of formal education and knowledge. While there is no material to substantiate the first two reasons, his personal circumstances are no justification for tendering an appeal out of time by 02-03 years. Most probably, his decision to appeal had been prompted by other inmates and therefore an afterthought. Thus, he had not provided any credible explanation for the long delay. 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.

[9] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

(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 by the appellant have been identified under the following headings:

Conviction

Ground 1 - Equivocal plea.

Ground 2 – Delay in reporting.

Ground 3- Lack of direct evidence.

Ground 4 – Non-observance of standing orders.

Ground 5 - Admission made in the cautioned interview.

Ground 6 – Failure to construct the crime scene.

Ground 7 – Failure to seize the victim's clothing.

Ground 8 – No medical report.

Ground 9 – Failure to serve secondary disclosures.

Ground 10 – Failure to produce the appellant within 48 hours of arrest.

Sentence

Ground 11 – Sentence is manifestly harsh, excessive and wrong in principle.

Ground 12 – Learned judge had erred in law and fact in taking irrelevant matters into consideration and not taking relevant maters into consideration.

Ground 13 – Learned judge had erred in law and fact in not taking into consideration the provisions of Sentencing and Penalties Act.

Ground 1 - Equivocal plea

[11] The appellant challenges his plea of guilty on the basis that his counsel from Legal Aid Commission made him plead guilty. However, the appellant had not followed **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) where judicial guidelines were pronounced regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant. Thus, this ground of appeal cannot be entertained at this stage.

[12] In any event, the trial proceedings reveal that the appellant had steadfastly disputed the matters relating to the 01st count in the summary of facts but been ready to plead to the other two counts based on the summary of facts. As a result, the DPP had withdrawn count 01 and the appellant pleaded guilty to the 02nd and 03rd counts. This shows that the appellant did exercise his own judgment in the plea and not necessarily or exclusively guided by his trial counsel. Therefore, he obviously had not and could not have been forced by his counsel in the mater of the plea of guilty.

[13] 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. Defence 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. Defence 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 (vide **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019)

[14] The primary source of a guilty plea is the summary of facts. When 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. If there is acceptance by the prosecution of any

material requested by the defence to be deleted from the summary of facts, the plea of guilty can still proceed [vide **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019)].

[15] It is not for a court to inquire into the advice tendered by counsel to his client. The respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it could be suggested that there was pressure. 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 [vide **State v Samy** (supra)].

[16] The Supreme Court in **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) and the Court of Appeal in **Masicola v State** [2021] FJCA; AAU 073.2015(29 April 2021) and **Tuimatavesi v State** [2021] FJCA 111; AAU032.2016 (3 June 2021) dealt with 'equivocal pleas' in great detail and the in the light of the principles enunciated in those decision the appellant ground of appeal had no real prospect of success.

02nd ground of appeal- Delay in reporting

[17] In the light of the admission of summary of facts and the unequivocal plea of guilty this ground of appeal is simply unsustainable and has no prospect of success.

[18] The Supreme Court in **State v Samy** (supra) had approved only 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.

03rd ground of appeal - Lack of direct evidence

[19] In the light of the admission of summary of facts and the unequivocal plea of guilty this ground of appeal is baseless and has no prospect of success.

[20] Contrary to what the appellant seems to be suggesting, the complainant was not an accomplice in the crimes. She was only a victim and therefore her account as found in the summary of facts, without any corroborative material, is more than sufficient to sustain the charges.

Ground 4 – Non-observance of standing orders

[21] This ground of appeal is unclear and not compressible. As required by Rule 35(4) of the Court of Appeal Rules, it is not precise. It obviously has no prospect of success at all.

[22] In any event, given the admission of summary of facts and the unequivocal plea of guilty this sort of ground of appeal becomes untenable.

Ground 5 - Admission made in the cautioned interview

[23] The appellant submits that he had been intimidated by the complainant's uncle who was a soldier to make admissions of the crimes in the cautioned interview.

[24] His plea of guilty should be considered to have made not on the basis of the cautioned interview but the summary of facts. Even if he had made the admissions under intimidation as alleged (he had not made any such complaint to the trial judge on any of the seven occasions he appeared in court) he need not have admitted the summary of facts unless he agreed with them unequivocally.

[25] In any event the appellant had made the cautioned interview when he was in the custody of the police and an outsider would not have been able to intimidate him to make admissions against his will. Further, he had resisted pleading guilty only to the first court but had expressed no reservations on pleading guilty to the 02nd and 03rd counts. Therefore, whoever allegedly intimated him would not have done so only in respect of the incident relating to count 01 and not the other two counts.

