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

CRIMINAL APPEAL NO.AAU 0038 of 2017
[High Court of Lautoka Criminal Case No. HAC 203 of 2016]

BETWEEN : **INOKE SALAYAVI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **31 July 2020**

Date of Ruling : **03 August 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on one count of assault causing actual bodily harm contrary to section 275 of the Crimes Decree No.44 of 2009 and one count of rape contrary to section 207(1) and (2) (b) of the Crimes Decree No.44 of 2009. The charges were as follows.

COUNT 1

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

*e departure fr on the 2nd day of October 2016 at Rakiraki in the Western Division assaulted **SHARON MATAI** thereby causing her actual bodily harm.*

COUNT 2

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

INOKE SALAYAVI *on the 2nd day of October 2016 at Rakiraki in the Western Division penetrated the vagina of **SHARON MATAI** with his fingers.*

[2] Represented by his counsel, the appellant had pleaded guilty to both counts. The trial judge had explained the consequences of the guilty plea and the sentence range. The appellant had understood both and remained steadfast in his plea of guilty. Thus, the learned trial judge had been satisfied that the appellant's plea was unequivocal, voluntary and free from any influence.

[3] On 03 March 2017 the appellant had agreed to the summary of facts presented by the prosecution and the trial judge had found that both charges against the appellant had been proved on the facts presented in the summary of facts and convicted him accordingly for both charges. The Learned High Court Judge had on 17 March 2017 imposed a sentence of 08 years of imprisonment with a non-parole period of 05 years.

[4] The appellant had appealed against the sentence within time on 27 March 2017. Later, Legal Aid Commission appearing for him had tendered an amended notice for leave to appeal against sentence accompanied by written submissions on 28 November 2019. Thereafter, Legal Aid Commission had filed an application for bail pending appeal and written submissions on behalf of the appellant on 22 June 2020. The State tendered its written submissions on 10 June 2020.

[5] The summary of facts admitted by the appellant disclosing a marital rape had been reproduced by the trial judge in the sentencing order as follows.

'[4]. The summary of facts filed by the State was that:

> *On the 2nd day of October 2016 at about 9.00 am at Dranivau Village, your wife was at home when you entered the house and approached her. You started to question your wife alleging her of extra-marital affairs which leads to a heated argument between you and your wife. You then punched her on the face and then left towards the kitchen. Your wife then lied down on the mattress in the bedroom since she felt body pain as she was three (3) months pregnant at that time.*
>
> *Whilst your wife was lying down, you returned to her and then pressed her buttocks. She tried to push you away but was unsuccessful as you were strong. You then forcefully spread her legs and forcefully inserted your finger in her vagina and started to poke it. Your wife felt pain in her vagina. Your wife tried to stop you but she could not. After doing this then walked out of the house.*
>
> *Your wife then reported the matter at the Rakiraki Police Station and she was taken for medical examination at the Rakiraki Hospital. You were then arrested and interviewed under caution. You admitted assaulting and raping your wife.'*

Law relating to bail pending appeal

[6] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*

*[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*

[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:

> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal hearing;*
>
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

*[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyayawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

*[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of **bail pending appeal**. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

*[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

*"The likelihood of success has always been a factor the court has considered in applications for **bail pending appeal** and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

*[31] It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[8] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[9] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).

On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'

[10] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed..."*

[12] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [Also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30]........All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for **bail pending appeal** should attempt even to comment on. They are matters for the Full Court ... ."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting **bail pending appeal** as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[14] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. A very high likelihood of success of the appeal would be deemed to

satisfy the requirement of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success' then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them he cannot then obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[17] Grounds of appeal:

> '***Ground 1***- *The learned Sentencing Judge erred in principle in the sentencing process by double counting in that using the same reasoning in selecting a starting point as aggravating factors to enhance the sentence.*'
>
> '***Ground 2***- *The learned Sentencing Judge erred in principle by not giving sufficient discount for the early guilty plea.* '

[18] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

01st ground of appeal

[19] The appellant's grievance is based on paragraph 13 of the sentencing order.

> '*[13]. You committed these offences on your wife who was three months pregnant at that time. You also used violence on her in addition to the digital penetration, an act in itself constituted violence. A man who penetrates his wife without her consent commits sexual violence in a domestic relationship. Marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. Having considered high culpability factors and the harm caused to the victim, I take 9 years as the starting point for the offence of Rape Count before taking into consideration the aggravating and mitigation factors.'*

[20] The learned trial judge had then stated in paragraph 14 -16 as follows.

> ***Aggravating factors***
>
> *[14]. You breached the trust the complainant placed on you in that she trusted you as her husband.*
>
> *[15]. You committed this offence whilst on license.*
>
> *[16]. You exploited the vulnerability of your pregnant wife.*
>
> ***Mitigating Factors***
>
> *[17]. I take into account the mitigating factors submitted on your behalf. You are a first offender. You are a 42 years old farmer and you look after your family. You are a father of three children and your wife is expecting the fourth child.*
>
> *[18]. You co-operated with the police.*
>
> *[19]. You admitted the offences at the caution interview and pleaded guilty to the charge at the first available opportunity. In doing so, you saved precious time and resources of this court and also saved your wife from going through the ordeal again in this court. You seek forgiveness of this Court and of your*

wife. Your wife indicated to this Court that she accepted the apology you tendered. I accept your remorse as genuine

[21] The appellant argues that the learned trial judge in selecting the starting point of 09 years had considered the high culpability factors *i.e.* the fact that the victim who was the appellant's wife was three months into her pregnancy and also that he had used violence on her. Thereafter, the appellant argues that it amounted to double counting when the trial judge had taken the factors under paragraph 15 and 16 of the sentencing order which are the same high culpability factors.

[22] I am not sure whether using violence could have been used even in fixing the starting point as it was part of the first charge of assault causing actual bodily harm. Equally, I am not sure whether complainant having been three months pregnant and the offences were committed in domestic relationship were relevant to decide the starting point, because they were clearly aggravating factors. Therefore, strictly speaking they should not have been taken into account in deciding the starting point as per the guidelines in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) where it was held *inter alia*

> *'[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
>
> *[27]* ***In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage****. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.'*

[23] The complaint of the appellant is that the trial judge having taken those 'high culpability factors' in fixing the starting point had again taken them as aggravating factors to enhance the sentence of 09 years by adding 02 years to the starting point of 09 years. From a practical point of view, since the trial judge had in fact considered

the said 'high culpability factors' to decide upon where to start the sentence they should not have been counted as aggravating factors, for such an exercise would amount to the error of double counting.

[24] I am not exactly certain what the trial judge had meant by the appellant being on license in the context of this case. If it is a reference to the domestic relationship between the appellant and his wife being husband and wife then it had already been subsumed in the starting point. One may argue that in a way even the breach of trust as an aggravating factor is also connected or arise from the domestic relationship in this setting. Similarly the vulnerability of the pregnant complainant had also been part of the 'high culpability factors'. Therefore, it appears that the trial judge had taken into account some, if not all, aggravating factors in selecting the starting point and then added 02 years to the starting sentence on account of more or less the same factors.

[25] Therefore, there seems to be substance in the submission of the counsel for the appellant on double counting and the consideration of the aggravating factors in setting the starting point appear to be inconsistent with ***Koroivuki*** guidelines.

[26] Yet, the remarks in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008), though not cited in ***Koroivuki***, where the appellant had been charged with two counts of 'Robbery With Violence', contrary to section 293(1) of the Penal Code Cap 17 and one count of 'Attempted Robbery With Violence' contrary to sections 380 & 293 (1) of the Penal Code, by the Court of Appeal appear to shed some light as to what factors may be bundled into the concept of 'objective seriousness of the offence', the expression used in ***Koroivuki***, in selecting the starting point.

> *22. 'In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments,* ***the aggravating features of the offence [not the offender]****; the seriousness of the penalty as set out in the act of parliament and relevant community considerations.* ***The second involves the application of the aggravating features of the offender*** *which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there*

is a guilty plea, this should be discounted for separately from the mitigating factor in a case.

23. <u>In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise</u> that has been proven before it following a trial or as in this instance the facts that were outlined to the appellant after his guilty was entered and he was convicted, to which he voluntarily admitted. <u>In doing this the court is taking cognizance of the aggravating features of the offence.</u>

24. In this case, the learned High Court Judge did just that when determining the starting point of the sentence of 10 years, when he said

> *'However, I cannot ignore the rampant nature of this type of crime, the terror and fear that is inflicted on those whose homes are invaded in the middle of the night. A person's home which ought to be a bastion of security is being turned in fortress with iron grills and other safety devices. But even then that was not enough in this case. I also take cognizance of the fact he was not a major player but as a joint offender he is liable for the acts of his co-offenders. But I place little reliance on the assertion that he was led into this by others, as he is not a stranger to this type of offending.' [Page 24 of Court Record]*

[27] Therefore, the learned trial judge appears to have been right in applying the aggravating features of the offender and increased the starting point by 02 years. Unfortunately, he had made an error in incorporating them as part of the starting point too.

[28] In **<u>Nadan v State</u>** [2019] FJSC 29; CAV0007.2019 (31 October 2019) the Supreme Court discussed the 'double counting' in sentencing as follows but decided on a final sentence of 14 years of imprisonment for child rape was justified.

> *'<u>The application for leave to appeal against sentence</u>*
>
> *[38] The challenge to the sentence is that the judge unwittingly double-counted some of the aggravating features. The argument runs like this. Having identified the <u>tariff for the rape of a child as 10-16 years' imprisonment</u>, the judge must have reflected some of the features which made this a serious case by taking <u>12 years as his starting point</u>. That is because he said that one of the factors which had caused him to choose that starting point was "the seriousness surrounded with the circumstances of the offence". He then set out the aggravating factors which caused him to increase the length to 15 years. They were the age of the girl when the abuse began, the breach of trust which the abuse involved, the threats Nadan made to deter her from speaking out, and the impact which the abuse had on her. These were unquestionably all*

aggravating factors, but the difficulty is that we do not know whether all or any of these aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting.

[39] This illustrates the pitfalls inherent in the mechanistic way judges arrive at an appropriate sentence in Fiji – assigning a particular additional term for any aggravating features and a particular lesser term for any mitigating features. In many jurisdictions, the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. But the real problem which this case illustrates is the danger of a span of years representing the tariff without identifying where the judge should start within that tariff for a case without any aggravating or mitigating features. This problem has been highlighted before by the Supreme Court: see ***Seninolokula v The State*** *[2018] FJSC 5 at paras 19 and 20 and* ***Kumar v The State*** *[2018] FJSC 30 at paras 55 and 56.*

[40] Two other things which the Supreme Court said in Kumar at paras 57 and 58 in this context are relevant to the present case:

> *"57. ... First, a common complaint is that a judge has fallen into the trap of 'double-counting', i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *58. Secondly, the lower [end] of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided."*

[41] Seninolokula and Kumar were, of course, decided well after the High Court passed sentence in Nadan's case, and the judge cannot therefore be criticised if he did not heed this advice. The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had therefore fallen into the trap of double-counting, I have considered for myself what the proper sentence in this case should be.

[42] It was, on any view, a bad case of its kind. I have already identified the factors which the judge rightly regarded as aggravating Nadan's offending. In addition there was the fact that there were three separate incidents, and they spanned almost two years. The girl would continually have been in fear with Nadan continuing to live under the same roof. <u>In my opinion, concurrent sentences totaling 14 years' imprisonment for the totality of Nadan's offending would have been appropriate.</u>

[29] Thus, the above Supreme Court decision in ***<u>Nadan</u>*** seem to signal some departure from ***<u>Koroivuki</u>*** where it was suggested that as a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. According to the Supreme Court in ***<u>Nadan</u>***, when the starting point is picked 'somewhere in the middle of the range' of the tariff, the judges can only use those aggravating features of the case which were not taken into account in deciding where the starting point should be as aggravating features to enhance the sentence. However, as the Supreme Court admitted the difficulty is to know whether all or any of the aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff and if that be the case then the judge would be falling into the trap of double-counting and thus, a sentencing error.

[30] In the present case, however, it is clear what features the learned trial judge had considered in selecting the starting point. Therefore, it becomes clear that there had been double counting when the same or similar factors were counted as aggravating features to enhance the sentence. Like in this case, if the trial judges state what factors they have taken into account in selecting the starting point the problem anticipated in ***<u>Nadan</u>*** may not arise. Therefore, in view of the pronouncements of the Supreme Court in ***<u>Nadan</u>*** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed *'somewhere in the middle of the range'* of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **<u>Naikelekelevesi</u>** and ***<u>Koroivuki</u>*** may provide useful tools to navigate the process of sentencing thereafter.

[31] However, the Supreme Court in ***<u>Nadan</u>*** had gone further and stated that judges should not treat as aggravating factors those features of the case which have already been reflected in the tariff itself and that would be another example of 'double-counting',

which must, of course, be avoided. However, to me it appears that there may be a difficulty to figure out what exact features had been considered in setting the tariff in the first place, for *inter alia* tariff itself may have evolved over a long period of time *via* several decisions. There may be other reasons such as the sophisticated nature of some offences and lack of exact foundation for setting tariffs for individual offences, absence of a statutory body charged with the responsibility of fixing tariffs (for example Federal Sentencing Guidelines in the United States or the United Kingdom's sentencing guidelines) why this task becomes difficult.

02nd ground of appeal

[32] The appellant argues that the trial judge had given insufficient discount for the early guilty plea. The learned judge afforded 03 years for all mitigating factors including the appellant's early guilty plea.

[33] In **Balaggan v State** [2012] FJHC 1032; HAA031.2011 (24 April 2012) Gounder J. had the occasion to comment on an argument based on 1/3 discount for an early guilty plea as follows.

> '*[10] This ground is misconceived. I am not aware of any law that says that a first time offender is entitled to one-third reduction in sentence. But, I am aware that as a matter of principle, the courts in Fiji generally give reduction in sentences for offenders who plead guilty. In Naikelekelevesi v State [2008] FJCA 11; AAU0061.2007 (27 June 2008), the Court of Appeal stressed that guilty plea should be discounted separately from other mitigating factors present in the case.*
>
> *[11] The weight that is given to a guilty plea depends on a number of factors...............*
>
> '*Encouragement will be given to early pleas of guilty only if they lead (and are seen to lead) to a substantial reduction in the sentence imposed.* ***That does not mean that the sentencing judge should show a precisely quantified or quantifiable period or percentage as having been allowed. Indeed, it is better that it not be shown****; that was the point of this Court's decision in Beavan at pp14-15. As was said in that case – discounts for assistance given to the authorities to one side – it is both unnecessary and often unwise for the judge to identify the sentence which he or she regards as appropriate to the particular case without reference to one factor and then to identify the allowance made which is thought to be appropriate to that particular factor."*

[12] The appellant's guilty plea was clearly taken into account as a mitigating factor.'

[34] As argued by the appellant, a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity was earlier considered as the 'high water mark' in **Ranima v State** [2015] FJCA17; AAU0022 of 2012 (27 February 2015) but it had not been regarded as an absolute benchmark in subsequent decisions such as **Mataunitoga v State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015). The Supreme Court dealing with ***Ranima*** said in **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)

> *'[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.'*

[35] Though, the appellant has not argued that he should have been given a 1/3 discount on account of his early guilty plea the same reasoning could be adopted to his complaint of insufficient discount.

[36] This brings me to the observations made in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) which may help deal with complaints similar to that of the appellant and overcome this quagmire in the sentencing process at the appeal stage.

> *'13. .... This argument misunderstands the sentencing process. It 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 recognising that 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. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence.'.*

[15] <u>Further, 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.</u> This is amply demonstrated by the fact that Shameem J adopted a lower starting point but after allowing for the the weighting she considered appropriate for matters of aggravation and mitigation reached the same total sentence as the learned Magistrate."

[37] The state has submitted that following the decision in **<u>Rokolaba v State</u>** [2018] FJSC 12; CAV0011.2017 (26 April 2018), the tariff for rape of an adult has been accepted to be between 7 and 15 years of imprisonment and tariff for Assault causing Actual Bodily Harm is between a suspended sentence and 09 months imprisonment [see **<u>Seeka v State</u>** [2008] FJCA 88; HAA027 of 2008 (25 April 2008)].

[38] The ultimate sentence of 08 years is well within the sentencing tariff for adult rape and not even close to the middle range of the tariff. Though, the trial judge may have been guilty of 'double counting' as alleged by the appellant, there is no real prospect of the appellant succeeding in appeal on this ground of appeal with regard to the ultimate sentence.

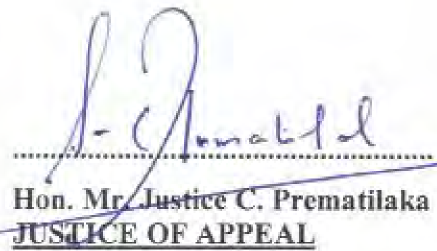
[39] Therefore, the appellant does certainly not have a 'very high likelihood of success' in any of the grounds of appeal on sentence and his personal circumstances pleaded cannot be regarded as exceptional circumstances for the purpose of bail pending appeal.

[40] It looks to me that with the changes introduced to the calculation of remission of one third of the sentence by section 27 (3) of the Correction Service (Amendment) Act, 2019 the appellant is likely to get released upon or short time after serving his non-parole period of 05 years operative from 17 March 2017.

'27 (3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, <u>for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.</u>

Order

1. Leve to appeal against sentence is refused.
2. Bail pending appeal is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL