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

CRIMINAL APPEAL NO.AAU 140 of 2018
[In the High Court at Lautoka Case No. HAC 181 of 2015]

BETWEEN : **SAULA VASU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **22 October 2020**

Date of Ruling : **23 October 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on two counts of rape contrary to section 207 (1) and (2) (a) respectively of the Crimes Act, 2009 committed on 02 November 2015 at Nadi, in the Western Division.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

SAULA VASU, *on the 2nd day of November, 2015 at Nadi, in the Western Division, penetrated the vagina of* ***TALEI SENIROSI*** *with his penis, without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SAULA VASU, *on the 2nd day of November, 2015 at Nadi, in the Western Division, penetrated the anus of* ***TALEI SENIROSI*** *with his penis, without her consent.*

[3] After the summing-up on 09 November 2018 the assessors had unanimously opined that the appellant was guilty of both charges and in the judgment delivered on 12 November 2018 the learned trial judge had agreed with them and convicted the appellant as charged. On 29 November 2018 the appellant had been sentenced to an aggregate sentence of 09 years and 10 months and 15 days of imprisonment with a non-parole period of 08 years.

[4] The appellant in person had signed a timely notice of application for leave to appeal against conviction and sentence on 06 December 2018 (received by the CA registry on 20 December 2018). Amended grounds of appeal against conviction and sentence had been tendered by the Legal Aid Commission on 28 April 2020. The state had responded by its written submission on 13 August 2020.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test 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.

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40: (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal filed within time 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*

[7] Grounds of appeal urged on behalf of the appellant are as follows.

> ***Against conviction.***
>
> *'Ground1 – The verdict on both counts of rape cannot be supported having regard to the totality of the evidence.*
>
> ***Against sentence.***
>
> *'Ground 2- The Learned Trial Judge erred in principle by enhancing the Appellant's sentence with the aggravating factors accounted for in as much as;*
>
> *i) Irrelevant or extraneous factors in Aggravating factor (a); and*
>
> *ii) Aggravating factor (b) makes up part of the offending.'*

[8] The trial judge had summarised the evidence for the prosecution as follows in the summing-up.

2. *'The brief facts were as follows.*

In the morning of 2nd November, 2015 the victim was drinking beer in room No.3 at the Martintar Hotel. The room door was open. After a while she saw the accused going past the room.

3. *The victim called out and asked the accused to join her, as the drinking continued the victim started to feel drunk. After a while the accused told the victim that he wanted her. The victim refused. The accused punched the victim, she stood up and went outside the room. The accused came and pulled her neck from behind and forcefully took her to his room no. 4.*

4. *The victim did not want to go into the room so she pushed him but the accused managed to pull her into his room. In the room the accused pushed the victim on the bed and pushed her down. The accused pulled up the victim's dress, she was screaming for help and pushing the accused he then locked the door of the room.*

5. *After pulling down her under wear the accused forcefully had sexual intercourse with the victim. The victim did not consent to what the accused had done to her. According to the victim she was turning, twisting and screaming for help and pushing the accused at the same time.*

6. *The accused held the victim's throat with one hand and with the other blocked her mouth. As the victim was trying to free herself the accused turned her around, pulled her bra and then inserted his penis into her anus. The victim was crying and calling for help. She did not consent to what the accused had done to her.*

7. *The accused took the victim to the bathroom here she was able to free herself and run out of the room. The accused also ran after her. At the hotel reception the police came and arrested the accused.*

[9] The medical evidence had been that the complainant had sustained vaginal tears on the vaginal opening *i.e.* the introitus and the doctor had seen anal tears as well. The medical opinion had been that there was evidence of forceful vaginal and anal penetration.

[10] The appellant had remained silent and called one witness by the name of Taraivosa Baleisuva. The appellant's defense had been one of consent at the trial as revealed in the cross-examination of the complainant. The trial judge had summarized the appellant's position in the summing up as follows.

'80. According to the line of cross examination the accused takes up the position that the accused had penetrated the complainant's vagina and anus with his penis with her consent. The complainant had invited him to join her for drinks after a while she wanted to have sex with him since her uncle's friend was asleep on the bed they went into the bathroom. Thereafter the accused realized his phone was missing the complainant had hidden the phone inside her bra. There was a struggle between the two resulting in the bra of the complainant being damaged.'

01st ground (conviction)

[11] The appellant argues that the verdict of guilty cannot be supported having regard to the totality of evidence. He has further submitted that the complainant had not stated that both acts of sexual intercourse had been committed on her by force, threats, intimidation or fear of bodily injury and therefore, there is insufficient evidence on lack of consent.

[12] This argument presupposes that in a rape case the victim should necessarily and expressly depose to any one or more of the matters set out in section 206(2) of the Crimes Act, 2009. The law does not require a victim of a rape to make a declaration, loud and clear, that her consent was not freely and voluntarily given because it was obtained under any of the circumstances given in section 206(2) of the Crimes Act, 2009. All what is necessary is that the assessors and the trial judge, being fact finders, should be able to be satisfied beyond reasonable doubt from the totality of the evidence that the victim had not consented to the act of sexual intercourse. In some cases the victim will testify to want of consent directly and in others lack of consent has to be and could be inferred. What is meant by 'consent' is described in section 206(1) of the Crimes Act, 2009 while section 206(2) highlights instances of 'consent' becoming not free and voluntary. In other words section 206(1) describes 'what is consent' and section 206(2) as to 'what is not 'consent'.