[26] Therefore, this ground of appeal has no prospect of success at all.

Ground 6 – Failure to construct the crime scene

[27] There was no question of reconstructing crime scenes for countless number of incidents spanning over three years. In any event once the appellant accepted the summary of facts and tendered an unequivocal plea of guilty there was no need for any reconstruction of the crime scenes.

[28] This ground of appeal is completely misconceived.

Ground 7 – Failure to seize the victim's clothing

[29] The appellant seems to argue that the police should have taken the victim's clothing and other 'evidence' to prove the case.

[30] This ground of appeal is also totally misconceived. Once an accused pleads guilty upon accepting the summary of facts the prosecution need not bring any evidence to prove the case against him. All that is necessary is for the summary of facts to speak to all the elements of the offence and for the judge to be satisfied that the guilty plea was unequivocal.

Ground 8 – No medical report

[31] The appellant submits that there was no medical report obtained.

[32] Not that a medical report was essential for the elements of the charges to be established as long as the summary of facts had referred to all elements of the offences but the state submits that the medical report was anyway attached to the summary of facts.

[33] There is no substance in this ground of appeal at all.

Ground 9 – Failure to serve secondary disclosures

[34] What relevance the so called 'secondary disclosures' have in relation to his plea of guilty is difficult to fathom. In any event, the state has submitted that all relevant disclosures had been submitted to the defense and the same had been accepted by him. It is what those disclosures demonstrated that would have persuaded the appellant to take the route of tendering a plea of guilty to the 02nd and 03rd counts as the best course of action while successfully urging the DPP to withdraw the 01st count.

[35] This ground of appeal is not coherent and has no substance in it at all.

Ground 10 – Failure to produce the appellant within 48 hours of arrest

[36] In **Heinrich v State** [2019] FJCA 41; AAU0029.2017 (7 March 2019) having considered several previous judicial decisions the Court of Appeal remarked:

> *'[32] Considering all the matters discussed above, I am of the view that though an accused in criminal proceedings against him is not prevented from making a collateral attack on his confessional statement on the bases of a breach of Article 13(1)(f) by the investigators, despite Article 44 making specific provision for enforcement of his rights under Bill of Rights, the breach of Article 13(1)(f) by itself would not be a bar for the admission of the caution interview in a court of law. However, the presiding Judge in any criminal proceedings is entitled to consider the fact of wrongful detention, length of time the accused was held under arrest, reasons for the delayed production of the accused before court, what impact the prolonged detention has had on the accused etc. in the broader context of oppression vis-à-vis the voluntariness of his confessional statement towards its admissibility. After the judge rules the caution interview voluntary and admissible, he may consider, whether it should be excluded on the general ground that it may operate unfairly against the accused, if required by the nature of the case or if the circumstances so warrant or demand.*
>
> *[11] Therefore, since detention beyond 48 hours of arrest without the accused being brought before a court of law has not been held to be absolutely critical and decisive to the admissibility of a confessional statement, it is per se unlikely to be affecting the validity of trial proceedings. In any event, if bringing a person arrested or detained before a court of law not later than 48 hours after the time of arrest is*

not reasonably possible that person could be so produced as soon as thereafter in terms of section 13(1)(f) of the Constitution.'

[37] Thus, even if the appellant had been produced to court beyond the 48 hour threshold (it is not certain whether it is the case) it would not *per se* affect his confession or vitiate a conviction; not certainly when the accused makes an unequivocal admission of guilty based on the summary of facts.

[38] Thus, this ground of appeal has no prospect of success in appeal.

Ground 11, 12 and 13 – Sentence

[39] 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)]

[40] Having taken 12 years as the starting point, the trial judge had added 06 years for aggravating features and reduced 03 years for the guilty plea and another 02 years for 'clear record' and period of remand (04 months) ending up with the final sentence of 13 years.

[41] I am not convinced that an accused who had sexually abused a juvenile for 03 years should be considered as a first time offender and given any discount for his previous 'clear record'. That being the case, even if the trial judge had taken 10 years as the starting point still the final sentence would have been about 13 years.

[42] In any event, 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. The sentence imposed on the appellant does fit the crime.

[43] The sentence of 13 years on the appellant is certainly not harsh or excessive. The trial judge had taken relevant maters under the Sentencing and Penalties Act into account and not considered any irrelevant maters in the mater of sentence.

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