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

CRIMINAL APPEAL NO.AAU 128 of 2017
[In the High Court at Lautoka Case No. HAC 50 of 2017]

BETWEEN : **KAVERIELI VATUOROORO**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

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

Date of Hearing : **03 September 2020**

Date of Ruling : **04 September 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of rape contrary to section 207(1) and 207(2)(b) of the Crimes Act, 2009 committed at Toge, Ba in the Western Division . The information read as follows.

'***Statement of Offence***

RAPE: Contrary to section 207(1) and 207(2) (b) of the Crimes Act 2009.

Particulars of Offence

***KAVERIELI VATUOROORO**, between the 4th day of February 2017 and the 5th day of February 2017, at Toge, Ba in the Western Division, penetrated the vulva of **LUSIANA ROKOCA**, with his finger, without her consent.*

[2] The appellant represented by his counsel had pleaded guilty on 04 May 2017 to the information and the learned High Court judge having explained the consequences of the guilty plea and the sentencing tariff to the appellant and been satisfied that the plea was unequivocal, voluntary and free from any influence, had convicted the appellant on 06 July 2017 and sentenced him on 28 July 2017 to 08 years of imprisonment with a non-parole term of 06 years.

[3] The appellant being dissatisfied with the sentence had signed a timely notice of appeal against sentence on 24 August 2017. Legal Aid Commission on 19 June 2020 had submitted an amended notice of appeal containing a single ground of appeal against sentence along with written submissions. The respondent's written submissions had been tendered on 17 July 2020.

[4] The summary of facts filed by the prosecution on 06 July 2017 and admitted by the appellant had stated as follows.

> '*The complainant is Lusiana Rokoca, aged 28 years, School Teacher, of Toge Village, Ba ("complainant"). The defendant is Kaverieli Vatuorooro, aged 21 years, Farmer, of Toge Village, Ba ("the defendant").*
>
> *The complainant and the defendant knew each other as they resided in the same community. The complainant resided with her 2- year- old daughter in her house.*
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> *On 4th February 2017, around 7.00 pm the complainant returned home with her daughter from town. After dinner they went to sleep. Around 11.30 pm in the night the complainant heard the sound of burglar bars being pulled. She went to check in the middle room, and saw the defendant entering the same room through the burglar bars on the room's window. The complainant asked what the defendant was doing and in response the defendant said for her to be quiet.*
>
> *The defendant then covered the complainant's mouth and took her to the bedroom where she and her daughter were sleeping. The complainant was struggling to break free. By this time the daughter had woken up and was crying. The defendant pushed the complainant onto the floor then came closer to her. The defendant heavily smelt of liquor. He then forcefully lifted the round neck t-shirt she was wearing and her bra, and then he sucked her breasts. He also licked the complainant's neck and stomach.*
>
> *After that the defendant forcefully opened the ¾ pants that the complainant was wearing, placed his hand inside her panty and poked her vagina thereby*

penetrating the vulva of the complainant with his finger. The complainant was scared for the safety of her daughter hence she let the defendant do what he was doing. Then the defendant told the complainant to hold his penis, which she did out of fear.

Thereafter, the defendant stood up and went outside. He then apologized to the complainant for what he had done and asked her not to tell anyone about it. The complainant then informed her mother and her younger sibling of what the defendant had done, and later she rang and reported the incident to the police.

The complainant was medically examined on 05/02/2017 around 11.09 am by one Dr. Talei Tamaka ("PW2") at Ba Mission Hospital. PW2 noted "slight areas of hyperemia consistent with friction/recent pressure at introitus". A copy of the medical report is annexed.

The defendant was taken into custody and caution interviewed on 06/02/2017. At Q.32 and Q.33 of the caution interview, the defendant admitted to entering the complainant's house through the window. At Q.37 the defendant said that he had pressed the complainant's mouth and dragged her when they were in the complainant's bedroom and not in the middle room. At Q.38 the defendant said that the complainant pushed him away when they were in her bedroom and not in the middle room. At Q.39 the defendant admitted that he tried to kiss the complainant but she pushed him away. At Q.40 the defendant said that he told the complainant to lift her t-shirt and he sucked her breasts. At Q.42 the defendant admitted to poking the complainant's vagina with his finger."

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is 'reasonable prospect of success' (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a timely ground of appeal against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(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.*

[7] ***Ground of appeal***

> '1. *That the learned Sentencing Judge erred in law and in fact when he failed to give a separate discount for the appellant's early guilty plea.*'

[8] The appellant complains that the learned judge has erred in failing to give a separate discount towards the appellant's early guilty plea. The trial judge had given a discount of 02 years for all the mitigating factors set out in paragraph 9 of the sentencing order including the plea to the charge at the first available opportunity. The appellant argues that the trial judge should have given him a separate deduction of the sentence on account of his early guilty plea and relies on the decisions in **Ranima v State** [2015] FJCA17; AAU0022 of 2012 (27 February 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018).

[9] In **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) decided prior to the promulgation of the Sentencing and Penalties Act, 2009 (04 November 2009) the Court of Appeal stated:

> *'In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the*

offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.

[10] In **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J had the occasion to observe as follows.

> '*[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In* ***Naikelekelevesi State*** *[2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.*
>
> *[11] The weight that is given to a guilty plea depends on a number of factors.....................*
>
> *[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.*'

[11] Madigan J in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) suggested that a discount for the early guilty plea should be considered last after aggravating and mitigating factors are considered and identified a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity as the 'high water mark'. However, it is clear that those remarks by Madigan J were not part of the main judgment and cannot be considered as part of *ratio decidendi* of the decision.

> '*Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.*"

[12] In **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) Goundar J held

> *'[18] In considering the weight of a guilty plea, **sentencing courts are encouraged** to give a separate consideration and quantification to the guilty plea (**as a matter of practice and not principle**), and assess the effect of the plea on the sentence by taking in account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.'*

[13] In **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court cited paragraph [18] in ***Mataunitoga*** and stated it was a more flexible approach towards an early guilty plea.

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'*

[14] In terms of section 4(2)(f) of the Sentencing and Penalties Act 2009, the sentencing court is to have regard to:

> *"whether the offender pleaded guilty to the offences, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so."*

[15] In **Naucusou v State** [2020] FJCA 74; AAU101.2019 (9 June 2020) I made the following remarks on a similar argument to that of the appellant taking into consideration the development of the law in the past which should include the Sentencing and Penalties Act, 2009 and I can only repeat the same sentiments here as well.

> *'[19] The current judicial thinking that has developed progressively over the years is that it is a not a sine qua none for a sentencing judge to give a separate discount for an early guilty plea though it should be accorded some discount depending on the circumstances of each case with even no discount for an inevitable and totally belated plea. As a matter of good practice the*

sentencing judges may do so but not showing a separate discount for the early guilty plea ipso facto does not constitute an error of law as long as it had been taken into account as a mitigating factor.'

[16] The learned trial judge had identified the starting point of the sentence in adult rape as 07 years as established in **Kasim v State** [1994] FJCA 25; AAU0021j of 1993s (27 May 1994). Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment following **State v. Marawa** [2004] FJHC 338.

[17] The trial judge had taken 08 years as the starting point, set out the aggravating factors and added 02 years and set out mitigating features and deducted 02 years leading to the ultimate sentence of 08 years of imprisonment with a non-parole period of 06 years. In the process of giving discount of 02 years for mitigating factors he had clearly identified the appellant's early guilty plea.

[18] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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, 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)] and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)].

[19] 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)].

[20] In my view, the same reasoning given in **Maya v State** (supra) by the Court of Appeal in rejecting a complaint that the period of remand had not been given a separate discount could be safely adopted on the appellant's complaint on guilty plea not having been separately discounted by the trial judge.

> '*[13] There is no ambiguity in the wording of section 24. It clearly sets out the sentencing court's obligation to consider the remand period in sentence. In the present case, the sentence was reduced to reflect the remand period. The appellant's argument is that the method that was used to make the reduction is incorrect. However, the methodology used for discounting does not involve an error of principle (Qurai v State unreported Cr App No CAV24 of 2014; 20 August 2015). Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors. Unlike a recent decision of this Court in Domona v State unreported Cr App No AAU0039 of 2013; 30 September 2016, in Sowane v State unreported Cr App No CAV0038/2015; 21 April 2016, the Supreme Court did not prefer one method over the other (see, [16]). The principle that the Supreme Court endorsed was stated at [14]:*
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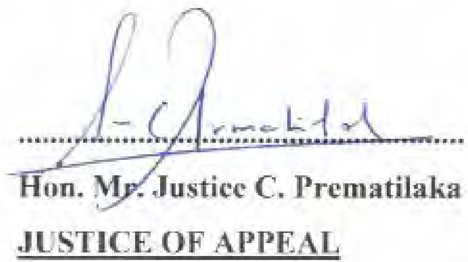
> > *.... the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. In doing so it is not necessary to make exact allowance for days and even weeks spent on remand. It depends upon its total significance. (per Gates CJ)*

[21] On the other hand, in my view considering the attendant circumstances under which the offence had been committed in which *inter alia* the appellant had invaded the home of the complainant in the night and committed the act of rape (and some other offences though not charged) in the presence of her 02-year-old daughter suggest that he had been handed a lenient sentence and he should consider himself lucky in that respect. However, I believe that if the matter of sentence is to be reviewed by the full court this is a fit case for it to consider acting under section 23(3) of the Court of Appeal Act to enhance the sentence on the appellant.

[21] Therefore, I conclude that there is no reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against sentence is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL