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

CRIMINAL APPEAL NO.AAU 077 of 2017
[In the High Court at Labasa Case No. 14 of 2016]

BETWEEN	**:**	**TAUSIA FUATA FABIANO**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**13 August 2020**
Date of Ruling	**:**	**14 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa on a single count of rape contrary to section 207(1) and 2(a) of the Crimes Decree, 2009 allegedly committed at Namawa Estste, Vatudamu, Cakaudrove, in the Northern Division on 12 March 2016.

[2] The information read as follows.

*'**Statement of Offence***

***RAPE:** contrary to section 207(1) and 2(a) of the Crimes Decree 2009*

Particulars of Offence

***TAUSIA FUATA FABIANO,** on the 12th day of March 2016 at Namawa Estste, Vatudamu, Cakaudrove, in the Northern Division, had carnal knowledge of (name suppressed) without her consent.*

[3] At the conclusion of the summing-up on 19 April 2017 the majority of assessors had opined that the appellant was guilty of the charge of rape. The learned trial judge had agreed with the majority of assessors in his judgment delivered on 20 April 2017 on their decision and convicted the appellant accordingly. On 21 April 2017 the High court judge had sentenced the appellant to 12 years and 06 months of imprisonment with a non-parole period of 09 years.

[4] The appellant's timely application for leave to appeal against conviction and sentence had been signed on 12 May 2017 (received by the CA registry on 24 May 2017). Thereafter, the Legal Aid Commission had filed an amended notice of appeal against conviction and sentence on 12 June 2020 along with written submissions. The state had tendered its written submissions on 08 July 2020.

[5] 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. 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. This threshold is the same with leave to appeal applications against conviction and sentence.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

> *'Conviction appeal ground*
>
> *1. That the learned trial Judge erred in law and in fact when he refused to accept the complainant's answers during her cross examination which had raised a reasonable doubt and the learned Judge in refusing to accept the same then stated that the complaint misunderstood and was confused – there was no such evidence that confirmed this through re-examination as such it was an error on the trial Judge to use such speculation to refuse this evidence.*

Sentence appeal ground

2. That the learned trial Judge erred in law and in fact when he acted upon a wrong principle when sentencing the Appellant to a tariff of child rape when the victim in the case is an adult."

[7] The evidence of the prosecution case against the appellant had been summarized by the trial judge in the judgment as follows.

> *'3. The thrust of the prosecution case came from the alleged victim of the rape, a 27 year old woman who being mentally handicapped had, according to her mother, a similar* ***mental age*** *to that of her 7 year old granddaughter.*
>
> *4. As a result the eliciting of evidence from the victim witness was extremely difficult.*
>
> *5. Her mother had given evidence before her and the mother told the Court of the difficulties her victim daughter had faced, initially in her primary education and subsequently in her interaction in a social milieu within the family. She occupies herself mainly in household chores but can be moody and very willful.*
>
> *6. It was very apparent when hearing the lady victim's evidence that she was mentally challenged. Her mother sat with her during her evidence to comfort her. She was able to answer simple questions in chief about her life and in particular about this sexual episode in her life; however when confronted in cross-examination with more complex questions and propositions, she was unable to cope. She would answer a question put to her both in the affirmative and the negative, and at one stage in response to quick fire questions from Defence Counsel she appeared to agree with everything he put to her; propositions that would not make any sense to agree with.*
>
> *7. She told the Court of the day in question when she had been left alone with her first cousin, the accused, and how he had called her into a bedroom of the house, stripped her of her clothing and had proceeded to have sexual intercourse with her.*
>
> *8. The actual act of the intercourse had been agreed by counsel before trial, so the only issue at trial was whether this lady victim was consenting or not.*
>
> *9. The lady was adamant in chief that she didn't want the accused to "do this bad thing". She didn't tell the full story to her mother when she returned because she was weak and frightened; however she told an aunt and the village crime committee some ten days later leading to the report of the crime to the authorities.*

[8] The appellant's position had been narrated as follows in the judgment.

> *'10. The accused gave evidence in his defence and consistently with the answers given in his caution interview, he told the Court that when they had been left alone the lady had come to him and insisted that they have sex. She led him to the bedroom, lay on the bed and exposed herself to him inviting him to penetrate her which he did. He told the Court that during the act the lady was enjoying it and telling him so.'*

[9] The trial judge had further highlighted the appellant's stand in the summing –up in paragraph 24.

> *'24. Tausia said that on the day in question, his aunty (Doreen's mum) had gone to town with her granddaughter leaving him, his little brother Thomas and Doreen alone in the house. Thomas went to the village leaving just him and Doreen. He was on the porch resting after doing some farming work when Doreen came out of the house and told him that she wanted to have sex with him. He ignored the request but she persevered for about 20 minutes before pulling him up and taking him into the room. She lay down and pulled up her skirt. She was not wearing underwear. Tausia undressed and proceeded to penetrate her. It lasted for about 5 minutes and during this time Doreen told him that it was nice, she liked it. When it was finished each went back to their respective resting places, Tausia the porch and Doreen the sitting room.'*

01st ground of appeal (against conviction)

[10] The appellant has submitted that the complainant under cross-examination had admitted that the sexual intercourse was consensual and the prosecution had not re-examined her and elicited answers to the contrary and therefore it was wrong for the trial judge not to have accepted those answers and acquitted him.

[11] A particular reference has been made to paragraph 12 of the judgment which is as follows.

> *'12. Despite the unusual manner in which the lady victim delivered her evidence, the Court was impressed with her forthright insistence that she was not a willing party to this incident. Her seeming reversal of that position in cross-examination was not brought about by skillful questioning but clearly by misunderstanding and confusion.'*

[12] Thus, the trial judge had attributed the complainant's changing of positions *vis-à-vis* the issue of consent under cross-examination to her misunderstanding and confusion.

[13] I have said in a number of previous rulings as to what a 'judgment' consists of under section 237 of the Criminal Procedure Act, 2009.

> *'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use).*

[see **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020)**, Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Tikoigiladi v State** [2020] FJCA 86; AAU138.2016 (23 June 2020), **Kumar v State** AAU185 of 2016 (22 July 2020), **Raitekiteki v State** AAU 011 of 2017 (29 July 2010), **Qio v State** [2020] FJCA 119; AAU057.2016 (31 July 2020) and **Vasu v State** AAU0118 of 2016 (11 August 2020)]

[14] Therefore, one needs to consider the summing-up as well. On the same point the trial judge had directed the assessors in paragraph 17 of the summing-up in the following manner:

> *'17. You will recall that in cross-examination Doreen was contradictory and it seemed to me at least that she was having trouble understanding the defence Counsel's questions. She said yes and no to the same questions. But Madam and Gentlemen, it is a matter for you what you make of her evidence and at this stage it is not a matter for me.'*

[15] Therefore, it is not clear as to what questions had been put in cross-examination and what answers had been given by the complainant. Without the complete appeal record it is not possible to understand the impact of the alleged contradictions on the issue of consent. A perusal of the summing-up and the judgment does not, however, reveal that the complainant had unequivocally stated that the sexual intercourse was consensual under cross-examination.

[16] It also appears that the trial judge had considered the fact that the complainant had been a person of some mental impairment and decided not to act on those contradictory answers. Paragraphs 15 of the summing-up and 6 of the judgment contain those findings.

> *'15. I now turn to the evidence of Doreen, which is the crucial evidence for the Prosecution. Despite Mr. Rakaria's doubts it was very obvious that Doreen was intellectually challenged. I do not need to tell you why I say that; it is a matter for you to find as a fact whether or not that is the case.*
>
> *'6. It was very apparent when hearing the lady victim's evidence that she was mentally challenged. Her mother sat with her during her evidence to comfort her. She was able to answer simple questions in chief about her life and in particular about this sexual episode in her life; however when confronted in cross-examination with more complex questions and propositions, she was unable to cope. She would answer a question put to her both in the affirmative and the negative, and at one stage in response to quick fire questions from Defence Counsel she appeared to agree with everything he put to her; propositions that would not make any sense to agree with.'*

[17] The appellant himself had admitted in evidence that he was aware of the complainant's mental deficiency. The trial judge had referred to it in paragraph 31 of the summing-up and 14 of the judgment.

> *'31. It is an agreed fact that there was sex. There is no medical evidence before the Court that she was mentally impaired but it is open to you to make that finding, having seen and heard her. Tausia admitted to the Court in cross-examination that he knew she was mentally impaired and had always known that.*
>
> *'14. The accused's version of events is unconvincing and implausible. He says that he resisted the lady's strenuous invitations to treat for 20 minutes before succumbing to her advances. This is a 19 year old man who on his own evidence had never had sex before. A young man's libido and sexual urges could never resist such an offer. He admits in his evidence that he was aware of the lady's mental deficiency and had been most of his life, having lived near or in the family. That being so, the Court cannot accept his version of events to be true. He has said nothing to cast doubt on the prosecution case.'*

[18] Therefore, the appellant's complaint under the first ground of appeal does not appear to have a reasonable prospect of success at this stage and only the full court could examine it in detail with the aid of the complete appeal record.

02nd ground of appeal (against sentence)

[19] The main thrust of the appellant's argument here is that the trial judge had followed the sentencing tariff applicable to child rape *i.e.* 10-16 years of imprisonment [vide **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) which is now 11- 20 years of imprisonment - **Aicheson v State** [2018] FJSC 29; CAV0012.2018 (02 November 2018)] and sentenced him accordingly though the complainant was a woman of 27 years at the time of the commission of the offence.

[20] The trial judge had stated why he decided to apply the sentencing tariff for child rape and add 03 years on account of breach of trust to the starting point of 10 years in paragraphs 14, 16 and 17 of the sentencing order.

> *'14. This rape was the rape of a 27 year old who because of mental impairment acted and thought as a 10 year old would. That being so, it greatly aggravates the offence or alternatively removes the case from the adult range and places it into the child range. Rapes of children are regarded by the Courts as far more serious than rapes of adults in that children are not yet mature enough to cope emotionally with sexual violation, and if subject to such abuse their own progress to sexual maturity can well be jeopardized.*
>
> *'15. To rape a mental defective can have the same disastrous consequences and it for this reason that sentences should be passed in the range pari passu with the* ***mental age*** *of the victim.*
>
> *'16. This crime therefore must be sentenced within the range of rapes of children; that is a sentence of between 10 to 16 years.*
>
> *'17. I take a starting point of 10 years. It is grossly aggravating that the accused should have breached the trust placed in him by his aunt to care for Donna whilst she was away. For that aggravation I add three years to the sentence. It is also an aggravating factor that the victim of the rape was mentally impaired, but as discussed earlier this aggravation is subsumed in sentencing the accused within the higher "child tariff".'*

[21] In any rape case without aggravating or mitigating features the starting point for sentencing an adult has been taken as a term of imprisonment of seven years (see **Kasim v State** AAU0021j of 93s: 27 May 1994 [1994] FJCA 25) and the higher end has been taken consistently to be 15 years (**State v Naicker** - Sentence [2015] FJHC 537; HAC279.2013 (15 July 2015), **State v Kumar** - Sentence [2019] FJHC 594;

HAC377.2016 (17 June 2019), **State v Caucau** - Sentence [2017] FJHC 518; HAC107.2013 (14 July 2017), **State v Vatuorooro** - Sentence [2017] FJHC 564; HAC50.2017 (28 July 2017), **State v Suguta** - Sentence [2017] FJHC 824; HAC100.2014 (2 November 2017), **Bera Yalimaiwai v The State,** Criminal Appeal Case No. AAU 0033 of 2003, **Navuniani Koroi v The State,** Criminal Appeal Case No. AAU 0037 of 2002, **Viliame Tamani v The State** and Criminal Appeal Case No. AAU 0025 OF 2003).

[22] In my view, what is of real concern is not the final sentence *per se* but the basis on which it was arrived at, which could potentially send a wrong signal to other sentencing judges who may deal with similar cases in a similar manner.

[23] The trial judge had determined that the complainant was of the mental age of 10 years and decided to treat this as a child rape case. There was no scientific or expert evidence at all, as admitted by the trial judge himself, for him to determine that the complainant's mental age was 10 years. The judge had apparently done so on the evidence of the complainant's mother who had said that her daughter had a similar mental age to that of her 07 year old granddaughter and the judge's own observations during the trial that the complainant was a mentally challenged person. Perhaps, the trial judge may have also taken into account the admission by the appellant that he knew of the mental deficiency of the complainant.

[24] In my view, none of these items, individually or collectively, is sufficient to conclude that the complainant was a person of mental age of 10 years without any expert evidence to substantiate such an inference.

[25] Looking at other jurisdictions for a legal definition of a mentally retarded person, I find that in terms of section 77(3) of the Police and Criminal Evidence Act 1984 in UK 'mentally handicapped' in relation to a person means that he is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning. However, there should be expert evidence indicating mental retardation and impairment of intelligence and social functioning before the court could determine that a person is a 'mentally handicapped' person. This definition had been

given in the context of requiring a warning to the jury on the admissibility of a confession of a 'mentally handicapped' accused.

[26] A random literature survey of the meaning of the term 'mental age' reveals that a person's mental age is a measurement of his ability to think when compared to an average person's ability of that age. Mental age is also described as a concept related to intelligence. It looks at how a specific individual, at a specific age, performs intellectually, compared to average intellectual performance for that individual's actual chronological age (*i.e.* time elapsed since birth). Mental age is based on one's intellectual development, while chronological age is based on the calendar date on which that person was born. If someone's chronological age and his mental age are the same, he is said to be of average intelligence. Gifted children have mental ages that are higher than their chronological age. Mental age is also defined as a measure used in psychological testing that expresses an individual's mental attainment in terms of the number of years it takes an average child to reach the same level. The above descriptions are not exhaustive of the term '*mental age*.'

[27] Thus, the mental age of a person is a scientific concept and cannot be determined by a layman or a judge without the assistance of expert evidence, and to so fix a mental age of a complainant arbitrarily is grossly erroneous and to sentence the accused based on such a determination creates a manifestly dangerous precedence.

[28] To add to this discussion, in my view section 207(3) of the Crimes Decree refers to the actual chronological age of 13 years for a child in the context of incapacity to give consent and not the mental age. Therefore, when the victim is 'mentally handicapped' or 'mentally impaired' that should be taken as a serious aggravating feature and sentence should be enhanced accordingly rather than treating that person as a child for the purpose of sentencing.

[29] Therefore, the statement of the learned trial judge that sentence should be passed on the appellant in the range *pari passu* with the mental age of the victim is an sentencing error which the full court should consider as a question of law and make pertinent observations for future guidance as well. Therefore, no leave is required but as a matter of formality leave to appeal against sentence is granted.

[30] Therefore, I make no pronouncement on the prospect of success of the second ground of appeal at this stage as the Court of Appeal would consider the ultimate sentence (which is within the sentencing tariff for adult rape) rather than each step in the reasoning process leading to it and assess whether in all the circumstances of the case the sentence is one that could reasonably have been imposed by the sentencing judge (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)] .

Order

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

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL