

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

CRIMINAL APPEAL NO. AAU 064 of 2021
[In the High Court at Suva Case No. HAC 010 of 2019]

BETWEEN : **JONE BEBE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **12 January 2023**

Date of Ruling : **13 January 2023**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of assault with intent to commit rape contrary to section 209 of the Crimes Act, 2009 and another count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed on 01 January 2019 at Manu Village, Tailevu in the Eastern Division.

[2] After the summing-up, the assessors had unanimously opined that the appellant was guilty of both counts and in the judgment the learned trial judge had agreed with them and convicted the appellant as charged. On 18 November 2019 the appellant had been sentenced to an aggregate 12 years of imprisonment with a non-parole period of 08 years.

- [3] The appellant had initially filed a timely appeal only against conviction. The Single Judge of the Court delivered a ruling refusing leave to appeal against conviction [**Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021)] and the appellant has in person renewed his conviction appeal before the Full Court where the preparation of appeal records has been undertaken by the Court of Appeal Registry.
- [4] Thereafter, the appellant had filed an appeal against sentence 07 October 202, nearly 02 years out of time.
- [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] These factors are not to be considered and evaluated in a mechanistic way as if they are on par with each other and carry equal importance relative to one another in every case. 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. No party in breach of the relevant procedural rules and timelines has an entailment to an extension of time and it is only in deserving cases where it is necessary to enable substantial justice to be done that breach will be excused [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)]. In practice an unrepresented appellant would usually deserve more leniency in terms of the length of delay and the reasons for the delay compared to an appellant assisted by a legal practitioner.

[7] The delay of this sentence appeal is very substantial. The appellant had not given any explanation for the delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against 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] 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 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[9] Grounds of appeal urged on behalf of the appellant against sentence are as follows:

Ground 1: *The sentence is manifestly harsh and excessive and wrong in principle in all circumstances of the case.*

Ground 2: *That the Learned Judge took irrelevant matters into consideration when sentencing the appellant and not considered relevant matters.*

[10] The trial judge had summarised the evidence in the sentencing order as follows:

2. *The facts of the case are that the complainant was 17 years of age and a single mother of an infant at the time of the offence. On the day of the incident she was washing some kitchen utensils beside her father's house when you approached her. You pulled her from her t-shirt to the nearby bush. You closed her mouth when she tried to scream. She was scared because you were drunk. She tried to resist, but failed because you were huge. Having pulled the complainant into the bush, you punched her in her face and bit her neck. Her head became numb; she fainted and fell to the ground. She did not agree to have sex with you and pleaded that she did not want to have sex as her daughter was still small. You did not listen to her. You laid on top of the complainant, inserted your penis into her vagina and had sexual intercourse with her, without her consent.*

3. *The complainant had received a 3mm x 3mm bruise on her right temple region. There was haematoma on the neck both on right and left sides.*

Upon the examination of the genitalia, the doctor found a superficial laceration on the interior surface of major labia at 6 o'clock and 8 o'clock positions.

[11] The trial judge had correctly applied the sentencing tariff of 11 - 20 years as the complainant was a juvenile, being under 18 years of age, set in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) and selected a very generous starting point of 11 years.

[12] The trial judge had set out aggravating and mitigating circumstances as follows:

8. I consider the following as aggravating factors in this case in light of the Supreme Court Judgment in Ram v State [2015] FJSC 26 923 October 2015);

a. You exploited the victim's vulnerability and naivety. She had come with her 6 month old child to visit her parents to celebrate the New Year and you took her to the bush without having any regard to the unattended baby.

b. You were drunk at the time of the offence.

c. You closed complainant's mouth when she was trying to shout for help.

d. You are in a domestic relationship with the complainant and you have breached the trust when you committed these offences on your own cousin.


10. Your Counsel has submitted that you are 25 years of age, single a farmer by profession. You are supporting the elderly parents as the sole breadwinner of the family. You have no previous convictions and have maintained a good character for the past 25 years. You have cooperated with police and you seek forgiveness of this court. You have maintained the not guilty plea allowing the complainant to relive her ordeal in court. Although you have sought forgiveness from the complainant and her family in an apparent bid to prevent her from reporting the matter to police, I am unable to accept what your Counsel has said in her submission that you are genuinely remorseful of your actions.

- [13] Having considered the aggravating factors the trial judge had enhanced the sentence by 03 years and for mitigating factors he had reduced it by 02 years. The judge claims to have discounted the remand period of 04 months in this exercise and pronounced the final sentence as 12 years of imprisonment with a non-parole period of 08 years.
- [14] I do not see any basis for the appellant's complaints under the two grounds of appeal. He has not elaborated them either. The final sentence is not harsh and excessive at all and in fact the appellant should count himself lucky to have got away with this sentence.
- [15] 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.
- [16] I am of the view, that in all the circumstances of the case the sentence is one that could reasonably have been imposed by a sentencing judge or, in other words, that the sentence imposed lies at the lower end of the permissible sentencing range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

Order of the Court:

1. Leave to appeal against sentence is refused.




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