[13] In **Nawaitabu v State** [2020] FJCA 53; AAU007.2019 (15 May 2020) I considered the term 'without consent' in section 207(2)(a) of the Crimes Act in the backdrop of a similar argument as follows.

'[10] Under the first ground of appeal the appellant argues that the prosecution had not adduced evidence from GN and MN that the appellant had committed the acts complained of by force, threats, intimidation or bodily harm to cause fear in them. In other words according to the appellant there

was no evidence to say that the consent was not given freely and voluntarily due to the absence of the factors outlined in section 206(2) of the Crimes Act.

[11] This argument presupposes that there is a burden on the prosecution to prove the absence of all factors set out under section 206(2) to prove lack of consent or to negate the element of consent required in the offence of rape. In my view, this is a wrong construction of the law. All what the prosecution has to prove is absence of consent on the part of the victim. This is denoted by the phrase 'without the other person's consent' in section 207(2)(a) of the Crimes Act.

'[12] Section 206 states that

'In this Part —

(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.'

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained —

(a).....

[13] Thus 'without consent' could be either patent lack of consent or consent (even if present outwardly) not given freely and voluntarily by a person, with the necessary mental capacity to give the consent. The prosecution may prove either of them or both. For example there can be initial physical resistance and subsequent submission in the same transaction due to any of the reasons set out in section 206(2) or some other reason inconsistent with the consent.

[14] However, the prosecution does not have to rule out one or more or all instances outlined under section 206(2) to prove the element of 'without consent' in a charge of rape. Sub-section (2) only elaborates without limiting sub-section (1) instances where consent is not regarded as freely and voluntarily given. Neither does sub-section (2) override sub-section (1). This is the same with submission without physical resistance which alone would not amount to consent.

[15] The evidence clearly shows that the appellant had committed the acts of rape without the consent of GN and MN. There is no ambiguity in that regard.

[14] The evidence of the complainant narrated by the learned High Court judge in paragraphs 39-49 of the summing -up clearly shows that the appellant had penetrated the vagina and anus of the complainant without her consent. Medical evidence in this case as summarised in paragraphs 59-66 provide strong corroboration of the

complainant's version of 'lack of consent'. In his concurring judgment the trial judge has once again analysed the totality of the evidence including that of the complainant and the doctor and stated as follows.

> *'36. I am satisfied beyond reasonable doubt that on the 2nd day of November, 2015 the accused had penetrated the vagina and the anus of the complainant with his penis without her consent.'*

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

02nd ground (sentence)

[16] The appellant challenges the trial judge's sentence on the basis that he had enhanced the sentence for breach trust and use of violence wrongly in as much as the former was not applicable to the facts of the case and the latter was anyway part of the offence.

[17] The trial judge in his sentencing order had stated on aggravating features as follows.

> *11. 'The aggravating features are:*
>
> *(a) Breach of Trust*
>
> *The victim trusted the accused so she invited him to join her for drinks. The accused breached her trust by his actions. The victim was alone and vulnerable the accused took advantage of this as well.*
>
> *(b) Use of Violence*
>
> *The accused punched the victim when she refused to have sex with him and then grabbed her by the neck and then took her to his room. The victim was 20 years of age and the accused was 28 years of age. The age difference is substantial.'*

[18] The appellant's contention is that because he and the complainant were not known to each other no breach of trust could arise as there was no fiduciary or personal relationship between him and the complainant. I tend to disagree. In the context of criminal law, breach of trust should not be confined to the civil law standard or concept of fiduciary or personal relationships. When a person invites another for a social drink, even spontaneously, the former places a certain degree of trust on the latter at least to the extent that the latter will not cause any harm to the former. Thus,

there is a breach of trust on the part of the appellant who was invited by the complainant to join her for drinks. Secondly, even otherwise there had been clearly an abuse of hospitality, friendship and courtesy extended by the complainant towards the appellant which is an aggravating factor.

[19] As to the appellant's argument that use of violence should not have been counted as an aggravating factor as it was part of the offence of rape, it should be clear that use of violence as in this case cannot be equated with mere use of force, threat or intimidation. The evidence of the complainant has shown that the appellant had exceeded threshold of simple force, threat or intimidation as contemplated under section 206(2) of the Crimes Act, 2009.

[20] The trial judge *inter alia* had dealt with the sentence imposed on the appellant as follows.

> *'12. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under the most serious category of offences. The accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.'*
>
> *16. 'It is the duty of the court to protect women from sexual violations of any kind that is the reason why the law makers have imposed life imprisonment for the offence of rape as the maximum penalty.*
>
> *17. Bearing in mind the seriousness of the offences committed I take 9 years imprisonment as the starting point of your aggregate sentence. I add 3 years for the aggravating factors, bringing an interim total of 12 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value, however, I find your good character has substantive mitigating value. I therefore reduce the sentence by 2 years. The sentence now is 10 years imprisonment.*
>
> *18. I note the accused has been in remand for about 1 month and 3 days. I exercise my discretion to further reduce the sentence for the remand period by 1 month and 15 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served.*
>
> *19. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for the two offences of rape is 9 years and 10 months and 15 days imprisonment.*
>
> *20. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim compels me to*

state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature

[21] Sentencing 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 arriving at a sentence that fits the crime. Recognising 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Mava v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[22] 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. The ultimate sentence imposed on the appellant is well within the sentencing tariff.

[23] Therefore, I see no sentencing error which has a reasonable prospect of success in appeal.

Order

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

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL