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

CRIMINAL APPEAL NO.AAU 87of 2019
[In the High Court at Lautoka Case No. HAC 48 of 2015]

BETWEEN	**:**	**SERUPEPELI DAWAI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Ms. E. A. Rice for the Respondent**
Date of Hearing	**:**	**16 July 2021**
Date of Ruling	**:**	**23 July 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division on 26 February 2015.

[2] The information read as follows:

'Statement of Offence'

RAPE*: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

'Particulars of Offence'

SERUPEPELI DAWAI, *on the 26th day of February, 2015 at Nadi, in the Western Division, penetrated the vagina of* ***LICE TINANIVALU*** *with his penis, without the consent of the said* ***LICE TINANIVALU****.*

[3] At the end of the summing-up the majority of the assessors had opined that the appellant was guilty of rape. The learned trial judge had agreed with the majority opinion, convicted the appellant of rape and sentenced him on 26 April 2019 to a sentence of 10 years and 09 months of imprisonment with a non-parole period of 09 years and 06 months.

[4] The appellant in person had lodged his appeal against conviction and sentence one month out of time but the state had informed court that it would not object to the appeal on the basis of delay. As a result his appeal would be deemed to be a timely appeal. The Legal Aid Commission had tendered an amended notice of appeal and written submissions on 03 March 2021. The state had tendered its written submissions on 14 July 2021. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or *via* Skype.

[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 conviction and 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** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

(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 urged on behalf of the appellant are as follows:

Conviction

1. *The learned trial judge erred in law and in fact in convicting the Appellant on evidence that raised reasonable doubts in the State's case.*

Sentence

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 had summarized the prosecution evidence as follows in the sentencing order:

'2. The Brief facts were as follows:-

In the evening of 25th February, 2015 the victim, accompanied by Miriama, her cousin sister, the accused who was Miriama's boyfriend and Petero Yalimaiwai a friend of the accused after drinking and clubbing went to the house of the accused at Dratabu.

3. They reached this vacant house the next morning at around 5 am. Miriama and the accused slept on the mattress which was on the floor while the victim and Petero were talking on the wooden bed inside the house. After a while Petero left.

4. The victim lay on the bed with her face resting on both her hands over the pillow. She was not sleeping but had closed her eyes. After a while she felt someone coming near her, the accused came and used a white bed sheet to block her mouth and covered her eyes then turned her over and wrapped her hands with the same bed sheet. He then started removing her pants and panty. The victim was struggling to push him away but she couldn't, at this time he punched her thighs.

5. The victim was crying and calling Miriama, she tried to push the accused away and free her hands. By this time he had pulled her panty and pants to

her knees. The accused forcefully inserted his penis into her vagina. The victim was unable to move around and her thighs were very painful.

6. The victim was crying while the accused had forceful sexual intercourse which lasted for about 15 minutes. The victim kept on trying to free herself until Miriama started calling the accused at this time he stopped. The victim was trying to breath because the bed sheet around her face was tight.

7. During the struggle the bed sheet around her face had gone loose. As soon as Miriama came and lifted the white bed sheet that was covering both of them the accused rolled over, stood up and started wearing his pants. Miriama then pulled the victim who stood up crying. The victim wore her panty and her pants the accused sought forgiveness from the victim for what he had done to her.

8. By this time it was day break, at around 6 am the complainant left the house with Miriama and reported the matter to the police.

[9] The appellant had elected not to give evidence but had called one witness whose position was that he was on the same bed with the complainant until 7.00 a.m. to imply that no incident of rape involving the appellant happened.

01st ground of appeal

[10] The counsel has referred only to paragraphs 37 and 39 of the summing-up and submitted that the evidence therein raises doubts in the state's case. This ground of appeal has not been further elaborated or substantiated in the written submissions.

[11] Paragraphs 37 and 39 of the summing-up are as follows:

37. The complainant could not see anything she was crying calling Miriama, she was trying to push this person away by trying to free her hands but by this time he had pulled her panty and pants to her knees. At this time this person was trying to spread her legs but could not. After a while he inserted his penis into her vagina. The complainant was unable to move around and her thighs were very painful.

38. The complainant was crying this person had sexual intercourse with her which lasted for about 15 minutes. She was also having her menstruation she was lying down and could not do anything since her mouth was blocked and her eyes were covered. The complainant kept on trying to free

herself until Miriama started calling her boyfriend the accused. The complainant was trying to breathe because the cloth around her face was tight when Miriama called out this person stopped.

39. *The complainant smelt liquor on this person by this time the cloth around her face had gone loose. As soon as Miriama came and lifted the white sheet that was covering both of them this person stood up, she saw the accused Miriama's boyfriend Seru was wearing his pants and she knew he was the one who had sexual intercourse with her. Miriama then pulled the complainant who stood up and was crying. The complainant wore her panty and her pants at this time she saw blood stains on her pants and the bed as well.*

[12] At best, the attempt on the part of the counsel for the appellant could be understood as casting possible doubts on the identity of the appellant as the person who committed rape on the complainant. However, the evidence of second prosecution witness Miriama Nayavusoata dispels any such hypothetical doubts. The paragraphs 53-56 of the summing-up deal with her evidence:

53. *All went into the vacant house belonging to the accused. Petero and Lice sat on the bed while the witness and the accused went to sleep on the floor. She was sleeping with the accused behind the bed.*

54. *The witness woke up at about 6 am because someone pulled her hand, when she opened her eyes she saw her bag was open and her phone was missing. At this time she saw Petero standing she asked him about her phone. He denied taking her phone. At this time the phone alarm started ringing since she had set the alarm for 6 am it was coming from Petero. Petero threw the phone at her and ran outside.*

55. *After Petero left the witness started looking for the accused. As she turned around she saw the accused lying next to Lice, she heard Lice calling her name. The witness moved closer to the bed and saw the complainant and the accused having sexual intercourse.*

56. *The witness called the accused but he was not responding so she lifted the bed sheet, she saw Lice's eyes and mouth were covered with a bed sheet and her hands were tied. The accused then rolled over and started wearing his shorts. At this time Lice was crying she pulled the accused away from Lice who stood up crying and wore her clothes. The witness heard the accused was asking for forgiveness from Lice.*

[13] In fact Miriama Nayavusoata's evidence discredits defence witness Petero Yalimaiwai too. His evidence was that he asked the complainant if he could have sex with her but she refused and thereafter both slept on the bed. He had further said that he had woken-up at 7 am, woke the accused up and told him that he was going home and then he left for home. According Miriama's evidence, Petero could not have been inside the house when she saw the appellant having sexual intercourse with the complainant. Petero had left the house by that time. Miriama's evidence is more consistent with that of the complainant who had stated that Petero did not sleep with her, he only asked whether she was married or single and when she told him that she was married Petero gave her $20.00 being her fare home and he left.

[14] Given the totality of the evidence of the complainant and that of Miriama there is no doubt that the appellant was the perpetrator and the complainant was not a consenting party but sexual intercourse had been forced upon her by the appellant.

[15] Therefore, I think on the evidence available the majority of the assessors and the trial judge could not have entertained any reasonable doubt as to the prosecution case.

[16] Having examined the summing-up and the judgment, it is clear that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[17] Therefore, there is no reasonable prospect of success in the first appeal ground against conviction.

02nd ground of appeal (sentence)

[18] The counsel for the appellant has submitted that the sentence is harsh and excessive.

[19] The tariff for adult rape is well settled to be between 07 and 15 years of imprisonment [vide **Lal v State** [2021]; AAU 016.2016 (03 June 2021), **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) and **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018)]. The trial judge had followed the same tariff in his sentencing order.

[20] Therefore, the final sentence is within the current sentencing tariff for rape. The issue is whether the trial judge had erred in enhancing the initial sentence by further 03 years for aggravating factors. I have no doubt that the factors considered as aggravating features are legitimate and tend to increase the gravity of the offence substantially. However, the concern one might entertain is whether the trial judge had already considered those factors or at least some of them when he picked the starting point at 09 years over and above the lower end of the tariff *i.e.* 07 years. If so, when the trial judge added 03 years for the same aggravating features once again he may have fallen into the error of double counting [see **Lal v State** [2021]; AAU 016.2016 (03 June 2021)].

[21] However, 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. Recognizing the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. 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 **Lal v State** [2021]; AAU 016.2016 (03 June 2021), **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. 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).

[22] Given the nature and gravity of the offence, the term of imprisonment of 10 years and 09 months with a non-parole term of 09 ½ years cannot be termed as harsh and excessive and is within the accepted range of sentences.

[23] Therefore, there is no reasonable prospect of success in the sentence appeal.

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