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

CRIMINAL APPEAL NO.AAU 012 of 2019
[In the High Court at Suva Case No. HAC 223 of 2017]

BETWEEN	**:**	**SIONE FUSI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**06 December 2021**
Date of Ruling	**:**	**07 December 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 committed on 16 July 2017 at Navuso village, Nausori in the Eastern Division.

[2] The information read as follows:

'***Statement of Offence (a)***

RAPE*: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence (b)

SIONE FUSI *, on the 16th day of July 2017, at Navuso village, Nausori in the Eastern Division, had carnal knowledge of* ***AB****, a child under the age of thirteen years.'*

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 18 December 2018 to seventeen (17) years and nine (9) months imprisonment (19 years before the remand period was deducted) with non-parole period of fifteen (15) years and nine (9) months**.**

[4] The appellant in person appealed against conviction and sentence in a timely manner (14 January 2019). The Legal Aid Commission has tendered amended grounds of appeal against conviction and sentence and written submission on 28 May 2021. The state had filed its written submissions on 15 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 <u>reasonable prospect of its success</u> 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:

> ***<u>Ground 1 (Conviction)</u>***
>
> *<u>THAT</u> the Learned Trial Judge erred in fact and in law when he did not independently assess all the evidence adduced during trial and in not doing so resulted in the conviction being unsafe and further causing a grave miscarriage of justice.*
>
> ***<u>Ground 2 (Sentence)</u>***
>
> *<u>THAT</u> the sentence imposed on the appellant is harsh and excessive.*

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

> *23. You have heard the evidence presented by the prosecution. The prosecution presented the evidence of three witnesses, including the complainant. The complainant and the accused were living in the same village. The complainant is living with his two siblings at their grandparent's house. The accused is one of their neighbours. On this particular day, the complainant and one of his siblings were raking, when the accused came and asked them to come and buy ice blocks. They had then gone to the house where the accused had sold them ice blocks. Having obtained the ice block, the sibling had ran away from the house. The accused then had closed the door and put his pants down. He had then asked the complainant to lie down and then penetrated his penis into his anus. I trust that you recall the words used by the complainant to explain this incident. The complainant said that the accused poked his "goli" into his buttock". The complainant explained that it was painful. The accused had then put his pants on and asked the complainant to put his pants on. He had then taken the complainant to the bathroom. On the way to the bathroom, the accused had taken a branch of a*

tree and assaulted the complainant with it. The accused then put the complainant into the bathroom and swore at him.

24. *The complainant had gone back home after this incident and informed his grandmother about this incident. You have heard the evidence of the grandmother, where she explained that she saw the complainant was crying in the house when she was washing in the bathroom. The complainant had told her that the accused penetrated his penis into his anus when she inquired about the reason for his crying. She had noticed blood in his backside. The grandmother had then taken the complainant to the police station, and then to the hospital for medical examination.*

25. *I now take your attention to the evidence given by the grandmother, stating that the accused had approached her once she received summons to appear in court. The accused had approached and requested her not to take the complainant to the Court. Instead, he had requested the grandmother to inform the Court that the complainant had gone somewhere during his school holidays.*

26. *Doctor Alofa Funaki in her evidence explained the finding that she made during the medical examination of the complainant on the 16th of July 2017. She tendered the medical report that she made based on those findings as prosecution exhibit. You may recall that the Doctor explained the findings which she has recorded in the medical report under the headings D12, D14, D16 and the appendix.*

27. *You have heard that the learned counsel for the prosecution cross examined the witnesses of the prosecution. She has specifically asked the complainant that the accused was sleeping at that time and this alleged incident, that the complainant was telling, had never taken place. The complainant denied that preposition of the defence and said that the accused had inserted his anus with the penis of the accused.*

[9] The appellant had remained silent at the trial and not called any witnesses.

01st ground of appeal

[10] The appellant submits that the learned trial judge had not independently assessed the evidence in the judgment and he had not substantially considered the defense case.

[11] The applicable law is that 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) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021).

[12] The summing-up becomes part and parcel of the judgment and the trial judge had directed himself according to the summing-up and therefore, the judge is not expected to repeat everything he said in the summing-up in the judgment (vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021). The appellant has no complaint about the summing-up where the trial judge had fully canvassed the evidence including the appellant's denial of penetration.

[13] The trial judge had examined the evidence in the case and stated in the judgment as follows:

> *7. The defence suggested to the complainant during the cross examination that the accused was sleeping at that time, therefore none of those incident as alleged by the complainant had taken place. The complainant denied those propositions and reaffirmed that the accused had penetrated into his anus with the penis of the accused.*
>
> *8. The complainant was five years old at the time of this alleged incident took place. The complainant was coherent and firm in explaining the incident that took place on the 16th of July 2017. The evidence of grandmother and Doctor Alofa Funaki further corroborated the evidence of the complainant. In view of these reasons, I find the evidence presented by the prosecution as credible and reliable evidence. Accordingly, I accept the evidence of the prosecution as true, credible and reliable evidence.*

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

02nd ground of appeal (sentence)

[15] The appellant argues that the trial judge had not considered the appellant's mitigation and also his first offender status. He also argues that the sentence is harsh and excessive.

[16] According to the trial judge, having taken into consideration the seriousness of the crime, the purpose of the sentence, the level of culpability and harm, he had decided to fix a higher starting point and picked fifteen (15) years as the starting point following sentencing tariff for child/juvenile rape set as 11-20 years in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[17] The aggravating factors highlighted by the trial judge are as follows:

> *'You have breached the trust that the complainant had in you not only as an elderly relative but also as a neighbour. He trusted you that you would not harm him in this manner, and came to the house to get ice blocks. Instead of caring and looking after this small young complainant, you manipulatively used the opportunity to satisfy your lustful sexual gratification. The complainant was five years old and had no parent as his mother has passed away and father had left him. You used the vulnerability of this child to fulfil your most disgraceful sexual desire. The age difference between you and the complainant is substantially high. He was just five years old and you were 25 years old at the time this offence was taken place. By committing this crime, you have exposed this five year old child to the sexual activities, at the very young age, thus preventing him to have a natural growth of maturity in his life.*
>
> *It was proved during the course of the hearing that you have approached the grandmother of the complainant and requested her to inform the court that the complainant was not available to give evidence. By doing that you have tried to prevent the complainant to get the justice for the dreadful offence that you have committed on him.'*

[18] The trial judge had ruled out any discount for the appellant's previous good character.

> *'The learned counsel for the defence submitted in her submission that you are a first offender, hence, you are entitled to a substantive discount. However, the learned counsel for the prosecution suggested otherwise, stating that your previous good character has allowed you to freely move around the village and*

access to the kids in order to execute your crime. I find that your previous good character, specially the fact that you have not been tainted with any previous conviction to an offence of sexual nature, would have definitely allowed you to freely move around in the community without any suspicion of risk. The community has perceived you as a man of good character and not as a child paedophile and allowed you to feely moved in the community. Moreover, there is no suggestion that you have significantly contributed to the community or have any reputation in the community as per Section 5 of the Sentencing and Penalties Act. The letter given by the pastor, has no much value as it only states your membership and involvement in the church. Therefore, I do not think that the previous good character has any significant mitigatory value. I accordingly find that you are not entitled to any significant discount for your good character.'

[19] The trial judge had also refused to consider the appellant's purported mitigating factors as they were all personal circumstances. No serious complaint can be made in this respect as in Fiji personal circumstances carry little mitigation value in sexual offences – vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)].

[20] In my view, the enhancement of the sentence by 04 years on account of aggravating factors also cannot be unduly criticized.

[21] However, I am somewhat concerned with the high starting point of 15 years purportedly based on the seriousness of the crime, the purpose of the sentence, the level of culpability and harm as I do not know whether all or any of the aggravating factors had already been taken into account (even inadvertently) when the trial judge selected as his starting point a term towards the middle of the tariff thereby falling into the trap of double-counting (see **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019).

[22] **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.

[23] 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.

[24] 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). However, not every sentence within the range would be necessarily an appropriate sentence for the crime.

[25] Nevertheless, whether the sentence imposed on the appellant is justified should be decided by the full court despite the sentencing error of probable double counting**.** If so, the full court would decide what the ultimate sentence should be. The full court exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act would have to decide that matter after a full hearing.

[26] The appellant should be given leave to appeal against sentence on this aspect of possible sentencing error. The appropriate sentence is a matter for the full court to decide [Also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020)]

Orders

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

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