

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

CRIMINAL APPEAL NO. AAU 0037 OF 2023
[Suva High Court: HAC 95 of 2022]

BETWEEN : **RAFAELE RAKAI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Qetaki, RJA

Counsel : Ms Sharma, N for the Appellant
Mr Nasa, S for the Respondent

Date of Hearing : 11th February, 2025

Date of Ruling : 28th February, 2025

RULING

Background

[1] The Appellant was charged and convicted with the following offences:

Count 1:

Rape: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act of 2009. **Rafaele Rakai** between 1st day of January 2019 and 31st December 2019, at Chadwick Road, Nakasi, in the Eastern Division, had carnal knowledge of “**AB**”, a child below the age of 13 years.

Count 2:

Rape: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

Rafaele Rakai between 1st day of January and 31st day of December 2019, on the same occasion as **Count 1**, at Chadwick Road, Nakasi, in the Eastern Division, penetrated the mouth of “**AB**”, a child below the age of 13 with his penis.

Count 3:

Rape: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Rafaele Rakai between the 1st day of January 2019 and 31st December 2019, on an occasion other than **Counts 1 and 2**, at Chadwick Road, in Nakasi, in the Eastern Division, penetrated the vulva of “**AB**”, a child below the age of 13 years, with his tongue.

Count 4:

Sexual Assault: Contrary to section 210(1) (a) of the Crimes Act 2009.

Rafaele Rakai between the 1st day of January 2019, and 31st day of January 2019, at Chadwick Road, in Nakasi, in the Eastern Division, unlawfully and indecently assaulted “**AB**”, by making her touch his penis.

Count 5:

Sexual Assault: Contrary to section 210(1) (a) of the Crimes Act 2009.

Rafaele Rakai between 1st day of January 2019 and 31st day of December 2019, at Chadwick Road in Nakasi, in the Eastern Division, unlawfully and indecently assaulted “**AB**”, by touching her buttocks.

Count 6:

Rape: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Rafaele Rakai between the 1st day of January 2020 and 31st December 2020, on an occasion other than, **Count 5**, at Chadwick Road in Nakasi, in the Eastern Division, penetrated the vulva of “**AB**”, a child below the age of 13 years, with his finger.

Count 7:

Rape: Contrary to section 207(1) and (2)(a) and (3) of the Crimes Act 2009.

Rafaele Rakai between the 1st of January 2020 and 31st day of December 2020, at Chadwick road, in Nakasi, in the Eastern Division, had carnal knowledge of “**AB**”, a child below the age of 13 years.

Count 8:

Rape: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Rafaele Rakai between the 1st day of January 2021 and 31st day of December 2021, at Chadwick Road, in Nakasi, in the Eastern Division, penetrated the vulva of “**AB**”, a child below the age of 13 years, with his tongue.

Count 9:

Rape: Contrary to section 207(1) and (2)(a) and (3) of the Crimes Act 2009.

Rafaele Rakai between the 1st day of January 2021 and 31st December 2021, at Chadwick Road, on an occasion other than **Count 8**, in Nakasi in the Eastern Division, has carnal knowledge of “**AB**”, a child below the age of 13 years.

Count 10:

Rape: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Rafaele Rakai between the 1st day of January 2021 and 31st of December 2021, at Chadwick Road, in Nakasi, in the Eastern Division, had carnal knowledge of “**AB**”, a child below the age of 13 years.

[2] On 3rd May 2022, the accused pleaded guilty to two offences of Rape as charge under counts three (3) and six (6) of the Information and two counts of Sexual Assault (Counts 4 and 5). He pleaded not guilty to the other counts. The hearing commenced on the 16th of August 2022 and concluded on 17th of August 2022. The Prosecution called only one witness that was the Complainant.

[3] After the Prosecution’s evidence, the learned Counsel for the Prosecution conceded that the Complainant provide no evidence for counts 7, 8, 9 and 10 of the Information and invited the Court to act under section 231 (1) of the Criminal Procedure Act. The Court

accordingly found the Accused not guilty of counts 7, 8, 9 and 10, and acquitted the Appellant of the same. Only Counts 1 and 2, both of Rape remain, and are to be tried.

[4] On counts one and two, the Accused opted to exercise his right to remain silent, and offered no evidence. After the trial the Accused was found guilty of one count of Rape under section 207 (1) (2) (a) and (3) of the Crimes Act and one Count of Rape, contrary to section 207(1) (2) (c) and (3) of the Crimes Act and was so convicted on 23 August 2022. The Accused was sentenced on 26th August 2022 to 18 years and 6 months imprisonment with a non-parole period of 16 years and 6 months.

[5] On 16th March 2023 the Appellant filed a Notice of Appeal, which was untimely, advancing three grounds of conviction and one ground against sentence. A ground of appeal alleging that the learned Judge erred in law and in fact when he did not put the case of the appellant to the assessors in a fair and balanced and objective manner, has been discarded as it is not relevant. On 21st September 2023, the Legal Aid Commission filed a Notice of Motion Seeking Enlargement of time and Amended Notice of Appeal for the Appellant.

[6] The consolidated grounds of appeal of the Appellant are as follows:

Appeal against conviction

1. That the learned trial Judge should have impressed upon the prosecution that due to the serious inconsistencies and infirmities in witness testimony she is an unreliable witness and not worthy of credibility and it is unsafe to act on her evidence.
2. That the learned trial Judge erred in law and fact when he did not consider in the judgment of the court the inconsistency between the complainant evidence given at trial and the medical evidence report.

Appeal against sentence

4. That the Honorable trial Judge erred in law and passed a sentence that is “*harsh and excessive.*” He is a first offender and there was no consideration for a “*suspended sentence*”.
5. That the learned trial Judge erred in principle when sentencing the appellant by selecting a starting point and “double-counting” aggravating factors, resulting in the final sentence being harsh and excessive.

[7] On 11th December 2024 , the Appellant filed an Application for Enlargement of Time against conviction, advancing the following reasons as contributing to the delay in filing of the appeal Notice and grounds:

(a) “ .. during the appeal period I had not made up my mind to appeal as I had pleaded guilty to some counts. However, after I was visited by LCA and received advice on the same, I decided to pursue appeal against conviction and sentence. I was only able to prepare my documents by 13th March 2023. The appeal is out of time by over 2 years. ”

(b) “I strongly believe that I have strong grounds of appeal against conviction and which has high prospects of success. ”

[8] On 21st September 2023, the Appellant through the Legal Aid Commission, filed a Notice of Appeal Against sentence, and an Application for Enlargement of Time Against Sentence. The ground of appeal against sentence being:

“1. The learned Judge erred in principle when sentencing the Appellant by selecting a high starting point and “double counting” aggravating factors, resulting in the final sentence being harsh and excessive. ”

[9] In the Affidavit in Support, the Appellant deposed to the following, amongst others:

“6. Whist serving my sentence during the appealable period, I had not made up my mind to appeal as I had pleaded guilty to some counts.

However, after I was visited by Legal Aid Commission and received advice on the same, I decided to pursue appeal against conviction and sentence. I was only able to prepare my documents by 13th March 2023 and the same was filed at Court of Appeal Registry on 16 March 2023. The appeal is out of time by 6-7 months.

7.

8. *My counsel had prepared an amended notice of appeal against sentence and I verily believe that the same has merits to be argued in the substantive appeal should I be granted leave to do so. I also believe that my appeal ground against sentence has a likelihood of success and I would like to have the chance to have this argued in the appeal hearing....”*

The Law

[10] Under section 21 (a) and (c), a person convicted on a trial held before the High Court may appeal to the Court of appeal (a) against conviction on any ground of appeal which involves a question of law alone; and (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

[11] Section 35 (1) of the Court of Appeal Act empowers the Court to grant leave to appeal, and a Judge of the court may (a) give leave to appeal to the court, and (b) extend time within which notice of appeal or an application for leave to appeal may be given.

[12] The “*test*” for granting leave to appear; to the Full Court is “*To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal*”: **Chand v State** [2008] FJCA 53. The “*test*” for leave to appeal is “*reasonable prospect of success*” in order to distinguish arguable grounds and non-arguable grounds.

[13] For a sentence appeal the applicable principles are as set out in **Kim Nam Bae v The State** Criminal Appeal No. AAU0015/1998S establishing the factors that need to be considered in deciding whether leave ought to be granted, and whether the appeal is arguable or not.

“The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles below. For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of success in appeal.”

[14] The Guidelines are:

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

[15] In an application for Enlargement of Time to appeal against a decision of the High Court, the factors to be considered in the exercise of the Courts discretion whether or not to grant an application, is established in **Rasaku v State** [2013] FJSC 4 and **Kumar v Kumar** [2012] FJSC 17, which are:

- (i) *The reasons 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; and*
- (v) *If time is enlarged, will the respondent be unfairly prejudiced?*

Delay and Reasons

[16] The delay is between 6-7 months. The reasons for the delay filed by the Appellant in person and by the Legal Aid Commission, on behalf of the Appellant, are consistent with each other. On the conviction appeal, the appellant did not go into any detail on the nature and substance of the legal advice he received from the Legal Aid Commission. He also states that the advice persuaded him to file his notice of appeal, and he strongly believes

that he has good prospects of success. He did not explain and elaborate on the factors (evidence and law) that supports his belief that he has good prospects of success.

[17] In consideration of the length of delay and its reason, I am not satisfied that the explanations are acceptable and reasonable under the circumstances. The Appellant had sufficient time to fully consider whether to appeal his conviction, after the delivery of Judgment. He had pleaded guilty to counts 3, 4, 5, and 6, he was found not guilty of counts 7, 8, 9, and 10. He denied counts 1 and 2 and after a fair trial in which he was totally in denial of the charges, opted to exercise his right to remain silent.

