

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

CRIMINAL APPEAL NO.AAU 0017 of 2019
[In the High Court at Lautoka Case No. HAC 183 of 2017]

BETWEEN : **KRISHNEEL CHANDRA**

AND : **STATE** *Appellant*
Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **24 June 2022**

Date of Ruling : **27 June 2022**

RULING

[1] The appellant had been charged in the Magistrates Court at Lautoka on one count of rape of a child of 12 years of age contrary to section 149 and 150 of the Penal Code committed between 01 and 31 October 2009 at Lautoka in the Western Division. The particulars of the charge read as follows.

“Krishneel Chandra, between 1st October to 31st October, 2009 at Lautoka in the Western Division, had unlawful carnal knowledge of “SP” without her consent”

[2] At the end of the trial, the Magistrate had found the appellant guilty as charged and referred the case to the High Court for sentencing. The learned High Court judge had sentenced him on 27 November 2017 to a sentence of 11 years, 08 months and 18 days of imprisonment with a non-parole period of 09 years.

[3] The appellant had appealed against conviction and sentence in person 01 year and 24 days out of time. The Legal Aid Commission had subsequently filed an application for enlargement of time to appeal against conviction and sentence with the appellant’s

affidavit and written submissions on 07 June 2021. The state had tendered its written submissions on 10 December 2021.

- [5] 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? (vide **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).
- [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] The delay of the appeal is substantial. The appellant had stated in his affidavit that he handed over his timely appeal on 03 December 2017 to the officials at Lautoka Correction Centre who had failed to lodge it with the Court of Appeal Registry. Then, he had filed another set of appeal papers signed on 21 Januarys 2019 which had reached the CA Registry on 30 January 2019. However, I do not find any mention or reference to the alleged timely appeal therein. Thus, there is not much credibility in the explanation given for the delay. Nevertheless, I would now 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.

[8] The guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (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). For a ground of appeal untimely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a real prospect of its success in appeal.

[9] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows.

Conviction

Ground 1

THAT the learned Magistrate erred in fact and in law in stating that the evidence of the complainant's mother corroborated the evidence of the complainant thus prejudicing the appellant.

Ground 2

THAT the learned Magistrate erred in fact and in law in not fully and properly analysing the evidence of delayed reporting and in not doing so, prejudiced the appellant.

Sentence

Ground 3

THAT the sentence imposed on the appellant is harsh and excessive.

[10] The sentencing order had summarized the evidence as follows.

[7] The brief facts were as follows:

The victim and the accused were neighbours and distantly related. In the month of October, 2009 the victim with her mother, the accused and two others went to Lovu Seaside to catch crabs. The victim was 12 years of age at the time.

The victim and the accused were far away from the others in the mangroves catching crabs. After a while the accused held the victim's neck tightly threatening her that he will kill her if she yells out. The accused pulled the victim's panty and pants below her knees he also had his undergarments and shorts below his knees.

The accused made the victim sit on top of him and started poking her vagina with his finger forcefully. Thereafter the accused inserted his penis into the vagina of the victim. The victim suffered pain when the accused penetrated the vagina of the victim for about 10 to 15 minutes.

The victim did not consent to have sexual intercourse with the accused. After 2 weeks of the incident, the victim told her mother of what the accused had done to her. The victim did not inform her mother earlier was because she was afraid of her mother. The victim's mother reported the matter to the police thereafter the victim was medically examined.

01st ground of Appeal

- [11] The appellant argues that the Magistrate had wrongly treated the victim's mother's evidence as corroborative of the victim's version at paragraph 11 of the judgment. However, when paragraph 11 is considered in conjunction with the mother's evidence at paragraph 09 of the judgment it is clear to me that the mother Saroj Shaneela Devi had narrated what happened on the day of the incident as she witnessed, for she accompanied both the appellant and the victim to pick crabs on that day. Therefore, her evidence in fact corroborated that of the victim to that extent. Further, when Saroj Shaneela Devi had told court that the victim informed her of the sexual abuse only after two weeks she was once again corroborating that fact spoken to by the victim in her evidence.
- [12] At no stage had the Magistrate treated what the victim had told the mother as to how the appellant had committed digital and penile penetration upon her as corroborative of her evidence on the charge against the appellant. Thus, what the Magistrate had stated at paragraph 11 of the judgment is not obnoxious to the rule on corroboration as regards recent compliant evidence as laid down in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). The sentiments expressed in **Prasad v State** [2019] FJSC 3; CAV0024.2018 (25 April 2019) are irrelevant to the facts of this case.

02nd ground of appeal

- [13] Under this ground of appeal the appellant complains that the Magistrate had not properly analyzed the reasons for the delay of two weeks in the victim complaining to the mother of the sexual abuse.
- [14] The Magistrate had indeed been fully conscious of the delay and considered it in detail as seen from paragraphs 6, 7 and 16 of the judgment according to which the victim's explanation for the delay had been that she was scared that her mother would assault her. The threats referred to by the Magistrate at paragraph 16 appear to relate to the time of the incident. Holding the victim's neck tightly and threatening to kill her if she yelled out would have undoubtedly instilled enough fear in her not to disclose the incident promptly to her mother.
- [15] 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. 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 but the surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case (vide State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018)). Given all the surrounding circumstances and the explanation for the delay, I do not think that there is any merit in the appellant's complaint.
- [16] According to Saroj Shaneela Devi her daughter looked sad after she returned with the appellant on the day of the incident after they were away from her sight for some time. This evidence could have been treated as distress evidence had the Magistrate chosen to do so and it would have added more weight to the prosecution case.
- [17] It is clear from the judgment that the demeanor and deportment of the victim had convinced the Magistrate that she was a reliable and credible witness. On the other hand, the appellant had failed to put to her in cross-examination the motive for the alleged false accusation namely his refusal to marry her as stated in his evidence whereas the suggestion to the victim had been that she had demanded money, jewelry and a phone.

[18] I am of the view that no ground exists for the appellate court to interfere with the conviction [see **Ralivanawa v State** AAU077 of 2016 (26 May 2022)].

Ground 3 – sentence

[19] The appellant complains that the sentence of 11 years and 08 months is harsh and excessive. Following **Raj v State** [2014] FJSC 12; CAV0003,2014 (20 August 2014) the High Court judge had adopted the sentencing tariff for juvenile rape of 10-16 years though the commission of the offence had happened in the year 2009. When the appellant was convicted and sentenced in 2017, the above tariff had come into operation.

[20] The Court of Appeal in **Tagidugu and another v The State** AAU 109/2016 & 137/2016 (26 May 2022) upheld the appellant having been sentenced according to the prevailing tariff though the offence had been committed and guilty plea had been tendered prior to the date where the tariff was set.

[21] The sentencing judge had commenced the sentencing process at 10 years and after making adjustments for aggravating and mitigating factors and the period of remand the final sentence had been set at 11 years, 08 months and 18 days. I do not find any sentencing error in that process.

[22] However, the state counsel following the best traditions of the Office of the DPP brought to the notice of this court that the appellant had endured a long wait from 2009 to 2017 to have the case against him concluded in the Magistrates court and another 04 months for the sentence. Altogether it had taken more than 08 years for the judicial system to deal with the charge against him. The state counsel submitted that usually, unless the appellant's own conduct had substantially contributed to the delay, such delay on the part of the justice system deserves a discount in the sentence which must be reflected in the final sentence. There is no indication that the counsel for the DPP appearing at the sentence hearing brought this aspect to the notice of the judge and as a result High Court judge had not given his mind to it.


[23] Although, the sentence itself is well within the tariff and cannot be treated as harsh and excessive at all and I cannot foresee a radical change of the sentence on account of the

said delay, I am inclined to grant enlargement of time on the sentence appeal to be taken up before the full court so that with the benefit of the full record the court could consider this matter more fully and decide whether any adjustment to the existing sentence should be afforded to the appellant on account of the delay in the process or notwithstanding the delay the sentence is fully justified given the gravity of the offence.

Orders

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




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