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

CRIMINAL APPEAL NO. AAU 115 OF 2023
[Lautoka High Court: HAC 111 of 2017]

BETWEEN : **NACANIELI RAIDA CAGIMAICAMA**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Ms L Ratidara for the Appellant
Mr R Kumar for the Respondent

Date of Hearing : 22 April, 2025

Date of Ruling : 25 April, 2025

RULING

Background

[1] The Appellant had been tried and convicted for the following two offences as per the Information vide Lautoka High Court HAC 111 of 2017:

First Count

Statement of offence

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

Particulars of offence

Nacanieli Raida Cagimaicama *between the 01st day of January, 2016 and 31st day of December 2016 at Vatudua Settlement, Rakiraki, Ra in the Western Division, unlawfully and indecently assaulted* ***"UT"****, by licking her vagina.*

Second Count

Statement of offence

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

Particulars of offence

Nacanieli Raida Cagimaicama*, between the 01st day of April, 2017 and the 30th day of April 2017 at Vatudua Settlement, Ra in the Western Division, penetrated the vagina of* ***"UT"****, with his penis, without the consent of the said* ***"UT".***

[2] The Appellant on 20 August 2020 was convicted by the High Court of Fiji at Lautoka for the one count of Sexual Assault and one count of Rape as charged. Upon conviction, the Appellant was sentenced on 4 September 2020 to 17 years and 9 months imprisonment with a non-parole period of 15 years.

[3] The Appellant on 26 September 2023 lodged an untimely appeal against conviction. Further, on 3rd February 2025 the Appellant filed an Amended Notice of Appeal against conviction and sentence. Also on 3rd February 2025, the Appellant filed a Notice of Motion (with an Affidavit in Support) seeking the *following* orders, that:

1. An extension of time within which to appeal conviction be granted to the Applicant;

2. Leave to appeal be granted to the Applicant to appeal against conviction;

3. Any other orders the Court deems just in the circumstances of the application.

Grounds of Appeal

[4] The grounds of appeal are:

Appeal against Conviction - Ground 1

That the learned Judge erred by failing to properly consider the issue of delayed reporting of the complainant.

Appeal against Sentence - Ground 1

That the sentence was harsh and excessive.

The Law On Enlargement of Time

[5] Section 35(1) (b) of the Court of Appeal Act empowers a Judge of the Court to extend the time within which notice of appeal or of an application for leave to appeal may be given. A relatively recent Ruling of this Court in **Gusuivalu v State** [2024) FJCA 188; AAU074.2023 (30 September 2024) endorsed the principles with regard to the factors/guidelines to be considered by the court in an untimely application for leave to appeal (paragraphs 7 and 8), be they conviction or sentence, as set out in paragraphs [18] and [19] in **Rasaku v State** [2013] FJSC 4; CAV0013 of 2009 (24 April 2013) , and **Kumar v State; Sinu v State** [2012] FJSC 17; CAV0001 of 2009 (21 August 2012). The following factors will be considered by a Court in Fiji for granting of enlargement of time:

(i) The reasons for the failure to file within time.

(ii) The length of the delay.

(iii) Whether there is ground of merit justifying the Appellate Court's consideration.

(iv) Whether there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced. See **Kumar v State; Sinu v State** (supra).

Reasons for the delay and Length of the delay

[6] The Appellant had stated the reasons for the delay in paragraphs 3 to 8 of his Affidavit, and the reasons may be summarized as follows:

At the time of sentencing the Appellant was held in Naboro Maximum Correctional Center in 2000. He was assisted by an inmate in drafting the appeal grounds, the same was given to Corrections officers to file. He did not receive any update from the Corrections office on his appeal grounds. He re-dated his appeal grounds and asked the Corrections Officer to file the same. He did not receive any update on the second set of appeal grounds. In 2023, the Appellant was in Suva Prison when he was assisted by another inmate with the appeal grounds and it was filed on 26 September 2023. The appeal is out of time by 3 years 1 month and 7 days due to the above reasons. The Appellant is aware that the filing is late, but he still intends to appeal against conviction. So, he applied to the Legal Aid Commission for assistance.

[7] The Legal Aid Commission had assisted in preparing and filing the Appellant's Application for Enlargement of Time and the Amended Grounds of Appeal against both conviction and sentence. The Appellant believes that the grounds of appeal have reasonable ground of success.

[8] The Respondent submits that the reasons for the delay of 3 years may be plausible, but it submits that, the reasons are unconvincing as *"many appellants do often manage to file a timely appeal (sometimes even on the day of sentencing)"*. The Respondent states that *"the Appellant's reasons cannot be refuted (or accepted) however, the appeal merits are the key consideration…."*

[9] The Respondent submits that a delay of more than 3 years to appeal both conviction and sentence is substantial.

[10] In this situation, the Court has to consider whether there is a ground of merit to justify the delay.

Ground of Merit

[11] The law views it as necessary for the Appellant to show that his appeal grounds have sufficient merit to excuse the delay, and be considered by the Court of Appeal: **Fisher v State** [2016] FJCA 57; AAU132.2014 (28 April 2016). The Supreme Court has

acknowledged that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals. However those difficulties do not by themselves justify setting aside the requirements of the Act and the Rules: **Raitamata v The State,** CAV 2 of 2007 (25 February 2008) and **Sheik Mohammed v The State,** CAV 2 of 2003 (27 February 2004).

[12] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019), this Court recognized and acknowledged the test of *"reasonable prospect of success"* to identify whether an arguable ground of appeal exists, as considered in **Caucau v State** AAU029 of 2016; 4 October 2018[2018]FJCA 171; **Navuki v State** AAU0038 of 2016; 4 October 2018[2018]FJCA 172 and **State v Vakarau** AAU0052 of 2017; 4 October 2018 [2018]FJCA 173 and **Sione Sadrugu v The State** Criminal Appeal No.AAU0057 of 2015; 06 June 2019. The Court, in **Nasila** also observed that in order to obtain enlargement or extension of time the appellant must satisfy the court that his appeal not only has "merits" and would probably succeed but also has a "real prospect of success" see **R v Miller** [2002] QCA 56 (1 March 2002) on any grounds of appeal. If not, an appeal with a very substantive delay does not deserve to reach the stage of full court hearing. The above test would help achieve the criteria for enlargement of time as set out by the Supreme Court in **Rasaku's** case.

[13] For appeals against sentence, the guidelines are whether the sentencing Judge:

(i) Acted upon 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 consideration:* **Naisua v State** (supra); **House v King** [1936] HCA 40;(1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No. AAU0015.

Appellant's Case

[14] On the conviction ground, the Appellant alleges that the learned Judge erred by failing to properly consider the issue of delayed reporting of the complaint. He relied on the

principles applied in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2014) where His Lordship Justice Gamalath discussed at some depth the issue of delayed reporting in the context of the *"totality of circumstances test"* as an approach in evaluating the delay in reporting in order to determine the credibility of the evidence. That the test to be applied on the issue of the delay in making a complaint is described as *"the totality of circumstances test"*. In **Tuyford** 186, N.W. 2nd at 548, a United States case, it was decided that:

> *"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."*

[15] As held by Justice Gamalath, an unexplained delay, does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not depends on the facts and circumstances of a particular case. Under such circumstances, the Court needs to evaluate all the evidence presented during the hearing to determine whether the evidence given by the complainant is true. Therefore, the explanation for the delay is essentially material in assessing the credibility of the evidence presented by the complainant.

[16] The Appellant contends that the complainant did not raise any complaints at the first available opportunity and her explanation for the delay is not satisfactory. For example, the complainant's explanation on why she never reported the matter to police or her aunt after the first incident does not make sense, see paragraphs 41 and 59 of Summing Up.

[17] The Appellant submits that on the evidence of the complainant, the main reason why she never informed her aunt during the one-week holiday was that she was worried about her mother's safety. She confirmed she was staying with her aunt (at paragraph 41 of Summing Up), however, her aunt contradicted that in her evidence saying the

complainant did not stay with her during the one-week school holiday, and that she was with her elder sister - See paragraph 88 of Summing Up. The Appellant submits that under the circumstances, the complainant's reason does not make sense if she was never with her aunt in the first place.

[18] The Appellant submits that, the complainant had told the aunt about the incident on 28 May 2017, after they had returned from the police post at Dobuilevu for an unrelated matter, on their way home (paragraph 83 of Summing Up), and on that occasion the complainant only told the aunt part of what the Appellant had done to her, that is, the allegation that the Appellant harassed her by touching her breast. The Appellant submits that the complainant was 17 years old at that time so there is no real reason why she would not inform her aunt before they went to the police post in the first instance. What the complainant told her aunt was the allegation against the appellant of the incident in 2016. She said nothing about the second incident which she told her aunt at the Rakiraki Hospital (see paragraph 86 of the Summing Up). The complainant confirmed this at paragraphs 67 and 68 of Summing Up. The Appellant submits that the complainant had nothing to fear for she was in the presence of police officers at the police post and her mother was with them so she was not in any danger from the Appellant; and it is illogical on why she did not complete her story about both alleged incidents at the police post.

[19] The Appellant submits that, the complainant mentioned she was scared of the Appellant but she did not hate him (paragraph 67 of Summing Up), however in paragraph 70 of Summing Up the complainant said she did not make up the allegations although she disliked the accused. The complainant gave contradictory evidence with regards to her feelings towards the Appellant. She first said she did not hate him but then informs that she dislikes him and there is no elaboration on why she dislikes him. Can her dislike of him be a contributing factor on why there was a delay in her complaint?