[18] On the sentence appeal, the reasons for the delay appear to be acceptable, in consideration of the grounds of appeal against sentence and its prospects of success. Bearing in mind the principles in **Rasaku** (supra) and **Kumar**, and the contention that the grounds against sentence have good prospects of success, the delay can be excused.

Is there a ground of Merit?

[19] Conviction Grounds

Ground 1, 2: Is there an arguable ground of appeal or put another way, is there a ground of merit? The Accused pleaded guilty to two offences of Rape (Counts 3 and 6), and two offences of Sexual Assault (Counts 4 and 5). He pleaded not guilty to the other counts. After the Prosecution evidence the learned Counsel for the prosecution conceded that there was no evidence provided by him for offence of Rape in Counts 7, 8, 9 and 10 of the Information and a verdict of not guilty was recorded under section 231 (1) of the Criminal Procedure Act 2009.

[20] The learned Judge at the end of the trial for offences of Rape committed under Counts 1 and 2, found the Accused guilty of both counts. The reasons for the delay cannot be regarded as acceptable in the circumstances of the guilty plea already taken, the exercise of powers under section 231(1) of the Criminal Procedure Act 2009, and the verdict on Counts 1 and 2.

[21] The grounds of appeal have no prospect of success. The grounds of appeal cover the following aspects; serious inconsistencies and infirmities in the Complainants evidence which affect her credibility; inconsistencies between complainant's evidence and the medical report. All these issues were adequately addressed in the Judgment It is the Judge who found the Accused guilty of Counts 1 and 2 after careful consideration and analysis of all the evidence, that are relevant, including Evidence of Recognition (paragraphs 15 and 16); Probability of Accused approaching the Complainant while she was sleeping with her cousins (paragraphs 17 and 18); Penetration (paragraphs 19, 20, 21) and Delay in Reporting the Matter (paragraphs 22, 23, 24, 25 and 26). The trial Judge at paragraph 27 of Judgment stated:

“.....I am satisfied that the Prosecution has successfully proven beyond a reasonable doubt that the Accused had committed these two offences of Rape as charged under counts one and two of the Information.”

The Grounds against conviction are not arguable. They have no merit.

[22] Sentence Ground 1: The following factors are to be considered: Did the trial Judge acted on a wrong principle; allow extraneous matters to guide or affect him; mistake the facts; failed to take into account some relevant consideration. The trial Judge considered that six offences which the Accused had committed are founded on the same series of facts with similar character, and imposed an aggregate sentence in line with section 17 of the Sentencing and Penalties Act.

[23] The trial Judge consider that the maximum penalty for Rape is Life Imprisonment, and the tariff for Rape for a child is between 11-20 years' imprisonment period: Gates CJ in Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2nd November 2018) .That the maximum penalty for Sexual Assault is ten year's imprisonment, however in State v Ratabacaca Laca [2012] FJHC 1414; HAC 252.2011 (14th of November 2012) ,in sentencing Justice Madigan had expounded the tariff of the offence of Sexual Assault as

between 2 years to 8 years imprisonment. He considered the aggravating factors (paragraphs 9 to 13) and the mitigating factors (paragraphs 14 to 19) and arrived at the Head Sentence of 19 years imprisonment as an aggregate sentence with a non-parole period of 17 years in line with section 18 (1) of the Sentencing and Penalties Act 2009. The sentencing Judge deducted Six (6) months for the period of imprisonment already served in line with section 24 of the Sentencing and Penalties Act 2009, thus arriving at the Actual Sentencing Period, which is eighteen (18) years and six (6) months.

[24] The Appellant's submissions through the Legal Aid Commission was comprehensive, analyzing the factors established in **Kim Nam Bae** (supra), the other factors which were considered by the trial Judge in sentencing the Appellant. It commented on the concerns of the Supreme Court regarding the selection of the "*starting point*" in the two tied approach to sentencing in the face of criticisms of "*double counting*": **Senilolokula v State** [2018] FJSC 5.

[25] The Appellant in his submissions demonstrated the vast disparity in the sentences passed unto the offenders against the sentence imposed onto the Appellant, which establish the fact that no two cases are the same. In the circumstances of this case, whether the sentence imposed on the Appellant is justified or not, should be decided by the Full Bench of the Court. "*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*" **Koroicakau v State** [2006] FJSC 5.

Conclusion

[26] In consideration of the foregoing, the application for enlargement of time to appeal conviction is disallowed. The application for enlarging of time against sentence is allowed.

Orders of Court:

1. *Application for Enlargement of Time to appeal against conviction is refused.*
2. *Application for Enlargement of Time to appeal against sentence is granted.*



A handwritten signature in blue ink, appearing to be "Alipate Qetaki", is written over a solid black horizontal line.

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL