

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

CRIMINAL APPEAL NO.AAU 0132 of 2014
[High Court Criminal Case No. HAC 0074 of 2013]

BETWEEN : **HENRY FISHER**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Mr. Fesaitu. M for the Appellant**
Ms. Alagendra. S and Ms. Fatiaki. J for the Respondent

Date of Hearing : **13 November 2018**

Date of Judgment : **29 November 2018**

JUDGMENT

Gamalath, JA

[1] I have read the judgment in draft of Prematilaka, JA and agree with the reasons and conclusions.

Prematilaka, JA

[2] This appeal arises from the refusal of the Appellant's Application for enlargement of time to file an application for leave to appeal against conviction and sentence by the Single Judge of the Court of Appeal on 28 April 2016.

- [3] The Appellant had been convicted for (1) having had carnal knowledge of 10 year old P (name withheld) by penetrating her vagina with his finger between 01 January 2011 and 23 April 2011 and (2) having had carnal knowledge of P by penetrating her vagina with his penis between 24 January 2011 and 30 April 2011. Both offences are alleged to have been committed at Yadua Island Bua in the Northern Division punishable under section 207 (1) and (2) (b) of the Crimes Decree, 2009 (now the Crimes Act, 2009).
- [4] After trial the assessors had expressed unanimous opinions that the Appellant, an uncle of the child victim was guilty of both counts. The Learned High Court Judge had concurred with their opinion and convicted the Appellant in his Judgment on 02 July 2014. On 03 July 2014, the Learned Judge had imposed a sentence of 11 years of imprisonment on each count with a non-parole period of 08 years (*i.e.* the mandatory period to be served before the Appellant becomes eligible for parole) to run concurrently from the date of the sentence of the Appellant.

Preliminary observations

- [5] The Appellant had been convicted in the High Court of Fiji at Lambasa and upon being sentenced he had been transferred to Vaturekuka Prison. After serving his sentence there for some time, he had been transferred to Korovou Prison in Suva. While at Korovou Prison he had by himself handed over a hand written application for leave to appeal, belatedly though, on 06 October 2014. The Correction Centre at Suva had typed the Appellant's Application but failed to file it in the Court of Appeal Registry until 06 November 2014. In the circumstances the Single Judge had considered the date of the Appellant's leave to appeal application as 06 October 2014 and determined that there has been a delay of about 08 weeks in filing the leave to appeal application (*i.e.* from 03 August 2014 to 06 October 2014)
- [6] In his first informal communication dated 06 October 2014 called 'an Application of Appeal against conviction and sentence'/'Notice of Leave to Appeal' tendered by the Appellant in person, he had sought leave to appeal in terms of the Court of Appeal Act against the conviction and sentence enabling all 06 grounds of appeal set out

therein to be taken up before the Full Court. He had also indicated that he had lost touch with his counsel from the Legal Aid Commission after the trial in order to file his appeal on time and managed to contact them only after a lapse of time.

- [7] The Legal Aid Commission had filed summons on 04 March 2016 on behalf of the Appellant along with his supporting affidavit dated 20 January 2016 where he had explained the reasons for the delay. In the summons the Legal Aid Commission had sought an extension of time within which to appeal and also permission to file an amended application for leave to appeal.
- [8] Therefore, it appears that though the Appellant in person had directly sought leave to appeal against his conviction and sentence, perhaps being unaware of the limitation of time in section 26(1) of the Court of Appeal Act to prefer a notice of appeal or an application for leave to appeal (30 days from the date of conviction), the Legal Aid Commission had correctly sought an extension of time to appeal and then permission of Court to file an amended leave to appeal application. The Court of Appeal could at any time under section 26(1) extend the time within which a notice of appeal or an application for leave to appeal may be given except in the case of a conviction involving sentence of death.
- [9] It is clear that the Appellant's proposed grounds of appeal involve questions of mixed law and fact but he had not filed a notice of application for leave to appeal against conviction and sentence on such grounds within the time prescribed in section 26(1) read with Rule 35 of the Court of Appeal Rules. Therefore, in the circumstances a notice of application for extension of time (Form 6) in terms of Rule 35(3) read with Rule 40 accompanied by a notice of application for leave to appeal (Form 4) had to be filed by the Appellant to initiate the appeal process to the Court of Appeal. If a single Judge of the Court of Appeal refuses such application an Appellant may have his application determined by the Full Court in terms of section 35(3) read with Rule 41(2).

- [10] The purpose of the notice of application for extension of time to accompany the notice of application for leave to appeal is for the single Judge to see *inter alia* whether there is a ground of merit or a ground of appeal that will probably succeed in deciding the issue whether an enlargement of time to file a belated application for leave to appeal should be granted or not. It is only if such extension of time is granted that the Appellant could formally file and the Court of Appeal would entertain an application for leave to appeal outside the time period of 30 days. Thus, an appellant who has failed to file a timely notice of appeal or an application for leave to appeal should first pass the threshold of obtaining extension of time from the single Judge or failing which from the Full Court, as the case may be, in order to have a valid appeal before the Full Court of the Court of Appeal.
- [11] The Legal Aid Commission had filed written submissions on behalf of the Appellant prior to the single Judge hearing the application for extension of time where grounds 04 to 06 had been described as unarguable and therefore not pursued. Accordingly, only grounds 01 to 03 had been urged before the single Judge upon merits of the appeal in the context of the application for extension of time along with the additional grounds relating to the determination of the application for extension of time. The Respondent had urged the rejection of the Appellant's application for extension of time in its written submissions.
- [12] The single Judge of the Court of Appeal had refused the Appellant's application pursued by the Legal Aid Commission for enlargement of time to file an application for leave to appeal against conviction and sentence on 28 April 2016. Therefore, the single judge had not even considered the question of granting or refusing leave to appeal against conviction and sentence in as much as there was no valid application seeking leave to appeal since the very application for an extension of time within which to file such an application for leave was refused. After the Ruling of the single Judge the Appellant in person had filed what he called a 'Special Leave to Appeal' application on 05 May 2016.

- [13] At the hearing before the Full Court the Legal Aid Commission appearing for the Appellant relied on its written submissions dated 14 March 2016 filed prior to the hearing before the single Judge and the Respondents had filed a fresh set of written submissions dated 24 September 2018.
- [14] As already pointed out if the Appellant's application dated 05 May 2016 is considered to be a renewal application under section 35(3) of the Court of Appeal Act he is entitled to renew only his application seeking extension of time to file an application for leave to appeal out of time. There is no application before this Court to renew an application for leave to appeal as the refusal by the single Judge related only to the Appellant's application for the enlargement of time. However, going by its fresh written submissions it appears that the Respondent had erroneously assumed that what is before this Court is an appeal against conviction and sentence of the Appellant, for the State had urged this Court not only to reject the 'appeal' but also to enhance the sentence imposed on the Appellant. Perhaps, for the same reason, the State's fresh written submissions have not dealt with matters relating to the Appellant's application for extension of time but only with the merits and the request for the enhancement of the sentence.
- [15] The Appellant and his Counsel together had filed a Notice of Abandonment of Appeal dated 06 November 2018 (Form 3) under Rule 39 of the Court of Appeal Rules where the Appellant had applied to Court to abandon his appeal against sentence. However, as pointed out above there is no valid notice of appeal or an application for leave to appeal as yet, for his application for enlargement of time to file such an application for leave to appeal had been refused. Therefore, the result of this abandonment is that this Court would not consider the submissions made on the ground of appeal against sentence in the matter of the renewed application for extension of time.
- [16] At the hearing the counsel for the Appellant also indicated to Court that he would not pursue the first and second grounds of appeal urged and refused by the single Judge. Thus, in terms of considering the question whether there is a meritorious ground or a ground that probably succeed for the purpose of the application for extension of time, I shall only consider the third ground of appeal.

[17] Sufficient guidance is provided for the determination of an Appellant's application for extension of time within which his application for leave to appeal may be filed, by the decisions in **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.

[18] In **Rasaku** the Supreme Court held

'[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in Ratnam v Cumarasamy [1964] 3 All ER 933 at 935 at 935:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.

[19] Enlargement of time has generally been permitted by courts only exceptionally, and only in an endeavor to avoid or redress some grave injustice that might otherwise occur from the strict application of rules of court.

[19] In **Kumar** the Supreme Court held

'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors 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?*

[20] In **Rasaku** the Supreme Court further held

'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always

endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'

[21] I shall now consider each of the above factors.

Reasons for the failure to file within time

[22] The reasons are to be found in his Notice of Appeal dated 06 October 2014 and affidavit dated 20 January 2016. They could be enumerated as follows.

- (i) The Appellant lost touch with his counsel from the Legal Aid Commission after the conclusion of the trial and did not have any documents with him until he managed to contact the said Commission later and by that time a considerable period of time had lapsed.
- (ii) Following his conviction and sentence, the Appellant initially served the sentence at Vaturekuka Prison at Labasa and later transferred to Korovou Prison in Suva where he managed to get the relevant documents but could not file an application for leave to appeal without assistance due to his lack of education and age until another inmate helped him to do so.

[23] As pointed out by the single Judge this Court agrees that incarcerated appellants who are unrepresented do face difficulties in the preparation of their appeals but those difficulties do not justify setting aside the requirements of the Act and the Rules. The Supreme Court in **Raitamata v State** CAV0002.2007:25 February 2008 [2008] FJSC 32 said

'The difficulties facing a person without legal advice in formulating grounds of appeal on questions of law are not to be under-estimated. Those difficulties, however, are not a basis for setting aside the requirements of the Act and the Rules, nor can they be a basis upon which an unsuccessful appellant to the Court of Appeal can simply raise for the first time new grounds upon the basis of which special leave to appeal is sought.' (emphasis added)

- [24] The Appellant had not stated or placed any material to show that he had approached the officials of any of the Prisons for help in order to make an application for leave to appeal until 06 October 2014. Nor had he at least communicated to them or to the Registrar of the Court of Appeal through the Prison officials his desire to lodge an appeal against the conviction and sentence and his difficulty of not having the relevant documents with him and thus, his inability to do so. Any of such steps would have demonstrated the genuineness of and lent credibility to his reasons adduced for the delay. In the circumstances, I am not convinced that the reasons for the delay given by the Appellant are good enough to excuse the delay of 06 weeks.

The length of the delay

- [25] The Appellant was convicted on 02 July 2016 and sentenced on 04 July 2016. Regarding the requirement of adhering to the stipulation of 30 days for filing the notice of appeal or an application for leave to appeal under section 26(1) of the Court of Appeal Act, I endorse the following observations of the single Judge

'[9] In considering the length of the delay it must be recalled that under section 26(1) of the Act the Appellant was required to give notice of his application for leave to appeal against conviction within 30 days of the date of conviction, or, on an application for leave to appeal against sentence that had been imposed on a different date, within 30 days of the date of that decision. The wording of section 26(1) indicates that the 30 days period starts from the date of conviction in respect of an appeal against conviction and 30 days from the date of the sentencing decision in respect of an appeal against sentence. Under those circumstances two notices are required to be filed, each within its time limit of 30 days. However in recent years the practice has evolved in the Court for the period to run from the date of the sentencing decision in respect of both conviction and sentence appeals. This approach has no doubt been adopted on account of most appellants filing in person their appeal papers as incarcerated appellants without access to any legal advice within the 30 days following sentence even when appealing against conviction and/or sentence.' (emphasis added)

- [26] Therefore, in terms of section 26(1) of the Court of Appeal Act the Appellant should have filed his application for leave to appeal no later than 03 August 2014 whereas it

had been tendered only on 06 October 2014. Thus, there is a delay of about 08 weeks which is substantial. In the absence of any material to show that the Appellant has made an attempt to mitigate the delay prior to 06 October 2016 in my view this is not an excusable delay.

Is there a meritorious ground of appeal or a ground of appeal that will probably succeed?

- [27] As pointed out above the Counsel for the Appellant placed only one ground of appeal at the hearing before this Court for consideration in this context. It is as follows.

‘The learned trial judge erred in law in fact when he failed to caution the assessors on the belatedness of the case and the reason it was given and to take great care in approaching the evidence, thereby causing a grave miscarriage of justice.’

- [28] The Appellant in the High Court had been charged with two counts of rape. The first count concerned digital rape while the second count related to penile rape. The offences were committed on two separate occasions on Yadua Island, Bua. The Appellant was the complainant's uncle (her mother's sister's husband) and guardian. The complainant was 10 years old at the time of the offences and was attending a local primary school. The complainant's parents had entrusted her to the Appellant's family for care and protection. At the time of the alleged incidents of rape the Appellant resided with his wife and five children along with the complainant at Vukasa settlement in a house provided by his employer.

- [29] The acts of rape had allegedly taken place between 01 January 2011 and 30 April 2011. It is the village headman named Meli Rokobuli called as a witness by the prosecution who had first reported the matter to the police. He had heard rumours circulating about the complainant in May 2011 and met her in Wakasa Settlement. The complainant had been very scared but told him that the Appellant had twice violated her. When confronted the Appellant and his wife had informed him that they had sorted out matters with the complainant. PC Mikaele had confirmed that the Appellant had been interviewed under caution on 23 June 2011 which means that by that time the allegations against the Appellant had been brought to the attention of the

police. The defence had elicited under cross-examination of the complainant at the trial that she had told her friend Laisani (not called as a witness) of the incidents in May 2011. The complainant, 14 years of age at the time of giving evidence had said that the Appellant had told her not to shout or tell anyone. She had not complained to her aunt fearing that she would not be believed and she had also been afraid that she would not get to stay with the Appellant's family (if she had disclosed the incidents). She had started crying several times under cross-examination. In the circumstances, I do not think that there is an undue or unexplained delay in bringing up the allegation against the Appellant.

[30] The complainant had been medically examined on 22 June 2011 and the doctor had observed a tear at 10 o'clock position in her hymen showing penetrative sexual intercourse and forced entry or struggle during the penetration.

[31] When one examines the cross-examination of the complainant carefully it appears that the defence had not contested the belatedness of the complaint *per se* but the complainant had been tested mainly on some inconsistencies of the complainant's evidence and her previous statements to the village headman and the police.

[32] The Learned Trial Judge directed the assessors on this point as follows

'[28] The incidents of the alleged rape are denied by the Accused. His defence is that the allegations were fabricated by the complainant because of village rumours. The defence further says that the complainant made no complaints to her aunty Susana regarding the allegations. The defence case is that when the complainant realized her mistake, she apologised to her aunty Susana. Susana gave evidence that the complainant denied the sexual allegations were true when she questioned her, and then later the complainant apologised to her. Whether the complainant fabricated the sexual allegations and later apologised for her mistake are questions of fact for you to consider. You may ask yourselves whether a 10- year old girl who was not living with her parents in a traditional village setting could have voluntarily complained about the sexual allegations to her aunty Susana or to someone else in the village or the settlement. These are of course matters for you to consider.'

[33] Thereafter, the Learned High Court Judge in his judgment directed himself as follows.

'[10] On count 1, the complainant's identification of the Accused without any light and by using only the physical built, however, is unreliable form of identification. The complainant said the Accused spoke to her after the alleged event and told her not to tell anyone. This evidence is crucial although the complainant accepted that she told the police the Accused warned her the following morning when she woke up and not immediately after the alleged incident. Whether the warning was made immediately after the alleged event or the following morning is not significant. What is significant is that the Accused warned the complainant not tell anyone about the alleged incident that is subject of count 1. In this regard I accept the complainant's evidence that she was warned by the Accused not to tell anyone about the alleged incident that is subject of count 1. I further accept the complainant's evidence that the Accused penetrated her vagina using his fingers and her identification of the Accused is reliable and not mistaken.'

[34] Therefore, I agree with the following observations of the single Judge and may add that as pointed above the Learned High Court Judge in the judgment also had addressed his mind to the complainant's position why she had been reluctant to make a complaint immediately after the first or the second incident of rape.

'[20] The third ground relates to the complaint having been made two months after the alleged second incident. The learned Judge considered at length in his summing up the explanation given by the complainant. It was a matter first for the assessors and then for the learned Judge to attach to the explanation such weight as was considered appropriate. In my view there was nothing further that could reasonably have been added by the learned Judge. This ground fail.'

[35] I am also conscious of the fact that despite the Learned High Court Judge having afforded an opportunity to both Counsel for a redirection, no such redirection which forms the basis for the Appellant's sole ground of appeal had been sought on his behalf. This is an additional reason why I am not inclined to uphold the Appellant's ground of appeal in this instance. The Court of Appeal has dealt with this type of omission which seems to be happening with alarming and embarrassing regularity giving rise to a plethora of appeal grounds. In **Prasad v State** Criminal Appeal No.

AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 the Court of Appeal held as follows.

‘The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client’s interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.

- [36] Similar sentiments were repeated in stronger terms by the Court of Appeal in Singh v State Criminal Appeal No.AAU134 of 2014:4 October 2018[2018] FJCA 146 in the following terms.

‘[15] The Supreme Court said in Raj v. State CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client’s interest but also they would help in achieving a fair trial and once again reiterated this position in stronger terms in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17. Needless to say that when such grounds of appeal are raised the appellate courts have to spend considerable time in dealing with them which they could otherwise devote to the real issues involved in the culpability or otherwise of the appellants.

[16] Thus, the appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, they would in appeal not look at the complaints against the summing-up based on such alleged errors in the directions favorably. If the omission had been done deliberately to find a ground of appeal the appellate courts would be very stringent in entertaining such grounds of appeal.

[17] However, given the duty cast on the Court of Appeal under section 23(1) (a) of the Court of Appeal Act in determining an appeal, I would not go so far as to say that a ground of appeal based on such a complaint which could have been addressed at the trial stage should

necessarily be rejected out of hand due to such an omission but given the regularity with which such grounds are urged in appeals, I am constrained to say that the appellate courts would be extremely slow to entertain such grounds of appeal and chances of them succeeding would be slender. Moreover, if these words of judicial caution are repeatedly observed in the breach as it seems to be happening at present, the day will come when the aggrieved parties start questioning and holding counsel answerable and accountable for professional negligence and incompetence.'

- [37] In the whole context explained above and given the circumstances under which the alleged acts of rape had happened, I do not think that there is any merit in the Appellant's complaint under the sole ground of appeal urged before this Court. Accordingly, I determine that the said ground of appeal does not merit the consideration of this Court and further that there is no probability that this ground of appeal will succeed in an appeal before this Court.
- [38] In view of the above conclusions, I do not think it is necessary for me to consider the last requirement for extension of time (prejudice to the Respondent) set out in Kumar. Therefore, I refuse the Appellant's application for enlargement of time within which an application for leave to appeal should be filed.

Request for enhancement of sentence

- [39] The Respondent had in its written submissions filed on 24 September 2018 had requested this Court to enhance the sentence imposed by the High Court on the Appellant by exercising its powers under section 23(3) of the Court of Appeal Act and also adverted to the new tariff of 11 to 20 years on child rape cases set by the Supreme Court in Aitcheson v State CAV0012 of 2018: 02 November 2018 [2018] FJSC 29.
- [40] The Supreme Court in Aitcheson has set out the statistics produced by the DPP's Office on the increased prevalence of child rape and sexual abuse cases generally in Fiji since 2015 to the third quarter of 2018. The Court of Appeal has earlier adverted to similar statistics in Singh.

[41] The Respondent has cited Waisele v State AAU0081 of 2013:30 November 2017 [2017] FJCA 136 to urge this Court to entertain its request to enhance the sentence imposed on the Appellant despite him having abandoned the appeal against the sentence.

[42] In referring to the powers under section 23(3) of the Court of Appeal Act the Court of Appeal in Waisele said

'[22] ...I think the Court of Appeal should exercise this power sui moto or ex mero motu in an appropriate case within the framework of section 23(3) even if there is no appeal against the sentence and in any event when there is an appeal against the sentence, even without an application for enhancement by the State....'

[43] In Waisele the Single Judge of the Court of Appeal who considered the Appellants' timely Leave to Appeal Applications had refused leave both in respect of sentence (01st and 02nd Appellants) and sentence and conviction (03rd Appellant) and all three had renewed their applications for leave to appeal against sentence for determination before the Full Court. Thus, the prerequisite for the Court of Appeal to act under section 23 namely the existence of a valid notice of appeal or an application for leave to appeal was present in Waisele. On the contrary in the instance case there is no valid leave to appeal application as the Appellant's application for enlargement of time to file such application for leave had been refused by the single Judge and this Court too has now refused his renewed application for extension of time before the Full Court. Thus, there is no application for leave to appeal before this Court. For the ruling in Waisele to apply proceedings should have reached the stage namely 'Determination of appeal in ordinary cases' contemplated under section 23 before the Court of Appeal could act under section 23(3) on sentence. In order to get to that stage there should be compliance with section 26 read with Rule 35. If there is non-compliance in so far as the appeal period is concerned it should be excused by a single Judge in an application for extension of time under Rule 40 and failing which by the Full Court under section 35(3) read with Rule 41(2) for the Appellant to proceed further in having a valid appeal being heard by the Court of Appeal. When the Full Court refuses extension of time within which a notice of appeal or an application for leave

to appeal may be given the matter of appeal cannot reach section 23 stage in the appeal process and in that event Full Court cannot make any orders affecting the conviction or sentence under section 23. Therefore, this Court is unable to consider the Respondent's request for enhancement of sentence in the present instance.

- [44] As a further remark may I state that this problem could have been overcome if the Respondent had filed an appeal separately seeking an enhancement of the sentence imposed by the High Court on the Appellant. Given the fact that the Respondent in its sentence submission dated 03 July 2014 had urged a custodial sentence which is not less than 14 years, I am surprised that it had not preferred an appeal against the sentence of 11 years meted out to the Appellant.
- [45] The Learned Trial Judge had taken the tariff for rape of a child as between 10-14 years when it had already been increased to 10-16 by the Court of Appeal in Raj, picked the lowest end of 10 years as the starting point without picking the starting point, as a good practice, from the lower or middle range of the tariff as stated in Koroivuki v State AAU0018 of 2010: 05 March 2013 [2013] FJCA 15 and considered personal and family circumstances as a mitigating factor affording leniency that the Appellant did not deserve (see the Judgments in Raj by the CA and SC) in sentencing him for 11 years with 08 years as the non-parole period. Thus, there were sufficient grounds for an appeal against the sentence by the State where all the matters contained in the fresh written submissions of the Respondent could have been considered in order to decide whether the sentence should be enhanced or not. Yet, the Respondent has not preferred to do so. As in Drotini v The State AAU00010 of 2005S:24 March 2006 [2006] FJCA 26 the facts of this case too may have merited a sentence of more than 11 years but it may also not be so manifestly lenient as to be interfered with by the Court of Appeal in the absence of an appeal by the State for an enhancement of the sentence. It should also be remembered that in any event the quantum alone can rarely be a ground for such an intervention (see the Judgment of the SC in Raj) unless the impugned sentence is caught up within the guidelines for challenging a sentence stated in House v The King [1936] HCA 40; (1936) 55 CLR 499, Bae v State AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14.

- [46] However, as requested by the counsel for the Respondent this Court is inclined to make a few general observations regarding the sentences in rape and other sexual abuse cases, especially when the victims are children. The Courts have been increasing the tariff for such offences from time to time in recognition of the gravity and the surge of such incidents.
- [47] Courts in Fiji for many years had taken 05 years as the starting point with no aggravating or mitigating circumstances for rape committed by an adult until it was increased to 07 years in **Kasim v State** AAU 0021 of 93s: 27 May 1994 [1994] FJCA 25. In **Drotini** the starting point for cases of rape committed by fathers or step fathers was increased to 10 years as such cases happen far too frequently. The Court of Appeal then decided that the accepted range of sentence for rape of juveniles (under the age of 18 years) is 10-16 years [vide **Raj v State** AAU0038 of 2010: 05 March 2014 [2014] FJCA 18] as the heavy sentences had still not deterred would be ‘family rapists’ and still more and more of such heinous crimes come before courts. The Supreme Court in **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12] confirmed that the tariff for rape of a child is between 10-16 years which was raised to be between 11-20 years imprisonment in **Aitcheson** in 2018 by the Supreme Court stating that increasing prevalence of these crimes characterised by disturbing aggravating circumstances means the court must consider widening the tariff for rape against children.
- [48] Thus, the statistics produced by the Office of the DPP shows that despite widening the tariff for child rape cases in 2014 in **Raj** to 10-16 years, the number and aggravating features of such cases have been on the increase resulting in further widening the tariff to 11-20 years in 2018 in **Aitcheson**. Therefore, it is clear that the hardening of attitude of courts expressed from time to time in the strongest possible language and expanding the tariff in dealing with such offences has either not reached the populace at large or deterrence alone has not been capable of dealing with the ever increasing number and gravity of such cases. Thus, while maintaining the courts’ attitude of zero tolerance towards cases of rape and other forms of sexual abuse, particularly of children it is equally important to educate the public and in particular would be offenders of severe consequences that would come upon them in the form of heavy imprisonments and simultaneously enlighten them of the long term physical as well as

perhaps irreversible mental harm that would befall the innocent victims of rape and other forms of sexual abuse as amply demonstrated in the Report by the Stanford University School of Medicine on ‘The Mental Health Consequences of Sexual Violence, Rape and Child Rape In the Context of Child Rape in Fiji’, a copy of which was given to this Court by the counsel for the Respondent at the conclusion of the hearing.

- [49] In the fight against acts of rape and other sexual abuses the society may well be made aware of the kind of sentiments expressed by the Supreme Court of India as quoted in **Turogo v State** AAU0008 of 2013:30 September 2016 [2016] FJCA 117 in order to highlight the extreme gravity associated with such heinous acts.

*‘[49] Dr. Anand, J speaking on behalf of the Supreme Court of India had the occasion to say the following in the criminal appeal of **The State Of Punjab vs Gurmit Singh & Others** 1996 AIR 1393, 1996 SCC (2) 384 where the victim was a 16 year old girl.*

‘We must remember that a rapist not only violates the victim’s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female.’

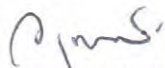
- [50] Therefore, it may safely be remarked that there should be a multi-pronged strategy to arrest the menace of rape and other sexual offences in Fiji.
- [51] In the circumstances, I would conclude that the Appellant’s application for extension of time to file an application for leave to appeal against conviction (ground of appeal on sentence having been abandoned) should stand dismissed.

Bandara, JA

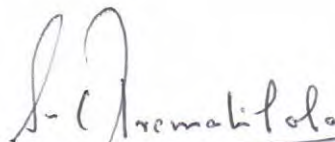
- [49] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions.

The Order of the Court is:

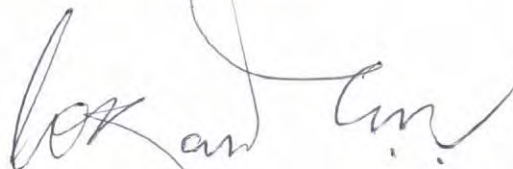
1. Appellant's Application for extension of time to file an application for leave to appeal against conviction is dismissed.



.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL