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

CRIMINAL APPEAL NO.AAU 123 of 2020
[In the High Court at Suva Case No. HAC 402 of 2018]

BETWEEN	:	**MELI KENAWAI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. E. R. V. Samisoni for the Respondent**
Date of Hearing	:	**04 August 2023**
Date of Ruling	:	**07 August 2023**

RULING

[1] The appellant had been charged in the High Court at Suva on the following counts of rape, attempted rape and sexual assault on two victims.

'COUNT ONE

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, *between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted* ***IM****, by touching his penis.*

COUNT TWO

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (c) of Crimes Act 2009.*

Particulars of Offence

***MELI KENAWAI,** between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the mouth of **IM** with his penis, without his consent.*

COUNT THREE

Statement of Offence

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

Particulars of Offence

***MELI KENAWAI,** between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **IM** with his penis, without his consent.*

COUNT FOUR

Statement of Offence

***ATTEMPT TO COMMIT RAPE**: Contrary to Section 208 of Crimes Act 2009.*

Particulars of Offence

***MELI KENAWAI,** between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the mouth of **JT** with his penis, without his consent.*

COUNT FIVE

(Representative Count)

Statement of Offence

***ATTEMPT TO COMMIT RAPE**: Contrary to Section 208 of the Crimes Act 2009.*

Particulars of Offence

***MELI KENAWAI,** between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the anus of **JT** with his penis, without his consent.*

COUNT SIX

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, *between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of* ***JT*** *with his finger, without his consent.*

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, *between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted* ***JT****, by touching his penis.*

[2] The assessors had opined that the appellant was guilty of all counts. Having agreed with the assessors, the trial judge had convicted the appellant accordingly and sentenced him on 12 August 2020 to 18 years' imprisonment on each of the rape counts, 05 years' imprisonment on each of attempted rape counts and 05 years imprisonment on each of the sexual assault counts; all sentences to run concurrently with a non-parole period of 15 years. The effective sentence was to be 17 years and 06 months imprisonment with a non-parole period of 14 years and 06 months after deducting the remand period.

[3] The appellant had lodged an untimely appeal against conviction and sentence through his lawyers Naco Chambers. However, on 15 March 2023, Raikanikoda & Associates had filed a notice of change of solicitors but no lawyer ever appeared from either of the firms in court. The appellant despite being given sufficient time to file written submissions has not done so. However, the respondent had replied to the grounds of appeal lodged on behalf of the appellant by Naco Chambers. The appellant who appeared in person *via* Skype from Taveuni Correction Centre was informed that

depending on the outcome of his appeal upon this hearing, he has a right to renew the appeal before the full court within 30 days.

[4] 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).

[5] The delay is about 03 weeks which is not substantial. The appellant has stated that he had to take time to collect funds and retain the lawyers to lodge the appeal as the reason for the delay. Nevertheless, I have to see whether there is a **real prospect of success** for the belated grounds of appeal against conviction 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.

[9] The prosecution, in support of their case, called the 1st complainant (IM), the 2nd complainant (JT), and 1st complainant's grand-mother Sera Rogonasau. The appellant had given evidence on his behalf and denied the allegations.

[10] The grounds of appeal urged by the appellant are as follows.

Conviction:

Ground 1

THAT the learned trial judge erred in law and fact in relying on and or considering or taking into consideration prejudicial evidence in finding the appellant guilty.

Ground 2

THAT the learned trial Judge failed to evaluate the evidence in favour of the appellant prior to returning a guilty plea which gave rise to a grave and substantial miscarriage of justice.

Ground 3

THAT the trial judge erred in law and in fact when it proceeded to disregard the inconsistencies and omissions in the testimonies of the two victims and accepted their evidence outright.

Sentence

Ground 4

THAT the sentence imposed by the court is manifestly harsh and excessive and wrong in principle considering all of the circumstances of the case.

Ground 5

THAT the sentence passed against the appellant is disproportionate in all the circumstance of the case and failed to properly consider relevant issues whilst taking into account irrelevant matters resulting in a sentence which is manifestly excessive.

Ground 1

[11] It is difficult to decipher as to what prejudicial evidence that appellant is complaining about.

[12] The learned trial judge had addressed the assessors on all aspects of the case including, burden of proof, ingredients of the offences, prosecution case, defence case etc. in a well-balanced, fair and objective manner. He had given his mind to the contentious aspects in the judgment t as well.

Ground 2

[13] The learned trial judge had fully placed before the assessors the defence case at paragraph 118 of the summing up and directed himself on the appellant's case at paragraph 34 of the judgment.

Ground 3

[14] The learned trial judge had considered the approach to inconsistencies and omission at paragraphs 124 & 125 of the summing-up and the alleged inconsistency which was

more an omission that surfaced during their testimonies at paragraphs 31-32 of the judgment but considered them not shaking the foundation of the prosecution case.

> *'**[31]** The 2nd complainant while confirming that the said incident as described by the 1st complainant took place in the accused's room, also testified to an incident which took place on another occasion while the 2nd complainant was sleeping in the sitting room of the accused's house, in the presence of the 1st complainant. However, the 1st complainant made no mention of this incident in the sitting room of the accused's house during his testimony. In fact, when questioned as to whether the accused had done anything else to him other than on that night (the incident which took place in the accused's room), the 1st complainant said No.*
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> ***[32]** I concede that this is no doubt a contradiction. However, it is my opinion, when taking into consideration the totality of the testimony of the two complainants' that there is no reason to disbelieve either witness. It must be borne in mind that even the 1st complainant testified to the acts which were perpetrated by the accused on the 2nd complainant, while in the accused's room. Some of these are the acts which the 2nd complainant said were committed on him by the accused, but in the sitting room, on another day (In addition the 2nd complainant said that the accused poked his anus with his finger).*
>
> ***[33]** As such, I accept the evidence of both the complainants as truthful, credible and reliable.*

[15] If the 01st complainant was not truthful and had fabricated the allegations against him, he could have testified to a second incident in the sitting room spoken to by the 02nd complainant as well. The omission may well be due to a lapse on the part of his memory whereas the 02nd complainant could still remember the second incident. The omission to speak to the incident in the sitting room cannot go to the root of the 01st complainant's evidence and shake the very foundation of his testimony as to the incident in the appellant's room.

[16] The Court of Appeal said in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)

> *[14]……No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.

Grounds 4 & 5

[17] The appellant complains that the sentence is harsh and excessive and disproportionate to the gravity of the offending.

[18] Referring to **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Court of Appeal said in **State v Khan** [2023] FJCA 122; AAU125.2018 (27 July 2023) that

'[21] Therefore, it is reasonable to assume that what the Supreme Court did was only to enhance the sentence rage from 10-16 years to 11-20 years. Therefore, for juvenile rape the minimum sentence now should be read as 11 years instead of 10 years and the range of sentences being 11-20. The sentence imposed by the trial judge is within permissible sentencing range.'

[19] In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) citing **House v The King** (1936) 55 CLR 499, the Court of Appeal held that a sentencing error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself.

[20] When the trial judge picked the starting point at 12 years, he may have unwittingly considered some aggravation later reflected in the aggravating factors as well. Thus, it is possible that there had been a discreet double counting involved given the observations of the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) at paragraphs [57] and [58].

[21] The learned judge had also added 08 years to the starting point of 12 years for the aggravating factors and deducted 02 years for the appellant being a first time offender

to arrive at the final sentence of 18 years. In **Hessell v R** [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)] at [73], the New Zealand Supreme Court cautioned the judges that

> *'[77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.'*

[22] 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)]. The approach taken by the appellate court in an appeal against sentence 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)]. However, within a permissible range, particularly when the range is broad such as the sentencing tariff for juvenile rape, a sentence could still be manifestly harsh or lenient.

[23] Given the doubt about double counting and the enhancement of the sentence by 08 years for aggravating factors ending up with the overall sentence of 18 years, I think it is better to leave it to the full court to consider the matter of sentence under section 23 (3) of the Court of Appeal Act (Cap 12) to decide whether the sentence fits the gravity of the offending.

Orders

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

COURT OF APPEAL FIJI

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