[20] On the ground against sentence, the Appellant submits that the sentence was harsh and excessive. That the learned sentencing Judge did not give much discount to the fact that the Appellant had been of good behavior until he was sentenced in 2020 when he was 64 years of age. That there should be more discount for good behavior, and the fact that only

one year was deducted for the same is unfair to the Appellant, and it made the sentence harsh and excessive.

Respondent's Case

[21] The Respondent in reply to the Appellant's submission on conviction, submits that the trial Judge had covered the issue of delayed reporting adequately in paragraphs 90 to 97 of Summing Up, and in paragraph 34 of Judgment. That the conviction appeal is misguided and has no merit.

[22] On the sentence appeal, the Respondent submits that a final aggregate term of 18 years imprisonment vis-à-vis the applicable 11 to 20 year tariff is on the higher side. The argument that not much discount was allowed by the sentencing Judge is unlikely to succeed because, when the aggravating factors and tariff are considered, it is plain to see that an element of double counting has crept into the sentencing process. The 11 to 20 year child rape tariff takes into account certain factors such as 'age difference', which was again used as an aggravating factor in this case, and it appears the final sentence of 18 years (before discounting for time in remand) was a result of double counting of age difference. The Respondent submits that while it was observed in Aitcheson that more heinous crimes would certainly exceed the 11 to 20 year tariff however, this case was not as egregious as Aitcheson's case.

Is there prejudice to the Respondent?

[23] The Respondent submits that while the conviction appeal lacks merit, there appears some prospects of success in the sentence appeal. There would certainly be no prejudice to the State if the belated application to appeal the Appellant's sentence were to be permitted.

Disposal

[24] In conclusion the Respondent submits that the application for enlargement of time for leave to appeal against conviction ought to be refused. However, the application for enlargement of time for leave to appeal sentence may be properly allowed, as some double counting may have inadvertently crept into the sentencing process.

Analysis

[25] At the hearing of this application the Appellant and the Respondent confirmed their reliance on the written submissions already filed and before the Court. The Appellant seeks an enlargement of time in which to seek the leave of this Court to appeal his conviction and sentence by the High Court. The factors to be considered when a Judge determines an application is set out in paragraph [5] above, including the reasons for the failure to file within time, the length of the delay, whether there is ground of merit justifying the Appellate Courts consideration, whether there has been a substantial delay; nonetheless is there a ground of appeal that will probably succeed, and if time is enlarged, will the Respondent be unfairly prejudiced.

[26] The reasons provided by the Appellant as causing the delay has been articulated in paragraph [6] above, and the cause of delay has been largely attributed to the Corrections Department. Although the Corrections Department was not given an opportunity to comment on the reasons for the delay in this case, the reasons given are not unfamiliar to the Court, and not peculiar to this case. Perhaps the Corrections Department's service delivery to serving prisoners on this aspect is due for a thorough review to ensure that a serving prisoner in a similar position as the Appellant, is not impeded or unnecessarily denied his/her right of access to the Appellate Courts, in accordance with section 14 (2) (o) of the Constitution, and the rules and procedures of Courts.

[27] A delay of 3 years is a substantial delay, and the reasons for the delay in my view appear not convincing as a justification, and has to be assessed in light of whether there is a ground of merit. The law views it as necessary for the Appellant to show that his appeal ground has merit to excuse the delay, and be considered by the Court of Appeal: **Fisher v State** (supra).

[28] The appeal against conviction, to be successful, must meet the applicable test of reasonable prospect of success, and to identify whether an arguable ground of appeal exists- see **Nasila v State** (supra), **Caucau v State** (supra) and related cases - see paragraph [12] above. The primary and only contention is, that the learned Judge erred

by failing to properly consider the delayed reporting of the complaint. The Appellant submits the principles enunciated in **Serelevu v State** (supra) is to be applied.

[29] In that case His Lordship Justice Gamalath applied the *"totality of circumstances test"* in evaluating the delay in reporting in order to determine the credibility of the evidence. In **Tuyford** (supra) the circumstances under which the totality of circumstances test is applied in the United States are described, which may be listed as follows: *(i) The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of the evidence. (ii) The complaint should be within a reasonable time. (iii) The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. (iv) By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity, within a reasonable time or whether there was an explanation of the delay*.

[30] Justice Gamalath held that an unexplained delay, does not necessarily or automatically render the prosecution case doubtful. Whether a case becomes doubtful or not depends on the circumstances of a particular case, and the Court needs to evaluate all the evidence presented during the hearing to determine whether the evidence given by the complainant is true. The explanation for the delay is essentially material in assessing the credibility of the evidence presented by the complainant.

[31] Did the complainant raise any complaints at the first opportunity? The Appellant had raised pertinent issues demonstrating that the complainant's explanation for the delay in reporting is not satisfactory as discussed in paragraphs [16] to [19] above.

[32] However, as rightly observed by the learned trial Judge, victims of sexual offences react differently to what they may have gone through, some in distress and anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily

demonstrate a true complaint. The matter and circumstances of each case has to be determined in its own context.

[33] A recent complaint evidence of the nature discussed in this appeal, is not evidence of what actually happened between the complainant and the accused, for example, the complainant's aunt Meiva, was not present and did not see what happened between the complainant and the accused. It is the assessors who are to determine the facts and whether they believed the complainant or not with respect to her complaint to her aunt and the manner and timing of the complaint to her aunt. The Appellant does not believe in the complainant's version, and contend that the complainant did not volunteer the information that the Appellant had sexual intercourse with her, but it was after being questioned on the matter.

[34] After the Summing Up and the deliberation by the assessors, the assessors returned a unanimous verdict of guilty on both counts, which the learned trial Judge accepted.

[35] In paragraphs 34 to 37, the learned trial Judge stated:

> *"34. There was a delay in reporting the first allegation of sexual assault for about one year, from May 2016 to May 2017, however, considering the circumstances of the complaint this delay was inevitable it was not that the complainant did not want to tell anyone about what the accused had done to her. The complainant and her mother could not leave the accused house and they were scared of the accused as well.*
>
> *35. There has also been some inconsistencies between the evidence of the complainant and her aunt Meiva about when the complainant told her aunt about what the accused had done to her and exactly what was told to Meiva. It is understandable that the complainant was faced with a compelling situation arising from within her own household by the very person in whose house the complainant was living and considering the passage of time the inconsistencies between the complainant's evidence and the evidence of Meiva did not create any doubt on the credibility of the complainant.*

36. In my judgment the complainant did convey to her aunt important and relevant information about what the accused had done to her which was enough to alert her aunt. There was no need for the complainant to give exact details of everything whether the complainant told her aunt about what happened to her at the Dobuilevu Police Post or at the Rakiraki Hospital is immaterial as long as the complainant did tell her aunt what had happened to her.

37. The inconsistencies in my view was a natural occurrence due to lapse of time. The doctor who examined the complainant in his medical findings also found that the hymen was not intact and there was sexually transmitted infection upon vaginal examination of the complainant. Meiva also told the truth about what the complainant had told her at Dobuilevu."

[36] The above seems to best sum up the circumstances surrounding the delayed reporting complaint and ground. The Appellant's ground of appeal against conviction has no merit. It is not arguable.

[37] On sentence, the Appellant contends that his sentence of an aggregate of 17 years 9 months imprisonment with a non-parole period of 15 years to be served before the accused is eligible for parole is harsh and excessive under the circumstances. The Respondent regard the sentence as on the higher side given the tariff of 11 to 20 years. The ground of appeal is unlikely to succeed. The serious nature of the offences committed by the Appellant on the victim who was his stepdaughter aged 17 years is reflected in the sentence.

[38] Section 4(1) of the Sentencing and Penalties Act 2009 requires (as done by the learned trial Judge) that, the sentence under the circumstances, be given for the purpose of punishing the offender to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same similar nature. A non-parole period is imposed in line with section 18(1) of the Sentencing and Penalties Act to act as a deterrent to others and for the protection of the community. It cannot be ignored however, that the Appellant while being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period

which is too close to the head sentence under the circumstances of this case, will not be justified as such.

[39] A final aggregate term of sentence of 17 years imprisonment vis-à-vis the applicable tariff of 11 to 20 years tariff, appear to be on the higher side. The argument that there has not been sufficient discount allowed by the sentencing Judge, cannot succeed. It appears that double counting has occurred in the sentencing process when the aggravating factor and the tariff are considered, that is with respect to the age difference. A child rape tariff takes into account certain factors such as age difference (used as an aggravating factor in this case), the final aggregate sentence of 18 years, before discounting for time in remand, was a result of double counting of the 'age difference'. The Respondent pointed out that, "*as observed in Aitcheson that more heinous crimes would most likely exceed the 11 to 20 years tariff*, however, this case is not one of such case. The ground against sentence is arguable.

Conclusion

[40] In the final, the application for enlargement of time for leave to appeal against conviction fails. The application for enlargement of time for leave to appeal against sentence succeeds, because there appears to be an element of double-counting (of age difference) in the aggregate sentence of 18 years imprisonment, before deduction of period already served on remand, and tariff of 11 to 20 years.

Order of Court

1. *Application for Enlargement of time for leave to appeal against conviction disallowed.*
2. *Application for Enlargement of time for leave to appeal against sentence allowed, on the issue of double-counting.*

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL