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

CRIMINAL APPEAL NO.AAU 0038 of 2016
[High Court Criminal Case No. HAC 050 of 2015)

BETWEEN	:	**ILAI NAVUKI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Ratu for the Appellant** **Mr. M. D. Korovou for the Respondent**
Date of Hearing	:	**17 September 2018**
Date of Ruling	:	**04 October 2018**

RULING

[1] The Appellant has sought leave to appeal against the sentence on a single count of rape under section 207 (1) and 207 (2)(a) the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed in Savusavu in the Northern Division for having had carnal knowledge of P.N (name withheld) without his consent.

[2] There had been another count of rape under section 275 of the Crimes Decree, 2009 (now the Crimes Act, 2009) for assault causing actual bodily harm.

[3] The Appellant pleaded guilty and was convicted by the Trial Judge who sentenced him to 16 years imprisonment with a non-parole period of 15 years on the rape charge and 12 months imprisonment on the assault charge; both to run concurrently.

[4] In his Amended Petition of Appeal dated 24 April 2018, the Appellant had raised the following grounds against the sentence imposed on the charge of rape seeking leave to appeal.

(1) 'THE Learned Trial Judge erred in law and fact when he passed a sentence which is harsh and excessive considering the circumstances of the offending.'

(2) 'THE learned trial judge has acted upon a wrong principle and faulted in his discretion to extend the non-parole too near to the head sentence.'

[5] It is clear that since the Appellant is appealing against the sentence, section 21(1)(c) of the Court of Appeal Act comes into play. Therefore, for the Appellant to appeal to the Court of Appeal against the sentence on the above grounds of appeal, he has to first obtain leave and to do so he should pass the test for granting leave to appeal.

[6] The basic purpose of requiring leave of the court is to ensure that unmeritorious cases do not consume the limited resources of the appellate court. The requirement of leave is the central mechanism by which appellate courts can control the quantity and quality of cases heard and determined on appeal. In **Coulter v R** [1988] HCA 3; (1988) 164 CLR 350 (11 February 1988) the High Court of Australia said

> *'The jurisdiction which the court exercises in determining an application for leave is not a proceeding in the ordinary course of litigation ... It is a preliminary procedure recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention.'*

[7] Granting leave or not is not just a formality but requires an examination of the merits of the particular case. The legal test for granting leave should be able to balance, on the one hand, the rights and interests of the aggrieved person in being able to have a decision or judgment of the lower court reviewed by a higher court with, on the other hand, the problem of appellate courts being swamped with increasing numbers of unmeritorious appeals. It should be neither too stringent nor too liberal. Whilst the legal test should be able to exclude unmeritorious appeals, it should not also exclude meritorious appeals.

[8] The applicable test for granting leave to appeal to the Full Court as established in **Chand v State** AAU0035 of 2007: 19 September 2008 [2008] FJCA 53 and regularly followed is articulated as follows.

> *'To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal'.*

[9] Therefore, the main task at the leave stage is to differentiate an arguable ground of appeal from a non-arguable ground of appeal. ***Chand*** does not state how to distinguish an arguable ground from a non-arguable ground. Ordinarily an arguable ground should mean a ground which is capable of being argued plausibly. It cannot be based on a mere argument for the sake of an argument. In other words, it should be reasonably arguable (**DeSilva v The Queen** [2015] VSCA 290 (5 November 2015). The threshold for leave to appeal has also been described as having a 'sufficiently arguable ground' (**Bailey v Director of Public Prosecutions** [1988] HCA 19; (1988) 78 ALR 116; (1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 May 1988) or even having a 'real prospect of success' (**R v Miller** [2002] QCA 56 (1 March 2002). 'No prospect of success' and 'reasonable prospect of success' too have been used as appropriate tests to decide the question of leave to appeal. In my view, if a ground of appeal is not at least reasonably arguable on merits then there is little point in the matter being allowed to reach the Full Court.

[10] **S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa enunciated the correct approach as to whether leave to appeal by the high court should have been granted or not as follows:

> *'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (emphasis added)*

[11] In my view the test of 'reasonable prospect of success' could be employed to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal. I shall proceed to consider the Appellant's appeal accordingly.

[12] I shall quote from the Sentence Order dated 27 January 2016 the summery of facts for convenience. The facts admitted by the Appellant speak for themselves as to the gravity of the offences.

> *'2. The prosecution then read her summary of facts in court. They were as follows. On 10 October 2015, the accused was married with six children – three sons and three daughters. They were aged between 18 years and 8 months old. The accused and his wife had been married for 18 years. The family lived in a village in Cakaudrove. At the time, the accused's wife had been in Nadi for about a month.*
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> *3. The complainant in this case was the accused's son. He was 16 years at the time. On 10 0ctober 2015, between 8 to 11pm, the accused was at home with his son and two daughters. The daughters were asleep. The accused called the complainant to his room to massage him, using coconut oil. Later, he asked his son for anal intercourse. The son refused. The accused then punched him on the jaw. He later forced himself on his son by penetrating his anus with his penis, without his consent, and he well knew he was not consenting to the above, at the time. The matter was reported to police. The accused was interviewed by police and he admitted the offence. He was later charged with rape and assault.'*
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> *4. Through his counsel, the accused admitted the above facts. He admitted, he penetrated his son's anus with his penis, without his consent and he well knew at the time that he was not consenting to the above. He also admitted he punched his son in the jaw when he refused to have sex with him. As a result of the above admissions, the court found the accused guilty as charged on both counts and convicted him accordingly on both counts.'(emphasis added)*

Ground 01

[13] The Appellant's complaint that the sentence of 16 years of imprisonment is harsh and excessive flows from the argument that the accepted range of sentence for rape of juvenile is 10-16 years [vide **Raj v State** AAU0038 of 2010: 05 March 2014 [2014] FJCA 18 and **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12] and given that, the sentence imposed is one at the highest end of tariff and it should have been in the middle range of the tariff.

[14] It is clear that the Appellant does not complain against the weight given by the Trial Judge to mitigating and aggravating factors. The Judge had started with 15 years, deducted 04 years for mitigating factors and added 05 years for aggravating factors ending up with the head sentence of 16 years. I do not find anything obnoxious in this exercise of deducting for mitigation and adding for aggravation and the respective weights given. I also do not believe that the sentence is bad in law simply because it is at the highest end of the tariff and also do not agree that the final sentence should necessarily have been in the middle range of the tariff.

[15] But I do see an issue regarding the Trial Judge having taken 15 years as the starting point. It is that high starting point that has culminated in the final sentence of 16 years. Therefore, the real concern should be as to whether the Trial Judge had erred in taking 15 years as the starting point when the tariff was between 10-16 years. As a result, having pleaded guilty within 03 months after the first call in the High Court and not putting the victim through the ordeal of having to narrate the repulsive incident once again in court, the Appellant had still ended up getting the highest of the sentencing range *i.e.* 16 years. Thus, the Appellant has reason to complain that the ultimate sentence may be harsh and excessive. But, the real root cause is at the high starting point.

[16] In **Koroivuki v State AAU0018** of 2010: 05 March 2013 [2013] FJCA 15 the Court of Appeal said as follows

> *'[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.' (emphasis added)*

[17] The Trial Judge has not given any reasons for taking 15 years as the starting point in the sentencing process which is almost at the highest point of the tariff of 10-16 years. In my view, the Trial Judge should have made the Appellant aware why he had done so, for the Appellant is entitled to know why despite the plea of guilt and other

mitigating factors highlighted by the Trial Judge, he still ended up getting the highest sentence within the range. Further, no appellate court could understand it without reasons. Thus, there is also an issue whether a trial judge should give reasons when he chooses to start with a high end point of the tariff.

[18] Moreover, without such reasons the accused in general may not see any value in an early plea and that will result in furthering the victim's misery, fear, and embarrassment by having to go through the trial. However, I shall not be understood to say that a trial judge cannot commence with a starting point at the middle or higher range of the tariff in a given case where the facts and circumstances justify it. But, if that be the case the Judge must give reasons.

[19] Therefore, in my view this ground has a 'reasonable prospect of success' and is therefore reasonably arguable and the Appellant is free to amend his ground of appeal suitably and/or add a new ground of appeal, as he thinks fit before the Full Bench hearing.

Ground 02

[20] The second ground of appeal is on the Trial Judge having fixed the non-parole period too close to the head sentence based on sections 18 and 4(1)(d) of the Sentencing and Penalties Decree and the decision in **Tora v State** AAU0063 of 2011: 27 February 2015 [2015] FJCA 20. The Trial Judge has fixed the non-parole period at 15 years out of the head sentence of 16 years. The Appellant argues that this defeats his prospect of rehabilitation. There were several appeals during this session alone where the same ground of appeal was argued.

[21] The Court of Appeal in **Rohit Prasad v State** AAU 0010 of 2014: 04 October 2018 dealt with the same ground of appeal *in extenso* by examining not only the aforesaid provisions of the Sentencing and Penalties Decree and ***Tora*** but also section 27(2) of the Correction Service Act, 2006 (previously known as Prisons and Corrections Act 2006), **Singh v State** AAU009 of 2013: 30 September 2016 [2016] FJCA 126, **Kean v State** CAV0007 of 2015: 23 October 2015[2015] FJSC 27, **Bogidrau v State**

CAV0031 of 2015: 21 April 2016 [2016] FJSC 5, **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 and **Turogo v State** CAV 0040 of 2016: 20 July 2017 [2017] FJSC 17. However, following the Supreme Court decisions in ***Kean*** and ***Bogidrau*** the Court of Appeal did not allow the appeal on the ground that non-parole period had been fixed too close to the head sentence.

[22] Nevertheless, the Court of Appeal in ***Rohit Prasad v. State*** held that a trial judge exercising discretionary power under section 18(2) of the Sentencing and Penalties Decree 2009 should ordinarily give reasons for the decision, particularly when non-parole period is fixed very close to the head sentence so as to almost negate the aspect of rehabilitation of an accused in the society. But, the Court added that there may be cases where the decision to fix the non-parole period close to the head sentence is fully justified on the facts and circumstances of the case. Finally, the Court did not interfere with the fixing of the non-parole period as it did not find overwhelming reasons to do so, coupled with the fact that the trial judge was in the best position to decide on the matter.

[23] The Trial Judge had not given any reasons as to why he had fixed the non-parole period at 15 years when the head sentence was 16 years. He had, however, mentioned under aggravating factors that *'You must be punished as a warning to others'*. Thus, the aspect of rehabilitation does not appear to have entered his mind at all but the only consideration seems to have been deterrence. Therefore, the High Court Judge has not been mindful of the guidance provided by the Court of Appeal in ***Tora*** in fixing the non-parole period.

[24] In the circumstances, I am inclined to grant leave to appeal on the question whether the Trial Judge has not paid due regard to the relevant provisions of the Sentencing and Penalties Decree and the guidelines in ***Tora*** in fixing the non-parole period too close to the head sentence and also in not giving reasons for the exercise of his discretion in such a way as to fix the non-parole period too close to the head sentence under section 18(2) of the Sentencing and Penalties Decree 2009. Thus, the Trial Judge has acted upon a wrong principle and failed to take into account some relevant considerations. In my view, these matters ae 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.

[25] In this respect also the Appellant is free to amend the existing ground and/or add a new ground of appeal, if deemed fit before the appeal is taken up by the Full Court for hearing.

[26] Therefore, I hold that the above grounds of appeal have a 'reasonable prospect of success' and are therefore reasonably arguable and leave to appeal should be granted.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL