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

CRIMINAL APPEAL NO.AAU 29 of 2018
[High Court Criminal Case No. HAC 27 of 2016]

BETWEEN	:	**DANIEL BHURRAH**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. S. Raikanikoda for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**17 August 2020**
Date of Ruling	:	**19 August 2020**

RULING

[1] The appellant had been charged in the High Court of Labasa on the following counts of the Crimes Decree No.44 of 2009,

> Count 1 - Indecent assault contrary to section 212 (1) of the Crimes Act 2009.
>
> Count 2 - Sexual assault contrary to section 210 (1) (a) of the Crimes Act 2009.
>
> Count 3 - Rape contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.
>
> Alternative Count – Rape contrary to section 207 (1) and 2 (b) of the Crimes Act 2009.

[2] After full trial, the assessors had expressed a unanimous opinion of guilty on the first three counts on 28 February 2018. The Learned High Court Judge in the judgment dated 01 March 2018 had agreed with the assessors and convicted the appellant of counts 1, 2 and 3 as charged. He was sentenced on 02 March 2018 as follows and all sentences were directed to run concurrently subject to a non-prole period of 08 years.

Count 1 – Indecent Assault – 6 months' imprisonment.

Count 2 – Sexual Assault – 2 years' imprisonment.

Count 3 – Rape – 12 years' imprisonment.

[3] The appellant by himself had signed a timely notice of appeal on 10 March 2018 against conviction (05 grounds) and sentence (02 grounds). Later, Raikanikoda & Associates had tendered written submissions dated 01 November 2019 on behalf of the Appellant. The state had tendered its written submissions on 20 December 2019.

[4] At the hearing into leave to appeal, the appellant tendered to court Form 3 dated 19 March 2020 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence.

[5] The ruling on the appellant's leave to appeal application was delivered on 22 May 2020 and leave to appeal against conviction was refused [see **Bhurrah v State** [2020] FJCA 56; AAU29.2018 (22 May 2020)]

[6] However, when the appellant's application to abandon his appeal against sentence came up before two judges of the Court of Appeal on 04 June 2020, his counsel indicated that the appellant had changed his mind and wished to pursue his appeal against sentence and moved for time to file amended grounds of appeal against sentence and written submission.

[7] Appellant's submissions had been filed on 30 June 2020 urging only one ground of appeal against sentence. The state had responded on 07 July 2020.

[8] The evidence against the appellant in a nutshell is as follows. On 14 May 2016, the victim aged 72, had been left alone at home by her family members who were attending a church service. She was living with her daughter and her family at the time. The victim's daughter had become her carer after she had a stroke seven years ago. The appellant had been returning home from a drinking session when he noticed that the victim was sitting alone on the veranda of her home. He had gone and sat beside her. He was her nephew. He called her "Aunty". He was also her neighbour and a frequent visitor to her home according to her daughter Ms. Gardenia Murphy. He knew about the victim's physical and mental health and that she was alone at home. He exploited the situation, kissed her and touched her genitals. Later he sexually penetrated her genitals. The victim was vulnerable due to her age and illness. 14 year old Miss. Erica Molly had seen the appellant in the act of kissing her grandmother. Dr. Elizabeth Koroivuki had expressed an opinion that the complainant did not have the mental capacity to give free and voluntary consent to the sexual acts due to dementia. She was about 72 years old when the appellant sexually molested her. The appellant was defended by counsel. He remained silent and did not call any witnesses.

[9] 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.

[10] **Ground of appeal**

> *'1. There sentence imposed on the appellant is harsh and excessive.'*

[11] The appellant's argument is that the learned trial judge had not assigned separate terms of imprisonment to each and every factor from (a) to (p) endorsed in **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) as features to be considered when sentencing for rape. These factors are as follows.

> *'(a) whether the crime had been planned, or whether it was incidental or opportunistic;*
>
> *(b) whether there had been a breach of trust;*
>
> *(c) whether committed alone;*
>
> *(d) whether alcohol or drugs had been used to condition the victim;*
>
> *(e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*
>
> *(f) whether the impact on the victim had been severe, traumatic, or continuing;*
>
> *(g) whether actual violence had been inflicted;*
>
> *(h) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
>
> *(i) whether the method of penetration was dangerous or especially abhorrent;*
>
> *(j) whether there had been a forced entry to a residence where the victim was present;*
>
> *(k) whether the incident was sustained over a long period such as several hours;*
>
> *(l) whether the incident had been especially degrading or humiliating;*
>
> *(m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*
>
> *(n) Time spent in custody on remand.*
>
> *(o) Extent of remorse and an evaluation of its genuineness;*

(p) If other counts or if serving another sentence, totality of appropriate sentence. (per Gates CJ)

[12] It has to be kept in mind that ***Ram*** was a case of child rape and the Supreme Court set down the factors to be considered as '*Factors to be considered in such cases* ***could be***'. Therefore, the Supreme Court did not intend to come up with an all-encompassing and exhaustive list of factors to be taken into account in meting out sentences in rape cases. Nor did it require the trail judges to assign separate sentences for those items and then to add all of them to arrive at the final sentence. ***Ram*** is furthest from being an authority to such a highly mechanical and arithmetical approach to sentencing in rape cases.

[13] The appellant also contends that there should be separate ranges of tariffs for each and every item spelt out from (a) to (p) in ***Ram***. Perhaps, the appellant envisages a situation somewhat similar to the UK where the Sentencing Council for England and Wales has produced guidelines on sentencing in the Magistrates' Court and the Crown Court setting out the range of sentence (tariff) for each and every offence. The sentencing court should determine which categories of harm and culpability (such as Category 1, 2, 3 etc. & Culpability A and B) the offence concerned falls into by reference only to the tables given. Having determined the harm and culpability category, the court should use the corresponding starting points to reach a sentence within the category range. For each category of harm and culpability a starting point is given with a range. Having determined the starting point, step two allows further adjustment for non-exhaustive aggravating or mitigating features set out in the list. Then the sentencing court considers any factors which indicate a reduction (such as assistance to the prosecution), reduction for guilty pleas, dangerousness, totality principle, ancillary orders, reasons and consideration for time spent on bail (tagged curfew). Many of these steps are required by statutory provisions such as Serious Organised Crime and Police Act 2005 and Criminal Justice Act 2003.

[14] All jurisdictions in Australia have sentencing laws that provide general guidance on principles and factors to be taken into account in sentencing. However, judges retain significant discretion and utilize an individualized approach to justice. All states have

grappled with issues related to reducing disparities in sentencing and enhancing public confidence in the justice system, while also maintaining judicial discretion and an individualized approach to sentencing. The option of an independent entity setting standardized sentencing guidelines or grids for multiple offenses has largely been rejected due to the restrictions these would impose on judicial discretion. For a period in the late 1990s and early 2000s, it appeared that the judiciary itself might provide guidelines for certain offenses or sentencing options in the form of guideline judgments. However, this approach had not been adopted and its constitutionality has been questioned by the High Court. The discussion regarding the balance between individualized justice and avoiding disparities in sentencing is ongoing in Australia.

[15] There is no dedicated institution similar to Sentencing Council for England and Wales in Fiji and therefore the methodology adopted in the UK in sentencing is ill-suited, if not impossible in this country. Like in Australia, the legal regime on sentencing in Fiji has safeguarded judges' discretion and the individualized approach to sentencing while trying to reduce disparities in sentencing by having tariffs of sentences judicially set down for most of the offenses.

[16] However, the methodology in the sentencing process in Fiji as expressed in decisions such as **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008), **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013), **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) has not been the same though the two tier approach is still being largely followed.

[17] In ***Naikelekelevesi*** it was held by the Court of Appeal

> *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. In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise 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 plea was entered and he was convicted, to which he voluntarily admitted. In doing this the court is taking cognizance of the aggravating features of the offence.

[18] The Court of Appeal without citing ***Naikelekelevesi*** said in ***Koroivuki:***

*"[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."*

[19] The Supreme Court remarked in ***Nadan*** as follows:

*"[39]..... 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.*

[20] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) The Supreme Court stated

*'18. But where within that range should the starting point have been? There is no problem when there is established authority for what the starting point should be. For example, in the past the starting point for the offence of rape was 7 years' imprisonment. The problem arises when there is no established authority for the starting point, but instead an appropriate range of sentence (sometimes referred to as the tariff) has been identified. For example, the appropriate range of sentence for the rape of a child (ie someone under the age of 18) is 10-16 years' imprisonment; see **Anand Abhay Raj v The State** [2014] FJSC 12 at [58]. Where within that range should the starting point be?*

19. There is here a difference in judicial opinion. In ***Koroivuki v The State*** *[2013] FJCA 15, Goundar JA said at [26]: "As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff." On the other hand, a number of trial judges choose the lower end of the range as a matter of routine....'*

21.The second feature about the judge's approach to the sentencing process which needs to be addressed is whether it is appropriate for the amount by which an offender's sentence is to be increased for each of the aggravating factors should be identified. The judge in this case enhanced the sentence in six separate stages, identifying the size of the increase at each stage: (i) three years for the abuse of authority; (ii) three years for the breach of trust; (iii) two years for the opportunistic nature of the abuse; (iv) one year for the planning; (v) one year for the length of time the abuse lasted; and (vi) one year for the defendant's lack of remorse. This is too mechanistic an approach. Sentencing is an art, not a science, and doing it in the way the judge did risks losing sight of the wood for the trees.'

27. In the circumstances, it is necessary for us to consider whether a different sentence should be passed in place of the sentence which the Court of Appeal substituted for that of the trial judge. Without deciding as a matter of principle where that starting point should be in a case where there is an appropriate range of sentence, we proceed in this case on the basis that the starting point here should be at the lower end of the appropriate range, namely 10 years' imprisonment. It should not be forgotten that even that is a substantial sentence, and reflects many of the features which make the rape of a child particularly serious.'

30. I should add just one thing to that. It is always useful for the judge to stand back at the end of the process to see whether the sentence he proposes to pass feels right. Judges tend to develop a strong sense of what the appropriate sentence should be. Asking themselves at the end of the process whether the sentence they propose to pass feels right is a sensible way for the judge to check whether the decision which he has reached by a more analytical process is likely to be correct. Had the trial judge done that, it may be that he would not have passed a sentence which was as long as the one he ended up passing."

[21] Keith J in the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) remarked as follows.

'[56] We raised this issue with Dato' Alagendra. It was not a topic which she had considered. I make absolutely no criticism of her for that. Her focus was on the appropriate sentencing range, not what the starting point within that range should be. In the circumstances, this is not the occasion to engage with the issue. I am not troubled by that. Whatever methodology judges choose to use, the ultimate sentence should be the same. 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. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.*

[22] It appears that the High Court judge in this case had adopted a methodology that I have not seen before in sentencing orders delivered in the High Court. However, it is the sentencing approach said to be adopted in many jurisdictions according to Keith J in ***Nadan*** which is that 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.

[23] This is exactly what the trial judge had done in the sentencing order dated 02 March 2018. He had identified the then starting point in adult rape of 07 years as established in **Kasim v State** [1994] FJCA 25; AAU0021j of 1993s (27 May 1994) and set out the aggravating and mitigating features and announced the ultimate sentence of 12 years of imprisonment with a non-parole period of 08 years. However, not long after the Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment following **State v. Marawa** [2004] FJHC 338.

[24] Thus, the trial judge had departed from all sentencing practices adopted in Fiji until then. Yet, that does not make the final sentence wrong or erroneous as Keith J had stated in ***Nadan.*** The final sentence will be tested in appeal in the legal framework pronounced in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006).

> *'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] 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.....'

[25] Similar sentiments had been expressed earlier in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) where the Court of Appeal stated:

*'[39]..... The present process followed by the courts in Fiji emanated from the decision of this Court in **Naikelekelevesi –v- The State** (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

> *"The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*

[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:

> *"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*

[41] The Supreme Court then observed in paragraph 51 that:

> *"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability ___."*

[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge.

The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.'*

[26] In the circumstances above discussed, it is not possible to state that the appellant has a reasonable prospect of success in appeal on the sentence appeal as the ultimate sentence of 12 years appears to be proportionate to the gravity of the offence committed by the appellant in all circumstances of the case.

[27] Therefore, there is no sentencing error as complained by the appellant in terms of the guidelines in **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).

[28] 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 reasonable prospect of its success 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.

[29] Accordingly, leave to appeal against sentence is refused.

Order

1. Leave to appeal against sentence is refused.

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL