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

CRIMINAL APPEAL NO: AAU0061A of 2015
[High Court Case No: HAC68 of 2014Lab)

BETWEEN	:	**NEMANI RAQIO**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Hon. Mr. Justice Daniel Goundar**
Counsel	:	**Ms. M. Tarai for the Appellant** **Mr. M. Korovou for the Respondent**
Date of Hearing	:	**19 June 2017**
Date of Ruling	:	**23 June 2017**

RULING

[1] Following a trial in the High Court at Labasa, the appellant was convicted of three counts of rape, one count of attempted rape and one count of indecent assault. He was sentenced to a total term of 13 years' imprisonment with a non-parole period of 11 years. This is a timely application for leave to appeal against both conviction and sentence. The appeal is governed by section 21(1) of the Court of Appeal Act. Leave is required on any ground of appeal that involves a question of mixed law and fact, or fact alone. Leave is not required on any ground that involves a question of law alone. Section 35(1) of the Court of Appeal Act gives a single judge power to grant leave. The test for leave is whether the ground of appeal is arguable. The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion.

[2] The charges involved two victims. Both victims gave evidence at the trial. They were closely related to the appellant. When the first incident of rape occurred, the victim, SK was a child. The second victim, MN was also a minor when she was indecently assaulted. The offences were committed over a period of four years, between 2009 and 2013. The defence case was denial of the sexual allegations.

[3] Initially, the appellant advanced numerous grounds of appeal. Subsequently, the grounds of appeal were amended and leave was sought on the following grounds:

(i) That the learned Trial Judge erred in law and in fact when he had directed the assessors on the examples which were similar to the facts in issue of the case and this was prejudicial to the appellant.

(ii) That the learned trial judge erred in law and in fact when he informed the assessors that a prima facie case was found at the end of the prosecution's case against the appellant thereby causing prejudice to the appellant.

(iii) That the learned trial Judge erred in law and in fact when he misdirected the assessors on an irrelevant issue of identification when the appellant had not disputed identification and thereby confusing the assessors which was unfair to the appellant.

(iv) That learned Trial Judge erred in law and in fact when he failed to direct the assessors that they must approach both of the complainants' evidence with caution considering the delay and whether they found the reasons for the delay adequate.

(v) That learned Trial Judge erred in law and in fact when he did not adequately put the defence case to the assessors.

(vi) That the sentence was harsh and excessive in that:

(a) The learned Trial Judge had erred in law when he took into account the elements of the offence as an aggravating factor to enhance the sentence imposed,

(b) The learned Trial Judge had picked a starting point of 13 years imprisonment without giving any reason for doing so.

Unfair use of example of indecent assault

[4] The impugned direction is contained in paragraph 17 of the summing up:

> An assault is indecent if it is committed in circumstances of indecency. An action is 'indecent' if right-thinking members of society consider it indecent. **For example, an older man putting his hand under the skirt of a 13 year old female, wanting to touch her panty.** (emphasis added).

[5] Counsel for the appellant submits that the trial judge's use of an example of indecent assault based on the facts of the case to explain the element of indecency lacked objectiveness and fairness required in the summing up. It was not in dispute that when the indecent assault charge arose, the appellant was 68 years old and the complainant was 13 years old. The complainant's evidence was that the appellant had put his hand under her skirt. In my judgment, the learned trial judge could have framed his example more objectively, but I am not convinced that the example using facts based on the evidence led at the trial to explain the element of indecency was unfair to cause a miscarriage of justice (*Balekivuya v State* [2016] FJCA 16; AAU0081.2011 (26 February 2016). Ground one is unarguable.

Disclosure of the no case to answer ruling to the assessors

[6] In paragraph 25 of the summing up, the learned trial judge informed the assessors that a prima facie case was found against the appellant at the end of the prosecution's case while directing on the options that were available to the appellant after that ruling was made. Counsel for the appellant submits that the disclosure of the no case to answer ruling to the assessors was wholly in appropriate and prejudicial to the appellant. A similar disclosure of the no case to answer ruling was made to the jury by the trial judge in the English case of *R v Smith and Doe* 85 Cr App R 197 CA. In that case, Watkins LJ said at p 200:

> The question as to whether or not there is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because they

'think the judge's view is sufficient indication that the evidence is strong enough for that purpose.

[7] Counsel for the State concedes that this ground is reasonably arguably. I agree. Ground two is arguable.

Direction on identification was irrelevant and confusing

[8] Identification was not an issue at the trial. The appellant's case was denial of the allegations. His evidence was that he did not commit the alleged offences. In other words, the appellant's case was that the allegations were fabricated by the complainants. The learned trial judge mistook that denial of the allegations as a case of disputed identification. In his summing up, the learned trial judge devoted three paragraphs (32-34) to direct on the issue of disputed identification. The directions arguably mistook the defence's case and were confusing to the assessors. Ground three is arguable.

Lack of warning regarding delayed reporting of the sexual allegations

[9] This ground is wholly misconceived. There is no overarching principle that the assessors must be warned to approach the complainant's evidence with care when there is a delayed reporting of a sexual offence and when the complainant has not adequately explained the delay.

Failure to adequately put the defence's case

[10] While this ground alleges that the trial judge had not adequately put the appellant's case to the assessors, the submissions advanced under this ground relate to the lack of direction on the inconsistencies in the prosecution's case. The alleged inconsistencies were not identified. Without reasonable particulars, the ground is unarguable.

Is there an arguable error in the exercise of the sentencing discretion?

[11] The method used in sentencing was clearly explained by the learned trial judge. The aggravating factors were that the appellant was guilty of multiple sexual acts involving two minor girls over a period of time. Furthermore, there was a gross breach of trust by the appellant because the victims were closely related to him. The starting point of 13 years was picked from the tariff of 10-16 years imprisonment for rape of a child and the

learned trial judge was not required to further explain his choice of the starting point. Overall, the sentence imposed on the appellant is within the tariff for child rape and reflects the criminality involved. I am satisfied that there no arguable error in the exercise of the sentencing discretion.

[12] **Result**

Leave to appeal against conviction is granted on grounds two and three only.

Leave to appeal against sentence is refused.

.....
Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State