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

CRIMINAL APPEAL NO. AAU 71 of 2021
[In the High Court at Suva Case No. HAC 12 of 2020]

BETWEEN	**:**	**MARIKA KOROVATA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. K. Bosewaqa for the Appellant** **Ms. K. Semisi for the Respondent**
Date of Hearing	**:**	**24 January 2024**
Date of Ruling	**:**	**26 January 2024**

RULING

[1] The appellant had been charged in the High Court at Suva as follows:

*'**COUNT ONE***

Statement of Offence

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

Particulars of Offence

***MARIKA KOROVATA,** between the 1st day of January 2016 to the 31st day of December 2016, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of **AS**, a child under the age of 13 years, with his penis.*

COUNT TWO

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, *between the 1st day of January 2017 to the 31st day of December 2017, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of* ***AS****, a child under the age of 13 years, with his penis.*

COUNT THREE

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, *between the 1st day of January 2018 to the 31st day of December 2018, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of* ***AS****, a child under the age of 13 years, with his penis.*

COUNT FOUR

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, *between the 1st day of January 2019 to the 29th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of* ***AS****, a child under the age of 13 years, with his penis.*

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT*: Contrary to Section 210 (1) (a) of the Crimes Act.*

Particulars of Offence

MARIKA KOROVATA, *between the 1st day of January 2019 to the 29th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, unlawfully and indecently assaulted* ***AS****, a child under the age of 13 years, by touching her breasts.*

COUNT SIX

Statement of Offence

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

Particulars of Offence

> ***MARIKA KOROVATA,*** *on the 30th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the anus of* ***AS****, a child under the age of 13 years, with his penis.'*

[2] After trial, the High Court convicted the appellant on all counts except the 06th count of which he was acquitted. The trial judge on 11 October 2021 had sentenced the appellant to a period of 17 years imprisonment for counts of rape and 06 years of imprisonment for sexual assault (all sentences to run concurrently) with a non-parole period of 13 years [after discounting the time in remand, the actual sentencing period was 15 years' and 08 months' imprisonment with a non-parole period of 11 years' and 08 months' imprisonment.

[3] The appellant's appeal against conviction and sentence is timely.

[4] 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. For a timely appeal, the test for leave to appeal against conviction 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) that will 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)].

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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].

[6] The trial judge had summarized the facts in the sentencing order as follows:

> *[5] 'It was proved during the trial that, between the 1 January 2016 and 31 December 2016, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.*
>
> *[6] It was proved during the trial that, between the 1 January 2017 and 31 December 2017, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.*
>
> *[7] It was also proved during the trial that, between the 1 January 2018 and 31 December 2018, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.*
>
> *[8] It was further proved during the trial that, between the 1 January 2019 and 29 October 2019, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.*
>
> *[9] And finally it was proved during the trial that, between the 1 January 2019 and 29 October 2019, in Koroibici Settlement, Lokia, Nausori, you unlawfully and indecently assaulted the complainant by touching her breasts.*

[7] It was an agreed fact that the appellant was the maternal grandfather of the complainant and that he financially supported the complainant after her mother had passed away in 2016.

[8] In addition to the complainant, her grandmother Tokasa Nora and aunt, Mereseini Rokowati and Dr. Losana Burua had given evidence for the prosecution. The appellant had given evidence on his own behalf.

[9] The grounds of appeal urged by the appellant are as follows:

> ***Ground 1:***
>
> *THAT the learned trial judge erred in law and in fact in not adequately considering the inconsistencies of the complainant's evidence.*

Ground 2:

THAT the rape conviction is not supported in totality of the evidence of the State.

Ground 3:

THAT the Learned Trial Judge erred in law when he failed to take into consideration the Turnbull guidelines for Count 3 when assessing the evidence at hand.

Ground 4:

THAT the Learned Trial Judge erred in fact when he failed to consider the distance of the farm and the forest from the residence and the appellant's ability to walk that far for each count.

Ground 5:

THAT the Learned Trial Judge erred in fact and law when he failed to take into consideration the lack of defence available to the appellant by the lack of specificity of the dates in counts 1-3.

Ground 6:

The final sentence imposed on the appellant is harsh and excessive given his age and clean record.

Ground 1

[10] In the year 2016 the complainant 09 years old, and she turned 10 in 2017, 11 in 2018 and 12 in 2019. When she gave evidence she had turned 13. She was attending the Nausori Special School and was a child with special needs. The inconsistencies complained about are only in relation to 2018 and 2019 allegations of rape. According to her police statement, 2018 incident happened in the appellant's farm whereas she had said in court that it happened at the back of the kitchen. Similarly, as per her police statement, 2019 incident took place outside the kitchen whereas according to her testimony in court it happened in the forest.

[11] By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident or several incidents spanning for a number of years. It is not as if a video tape is replayed on the mental screen [vide **Nadim v State** [2015]

FJCA 130; AAU0080.2011 (2 October 2015) & **Naulumosi v State** [2018] FJCA 24; AAU0021.2014 (8 March 2018)]. This is even greater when a witness such as the complainant of tender years with slow learning capacity testifies to a campaign of rape carried out for a number of years.

[12] The trial judge had referred to these inconsistencies at paragraphs 19 of the judgment and concluded at paragraph 57 as follows:

> *'[57] It is true that there were certain inconsistencies in her evidence, which were highlighted by the defence, specifically with regard to her police statement. But it is the opinion of this Court that those inconsistencies or contradictions were not significant or material, considering the totality of the evidence adduced in the case.'*

[13] I do not see any error in the trial judge's conclusion having regard to the fact that the complainant was a child victim and a slow learner with special needs. She may very well have mixed up the places of the two incidents in 2018 and 2019. It has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

Ground 2

[14] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) and **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) it was emphasised that in terms of section 23 (1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed but the proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in

favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

[15] The appellant's real compliant is that the verdict is unreasonable and unsupported by evidence. The test to be applied under section 23 of the Court of Appeal in considering a challenge to a verdict of guilty on this basis has been elaborated again in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [the assessors were dispensed with by the Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] as follows:

> **'***[23] ……****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 assessors to be satisfied beyond reasonable doubt of the commission of the offence.* ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors'***

[16] This is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47).

[17] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court. In **Vulaca v State** [2012] FJSC 22; CAV0005.2011 (21 August 2012) the Supreme Court elaborated the pronouncement in ***Ram*** as follows:

> *35. Praveen Ram Vs Sate (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying*

in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors or differ from the opinion of the assessors. If the Judge differs he has to give his reasons.

36. ……. As the appellate courts have not seen and heard the witnesses it cannot independently assess and evaluate the evidence led at the trial to the extent of a trial court judge. But an analysis of evidence is necessary for two reasons one is to ascertain whether there is evidence to convict the accused. If there is no evidence it is a question of law, the Court of Appeal have to take into consideration in arriving at its finding. The other is to ascertain whether on the given facts if a properly directed panel of assessors would have come to the same decision. This is to ascertain whether the assessors were properly directed in the application of law on the given facts. However the Court of Appeal will not set aside a verdict of a High Court on a question of law (s.21(1)(a)) or fact (s.21(1)(b)) unless a substantial miscarriage of justice has in fact occurred (s.22(6)).

[18] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'

[19] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether the verdict is reasonable and supported by evidence ***and*** whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt; as expressed by the Court of Appeal in another way, whether or not the trial judge

could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). This exercise involves both subjective and objective elements which, however, do not exist in watertight compartments.

[20] I have considered the matters raised by the appellant under this ground of appeal but do not find them to be in anyway adequate to render the verdicts unreasonable or unsupported by evidence. The judge had fully ventilated the evidence led by both sides and engaged in an independent evaluation and assessment of it in the judgment.

Ground 3

[21] This argument could only relate to the rape incident in 2018 where the appellant woke up the complainant and asked her to go the back of the kitchen. She had clearly seen his face from the solar light. In any event, identity was never a trial issue and the appellant's defense was a total denial of all alleged acts. There was no need for separate Turnbull guidelines to be applied here.

Ground 4

[22] The appellant's argument that he was unable to walk to the farm seems to only affect the rape conviction in relation to the incident in 2019. The distance was 20-30 minutes' walk. His position is that he was recovering from an injury and could not walk that distance. However, having denied going to the farm/forest the appellant admitted under cross-examination that he did go to the forest lately as there was good weather. Witness Tokasa Nora had said in evidence that after his recovery, the appellant was seen going there to work. It appears that at the time material to the charge the appellant had no disability of walking to the farm.

Ground 5

[23] The appellant contends lack of specificity of timelines of the charges 1-3. No such concern had ever been raised before or during the trial. The charges had been framed

in the manner they appear on the information as the child victim was not sure of exact dates of offending. In any event, the appellant's defense was having done no wrongdoing at any stage.

Ground 6 (sentence)

[24] The trial judge had correctly guided himself by the sentencing tariff in **Aitcheson v. State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) of 11-20 years of imprisonment. However, the maximum sentence is life imprisonment.

[25] The trial judge had explained and justified the basis of his sentence of 17 years imposed on the appellant. In **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023) this court said:

> *'[54] ……..Sentencing must achieve justice in individual cases and that requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed. The prime justification and function of the guideline judgment is to promote consistency in sentencing levels nationwide. Like cases should be treated in like manner, similarly situated offenders should receive similar sentences and outcomes should not turn on the identity of the particular judge. Consistency is not of course an absolute and sentencing is still an evaluative exercise. The guideline judgments are 'guidelines' (and not tramlines from which deviation is not permitted), and must not be applied in a mechanistic way. The bands themselves typically allow an overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified (vide **Zhang**).'*

[26] However, 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)]. The approach taken by the appellate court in an appeal against sentence 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)]. Period was 17 years imprisonment with a non-parole period of 13 years' imprisonment is well within the tariff.

[27] As for the old age of the appellant, the trial judge had fully considered this aspect in the sentencing order at paragraph 45-49. He had specifically fixed 13 years as the non-parole period due to the appellant's old age. In the effective sentence the non-parole is even lesser *i.e.* 11 years' and 08 months' imprisonment. An accused who has abused a child for 03 years cannot claim to be having a 'clean record' and thus deserves no discount on that account.

Orders of the Court:

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

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

Solicitors:

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent