<u>IN THE COURT OF APPEAL, FIJI</u>
<u>[On Appeal from the High Court]</u>

<u>CRIMINAL APPEAL NO. AAU 098 of 2022</u>
[In the High Court at Suva Case No. HAC 57 of 2018]

<u>BETWEEN</u> : **<u>JOSEFA VUANIBAKA</u>**

<u>Appellant</u>

<u>AND</u> : **<u>THE STATE</u>**

<u>Respondent</u>

<u>Coram</u> : **Prematilaka, RJA**

<u>Counsel</u> : **Appellant in person**
: **Mr. T. Tuenuku for the Respondent**

<u>Date of Hearing</u> : **02 April 2024**

<u>Date of Ruling</u> : **03 April 2024**

<u>RULING</u>

[1] The appellant had been changed at Lautoka High Court on the following counts:

*'<u>**Statement of Offence**</u>*

<u>RAPE</u>*: Contrary to section 207 (1) and 2(c) and (3) of the Crimes Act, 2009.*

*<u>**Particulars of Offence**</u>*

> ***JOSEFA VUANIBAKA*** *on the 1st day of March, 2018 at Rakiraki in the Western Division, penetrated the mouth of "J.Q", aged 4 years and 2 months, with his penis.'*

[2] The High Court judge convicted the appellant and on 29 March 2022 sentenced him to a sentence of 11 years & 6 months with a non-parole period of 09 years and 06 months.

[3] The appellant's appeal against conviction and sentence is out of time by 03 months and 20 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] 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.

[6] The delay of the appeal is not very substantial given that the appellant had filed it in person. He had not offered any explanation for his belated appeal. Nevertheless, I would see whether there is a **real prospect of success** for the belated ground 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 to appeal.

[7] 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)].

[8] The prosecution evidence had been summarised by the trial judge in the sentencing order as follows:

> '2. *The brief facts were as follows:*
>
> *In the year 2018 the victim was 4 years and 2 months old, in the afternoon of 1st March, 2018 she was at the house of the accused, after sometime the accused told her that he has to take lollies to the toilet. He got the victim to follow him.*
>
> 3. *In the toilet, the accused closed the door, put down the toilet seat, blindfolded the victim with a white vest. After this, the accused put his penis inside the victim's mouth and urinated. The victim cried so the accused said it's finished, and then he opened the door.*
> 4. *The victim went home and told her aunt Kinisela and later in the afternoon to her mother about what the accused had done to her. The victim's mother confronted the accused who was their neighbor, and he apologized for his wrong doing.*
> 5. *The matter was reported to the police the same day. The accused was arrested, caution interviewed and charged.* '

[9] The appellant had given evidence and taken up the position that he took her to the kitchen, blindfolded her and then took her to the toilet and closed the door. In the toilet he made her sit on the toilet seat, pulled down his pants, took out his penis and put it in her lips. The complainant cried so he opened the door and let her go.

[10] The grounds of appeal urged by the appellant against conviction are as follows:

> '***Conviction***
>
> ***Ground 1:***
>
> THAT *the Learned Trial Judge erred in law when he accepted the version of the victims that she was raped, but the judge failed to explain and give an analysis of the evidence in court.*

Ground 2:

THAT the Learned Trial Judge erred in law in not considering an alternative less offence in accordance with the provision of both the Criminal Procedure Decree (section 162) and the Crime Decree (section 215) that the appellant be convicted of lesser offence. The appellant do refer to Rohit Prasad v State, criminal appeal no: CAV0024 of 2018.

Ground 3:

THAT the Learned Trial Judge erred in law when he made a wrong assessment on the explanation of law regarding penetration therefore was inadequate, insufficient, arbitrary, unfair and causing a substantial miscarriage of justice.

Sentence

Ground 4:

THAT the Learned Trial Judge erred in law when he directly apply section 18 (1) of the Sentencing Penalties Decree 2009 without making any enquiry hearing whether it was mandatory to impose a non-parole sentence on the appellant's case, that the appellant do referred to Jone Vakacegu HAC 119 of 2016.

Ground 1

[11] It appears that the real concern expressed by the appellant, to my mind, is the inadequacy of reasons in the judgment for the verdict of guilty.

[12] I had the occasion to consider the issue of inadequate reasons in somewhat detail in **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023) and **Prasad v State** [2023] FJCA 280; AAU45.2022 (18 December 2023) and the proposition of law, I arrived at is as follows:

'Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's

explanation in its own reasons is sufficient. There is no need in that case for a new trial.'

'If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court i.e. to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an error of law within the meaning of section 23 of the Court of Appeal Act. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act.'

[13] Having perused the judgment in this case and applying the above proposition of law, I am not satisfied that the reasons are inadequate for the acceptance of the prosecution case and rejection of the defence case and ultimately the verdict of guilty. Reasons are sufficiently intelligible to permit appellate review of the correctness of the decision.

Ground 2

[14] Contrary to the appellant's assertion, the High Court judge had indeed considered the possibility of a lesser offence of sexual assault (see paragraphs11-16 & 97 of the judgment) but rejected it and concluded that the charge of rape had been proved beyond reasonable doubt.

Ground 3

[15] This ground of appeal focuses on the issue of penetration. For the offence of rape even the slightest penetration is sufficient.

[16] According to the victim, the appellant had put his penis inside her mouth and urinated. She had tasted urine. She had made very prompt complaints to aunt, Kinisela Naituku and mother Lavenia Lagimirimiri of the very fact that appellant had put his penis inside her mouth. When confronted by the mother, the appellant had apologised and

asked her not to report the matter to police. In the cautioned interview (produced by the prosecution unchallenged by the defence and therefore without the need for a *voir dire* inquiry), the appellant had said that he put his penis *on* the victim's lips. In evidence he had said that he put his penis *in* her lips. Later he had clarified that he put his penis *on* the victim's lips. He had denied urinating in her mouth too. The victim had denied that the appellant only put his penis on her lips.

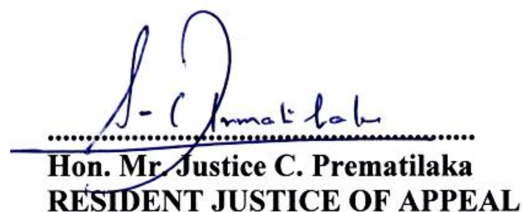
[17] The trial judge had analysed the appellant's position that he only put his penis on her lips and not *inside* her mouth *vis-à-vis* the above evidence and rejected it. I see no error in the reasoning by the trial judge. In the light of the defence he took up under oath, he cannot now argue that he unknowingly urinated on her and his penis may have accidently touched her mouth or what he did was not of sexual nature (as he had agreed the reason why he took out his penis and put it inside the complainant's mouth was because he wanted her to suck his penis and have oral sex – see paragraph 74 of the judgment).

Ground 4

[18] In terms of section 18(1) [as amended by Act No. 29 of 2019 (22 November 2019)] of the Sentencing and Penalties Act, the sentencing judge must fix a non-parole period when the term of imprisonment is life or over 02 years. There was no need for an inquiry to decide whether the non-parole period was mandatory or not.

Orders of the Court:

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



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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent