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

**CRIMINAL APPEAL NO.AAU 0056 of 2015**
**[In the High Court at Suva Case No. HAC 162 of 2013]**

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| **BETWEEN** | : | **KANEA NAUA** |
| | | ***Appellant*** |
| **AND** | : | **STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Basnayake, JA**<br>**Prematilaka, JA**<br>**Bandara, JA** |
| **Counsel** | : | **Appellant in person** |
| | : | **Ms. S. Kiran for the Respondent** |
| **Date of Hearing** | : | **06 April 2021** |
| **Date of Judgment** | : | **29 April 2021** |

# JUDGMENT

**Basnayake, JA**

[1] I agree with the reasoning and conclusions arrived at by Prematilaka JA.

**Prematilaka, JA**

[2] The appellant had been indicted in the High Court of Suva with one count of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Valelevu, in the Central Division between 01 January 2010 and the 31 December 2010. The victim was 08 and the appellant was 56 years old respectively at the time of the incident. The appellant was a neighbour and related to the victim by marriage.

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of both charges levelled against him. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment, convicted the appellant of both charges and sentenced him to imprisonments of 13 years on rape (12 years and 08 months after the remand period was deducted) and 05 years on sexual assault; both sentences to run concurrently with a non-parole period of 10 years.

[4] The appellant had appealed against conviction and sentence in person out of time by nearly a month. However, the respondent had agreed to treat it as a timely appeal. Thereafter, the Legal Aid Commission had tendered amended grounds of appeal only against conviction and written submission. The State had tendered its written submissions.

[5] The appellate had urged the following grounds of appeal at the leave stage but the single Judge had refused leave to appeal on all grounds on 06 June 2019:

> *'(1) the learned trial judge erred in law and in fact when he did not properly consider that the record of the caution interview of the appellant was fabricated by the Police during the interview and he did not understand the process given that he understood very little language thus amount to being subject to an oppressive circumstances which should not have been admitted into evidence. [sic].*
>
> *(2) that the learned Trial Judge erred in law and in fact when he did not properly consider the denial of the appellant in the trial which was consistent and credible.*
>
> *(3) that the learned trial Judge erred in law and in fact when he did not give direction to the assessors relating to the consequences of a complaint that was not recent which goes to the consistency of the evidence of the complainant and nothing else.'*

[6] The appellant had tendered the following grounds of appeal for the consideration of the Court of Appeal on 14 August 2020:

> *(i) Medical Report not certain about hymen;*
> *(ii) Doubts that are reasonable against evidence;*
> *(iii) Caution statement obtained by deception;*
> *(iv) Self-Intoxication a non-direction;*
> *(v) Voir Dire;*

*(vi) Interpreter;*
*(vii) Single judgment dismissed-Special Leave application;*
*(viii) Sentence Appeal (With further subheadings).*

[7] The facts of the case were that on an unknown day of year 2010, the victim had visited the house of the appellant who had been a neighbour and related to the girl by marriage to fetch water. The appellant had apparently been alone at home and asked the victim to sit on his lap. He had then proceeded to put his hands in her pants, fondled her genitals and penetrated her vagina with his forefinger. He had kissed her mouth, licked her lips and fondled her breasts. The victim had run home but gone back again a second time when her father told her to fetch more water. She had again been sexually abused by the appellant on the mattress. She had eventually told her maternal aunt as to what happened and the aunt in turn had told the victim's mother and the Police had been informed. The appellant had been arrested and he had admitted to the alleged acts of rape and sexual assault saying that he was drunk and did not know what he was doing.

[8] The matter had come to light when the victim's aunt, Pene caught her moving her hips up and down on a mattress. The victim had then told the aunt about what happened between the appellant and her and Aunty Pene had communicated the same to the victim's mother, Esther. According to Esther, Pane had told her what the victim told her and Esther had rushed to the appellant's house but the appellant was not there. Later, the appellant had visited her house and apologised but Esther had ordered him out of the house before proceeding to lodge the complaint with the police.

[9] The two police officers who had recorded the cautioned interview and the charge statement of the appellant had given evidence at the trial.

[10] The appellant too had testified at the trial and stated that he never put his hand into the victim's panties, never kissed her mouth, nor fondled her breasts. According to his narrative, when the victim first came to his house he was watching TV. He saw her come to the back side of the house, fill her bottle with water and then go home. She had come back a second time to fetch water and come into the house. She had said that she wanted to watch a DVD. He had told her to take the water home and come

back. She had come back and they had sat on the settee together and watched a movie. He had been drinking beer. Junior kept coming in and out of the room. After the movie she had gone home. He had done nothing to her but later heard rumours that he abused her so he had gone to Esther's house to find out what was being said. He had not gone to apologise. Esther had been angry so he could not find out what the story was.

[11] Regarding the cautioned statement and the charge statement, the appellant had disputed both and stated that he had not understood the process because he had a limited knowledge of English and anyway the answers that his counsel referred to were not answers that he gave but were fabricated by the Police.

[12] It appears that appeal grounds (i), (ii) and (viii) are totally new grounds of appeal not even remotely urged before the single Judge of this court. Given that the appellant had been sentenced on 23 February 2015, the delay is over 05 years and 04 months. Therefore, this court would now follow ***Nasila*** guidelines regarding those grounds of appeal and see whether enlargement of time should be granted to urge them before this Court. In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) faced with a similar situation the Court of Appeal stated:

> *'[14] Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned.'*
>
> *'[15] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in* ***Rasaku v State*** *CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and* ***Kumar v State; Sinu v State*** *CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.*

[13] Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[14] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).

[15] It is clear that the delay is very substantial and appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide ***Nasila)***. The respondent had not averred any prejudice that would be caused by an enlargement of time.

***01st ground of appal***

[16] This was not a ground of appeal urged before the single judge. The appellant has submitted that because the medical examination form (MLF) of the victim had recorded *'hymen not seen'* and *'cannot visualise hymen'* instead of *'hymen not intact'* that cast doubt on the allegation of digital rape against him. In the first place, the MLF had not been led in evidence at the trial by either party. Secondly, the medical examination had been done at least 1 ½ months after the last date of the time period mentioned in the information, if not after a longer period of time. Thirdly, in any event the hymen not being visible does not mean that no digital penetration had taken place. In any event, the appellant had admitted to have fingered only the *'nipple part'* of the vagina. Therefore, there is no merit or real prospect of success at all in the appellant's contention and enlargement of time is therefore refused.

***02nd ground of appeal***

[17] The appellant has contended that the movie he and the victim were watching had 'love scenes' and that would have influenced the victim to have come out with the allegations against him. He has also complained that Aunt Pene was mentally ill and the victim's mother Esther was angry and the victim had been bullied into come out with the allegations against him by them.

[18] The above narratives had not been even suggested to the victim, Pene or Esther at the trial. The appellant had not given such evidence either. Clearly, this ground of appeal lacks merit and has no real prospect of success. Accordingly, enlargement of time is refused.

***04th ground of appeal***

[19] The appellant's argument based on section 13 (4) of the now repealed Penal Code is that the trial judge should have given directions on self-intoxication as he had said in the cautioned interview that he could not remember as to what happened because he was drunk. However, the Penal Code provisions would not apply to the appellant as the offences had been committed under the Crimes Act, 2009. The provisions in the Crimes Act, 2009 on intoxications are found in sections 29-32 of the Crimes Act, 2009.

[20] The appellant had not taken up the position that he could not remember as to what happened because he was drunk under oath at the trial except to say that he was drinking beer. Nor had it been even suggested to the victim that the appellant was behaving in the way he did because he appeared to be drunk. Thus, it is clear that the appellant's position that he could not remember as to what happened as he was drunk cannot be treated as affecting the fault element of rape or sexual assault. Therefore, his statements in the cautioned statement have to be considered as an attempt to wriggle out of his deliberate actions. Therefore, there was no basis for the trial judge to have treated the appellant's contention under section 30(2), 31(1) or 32(1) of the Crimes Act, 2009. There was not a sufficient evidentiary basis for any directions to the assessors based on the so called self-intoxication. This ground of appeal lacks

merit and has no real prospect of success and enlargement of time is accordingly refused.

***03rd, 05th and 06th grounds of appeal***

[21] All the above grounds of appeal could be conveniently considered together, for they all deal with the appellant's cautioned statement. Leave to appeal had been refused by the single Judge on a similar complaint forming the gist of the above appeal grounds.

[22] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction 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) used 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.

[23] The appellant complains that he knew or understood little of English and therefore the incriminating answers in his cautioned interview and the charge statement were not of him. He says that those answers were taken by deception but also pleads that they were fabrications on the part of the police. The appellant is a native Banaba islander from Kiribati who had settled down in Fiji at the age of 20. Banaba is one of the islands belonging to Kiribati. His mother tongue is said to be Rabi.

[24] PW1, DC 3627 Kibau, whose origin is also from Banaba Island, had caution interviewed the appellant. He was based at Rabi Community Post and speaks fluent Rabi dialect as well as English. He had known the appellant very well from mixing in the Rabi community. According to him, the appellant had chosen to be interviewed in English though during the interview he was in conversation with him in Rabi as well

to make sure that the appellant fully understood the cautions, his rights and questions. He had to really explain to the appellant only the word 'obliged' in Rabi dialect which the appellant could not understand in English. The appellant in his evidence had admitted that he preferred English at the cautioned interview and chose to be interviewed in English and understands English well. He had also stated that the cautioned interview was read back to him.

[25] DC 36666 Mosile who charged the appellant had stated that after charging him in English language it was read back to him.

[26] The trial judge had held a *voir dire* inquiry (where a Rabi translator had been present and where the appellant had remained silent) into the following matters raised by the appellant and in the end rejected those concerns and admitted the cautioned interview:

> *'1. He has been educated to Form 3 level in Kiribati and his English is not good enough to express himself clearly. The interview was conducted in English.*
>
> *2. He was not given enough time and did not understand the availability of Legal Aid Counsel.*
>
> *3. That the record of interview was not read back to him.'*

[27] In the *voir dire* ruling also the trial judge had carefully looked at the appellant's complaint on the language issue along with other *voir dire* grounds and found no merits in all of them.

[28] During the trial also there had been a Rabi translator in attendance and in the summing-up the trial judge had addressed the assessors fully on the appellant's challenge to his cautioned interview and the charge statement at paragraph 20. The assessors had obviously rejected his position.

[29] The single Judge of the Court of Appeal also ventilated the same complaint under the first ground of appeal urged before him and held it not to be even arguable.

[30] In addition to what was discussed above, having examined the cautioned interview and the charge statement, I do not find any merits in the appellant's complaint of deception or fabrication of those two statements by the police. There is a clear consonance between what the appellant had stated in the cautioned interview and the charge statement on the one hand and the narrative of the victim and her mother on the other. I also conclude that the appellant did not suffer from any handicap by the use of English language, which was his choice any way, in recording those two statements.

[31] DC 3627 Kibau had given unequivocal evidence that the appellant was offered his right to have legal counsel and informed him of the Legal Aid Commission. The cautioned statement proves this position. There is no merit in the appellant's complaint in this regard.

[32] As for the cautioned statement not being read back to the appellant, DC 3627 Kibau could not recollect whether he read it back to the appellant or not though according to the document itself the appellant had waived off reading it. However, the appellant in his evidence under oath had testified that it was read back to him by the interviewing officer. Therefore, there is no breach of Judges' Rules. Even if there is such a breach it will not necessarily vitiate an otherwise admissible confession, for Judges' Rules are primarily meant for guidance but not as statutory prescriptions as correctly held by the trial judge at the *voir dire* ruling.

[33] The appellant also complains that there was no independent Rabi interpreter at the time of recording his cautioned interview. DC 3627 Kibau had been a fluent speaker of Rabi dialect who had even known the appellant for a long time prior to the allegation of sexual abuses against him. He had spoken with the appellant even during the cautioned interview. It was not suggested to him either at the *voir dire* inquiry or the trial proper that he was not competent in Rabi language. The appellant had a separate Rabi translator both during the *voir dire* and trial proceedings though he does not appear to have availed himself of his assistance. This complaint has no merits at all and leave to appeal is refused in respect of all three grounds of appeal.

***07th ground of appeal***

[34] The appellant's contention is on the single Judge ruling. The first ground of appeal urged by the appellant at the leave to appeal hearing was the same as the 03rd ground of appeal which had been already dealt with earlier and leave to appeal has been refused.

[35] The second ground of appeal urged before the single Judge was that the trial judge had not properly considered the denial of the appellant as being credible and consistent.

[36] The appellant had not denied the allegations of rape and sexual abuse in the cautioned statement and the charge statement but admitted them. In fact in both statements he had also admitted that he apologised to the victim's mother following those acts.

[37] The appellant had not given evidence at the *voir dire* inquiry and denied his admissions of the allegations against him. No direct suggestion to that effect had been put to the police officers either.

[38] At the trial proper suggestions had been made (but denied by the police officers) of the appellant's denial of the allegations and the appellant had also denied the admissions made in his cautioned interview.

[39] Therefore, it cannot be argued that the appellant had taken up a consistent position of denial from the inception. The trial judge on his part had directed the assessors of his defence amply at paragraph 20 and 24-29 of the summing-up.

[40] In the circumstances, there are no merits in the second ground of appeal taken up before the single Judge and leave to appeal is refused.

[41] The third appeal ground for which leave to appeal had been sought is the lack of directions by the trial judge on delay in reporting the incident.

[42] The incident had happened on a day in the year 2010 and the matter had come to light in February 2011. The following relevant direction had been given by the trial judge in the summing-up:

> *'18. Ladies and Gentleman, there is no rule of law that says the victim of rape or sexual assault must tell somebody else and must tell somebody else soon after the assault. The fact that she did and the circumstances that she did you will take into account and give them whatever weight you might think fit. Even if she never told anybody at any time, you are still entitled to judge this case on the evidence of Doreen alone.'*

[43] In **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) some guidelines were suggested on how to deal with a complaint of delayed reporting by the Court of Appeal applying the "the totality of circumstances test":

> *'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.'*

[44] As far as the appellant's case is concerned his trial counsel had not challenged the victim's credibility on the basis of delayed reporting of the incident. If the counsel had wished to discredit the victim on the basis of fabrication of allegations as a subsequent reflection as evidenced from the late complaint, the victim must have been confronted on those lines in cross-examination. Only then could the victim have explained reasons, if any, for not making a prompt complaint regarding the incident in 2010. In other words, the delay should have been canvassed as a trial issue. Otherwise, the appellant's argument based on 'belated complaint' remains only an afterthought taken up simply as an appeal point.

[45] In **Vetau v State** [2016] FJSC 9; CAV008.2015 (21 April 2016) the Supreme Court remarked:

> *'50. In **Lucke v Clearly** & Otrs (2011 iii SASR 134) the Supreme Court of South Australia has held that in regard to a point abandoned at trial, it would not be in the interests of justice to allow it to be raised on appeal.*

*The court further observed that:*

> *(i) The threshold test to be met by a party seeking to raise an argument for the first time on appeal is high. An appeal court will only permit a party to do so in the most exceptional circumstances....."*

*51. In the case **Whisprun Pty Ltd. v Dixon (2003) ARI 447** the High Court of Australia observed that:*

> *" It would be adverse to the due administration of justice if, on appeal a party could raise a point that had not been raised at trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not raised at trial or might possibly have been met rebutting evidence or cross-examination."*

[46] In any event the appellant's counsel should have sought redirections in respect of the complaint now being made on the failure to administer directions on 'delay' in the summing-up as held in **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). The obvious failure to do so would disentitle the appellant even to raise this matter in appeal with any credibility at this stage.

[47] Therefore, in the circumstances, the directions given by the trial judge are adequate and the single Judge had correctly refused to allow leave to appeal on the issue of lack of directions on delayed reporting. Accordingly, leave to appeal on this appeal ground is refused.

***08th ground of appeal (sentence)***

[48] The appellant has not canvassed the sentence of 12 years and 08 months with a non-parole period of 10 years before the single Judge. However, his initial appeal in person was against both the conviction and the sentence which had been treated as timely.

[49] The guidelines to be followed 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 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.*

[50] The trial judge had correctly identified the sentencing tariff for juvenile rape as 10-16 years of imprisonment as set out in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and confirmed in **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. He had picked 12 years as the starting point and added 04 years for aggravating factors to make it 16 years. Two years had been deducted for the mitigating factors and one year for being a first offender leaving a period of 13 years. After deducting the period of remand *i.e.* 04 months the appellant had served the effective serving sentence had been fixed at 12 years and 08 months.

[51] The aggravating factors considered by the trial judge are (i) taking advantage of a vulnerable child (ii) abuse of trust by a relative and (iii) the age difference of 49 years.

[52] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[53] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018):

> *[57] Two words of caution. First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of*

*incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided.*

[54] In other words if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[55] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[56] The trial judge had selected 12 years in the middle range of the sentencing tariff as the starting point. If a trial judge is not sure as to what factors he has considered and cannot set them down to show why he starts with a sentence in the middle range of the tariff, it is safe (at least in order to avoid a complaint of double counting) to pick the starting point at the lower end of the tariff and goes through the process of arriving at the final sentence balancing aggravating and mitigating factors etc. unless the trial judge follows the two-tiered approach articulated in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) where the sentencing judge first considers the *objective* circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the *subjective* circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed.

[57] If not, it is open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors as stated by the Supreme Court in ***Qurai*** where the Supreme Court also remarked that the two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges. The Supreme Court said in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) that in many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors.

[58] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** (supra) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[59] This court is faced with exactly the same dilemma in this appeal. It is not clear what factors the trial judge had considered under 'objective seriousness' of the crime in selecting the starting point other than the aggravating factors indicated. The concern is whether any one or more of the aggravating factors named by the trial judge had influenced the starting point of 12 years towards the middle range of the tariff. If so, 04 year increase on account of the same factors may have caused double counting.

[60] At the same time the facts in the instant case cannot be compared equally to those shocking aggravating circumstances in ***Raj.***

[61] However, 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).

[62] The fact that the ultimate sentence is within the tariff does not necessarily make it appropriate to the gravity of the offence. 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. The question in this case is whether the sentence imposed on the appellant fits the crimes.

[63] As discussed above, there appears to be a sentencing error in the form of double counting and leave to appeal against sentence should be allowed. Therefore, given all the facts and circumstances of the case including the fact that the appellant is now around 68 years of age and said to be suffering from arthritis especially in the colder weather, I think a sentence of 10 years and 08 months would be appropriate for the crimes he committed.

[64] In view of the above conclusion, the other matters raised by the appellant against sentence including the concern on the non-parole period need not be considered.

**Bandara, JA**

[65] I have read the draft judgment of Prematilaka JA and agree with his reasoning and conclusions.

**Orders**

1. Leave to appeal and enlargement of time, as the case may be, to appeal against conviction is refused.
2. Appeal against conviction is refused.
3. Leave to appeal against sentence is allowed.
4. Appeal against sentence is allowed.
5. Sentence passed at the trial is quashed.
6. A final sentence of 10 years and 08 months of imprisonment is passed on the appellant to run from 23 February 2015 subject to a non-parole period of 08 years.

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**Hon. Mr. Justice E. Basnayake**
**JUSTICE OF APPEAL**

COURT OF APPEAL FIJI

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**Hon. Mr. Justice C. Prematilaka**
**JUSTICE OF APPEAL**

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**Hon. Mr. Justice W. Bandara**
**JUSTICE OF APPEAL**