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

CRIMINAL APPEAL NO.AAU 025 of 2021
[In the High Court at Suva Case No. HAC 117 of 2019]

BETWEEN	**:**	**SEVARO RABOSEA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**18 August 2023**
Date of Ruling	**:**	**21 August 2023**

RULING

[1] The appellant, aged 79 had been charged with one count of sexual assault and two counts of rape under the Crimes Act, 2009 at Suva High Court. The victim was a 27 years old mentally imparted female or a slow learner. The charges were as follows:

> *'COUNT ONE*
>
> ***Statement of Offence***
>
> ***SEXUAL ASSAULT****: Contrary to Section 210 (1) (b) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***SEVARO RABOSEA*** *on the 8th day of March 2019 at Waikete Village, Nausori in the Eastern Division unlawfully and indecently assaulted* ***ATECA SAULAKI*** *by sucking both her breasts.*
>
> ***COUNT TWO***
>
> ***Statement of Offence***

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

Particulars of Offence

SEVARO RABOSEA *on the 8th day of March 2019 at Waikete Village, Nausori in the Eastern Division penetrated the mouth of* ***ATECA SAULAKI*** *with his penis, without her consent.*

COUNT THREE

Statement of Offence

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

Particulars of Offence

SEVARO RABOSEA *on the 8th day of March 2019 at Waikete Village, Nausori in the Eastern Division had carnal knowledge with* ***ATECA SAULAKI****, without her consent.*

[2] The assessors had unanimously opined that the appellant was guilty. The learned High Court judge found the appellant guilty as charged of rape and he was convicted accordingly. On 12 August 2020, the appellant was given a sentence of 11 years imprisonment with a non-parole period of 08 years.

[3] The High Court judge had summarised the facts in the sentencing order as follows.

> *'3. The facts of the case are that, the victim is 27 years of age. She is a mentally impaired person. Both her parents had passed away. She was under the care of her uncle who is also disabled. She is related and known to you. She used to feed the pigs of her uncle every evening. The pig pen was located in an isolated place in the jungle. You knew of the existence of the pig pen and you approached the victim while she was feeding the pigs. You asked her to undress and you sucked her breasts. You penetrated her mouth and her vagina with your penis. The victim did not agree to any of those sexual acts. You knew that the victim is a mentally impaired person. You did not care if the victim was consenting or not for the sexual acts. You raped and sexually assaulted the victim.'*

[4] The appellant in person had filed an untimely appeal against conviction and sentence. 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] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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].

[6] The delay is about 05 months. The appellant has blamed the counsel for the Legal Aid Commission for the failure to file appeal papers in time. I have no material before me to substantiate his explanation. Nevertheless, 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 by the appellant are as follows.

> ***'Conviction:***
>
> ***Ground 1***
>
> *THAT the learned Judge erred in law with respect to corroboration regarding the two medical reports which contradicted each other making doubtful the complainant's evidence (see State v Batelala by Shameem J).*
>
> ***Ground 2***
>
> *THAT by pleading not guilty, the appellant's identification was not proved beyond reasonable doubt as to the sex claim, place of intercourse and the use of force considering that the appellant was physically weak and sexually incapable 80 year old man. The penis is only used for urination not sex at this age.*

Sentence

Ground 3

THAT the sentence was harsh and excessive compare to ***Raogo v State*** *(FCA) (habitual offender) whose sentence was reduced from 18 years to 9 years whilst this appellant on the evidence was sentenced as a first offender to 10 years and the non-parole of 8 years without deduction of time served.*

Ground 4

THAT the time on remand was not deducted from the non-parole period which was 16 months.

Ground 5

That the non-parole exceeds the remission of the 10 years when section 27(3) entitles the appellant to a remission of one third of the sentence under to a remission of one third of the sentence under the Corrections Act as amended in 2019.

01st ground of appeal

[8] Going by the summing-up (paragraphs 50-53) and the judgment (paragraph 6), the prosecution had led in evidence only one medical report which is that of the complainant. This ground is misconceived.

02nd ground of appeal

[9] The appellant seem to challenge the element of penetration as he claims to have been physically weak and sexually incapable 80 year old man and his penis was only used for urination and not sex.

[10] The trial judge had carefully considered all the elements of the offences in the summing-up and the judgment and observed at paragraph 9 of the judgment that:

> *'9. The accused is an elderly man in his seventies. In his evidence, he endeavored to portray himself to be a feeble and shabby person. However, he appeared to me to be a strong and capable man in his age.'*

[11] In any event, there was no expert evidence led to demonstrate that any man of 79 years or personally the appellant was not capable of penile erection. There is no reason to doubt the complainant's evidence in this respect and the observation of the trial judge.

03rd ground of appeal (sentence)

[12] The sentencing tariff for adult rape is 7-15 years [see vide **Lal v State** [2021]; AAU 016.2016 (03 June 2021), **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) and **Rokolaba v State** [2018] FJSC 12; CAV0017 (26 April 2018].

[13] The two cases cited by the appellant are not comparable to the appellant's case. One is a case where the accused though a habitual offender had been sentenced to 11 years of imprisonment and the Court of Appeal affirmed the sentence. In the second case the accused being a habitual offender had initially been sentenced to 18 years but the Court of Appeal had reduced it to 09 years because it was thought that making 18 years consecutive to his existing sentence was unwarranted.

04th ground of appeal

[14] The trial judge had recorded the appellant's pre-trial remand period as 162 days which was 05 months and deducted 12 months for the remand period and mitigating factors. The issue is that this court is unable ascertain what discount the trial judge accorded to the appellant's remand period.

[15] This is not in strict compliance with section 24 of the Sentencing and Penalties Act 2009. In **Mataunitoga v State** [2015] FJCA 70; AAU125.2013 (28 May 2015) the Court of Appeal said

> *'[22] In the present case, the learned High Court did consider the appellant's remand period as part of the mitigating factors identified at para 9 of the sentencing remarks. ……..Any deduction for remand period should be reflected in the head sentence and the non-parole period (**R v Newman & Simpson** [2004] NSWCCA 102; (2004) 145 A Crim R 361 at [25] and **R v Youkhana** [2005] NSWCCA 231 at [10]). The learned judge failed to make adequate reduction in the appellant's non-parole period to reflect his remand period. There is an error in the sentencing discretion in that regard.*

[16] The appellant was 79 years at the time of sentencing. Should the trial judge have considered his age separately in the mater of sentence? Two views have been expressed in this regard.

[17] Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released (see **Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002). In this case, the 09 years' term of imprisonment was held to be excessive in totality and a five year term was deemed appropriate in the circumstances to reflect the seriousness of the offending (09 counts of indecent assault) having taken into account the age of the appellant (64 years).

[18] There is a principle in sentencing that a sentence should normally be shortened so as to avoid the possibility that an elderly offender will not live to be released from prison However, it must be stressed that old age is not a mitigating factor especially in cases of sexual offence and old age is definitely not a licence to commit a crime [**State v Vukici** [2018] FJHC 1193; HAC104.2017 (14 December 2018)]. In this case the accused had been engaged in the worst form of sexual violence against his own children for a period of 31 years and was sentenced to life imprisonment though he was 74 years at the time of sentencing.

[19] In the light of above decisions, I think it best to leave it to the full court to revisit the sentence and decide the propriety of the final sentence. 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)].

05th ground of appeal

[20] The appellant's complaint is that the non-parole period exceeds the total sentence sans of 1/3rd remission and therefore unlawful.

[21] Section 27 of the Corrections Service Act 2016 was amended by Corrections Service (Amendment) Act 2019 as follows.

Section 27 amended

2. *Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*

"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.

(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.

(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019."

Consequential amendment

3. *The Sentencing and Penalties Act 2009 is amended by—*

(a) in section 18—
(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and
(ii) deleting subsection (2); and

(b) deleting section 20(3).

Passed by the Parliament of the Republic of Fiji this 22nd day of November 2019.

[22] Accordingly, where the sentence includes a mandatory non-parole in accordance with section 18(1) of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner will be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. However, where the sentence includes such a non-parole period, the prisoner must necessarily serve the full term of the non-parole period irrespective of any remission he had earned. The sentencing court is not required by section 27 of the Corrections Service Act 2006 (as amended) or section 18 of the sentencing and Penalties Act 2009

to take into account an inmate's remission in determining the appropriate the sentence. Calculation of remission is a matter for the Corrections Service.

[23] This matter has been further clarified by the Supreme Court in **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023). The appellant had been given a generous non-parole period by the trial judge perhaps due to his old age. Thus, there is no merit in the appellant's complaint.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed on the 04th ground of appeal.

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