

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO. HAA 001 of 2018**  
**[Magistrates' Court Criminal Case No. 70 of 2013]**

**BETWEEN** : **MOHAMMED FAIYUM** **APPELLANT**

**AND** : **THE STATE** **RESPONDENT**

**Counsel** : **Mr. J. Singh for the Appellant**  
**Ms. L. Bogitini for the Respondent**

**Date of Hearing** : **9 March 2018**

**Date of Judgment** : **20 March 2018**

**JUDGMENT**

[1] This is untimely appeal against sentence only. On 16 May 2013, the appellant was charged with indecent assault contrary to section 212(1) of the Crimes Act 2009. The charge alleged that the appellant on 3 July 2011 at Bureta, Ovalau, unlawfully and indecently assaulted E A. After numerous adjournments, on 13 September 2017, the appellant pleaded guilty to the charge in the Magistrates' Court at Levuka. The appellant was represented by counsel when he pleaded guilty. On 18 September 2017, the appellant was sentenced to 18 months' imprisonment.

[2] The appeal was filed on 18 January 2018. The appeal is late by 3 months. The appellant explained the reasons for the delay in his affidavit. He was handicapped in filing a timely

appeal due to his incarceration. His sole ground of appeal is that his sentence is harsh and excessive.

- [3] The learned magistrate used the two-tiered approach to give the reasons for the sentence. He first considered the seriousness of the offence and then adjusted the sentence to reflect the mitigating and aggravating factors.
- [4] The maximum penalty prescribed for indecent assault is 5 years imprisonment. The recognized tariff for indecent assault is 1 - 4 years' imprisonment (*Rokota v The State* [2002] FJHC 168; HAA0068J.2002S (23 August 2002). The seriousness of the actual act of the offender will depend upon the following factors:
- (a) Whether the victim was a child or an elderly person or vulnerable due to physical or mental illness.
  - (b) The nature of the assault – was the act fleeting or invasive.
  - (c) Whether any weapon was used.
  - (d) Whether the victim was physically harmed or humiliated or psychologically traumatized.
  - (e) Whether the incidents were repeated over a prolonged period of time.
  - (f) Whether there was a breach of trust.
  - (g) Whether the offender has taken responsibility for his conduct and expressed genuine remorse.
- [5] In this case, the victim was a juvenile girl. She was 14 years old. The incident occurred when she was returning home from church by foot. The appellant stopped his vehicle (truck) and offered to give her a ride. Although she did not know him, she decided to take the offer and got into the truck. She sat on the front passenger seat. He asked her whether he could touch her. She replied no. At that point the appellant touched her breast. The victim protested and pushed his hand away. Despite the victim's protests, the appellant continued to fondle her breast and also kissed her on the lips. He stopped when they were about to reach her village.

- [6] At the time of offending, the appellant was 26 years old and single. At the time of sentencing, he was married with two children. He had previous good character. The learned magistrate used 16 months as a starting point. He discounted the sentence by 4 months to reflect the appellant's previous good character and by another 4 months to reflect the appellant's guilty plea. The learned magistrate said the plea was not an early plea but he gave discount because the victim was saved from giving evidence.
- [7] Although the incident occurred on 3 July 2011, the appellant was not charged until 16 May 2013. The pre-charge delay of two years is unexplained. The appellant was first produced in court on the day he was charged. The charge was explained to him but his plea was not taken. Thereafter, the case was adjourned on twenty seven occasions until 13 September 2017 when the appellant informed the court that he wanted to change his plea and did in fact plead guilty to the charge.
- [8] Section 14 (2) (g) of the Constitution gave the appellant a right to have the trial begin and conclude without unreasonable delay. The Magistrates' Court took more than four years to conclude the case against the appellant. The charge was not complex. Neither the prosecution nor the appellant is at fault. The appellant continuously appeared whenever the case was called in court. But there was a lack of commitment by the court to hold a trial. The delay is systematic and unreasonable. Unreasonable post-charge delay is a relevant consideration in sentencing. As the Court of Appeal in *Sahim v. The State MISC Action No. 17 of 2007* (25 March 2008) said:

The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence.  
(underlining mine)



[9] Similarly, in *AG's Reference* (No. 2 of 2001) [2004] 2 AC 72 Lord Bingham said at [24]:

If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant.

[10] In all circumstances, the appellant's sentence should have been discounted to reflect the unreasonable delay of four years. The appellant has already served 6 months in prison. A just result can be achieved by making the sentence partially suspended so as to provide a remedy for the breach of the appellant's constitutional right to be tried within a reasonable time.

[11] For these reasons, I grant an enlargement of time and allow the appeal.

**Orders of the Court:**

1. Appeal against sentence allowed.
2. The appellant is sentenced to 18 months' imprisonment of which 6 months has already been served and the remaining 12 months is suspended for two years.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Samusamuvodre Sharma Law for the Appellant  
Director of Public Prosecutions for the Respondent