

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

CRIMINAL APPEAL NO.AAU 0010 of 2019
[In the High Court at Lautoka Case No. HAC 107 of 2014]

BETWEEN : **ATISH NATH SHARMA**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. V. Narara for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **20 August 2021**

Date of Ruling : **20 August 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka on a single count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division on 09 August 2014.

[2] The information read as follows:

Statement of Offence

RAPE: *Contrary to Section 207 [1] and [2] [a] of the Crimes Decree 44 of 2009.*

Particulars of Offence

ATISH NATH SHARMA between the 9th day of August, 2014 to 10th day of August, 2014 at Nadi in the Western Division, penetrated the vagina of ***PREETI POOJA SHARMA***, with his penis without the consent of the said ***PREETI POOJA SHARMA***.

- [3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 06 August 2018 to 09 years and 11 months of imprisonment with a non-parole period of 08 years.
- [4] The appellant in person had signed his application for extension of time to appeal against conviction and sentence after 03 ½ months out of time (20 December 2018). The Legal Aid Commission had filed written submissions on 02 December 2020 and later tendered a formal application for enlargement of time on 20 January 2021. The state had filed its submissions on 21 December 2020.
- [5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in 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. Thus, 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?
- [6] 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 [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].
- [7] Given that the appellant had pursued his appeal in person initially, the delay of the appeal (being 03 ½ months) is not substantial. The appellant has attributed the delay to the misplacement of his appeal papers given on 29 August 2018 by the Correction Administrative Officer. He claims to have applied to the Legal Aid Commission on 13 August 2018 for legal aid too. His second application submitted on 06 November

2018 had been similarly misplaced. He had submitted two more sets of papers (available in the appeal record) before receiving an acknowledgement from the CA registry. Thus, his explanation for the short delay appears to carry considerable weight and could be accepted. Therefore, I would see whether there is a reasonable prospect of success in any of the grounds of appeal as applicable to timely appeals as opposed to real prospect of success for belated grounds of appeal in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]. The respondent had not averred any prejudice that would be caused by an enlargement of time.

[8] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is ‘reasonable prospect of success’ [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaga v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[9] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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) and they are whether the sentencing judge had:

- (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.*

[10] The grounds of appeal urged on behalf of the appellant are as follows:

Conviction

Ground 1

THAT the Learned Trial Judge erred in law and in fact when it relied on the medical evidence of the complainant in absence of a medical report or an expert witness.

Sentence

Ground 1

THAT the Learned Trial Judge erred in his sentencing discretion when he had considered digital penetration as an aggravating factor.

[11] The trial judge had summarized the prosecution case in the judgment as follows:

4. *Prosecution called only the Complainant. Prosecution relies on evidence of the complaint she promptly made to police to prove the consistency of the Complainant's conduct.*
5. *Defence case is one of denial. Accused completely denies that he was ever engaged in a sexual intercourse with the Complainant.*
6. *Having considered all evidence led in the trial, I am satisfied that the evidence the Complainant gave in Court is truthful and believable.*
7. *Defence argues that it would not have been possible for the Accused to rape the Complainant the way she described in court that it happened. However, the Assessors were convinced that Complainant was raped the way she described.*
8. *The Accused had consumed beer but not more than 6 small bottles. There is no evidence that he was badly drunk so that he was physically weak and incapable of overpower the Complainant.*
9. *Complainant is Accused's cousin. According to her evidence it was not the first time she had gone out with the Accused. She had visited him in that crucial evening to tie a knot on the Accused at Rakshabhandan celebration. She had trusted her cousin when he invited her to accompany him to the Bula festival. The Accused had suddenly decided to drink alcohol with her and had insisted her to drink. She frankly admitted that she had no option but to consume two glasses of beer at the Farmers Club. However she vehemently denied that she drank alcohol when she was taken to the beach.*

10. *Complainant's conduct in going out and having drinks with the Accused who is her cousin is quite natural and believable. Her words speak for the trust she placed on the Accused. She told, 'I didn't think for a second that he would do something like that to me, if anything, I thought if something like that would happen, he would be there to stop it'.*
11. *She said that she had protested and screamed during the incident. She had told police that she screamed and maintained her position in her evidence. The incident had happened during midnight. It is possible that no one could see or hear what was being done to her that night.*
12. *After the alleged rape incident, she had listened to the Accused and had calmed herself down because she had no other option but to go home with the Accused that night. As soon as she arrived home, she went to the room, locked the door and rang up the police. She did not come out until the police officers had arrived. She made a prompt complaint to police. Complainant's conduct is quite consistent with the allegation of rape.*

[12] The appellant had elected to exercise his right to remain silent. However, his position taken up in the cross-examination of the complainant is set out by the trial judge in the summing-up as follows:

44. *Ladies and gentleman Assessors, it is suggested on behalf of the Accused that the alleged offence of Rape never happened. Defence says that it would not have been possible for the Accused to rape the complainant the way she described in court that it happened. The Defence Counsel suggested that the Accused was really drunk and in his drunk state he was physically weak and it was impossible for him to overpower the Complainant while having his body weight on her, and hold both her hands with one hand, and with the other free hand lift up her black t-shirt, pull down her bra and kiss and bite her breast. It is up to you to form your own opinion on that.*

01st ground of appeal

[13] The appellant's counsel submits that the trial judge had relied on medical evidence of the complainant in the absence of a medical report or an expert witness. This complaint arises from paragraph 36 of the summing-up and paragraph 13 of the judgment:

[36]Then the police officers took him to the station and then they took her to the hospital. At the hospital, the doctor examined her, inserted something to see if her hymen is intact or not. She said she got three stiches in her vagina because it was torn. She also told this Court that she would not come out until the police were in the house. When the police arrived, then she told the Police that she was raped by her own cousin.

[13] Complainant was medically examined. She said that she got three stiches in her vagina because it was torn. The fact that the medical report was not tendered in evidence is not a good reason for the court to disbelieve her version.'

[14] The appellant's counsel also submits that the prosecution should have tendered a medical report to corroborate the injuries spoken to by the complainant.

[15] It does not appear from the summing-up or the judgment that the defense counsel had challenged the complainant on her above evidence during the trial. This should have been canvased as a trial issue and not taken up for the first time in appeal. Nor had the trial counsel sought a redirection to inform the assessors that no medical evidence had been placed to support or corroborate the complainant's evidence on her alleged injuries and therefore the appellant cannot complain in appeal at this stage [see **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)] in the absence of any cogent reasons for the failure.

[16] Any victim of violence is entitled to speak to his or her injuries in evidence. Such evidence does not amount to expert evidence but constitutes direct evidence on his or her injuries. In the absence of expert supportive (medical) evidence it is for the fact finders to attach whatever weight they assign to such evidence, particularly if that evidence is challenged.

[17] On the other hand what is important is the act of penetration and not the resulting injuries, if any. With or without injuries, if penetration had taken place the offence of rape would have constituted. Thus, even if the complainant's evidence on her injuries is disregarded, the rest of her evidence is quite sufficient to prove the act of penetration.

[18] Finally, in any event corroboration is not legally required in cases involving sexual offences (see section 129 of the Criminal Procedure Act, 2009) and therefore the prosecution bore no legal obligation to produce medical evidence to corroborate the complainant's evidence.

[19] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal (sentence)

[20] The appellant complains that the trial judge was wrong to have considered the act of digital penetration as an aggravating factor. The relevant paragraph in the sentencing order is as follows:

10. There is evidence that you had inserted two fingers in complainant's vagina without her consent. For reasons unknown to this court, you have not been charged for the digital penetration. Therefore, I do not intend to punish you for an offence for which you were not convicted. However I consider the digital penetration as an aggravating circumstance of this case.

[21] However, this is not the only aggravating factor considered by the trial judge as seen from paragraph 09 of the sentencing order:

'9. The complainant agreed to accompany you to the Bulla Festival without a shadow of doubt about your sincerity because she is your cousin. You breached that trust when you committed this offence. You were 36 years old while the complainant was only 19 years old at the time of the offence. Furthermore, she was quite vulnerable when she was alone with you in a beach, close to midnight. You have exploited her vulnerability. You were drunk and you imposed alcohol on her. I consider your drunkenness and your insistence on the complainant to drink alcohol before committing the offence as an aggravating factor.


[22] While there is nothing wrong in considering the act of digital rape as an aggravating factor as it was an uncharged act and not part of the information, the increase of 03 years could be justified on the other aggravating factors even without the act of digital rape.

- [23] In any event, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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 (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015). It cannot be said that the sentence is harsh or excessive. The sentence imposed on the appellant does fit the crime.
- [24] The tariff for adult rape is between 07 and 15 years of imprisonment [vide **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994), **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) and **Kumar v State** [2021] FJCA 101; AAU0140.2015 (27 May 2021)].
- [25] Considering the facts and circumstances of the case the appellant's sentence of 09 years and 11 months imprisonment of imprisonment is not excessive and harsh.
- [26] Therefore, there is no sentencing error or a reasonable prospect of success in this ground of appeal against sentence.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.




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