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

CRIMINAL APPEAL NO.AAU 0042 of 2019
[In the High Court at Labasa Case No. HAC 19 of 2017]

BETWEEN	**:**	**ERONI RATUDOI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Ms. A. Vavadakua for the Respondent**
Date of Hearing	**:**	**25 August 2021**
Date of Ruling	**:**	**27 August 2021**

RULING

[1] The appellant, aged 65 and the father of the victim had been indicted in the High Court at Labasa on five counts of rape of his 13/15 year old biological daughter contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009 committed at Savusavu in the Northern Division and Levuka in the Eastern Division.

[2] The information read as follows:

FIRST COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

ERONI RATUDOI*, between 01 January 2012 to 31 December 2012, at Savusavu in the Northern Division, with his penis, penetrated the vagina of* ***A.B.****, a child under the age of 13 years.*

SECOND COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

ERONI RATUDOI*, between 01 January 2014 to 31 December 2014, at Savusavu in the Northern Division, penetrated the vagina of* ***A.B.****, with his penis, without her consent.*

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ERONI RATUDOI, *between 01 November 2015 to 30 November 2015, at Levuka in the Eastern Division, penetrated the vagina of A.B., with his penis, without her consent.*

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ERONI RATUDOI*, between 01 December 2015 to 24 December 2015, at Savusavu in the Northern Division, penetrated the vagina of* ***A.B.****, with his penis, without her consent.*

FIFTH COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

***ERONI RATUDOI**, between 23 April 2016 to 28 August 2016, at Savusavu in the Northern Division, penetrated the vagina of **A.B.**, with his penis, without her consent.*

[3] At the conclusion of the prosecution case, the trial judge had found the appellant not guilty and acquitted him of the first, second, fourth and fifth counts pursuant to section 231 (1) of the Criminal Procedure Act, 2009. The counsel for the prosecution had conceded to this course of action. Thereafter, at the end of the summing-up on the remaining count the assessors had unanimously opined that the appellant was guilty of the third count of rape. The learned trial judge had agreed with the assessors, convicted the appellant and on 13 February 2019 sentenced him to 17 years of imprisonment with a non-parole period of 15 years (the effective serving period being 15 years and 02 months with a non-parole period of 13 years and 02 months after the period of remand was deducted).

[4] The appellant had lodged an appeal against conviction and sentence in a timely manner. Subsequently, the Legal Aid Commission had tendered an amended notice of appeal against conviction and sentence along with written submissions. In reply, the state too had tendered its written submissions. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.

[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 in a timely appeal for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau**

[2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

> *(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.*

[6] The grounds of appeal are as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to properly and fully assess the Appellants defence of erectile dysfunction resulting in an unsafe conviction.*
>
> ***Sentence***
>
> ***Ground 2***
>
> *THAT the Learned Sentencing Judge erred in law and in fact when failing to give discount for the Appellant's mitigation of nil previous criminal records*.

[7] The trial judge had summarized the evidence of the prosecution and the defense as follows in the judgment:

> *7. The prosecution alleges that the accused penetrated the vagina of the complainant without her consent while they were staying at the Royal Park Hotel in Levuka. The accused denies the allegation, claiming that he has been suffering from erectile dysfunction therefore, he was not able to penetrate into the vagina of the complainant.*
>
> *8. In view of the evidence presented by the prosecution and the defence, the main dispute is whether the accused actually penetrated into the vagina of the complainant.*
>
> *9. The accused in his evidence said that he has been suffering from this erectile dysfunction since 2012. However, there is no medical report to confirm about this physical condition of the accused. The accused said that he visited the Savusavu Hospital, but they do not have specialist doctor who could properly treat this erectile dysfunction. The accused had referred to the Labasa Hospital after he was charged for this offence, in order to check this physical condition. The accused said the special doctor who could treat this condition was not at the hospital and a normal doctor attended to him. The said doctor has told him that he may be suffering from erectile dysfunction. If the doctor found that the condition of the accused demands the attention of a special doctor, he would have definitely referred the accused to such a specialist doctor.*

01st ground of appeal

[8] The counsel for the appellant submits that the trial judge had failed to properly and fully assess the defence of erectile dysfunction.

[9] The trial judge had informed the assessors that penetration was one of the elements of the offence of rape (see paragraph 13 and 16 of the summing-up). Then, he had addressed them fully on the appellant's evidence of erectile dysfunction (see paragraph 31) along with his evidence that he in fact slept with the victim on the relevant day in the hotel room (see paragraph 32 of the summing-up). The trial judge had once against referred the assessors to his defence of erectile dysfunction (see paragraph 34 of the summing-up) and told them the real issue in the case was whether there was penetration of the victim's vagina by the appellant (see paragraph 35 of the

summing-up). Thereafter, the trial judge had fully ventilated the question of penetration *vis-à-vis* the defence of erectile dysfunction from paragraphs 43-47 of the summing-up. This being a short trial of 02 days the trial judge's address to the assessors on the appellant's defence of erectile dysfunction was more than sufficient.

[10] Not stopping at that the trial judge had addressed his mind to the appellant's defence of erectile dysfunction at paragraphs 07-10 of the summing-up.

[11] In the circumstances, there is no reasonable prospect of success at all of this ground of appeal.

02nd ground of appeal (sentence)

[12] The appellant's counsel contends that the trial judge had failed to give a discount for the appellant's mitigation of not having previous convictions against his name or for his previous good character for 60 years.

[13] The trial judge had explained why he was not inclined to afford the appellant a discount for his previous good character at paragraph 17 of the sentencing order:

> *17. There is no evidence or information before this court to consider your general reputation in the society and also no information about any significant contribution that you have made to the community. I take into account the fact that you have no previous criminal records. Meantime, I am mindful of the fact that you had been a dominating and abusive father towards your family as at one instance you have chased the family away from the home. Taking these reasons in to consideration, I do not find that you are entitled for a discount for your previous character.*

[14] It appears from section 05 of the Sentencing and Penalties Act that having no previous convictions would not *ipso facto* compel a trial judge to give a discount in every case. Having no previous convictions cannot be considered in isolation. In determining the character of an offender for the purpose of sentencing a trial judge may among other matters consider any previous convictions recorded against the offender along with his general repudiation and significant contribution of him to the community. Thus,

whether to give a discount on account of the offender's character the trial judge would consider a bundle of factors which sheds light on his character and absence of previous convictions recorded against him is only one of them.

[15] It is clear from paragraph 17 of the sentencing order the trial judge had guided himself according to section 05 of the Sentencing and Penalties Act and exercised his discretion not to grant any reduction of the sentence on account of the appellant's character free of previous convictions in the light of negative returns on his general reputation and lack of any significant contribution to the society.

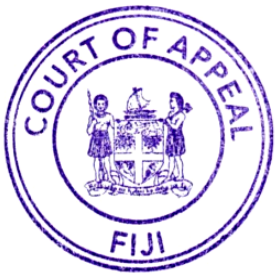
[16] On the other hand, I am conscious of the fact that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). 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)].

[17] In all the circumstances of the case the sentence imposed on the appellant is one that could reasonably have ben be imposed by the sentencing judge and the sentence imposed on him is well within the sentencing tariff for rape of juveniles set down in **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (02 November 2018) as 11 years to 20 years of imprisonment.

[18] In the circumstances, there is no reasonable prospect of success in this ground of appeal.

Orders

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
ACTING RESIDENT JUSTICE OF APPEAL