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

CRIMINAL APPEAL NO.AAU 158 of 2017
[In the High Court at Suva Case No. HAC 271 of 2016S]

BETWEEN : **SAINIANA MARAMA DROSE**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **11 November 2020**

Date of Ruling : **12 November 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of rape contrary to section 207 (1) and (2) of the Crimes Act, 2009 and another count of sexual assault contrary to section 210 (1) (a) and 3 (b) of the Crimes Act, 2009 committed between 01 January 2016 and 05 July 2016 at Nasinu in the Central Division.

[2] The particulars of the offence were as follows.

*'**First Count***

Representative Count

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) of the Crime Act of 2009*

Particulars of Offence

SAINIANA MARAMA DROSE *between 1st day of January 2016 and 5th day of July 2016, at Nasinu in the Central Division, penetrated the vagina of* ***M. L. D.*** *with her tongue without her consent.*

Second Count

Representative Count

Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210 (1) (a) and 3 (b) of the Crimes Act of 2009.*

Particulars of Offence

SAINIANA MARAMA DROSE *between the 1st day of January 2016 and 5th day of July 2016, at Nasinu in the Central Division, unlawfully and indecently assaulted* ***M. L. D****.*

[3] After the summing-up on 10 November 2017 the majority of assessors had opined that the appellant was guilty of the first count and all three assessors had opined that the appellant was guilty of the second count. In the judgment delivered on 13 November 2017 the learned trial judge had agreed with them and convicted the appellant of both counts. On 14 November 2017 the appellant had been sentenced to 13 years of imprisonment on the first count and 04 years of imprisonment on the second count; both sentences to run concurrently subject to a non-parole period of 12 years.

[4] The appellant in person had signed a timely notice of leave to appeal against conviction and sentence on 18 November 2017 (received by the CA registry on 22 November 2017). The Legal Aid Commission had filed amended grounds of appeal against conviction and sentence and written submissions on 17 July 2020. The state had responded by its written submission on 25 August 2020.

[5] In terms of section 21(1)(a) and (b) 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.

[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 ground of appeal filed within time 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] Grounds of appeal against conviction and sentence urged on behalf of the appellant are as follows.

(i) 'THE learned trial judge had erred in law and in fact when he failed to direct the assessors and himself on the principle of recent complaint and/or delayed reporting.

(ii) THAT the sentence imposed on the appellant is harsh and excessive.

[8] The appellant is the complainant's mother and the complainant was 14 years of age when the incident happened. The trial judge had summarised the evidence of the complainant and the appellant as follows in the summing-up.

'***THE PROSECUTION CASE***

19. 'The prosecution's case were as follows. The accused (DW1) is 45 years old. She is a single mother, and had three sons and a daughter. Her sons were aged 24, 21 and 8. Her daughter was 14 years old and is the complainant (PW1)

in this case. At the time of the alleged offendings, the accused and her children were living at Wainibuku Hart as a family. PW1 is now a form 3 student at a school in Suva. At the time of the alleged offences, she was schooling at a primary school in Wainibuku.

20. According to the prosecution, when the accused and the complainant were at home alone, the accused used to force PW1 to take off her clothes. Thereafter, she used to tell PW1 to lie down. Then she fondled her breasts. According to the prosecution, PW1 was often lying down naked, and the accused used to forcefully part her legs, and licked her "mimi", the term PW1 used to describe her vagina. According to the prosecution, when the accused was licking PW1's vagina, her tongue often penetrated her vagina for about 2 minutes.

21. According to the prosecution, the accused did the above to PW1 approximately 20 times when her other siblings were not at home. She also used to fondle her breasts for about 20 times. PW1 said the accused also poked her vagina 3 times. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged on both counts. That was the case for the prosecution.

THE ACCUSED'S CASE

22. On 8 November 2017, the information was put to the accused, in the presence of her counsels. She pleaded not guilty to the charge. In other words, she denied the allegations against her. At the end of the prosecution's case, she was acquitted on count no. 3. However, a prima facie case was found against her on count no. 1 and 2. She was called upon to make her defence. She chose to give sworn evidence and called no witness. That was her right.

23. The accused's case was very simple. On oath, she denied the allegations against her. She said, she loved her daughter a lot and all she wanted for her was to focus on her education and to succeed in life. Because of the above, the defence is asking you, as assessors and judges of facts, to find the accused not guilty as charged. That was the case for the defence.'

01st ground of appeal

[9] The appellant's complaint is based on paragraph 26 of the summing-up which is as follows.

> [26] *The state's case against the accused was based fundamentally on her daughter's (PW1) verbal evidence in court. I will quote her evidence from the record for you,*
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> > *"...She used to come to the room, that is, my mother. She used to tell me to take off my clothes. She used to tell me to lie down. I said no. She then*

forced me to lie down. She than touched my body. That is my breast and "mimi". I was naked, she then poked my "mimi". She was using her hand to touch me. She then licked my "mimi". My mother licks my "mimi". She uses her tongue to lick my "mimi" for about 2 minutes. "Mimi" is my private part. My private part is below me.

When she was licking my "mimi", I can feel it. I can feel the wetness of her tongue inside my "mimi". I was scared. I use the "mimi" to urinate with. [PW1 point to where her vagina is, to demonstrate where her "mimi" is]. I can feel her tongue inside my "mimi". Her tongue were inside my "mimi", from the front. She licked my "mimi" for 2 minutes. She parted my legs and licked my "mimi". She licked the front of my "mimi". She force me to part my legs, so that she could licked me. I was crying. What she was doing to me was painful. When she was licking my "mimi", it was painful. After that she told me to get dressed. She told me not to tell anyone else about the incident. I was scared of my mother. She had a short temper.

When mum touched my breast and licked my "mimi", she did it in a room in our home. It was the house our family stays in. My brothers were not in the house and were somewhere else. Only myself and mum were in the house at the time. Between 1 January to 5 July 2016, she did the above most of the time, that is, she did it about 20 times. She touched my breast for about 20 times during the above period.

I used to cry on my way to school. I then told my form teacher about the above. Then we went to the Nakasi Police Station (NPS). At Nakasi Police Station, I gave my statements. I was later taken to the HOME.

I can't recall 5 July 2016. The last time mum licked my "mimi" was on 5 July 2016. Before she licked my "mimi", she touched both my breasts. At the time, I was living with mum. I was attending Wainibuku HART Primary School. She also poked my mimi 3 times. She also told me to poke her "mimi" some times.

My relationship with my mum was not good because she did not care for me. When I asked her to do something, she often refuses. When by brothers assaulted me, she does not care about it. Taniela often assaults me. Only he assaults me..."

[10] The appellant's argument is on the portion of the complainant's evidence '*I used to cry on my way to school. I then told my form teacher about the above. Then we went to the Nakasi Police Station (NPS). At Nakasi Police Station, I gave my statements. I was later taken to the HOME.'*. He submits that by that piece of evidence the prosecution had offered recent complaint evidence but the trial judge had failed to direct them in

accordance with the law relevant to recent complaint evidence causing a miscarriage of justice. He relies on **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[11] In **Raj v State** (supra) the Supreme Court set down the law regarding recent complaint evidence as follows.

> *'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account:* ***R v. Whitehead*** *(1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness:* ***Basant Singh & Others v. The State*** *Crim. App. 12 of 1989;* ***Jones v. The Queen*** *[1997] HCA 12; (1997) 191 CLR 439;* ***Vasu v. The State*** *Crim. App. AAU0011/2006S, 24th November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint:* ***Kory White v. The Queen*** *[1999] 1 AC 210 at p215H. This was done here.*
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> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
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> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.*

[12] When one looks at the whole of the appellant's evidence as narrated in paragraph [26] of the summing-up it is clear that the complainant had simply come out with the impugned portion as part of the whole narrative. There does not appear to be a deliberate attempt by the prosecution to lead recent complaint evidence. In any event since the teacher had not been called as a witness what the appellant had stated of her having told the teacher cannot be regarded as a piece of recent complaint evidence. It is also not clear how long after 05 July 2016 the complainant had told the teacher. Further, what she had told the teacher is also not disclosed. Whether it was actually a 'recent' complaint cannot be ascertained from paragraph [26].

[13] The defence too does not appear to have probed the so called recent complaint evidence any further because the impugned portion may not have regarded as a piece of recent complaint evidence by all parties at the trial.

[14] Therefore, it is understandable as to why the trial judge had chosen not to address the assessors on this piece of evidence as recent complaint evidence. There was no legal basis for the trial judge to direct the assessors on recent complaint evidence. On the other hand, if the defence had entertained a concern as expressed by the appellant now namely that the assessors could misinterpret that piece of evidence as recent complaint evidence her counsel could have sought a redirection as required from the trial judge for a warning. No such redirection appears to have been sought. Thus, this complaint of the appellant seems to be an afterthought.

[15] As pointed out the appellant is not entitled to raise it as an appeal point at this stage (vide **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)].

[16] On the other hand the test to be applied here is whether excluding the disputed piece of evidence there was sufficient evidence to convict the appellant. It is clear that had the assessors and the trial judge believed the rest of the complainant's evidence the verdict of guilty could be justified. They had obviously believed her narrative and rejected the appellant's denial. The appellant had not suggested any possible motive for her daughter to make series allegations of this nature against her.

[17] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> *''It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.'*
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> *'……..Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies*

between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

The appeal is dismissed.'

[18] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[19] In my view, it was open to the assessors to bring the verdict they brought against the appellant and for the trial judge to agree with them. Having considered the evidence against the appellant as a whole, one cannot say that the verdict was unreasonable. There was evidence, when believed, on which the verdict could be based. In the circumstances, I do not see any basis for this court to interfere with the verdict of the assessors and the trial judge.

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

02nd ground of appeal

[21] The appellant argues that the sentence is harsh and excessive because the trial judge had taken into account 'Rape of a child' as an aggravating factor when it was part of the tariff for juvenile rape cases.

[22] The Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) identified an instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself.

[23] While it is true that 'rape of a child' should not have been separately counted as an aggravating factor in enhancing the sentence when the trial judge had picked the starting point at 12 years and when the tariff for juvenile rape included child rape as well, in my view the breach of trust by the appellant as the mother of her 14 year old daughter (the complainant) is unconscionable and that alone warrants increasing the sentence by 04 years.

[24] In any event, the ultimate sentence of 13 years of imprisonment is well within the tariff applicable to juvenile rape of 10-16 years of imprisonment [vide **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Now it is 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). As said in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) quantum can rarely be a ground for the intervention by an appellate court.

[25] 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).

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

Order

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
JUSTICE OF APPEAL