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

CRIMINAL APPEAL NO. AAU 080 of 2023
[In the High Court at Suva Case No. HAC 110 of 2022]

BETWEEN	:	**AMINIO ROKOTUIVUNA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. J. Singh for the Respondent**
Date of Hearing	:	**27 August 2024**
Date of Ruling	:	**29 August 2024**

RULING

[1] The appellant had been charged with a single count of rape under the Crimes Act 2009. The charge was as follows:

COUNT 1

Statement of Offence

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

Particulars of Offence

AMINIO ROKOTUIVUNA *on an unknown date between the 1st day of December 2016 and the 11th day of December 2016 at Suva, in the Central Division, penetrated the vagina of* ***AB****, a child under the age of 13 years with his penis.*

[2] The High Court judge found the appellant guilty of rape. On 16 August 2023, the appellant was sentenced to a sentence of 13 years' and 11 months' of imprisonment with a non-parole period of 11 years and 11 months.

[3] The appellant's appeal in person 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 referred to the complainant's evidence in the sentencing order as follows:

> *2. It was proved during the hearing that you had penetrated the vagina of the Complainant on an unknown date between the 1st day of December 2016 and the 11th day of December 2016. The Complainant's stepfather is your cousin. She was 12 years old at that time, attending school. You had taken the Complainant to the Community Hall's Toilet and then forcefully penetrated her vagina with your penis.*

[7] The appellant represented by counsel at the trial in his evidence had merely denied the allegation, stating that he never engaged in such sexual intercourse with the complainant.

[8] The initial and additional grounds of appeal urged by the appellant against conviction and sentence are as follows:

> *'**Conviction***
>
> ***Ground 1***
> ***THAT*** *the Learned Trial Judge erred in law and in fact upon convicting the appellant when conviction cannot be supported having regards to the totality of evidence therefore causing a grave miscarriage of justice.*
>
> ***Ground 2***
> ***THAT*** *the Learned Trial Judge erred by not giving his mind on the complainant's motive to falsely implicate the appellant based on the jealousy basis resulting into substantial miscarriage of justice.*
>
> ***Ground 3***
> ***THAT*** *the Learned Trial Judge erred in law and in fact by accepting a reasonable doubt which existed on complainant testimony thereby failing to give a benefit of doubt to the appellant had caused a substantial miscarriage of justice.*
>
> ***Conviction (additional)***
>
> ***Ground 1***
> ***THAT*** *the Learned Trial Judge erred in law and in fact by not allowing the appellant a fair trial before court of law.*
>
> ***Ground 2***
> ***THAT*** *the Learned Trial Judge erred in law and fact by not evaluating the doubt in an unexplained delay in reporting by the complainant.*
>
> ***Ground 3***
> ***THAT*** *the Learned Trial Judge erred in law by not considering the appellant's side of the facts and circumstances.*
>
> ***Ground 4***
> ***THAT*** *the Learned Trial Judge failed to proceed with caution as where there is material to suggest that a witness's evidence could be tainted by improper motive.*
>
> ***Ground 5***
> ***THAT*** *there has been a serious misdirection the trial judge to rectify himself to disregard himself that there was no examination report of the complainant thus the accusation was defective to the core of evidence.*
>
> ***Sentence***
>
> ***Ground 6***
> ***THAT*** *the sentencing judge erred in law and in fact when he failed to abide by. The sentencing guidelines highlighted by the Kreimaris and ensconced from Mohammed Ismails Supreme Court Judgement petition no. CAV002 of 2022.'*

[9] The appellant had also submitted two consolidated grounds of appeal on conviction after the respondent had replied to his initial grounds of appeal as follows:

> ***Ground 1***
>
> ***THAT*** *the Learned Trial Judge erred in law and in fact when he misdirected himself at para 26 that it was the 1st and 2nd components of facts? Which corroborates the complainant's behaviour which he accepted.*
>
> ***Ground 2***
>
> ***THAT*** *the Learned Trial Judge erred in law and in fact when he further stated at para 29 of his judgment that he found the prosecution successfully proved beyond reasonable doubt that the accused penetrated the vagina of the complainant on an unknown date between the 1st day of December 2016, while not giving the appellant his constitutional rights [chapter 2-15-(1)] his right to mitigate also.*

[10] At the leave to appeal hearing, when the appellant was questioned as to what initial grounds of appeal had been consolidated in his belated two grounds of appeal, he was unable to clarify and instead highlighted his main complaints against the judgment and sentence as follows:

> *Improper motive – Ground 2 and Additional Ground 4*
>
> *Unexplained delay – Additional ground 2*
>
> *Lack of medical examination/report - Additional ground 5*
>
> *Improbability of the prosecution case – New (and grounds 1 & 3 and additional ground 1)*
>
> *Improper motive (Ground 2 and Additional Ground 4)*

[11] The appellant submits that there was jealousy displayed towards him by the complainant's (AB's) mother which resulted in the false complaint against him. However, upon a perusal of the judgment, I do not find any material to suggest that the appellant represented by counsel had conducted his defense case on that line. AB or her mother who gave evidence do not appear to have been cross-examined as to a possible sinister motive to implicate the appellant falsely for the allegation of rape. Neither does it appear from the judgment that there had been any material before court to suggest that there may have been such a possible bad motive on the part of AB and her mother.

Unexplained delay *– (Additional ground 2)*

[12] The appellant submits that AB made the first complaint only in July 2021 when the alleged incident happened in December 2016. The trial judge had examined this matter carefully at paragraphs 19-26 of the judgment. Paragraph 22 sets out her explanation and the circumstances that led to the change of her mind in 2021 and why the trial judge had accepted the same at paragraph 23:

> *"22. The Complainant explained that the Accused threatened her, telling her not to tell anyone about that incident. As a child, she believed that the Accused could do something as he threatened her. Hence, she did not tell anyone, even after returning to her Aunty. Instead, she withdrew from the others, confining herself from social engagement, thinking she could forget this incident and move on with her life. She felt insecure whenever the Accused was present in her vicinity….'*
>
> *23. According to the Complainant, she moved back with her mother in 2020 and rented a place in Nayau, Samabula. In July 2021, during the Covid time, she related this incident to her mother. Accordingly, the reason for such a delay is that the Complainant feared the Accused. She related this incident to her mother once she moved to a new place and felt comfortable. I find this explanation satisfactory. Hence, the delay in reporting has not affected the credibility and reliability of the Complainant's evidence."*

[13] The trial judge had also been mindful of the test formulated in **State v Serelevu** [2018] FJCA 163; AAU141.2014 that "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence and referred to **Masei v State** [2022] FJCA 10; AAU131.2017 (3 March 2022) that delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the prosecution case but it only cautions the court to seek and consider a whether there is any satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence in case if the explanation is unsatisfactory for the delay or unexplained delay.

[14] Keith, J said in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] ……..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.'

[15] On the plain reading of the judgment, I do not think that the trial judge's view as to the credibility of AB's explanation for the belated reporting can be termed as unreasonable.

Lack of medical examination/report *- Additional ground 5*

[16] The appellant seems to argue that AB's evidence had not been corroborated by medical evidence and the judge had not considered that aspect of the case in his favour. The respondent submits that there was a medical examination and a report prepared which a disclosure was served on the appellant. The prosecution, however, had not thought it necessary to lead it in evidence and it was the DPP's prerogative as section 129 of the Criminal Procedure Act has done away with the rule on corroboration. The defense could have, if it was so desired, called the doctor and made use of it for its benefit. The defense had not done that either. Thus, there was no reason for the trial judge to canvass lack of medical evidence any further in his deliberations. In any event, little value would be attached to a medical report taken in 2021 for the alleged act of sexual intercourse in 2016. Further, there had been many instances medically recorded where penetration or slight penetration had occurred without causing any perforation of the hymen. An intact hymen does not necessarily mean lack of penetration of the vagina. There would be no rupture of the hymen if the penetration was only to her vulva which was still carnal knowledge and rape. On the other hand, had AB engaged in sexual intercourse after 2016 with someone else, any damage to her hymen later should not be attributed to the initial act of penetration by the appellant.

Improbability of the prosecution case *– New (and grounds 1 & 3 and additional ground 1)*

[17] When examining whether a verdict is unreasonable or cannot be supported by evidence , as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) 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 including defence 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 reasonably 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. The same test could be applied *mutatis mutandis* to a trial by a Judge alone (without assessors) or a Magistrate.[1]

[18] In **Pell v The Queen** [2020] HCA 12 where the theory of compounded improbability was adverted to, it was held that in a criminal case, the prosecution is required to prove the case beyond all reasonable doubt and if there is any evidence that would raise doubt, then the accused cannot be convicted, however, the prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but only beyond reasonable doubt. I have no doubt, that the prosecution has accomplished its task to this criminal standard in this case. In coming to this conclusion, while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses[2], I have evaluated the evidence and made an independent assessment thereof[3]. I am convinced that the trial judge could have reasonably convicted the appellant on the evidence before him[4].

[19] AB's mother, in her evidence, had explained that she in fact observed withdrawn behaviors of the daughter. Therefore, the appellant's argument that the parents should have observed clear signs of distress in AB following the incident cannot hold much water. I do not see any unfairness in the manner in which the trial had been conducted either.

Ground 6 (sentence)

[20] No specific submissions had been made by the appellant under this ground of appeal but his complaint appears to be on the calculation of remission.

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[1] **Filippou v The Queen** (2015) 256 CLR 47
[2] **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)
[3] **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)
[4] **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 (14 March 2013)

[21] The trial judge was bound by section 18 of the Sentencing and Penalties Act to fix a non-parole period as the sentence of imprisonment was over 02 years irrespective of the existence or operation of the Parole Board or not. Section 18(1) which required a non-parole period to be fixed in every case in which the sentence was for a term of two years or more – Per Keith J in **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023) paragraph 46.

[22] The issues surrounding fixing the non-parole period had been settled by the Supreme Court in **Ratu v State** [2024] FJSC 10; CAV24.2022 (25 April 2024) where the court remarked:

> *'[33] ..... The fixing of a non-parole is an innovative feature of Fiji's criminal justice system. Its purpose is well-established. It is intended to be the minimum period which an offender has to serve so that the offender will not be released earlier than the court thinks appropriate by the grant of parole or the practice of remitting one-third of the sentence for "good behaviour" in prison. However, since a Parole Board has never been established in Fiji, the only route by which an offender can be released earlier than the expiration of his head sentence, but for a* ***non-parole period*** *being fixed in his case, is by the operation of the practice relating to remission of sentence: see Ilaisa Bogidrau v The State [2016] FJSC 5 at para 4.'*

[23] How the remission should be calculated was decided by the Supreme Court in **Kreimanis v The State** [2023] FJSC 19 at para 17 (*per* Calanchini J) in that in terms of section 27 of the Corrections Service Act 2006, the Commissioner has to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence ***or*** has completed his non-parole period, whichever is the later.

[24] The trial judge had taken 13 years as the starting point. In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court said that the tariff previously set for juvenile rape in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years. The trial judge had started with 13 years and ended up imposing a sentence of 13 and 11 months with a reasonable non-parole period of 11 years and 11 months.

[25] The only issue that I can see is whether there had been some degree of double counting because where established, such double-counting amounts to a legal error since *"factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa"* and facts could only be taken into consideration once – either as factors relevant to the gravity of the crime or as aggravating circumstance [see **Tiko v State** [2024] FJCA 95; AAU093.2020 (30 May 2024) at [15]).

[26] Firstly, the trial judge claims to have taken 13 years as the starting point due to *'Considering the seriousness of this offence, the applicable tariff, the level of harm and the level of culpability'* without mentioning all the facts which make up of the elements of such matters. The doubtful aspect here is whether the trial judge even unwittingly considered some aggravation in taking the starting point at 13 years instead of 11 years and used them, though differently worded, as an aggravating factor/s as well. If so, there is double counting. The lower end of the tariff for the rape of children and juveniles is long and they reflect the gravity of these offences and it also means that the many things which make these crimes so serious have already been built into the tariff (see **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)].

[27] 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 and even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question [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)].

[28] Although, the final sentence still within the tariff of 11-20, it is for the Full Court to decide whether due to possible double counting, they should revisit the sentence and resentence the appellant. The test for double counting based on same factors being

considered twice in the sentencing process is *"even when properly taken into account only once, do such facts still warrant a sentence comparable to that imposed by the trial judge"* (see ***Tiko***).

Orders of the Court:

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
RESIDENT JUSTICE OF APPEAL

Solicitors:
Appellant in person
Office of the Director of Public Prosecution for the Respondent