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

CRIMINAL APPEAL NO. AAU 146 of 2019
[In the High Court at Lautoka Case No. HAC 152 of 2016]

BETWEEN	**:**	**SEMI MALAI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**01 December 2021**
Date of Ruling	**:**	**02 December 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka on one count of rape contrary to section 207(1) and (2) (c) and (3) of the Crimes Act, 2009 and two counts of indecent assault contrary to section 212 (1) of the Crimes Act, 2009 committed at Sigatoka in the Western Division on 23 July 2016 against a 07 year old female child.

[2] The information read as follows:

'COUNT ONE

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

SEMI MALAI *, on the 23rd day of July, 2016, at Sigatoka, in the Western Division, inserted his penis into the mouth of* ***"VH"****.*

COUNT TWO

Statement of Offence

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

Particulars of Offence

SEMI MALAI *on the 23rd day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted* ***"VH"*** *by touching her vagina.*

COUNT THREE

Statement of Offence

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

Particulars of Offence

SEMI MALAI *, on the 23rd day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted* ***"VH"*** *by touching her breasts.'*

[3] At the end of the summing-up, the assessors had opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 11 June 2019 to an aggregate sentence of 18 years, 04 months and 15 days of imprisonment (after the remand period was deducted) with a non- parole period of 16 years.

[4] The appellant's appeal against conviction and sentence (03 October 2019) is out of time but within 03 months after the lapse of the appealable period. Therefore, the respondent waived the requirement for enlargement of time and accordingly, the Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence and written submission on 04 March 2021. The state had tendered its written submissions on 30 November 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 had erred in law and in facts having not directed the assessors to evaluate for themselves the discrepancy as to what was communicated between the complainant and her mother in regards to the evidence of recent complaint that may affect the credibility of the complainant.*
>
> ***Sentence***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in principle by double counting having considered aggravating factors that is reflected already in selecting a starting point.*

[8] The trial judge in the judgment had summarized the prosecution evidence and defense position as follows:

> *4. The prosecution called two witnesses whereas the accused exercised his right to silence and did not call any witness.*
>
> *5. The complainant who was 7 years of age in 2016 informed the court that she was on her way to the beach near her house looking for her mother when "Vava" Semi meaning uncle Semi the accused held her hair and took her into the bushes.*
>
> *6. In the bush the accused told the complainant to suck his penis when she refused the accused forced her to suck his penis by pulling her head towards him. The accused and the complainant were standing at this time. The accused also touched her body by putting his hand inside her t-shirt from her breast down to her private part. The accused had touched her private part by putting his hand inside her panty.*
>
> *7. On this day the complainant was wearing a t-shirt and a skirt. She wanted to run away but the accused grabbed her hand and then gave her a $2 coin. Both went to the beachside, the complainant wanted to call out to her grandmother but the accused blocked her mouth with his hand. After a while her mother came and asked her what had happened whilst crying the complainant told her mother that the accused had touched her private part.*

8. *Upon hearing this, the complainant's mother started to cry the matter was then reported to the police.*

9. *The final prosecution witness was the mother of the complainant Miriama Naioba, on 23rd July, 2016 between 2pm to 3pm the witness returned from the beach. When she could not find the complainant at home she started asking around the village whether someone had seen the complainant. After a while the witness came to know that the complainant was standing beside the by-pound crying. When the witness went to where the complainant was the complainant said "Mum both you and dad always told me that if anyone touches my private part I should tell you". The witness then asked the complainant what had happened. The complainant told the witness the accused had forced her to suck his penis and touched her private part. The complainant also showed the $2 coin the accused had given her.*

10. *On the other hand the defence position was that the accused did not commit the offences as alleged by the complainant. The allegation by the complainant was made up by the complainant's mother Miriama after she was told by some villagers that they had seen the complainant with an unidentified boy near the bush. It was due to Miriama's suspicion that she had told the complainant to make up a story to implicate the accused.*

01st ground of appeal

[9] The appellant submits that the learned trial judge at paragraphs 46-48 of the summing-up had directed the assessors how to approach the recent complaint evidence of PW2 (the mother of the victim) but failed to direct them to consider and evaluate for themselves the discrepancy as to what PW1 (the complainant) relayed to PW2. The discrepancy highlighted is that according to PW1's evidence she only told PW2 that the appellant had touched her private part but not that he had got her to such his penis whereas PW2 said in evidence that her daughter told her that the appellant had got her to suck his penis and he also touched her private part.

[10] The directions at paragraphs 46-48 of the summing-up is in consonance with guidance provided in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) and **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) for recent complaint evidence. The appellant does not complain of misdirection therein. His argument is that the trial judge should have further highlighted the above discrepancy

and asked the assessors to evaluate it on the issue of credibility of the victim' version. He relies on paragraph 39 of ***Raj*** in support of his contention.

[11] However, any perceived inadequacy or omission in directions on this point should have been addressed by way of redirections 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) and the deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[12] The trial judge had himself explained the discrepancy at paragraph 14 of the judgment as follows:

> *14. The complainant's mother Miriama Naioba also told the truth in court when she narrated what the complainant had told her. I accept that it is only natural for a person who has just gone through an unexpected sexual experience to be affected psychologically, here a 7 year old child who has just had an unexpected experience was not expected to tell her mother everything that had happened to her at the first instance. In this situation as soon as the complainant told her mother about the touching of her private part her mother started crying.*

[13] In fact ***Raj*** also held that it is not necessary for the complainant to describe the full extent of the unlawful sexual conduct but only material and relevant unlawful sexual conduct on the part of the accused. What prompted the victim to readily come out with the act of touching her private part by the appellant can be understood by what she had told PW2 as revealed in the latter's evidence to the effect that *"Mum both you and dad always told me that if anyone touches my private part I should tell you"*. That perhaps explains why the act of the appellant putting his penis into the victim's mouth was not disclosed at that stage by the victim to her mother as the advice by her parents was to tell them if anyone were to touch her private part. Further, immediately after hearing the victim's story the mother also had started crying which may have prevented the former disclosing other details.

[14] In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015], **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]. The judge was entitled to draw reasonable inferences from the factual scenario in the case and real-life human experience to explain the conduct of the victim.

[15] In addition, even if the recent evidence of the mother is excluded there is direct un-assailed evidence of the victim on all counts. Her demeanour of crying alone soon after the incident may amount to distress evidence as well though not considered by the prosecution and the trial judge (see for distress evidence **Soqonaivi v State** (Majority Judgment) [1998] FJCA 64; AAU0008U.97S (13 November 1998), **Balelala v State** [2004] FJCA 49; AAU0003 of 2004S (11 November 2004).

[16] The current judicial thinking on distress evidence was expressed by Morgan LCJ, Weir LJ and Stephens J in the Court of Appeal in Northern Ireland in **The Queen v BZ** [2017] NICA 2 where having examined **R v Redpath** (1962) 46 Cr App Rep 319, 106 Sol Jo 412, **R v Chauhan** (1981) 73 Cr App Rep 232, **R v Venn** [2002] EWCA Crim 236, **R v Romeo** [2003] EWCA Crim 2844; [2004] 1 Cr. App. R. 30; [2004] Crim. L.R. 302; Times, October 2, 2003, **R v AH** [2005] EWCA Crim 3341 and **R v Zala** [2014] EWCA Crim 2181, the Court stated the law as follows:

> *'[43] Given that the weight of evidence as to distress will vary according to the circumstances of the case we consider that whether the evidence is admissible and if so whether a direction is needed and, if it is needed, then in what terms, depends much on the particular circumstances in any given case. In giving consideration to those questions a distinction can be drawn between the complainant's own evidence of distress and evidence from a witness, who may be independent, as to the distress 20 of the complainant. A distinction can also be drawn between evidence of distress at the time or shortly after the alleged offence and distress displayed years later when making a complaint. If the jury is sure that distress at the time is not feigned*

then the complainant's appearance or state of mind could be considered by the jury to be consistent with the incident.

[44] We consider that it is for the judge to look at the circumstances of each case and tailor the direction to the facts of the particular case emphasising to the jury the need, before they act on evidence of distress, to make sure that the distress is not feigned and drawing to their attention factors that may affect the weight to be given to the evidence.'

[17] Thus, I do not see any reasonable prospect of success in this ground of appeal.

01st ground of appeal (sentence)

[18] The appellant's complaint is based on the sentencing error of 'double counting'.

[19] 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'.

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

[21] The Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) 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.

[22] It appears that what matters the trial judge considered under 'objective seriousness' in selecting the starting point at 13 years (02 years above the lower point) following **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) where sentencing tariff for child/juvenile rape was set at 11-20 years, is not clear from the sentencing order. There can be a doubt whether the trial judge had taken into account the same or similar aggravating factors inadvertently, which were later considered to enhance the sentence by 06 years, to pick the starting point as well. If, so it amounts to double counting and has contributed to the final sentence.

[23] Therefore, I am inclined to grant leave to appeal against sentence on this ground of appeal.

[24] 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)]. Therefore, it is for the full court to determine the ultimate sentence.

Orders

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

COURT OF APPEAL FIJI

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