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

CRIMINAL APPEAL NO.AAU 0103 of 2018
[In the High Court at Suva Case No. HAC 234 of 2018S]

BETWEEN	:	**SAMISONI LALANAKORO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**01 July 2020**
Date of Ruling	:	**03 July 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of rape (contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009), one count of assault causing actual bodily harm (contrary to section 275 of the Crimes Act, 2009) and one count of criminal intimidation (contrary to section 375 (1) (a)(i) and (2) (a) of the Crimes Act, 2009).

[2] The particulars of the counts were as follows.

'***FIRST COUNT***

Statement of Offence

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

Particulars of Offence

SAMISONI LALANAKORO *on the 24th day of May 2018 at Nasinu in the Central Division had carnal knowledge of* ***E. B.,*** *without her consent.*

COUNT TWO

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: *Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

SAMISONI LALANAKORO *between the 23rd day of May 2018 and the 24th day of May 2018 at Nasinu in the Central Division assaulted* ***E. B.****, by punching her head and arm, causing her actual bodily harm.*

COUNT THREE

Statement of Offence

CRIMINAL INTIMIDATION: *Contrary to Section 375 (1)(a)(i) and (2)(a) of the Crimes Act 2009.*

Particulars of Offence

SAMISONI LALANAKORO *on the 24th day of May 2018 at Nasinu in the Central Division without lawful excuse threatened to cause the death of* ***E.B.,*** *by cutting off her head.*

[3] The appellant had pleaded guilty to all three counts. The summary of facts had revealed the facts of the case as follows.

> *4. The prosecution read her summary of facts in court. Briefly they were as follows. On 23 and 24 May 2018, the accused was 28 years old. He reached Form 6 level education and worked as a delivery boy for a company in Vatuwaqa. He resided with his grandparents at Tuirara Sub Division, Nasinu. The female complainant was 24 years old, and she works as a sales agent for a telephone company. She resided at Nadera in Nasinu. According to the prosecution, the accused and the complainant were in a relationship for 1 year 5 months. As a result of that relationship, according to the accused, the complainant became pregnant.*
>
> *5. According to the accused, the complainant allegedly went through an abortion that ended her pregnancy. This caused friction between the two. In addition to the above, the accused was accusing the complainant of having an affair with her ex-boyfriend behind his back. Between 23 and 24 May 2018, the accused took the complainant to his residence at Tuirara Sub Division. On 23 May 2018, after an argument between the two, the accused repeatedly*

punched the complainant in the head and arms, resulting in her suffering some bodily injuries.

6. On 24 May 2018 after 8.30 pm, the two had an argument over the complainant's alleged affair. The accused then threatened to sodomize the complainant and cut off her head if she was lying to him about the alleged affair. The accused then later inserted his penis into the complainant's anus for about 15 minutes. The complainant suffered injuries as a result. The matter was reported to police. An investigation was carried out. The accused was caution interviewed by police at Nasinu Police Station. He admitted the offence. He was later taken to Nasinu Magistrate Court on 8 June 2018 charged with criminal intimidation, assault and rape against the complainant.

[4] Thereafter, the learned trial judge had sentenced him on 31 August 2018 to 08 years of imprisonment on the first count and 18 months of imprisonment each on the second and third counts. All sentences were ordered to run concurrently with a non-parole period of 07 years.

[5] The appellant had signed a timely appeal against sentence on 20 September 2016 (received by the CA registry on 26 September 2018). The Legal Aid Commission had filed amended grounds of appeal against sentence on 19 June 2019 along with written submissions. The state had tendered its written submissions on 30 June 2020.

[6] 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. This threshold is the same with leave to appeal applications against sentence as well.

[7] Further guidelines to be followed when a sentence is challenged are given 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). 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.*

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

> ***Against Sentence***
>
> 1. *That the Judge took into account irrelevant factor that my offending has caused sadness and heartache to her family as an aggravating factor in the absence of it being substantiated in the Summary of Facts or by way of any reports.*
>
> 2. *That the Judge failed to take into account some relevant consideration being the clear evidence of remorse of the Appellant and also his cooperation with police.*

01st ground of appeal

[9] The first ground of appeal is based on one of the aggravating factors set out by the learned trial judge in the sentencing order *'By your offending, you had caused sadness and heartache to her family'* in paragraph 8(iii). The appellant argues that there was no material before the learned trial judge in the form of a victim impact report or any other similar document substantiating that the wrongs committed by the appellant on the complainant had caused sadness and heartache to her family.

[10] As a matter of law it has been submitted on behalf of the appellant that in terms of section 4(2) (e) of the Sentencing and Penalties Act the court could take into account the impact of the offence on the victim only and any injury, loss or damages resulting from the offence and not those of the victim's family. However, upon a careful consideration of section 4(2)(e), it becomes clear that it compels a sentencing court to have regard to the impact of the offence on any victim and the resulting injury, loss or damages in sentencing offenders. But, the section does not prohibit the court from considering or having regard to similar impact on others who are immediately connected to the victim including the victim's family. Therefore, there is no legal bar for the court to consider the impact of the offence even on the victim's family in an appropriate case. No hard and fast rule could be laid down in this regard. When a sentencing court could legitimately have regard to the impact of an offence on the victim's family would depend on the facts and circumstances of each case.

[11] In fact the counsel for the appellant conceded that it was not totally uncommon for sentencing courts to do so in deserving cases. Nevertheless, the state has also conceded that there was no material before the trial judge such as any victim impact report nor did the prosecution submit this factor as part of aggravation of the offence at the stage of sentencing.

[12] It goes without saying that any offence may offend the feelings not only of the victim but also at least the victim's immediate family. However, if that is to be considered as a separate aggravating factor to enhance the sentence, in my view there should be some tangible material before court in the form of an impact report or otherwise or at least such consideration should be able to be justified having regard to the evidence led at the trial. If not, to treat the impact of the offence on the family of the victim in the abstract as part of aggravation of the offence should be avoided, particularly when it is used as a separate aggravating feature to enhance the sentence.

[13] That being said, I do not think that the learned High Court judge having considered sadness and heartache to her family as part of aggravating features along with two other very relevant matters (for which he had collectively added 04 years to the initial starting point of 09 years) would have had a decisive impact on the total of 04 years so added, for the other two factors namely breach of trust (with all the details given)

and violation of the complainant's right to safely and peacefully live in a protective domestic environment, themselves warrant and justify the enhancement of 4 years to the starting point. The summary of facts suggests that there may have been other aggravating features not counted by the trial judge. One of them appears to be that the appellant seems to have used his penis not only as a sexual organ but also as some form of a weapon.

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

02nd ground of appeal

[15] The appellant argues that the learned trial judge had failed to account for some clear evidence of remorse on the part of the appellant and his cooperation with police as part of mitigating factors.

[16] The learned judge had considered the appellant's guilty plea made at a relatively early stage of the proceedings as a mitigating factor and given a discount of 02 years and 09 months on account of that. One can argue, not without merit, that the reduction of the sentence due to an early plea of guilty necessarily include an element of remorse, for one of the ways in which an accused could show remorse is by not putting the victim through the agony of recounting a very unpleasant experience once again in public. In my view, if an accused expects further discount for remorse separately there should be evidence of his having actively made amends in a tangible way for the wrong he perpetrated on the victim. In other words, there should be an outward manifestation of the so called remorse either in monetary terms or in any other ascertainable manner upon the victim or the family of the victim. Otherwise, when an accused claims that he is remorseful it does not mean anything to the victim or the family and it remains an empty declaration on paper just to get an advantage of a reduction in sentence.

[17] As for the cooperation with the police, my view is that unless an accused has actively engaged with law enforcement authorities in a positive manner as opposed to being a passive participant in the process of delivering justice including solving the crime and bringing the culprits to justice, he should not expect any special concession in terms of sentence on account of 'cooperation with the police', for everyone without

exception is anyway expected to be part of that effort by law enforcement agencies. Nevertheless, I do agree that an accused who voluntarily becomes part of that process including the admission of culpability deserves a discount on account of that as there should be an encouragement for prospective offenders to do so by an acknowledgement of that fact as part of mitigation by courts for saving the time, energy and resources of the system of law enforcement and administration of justice.

[18] It is true that the learned trial judge had not given a special discount to the appellant for having admitted the offence in his cautioned interview. It is not clear whether his admission of guilt was the result of realisation of the inescapable eventuality he was faced with or a genuine desire to cooperate with the police.

[19] However, in dealing with the appellant's complaint the following observations by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) are relevant.

> *'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.'.*

[20] The state has submitted that following the decision in **Rokolaba v State** [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 it has been reiterated in **State v Lagilevu - Sentence** [2020] FJHC 353; HAC009.2019 (29 May 2020).

[21] The appellant has received a sentence of 08 years of imprisonment with a non-parole period of 07 years. The sentence is very much at the lower end of the sentencing tariff for adult rape. I do not find any reasonable prospect of successfully challenging the final sentence which to my mind could be described as being even lenient in all circumstances of the case.

[22] Therefore, these grounds of appeal against sentence have no reasonable prospect of success in appeal for the reasons set out above.

Order

1. Leave to appeal against sentence is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL