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

CRIMINAL APPEAL NO.AAU 167 of 2019
[In the High Court at Lautoka Case No. HAC 19 of 2016]

BETWEEN	:	**ISIKELI BAINITABUA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**19 November 2021**
Date of Ruling	:	**22 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with two counts of indecent assault contrary to section 212 (1) of the Crimes Act No. 44 of 2009, two counts of sexual assault contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009 and two counts of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Lautoka in the Western Division against three victims in the Western Division in December 2015 and January 2016.

[2] The information read as follows:

*'**COUNT ONE***

Statement of Offence

***INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***ISIKELI BAINITABUA**, on the 6th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **"LM"** by pinching the nipple of the said **"LM"**.*

COUNT TWO

Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***ISIKELI BAINITABUA,** on the 20th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **"AV"** by touching the vagina of the said **"AV"**.*

COUNT THREE

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***ISIKELI BAINITABUA**, on the 20th day of December, 2015 at Lautoka in the Western Division, penetrated the vagina of **"AV"** with his finger.*

COUNT FOUR

Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***ISIKELI BAINITABUA**, on the 28th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **"AV"** by licking the vagina of the said **"AV"**.*

COUNT FIVE

Statement of Offence

RAPE*: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

ISIKELI BAINITABUA*, on the 28th day of December, 2015 at Lautoka in the Western Division, penetrated the mouth of* ***"AV"*** *with his penis.*

COUNT SIX

Statement of Offence

INDECENT ASSAULT*: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

ISIKELI BAINITABUA*, on the 7th day of January, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted* ***"RM"*** *by poking his finger in between the buttocks of the said* ***"RM".****'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was not guilty of the first count but guilty of all other counts. The learned trial judge had agreed with the assessors' opinion on two to six counts but disagreed with their opinion on the first count, convicted the appellant of all counts and sentenced him on 25 October 2019 to an aggregate sentence of 16 years and 05 months and 25 days of imprisonment (after the remand period was deducted) with a non- parole period of 13 years.

[4] The appellant had in person filed a timely appeal against conviction and sentence (16 November 2019). Thereafter, the Legal Aid Commission had tendered amended grounds of appeal and written submission on 22 February 2021. The state had tendered its written submissions on 28 October 2021.

[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 in a timely

appeal for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[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 timely preferred 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] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact in convicting the appellant after accepting evidence from the State when the same could not relied upon to secure a conviction.*

Sentence

Ground 2

THAT the Learned Trial Judge erred in law and in fact in sentencing the appellant to a sentence that is harsh and excessive.

[8] The trial judge in the sentencing order had summarized the complainant's evidence against the appellant as follows:

> *'2. The brief facts were as follows:*
>
> > *"On 20th December, 2015 the first victim "AV" who was 9 years of age was at the house of her uncle, the accused. After having her shower, she was on her way to get her towel from the room when she saw the accused standing at the doorway. The victim got scared when she saw the accused. At this time he came and touched her vagina.*
>
> *3. The victim went into the room to wear her clothes after a while the accused called her into the sitting room. In the sitting room the accused showed her some videos in his phone of a man and a woman having sex the accused also told her for them to do what was in the video, this made the victim scared and she refused.*
>
> *4. After the victim refused, the accused forcefully removed the victim's pants and panty and then poked his index finger inside her vagina she felt pain so the accused sought forgiveness.*
>
> *5. The accused then licked and sucked the victim's vagina for about 5 minutes. After this, the victim wore her clothes and went to her grandmother and lay beside her. She did not tell her grandmother about what the accused had done to her because her grandmother was sick and sleeping. Since her parents were in Australia, she told her cousin, Litiana about what the accused had done to her. Litiana told the victim to wait till her parents returned.*
>
> *6. The victim also recalled on 28th December, 2015 she was at the house of the accused, on this day the accused was at home with his son. When the victim was sitting on the settee in the sitting room the accused told the victim to suck and lick his penis, she refused.*
>
> *7. Thereafter, the accused pushed the victim's head towards his penis, at this time the accused was not wearing his pants the victim refused so he again pushed her head towards his penis. The accused held the victim's jaws forced open her mouth and then put his penis inside her mouth for about 5 minutes.*

8. *After this, the accused told the victim not to tell anyone and he will give her money. On 29th December the victim left the house of the accused, at home she complained to her cousin Litiana and her sister "LM".*

9. *The second victim "LM" who was 15 years of age in 2015 informed the court that on 6th December, 2015 she was at home, in the afternoon the accused with his wife and their baby were returning home to Sakur Place. The accused was carrying baby Rupeni in his arms and the baby was leaning on the chest of the accused.*

10. *The victim went near the accused to kiss her cousin Rupeni as she leaned forward to kiss Rupeni she felt the hand of the accused touch her breast. When her breast was touched she was scared at this time she took a step back and looked at the accused who was staring at her. The accused did not say anything, she went into her house and told her cousin Litiana about what had happened.*

11. *The third victim "RM" who was 14 years of age in 2016 on 7th January, 2016 he was at the house of the accused babysitting Rupeni the accused's son. The wife of the accused was doing night shift from 5 pm to 12 midnight at around 9 to 10 pm the victim went to the washroom. When he returned he went to watch the TV the accused was sitting on the settee in the sitting room.*

12. *After a while, the victim lay on the mattress face down and fell asleep he woke up after he felt someone was touching his buttocks. When he turned around he saw the accused laughing at him, he did not like what the accused had done to him.*

13. *The victim was able to recognize the accused because at that time the light in the sitting room was switched on together with the TV when the accused touched the victim's buttocks he inserted his fingers inside from on top of the victim's shorts. The accused told the victim not to tell anyone and to keep it a secret. The victim told his aunt the wife of the accused and his cousin Litiana the next day at his house at Vunato about what the accused had done to him.*

14. *The parents of the victims were informed when they returned from Australia and the matter was reported to the police. An investigation was conducted, the accused was arrested and charged.'*

[9] In addition to the three victims, their cousin Litiana, the doctor who had examined the first victim and the interviewing officer who had recorded the appellant's cautioned interview had given evidence.

[10] The appellant had given evidence and denied committing the offences and stated that he was not at home at the times relevant to the alleged incidents. He had called one witness to buttress his evidence.

01st ground of appeal

[11] This ground of appeal is couched in general terms and not descriptive enough to be dealt with specifically. However, it appears that the gist of it is that the verdict is *'unreasonable or cannot be supported having regard to the evidence'.*

Legal test applicable

[12] At a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[13] The appellant submits that the trial judge had not considered the doubts in the prosecution case and therefore, the verdict cannot be considered safe. However, the appellant had not pointed out what the alleged doubts were.

[14] Whether the verdict is unsafe and unsatisfactory is not the criteria in Fiji in view of section 23 of the Court of Appeal Act but the question posed here is whether having considered the evidence against the appellant as a whole the verdict is unreasonable and whether there is clearly evidence on which the verdict could be based (**Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992). ***Sahib*** also added:

> *'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…….'*

[15] The trial judge had placed all the material before the assessors and directed them on the defense evidence as follows:

> *150. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.*
>
> *151. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.*
>
> *152. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.*
>
> *153. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether*

the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

154. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

155. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

156. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

157. In this case, the accused is charged with two counts of indecent assault, two counts of sexual assault and two counts of rape, involving three complainants as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count and each complainant separately from the other. You must not assume that because the accused is guilty of one count that he must be guilty of the other as well.

[16] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[17] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[18] In a very comprehensive judgment running into 18 pages and 88 paragraphs the trial judge had discharged his duty in agreeing with the assessors in respect of 02nd-06th count and disagreeing with them on the 01st count. Therefore, in my view upon the whole of the evidence it was open to the assessors [02nd-06th counts] and the trial judge [01st to 06th counts] to be satisfied of appellant's guilt beyond reasonable doubt. I do not think that the assessors [02nd-06th counts] and the trial judge [01st to 06th counts] must, as distinct from might, have entertained a reasonable doubt about the appellant's guilt or I cannot say that it was *"not reasonably open"* to the assessors [02nd-06th counts] and the trial judge [01st to 06th counts] to be satisfied beyond reasonable doubt of the commission of the offence.

[19] In the circumstances, I do not see any reasonable prospect of success in the sole ground of appeal against conviction.

02nd ground of appeal (sentence)

[20] The appellant's complaint is that the sentence is harsh and excessive. The trial had followed sentencing tariff for juvenile rape *i.e.* 11-20 years set in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[21] I have examined the lengthy sentencing order of the High Court judge and it is clear that he had examined all relevant matters before the sentence was meted out.

[22] In New Zealand it has been held that in sentencing those convicted of dealing commercially in controlled drugs, the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant. Rather, such circumstances are to be weighed in the balance with the needs of deterrence, denunciation, accountability and public protection. These considerations, in conjunction with the maximum sentence scale enacted, require a stern response to offending of this kind [vide **Zhang v R** [2019] NZCA 507; [2019] 3 NZLR 648 (21 October 2019)**.** Fiji seems to have already adopted more or less a similar approach to serious sexual offences in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). Accordingly, the trial judge had attached little value to the appellant's mitigating factors of personal nature.

[23] The aggravating circumstances in the case as highlighted by the trial judge are very serious; so are the maters revealed in the Victim Impact statement. However, one might argue that 'exposing children to sexual abuse' is already built into the sentencing tariff or may have considered in picking the starting point and should not have been considered once again as an aggravating factor.

[24] Nevertheless, 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)]. The had followed sentencing tariff in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[25] I see no real prospect of success in the appellant's appeal against sentence which given the seriousness of the crime and the number of victims committed by the appellant cannot be called disproportionate, harsh or excessive.

[26] In my view, as a whole the appeal has no real prospect of success against conviction or sentence [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

Orders

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL