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

CRIMINAL APPEAL NO.AAU 0044 of 2019
[In the High Court at Suva Criminal Case No. HAC 338 of 2017S]

BETWEEN : **NIKO ROKARA LEVULA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, ARJA**

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

Date of Hearing : **14 October 2021**

Date of Ruling : **15 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of burglary contrary to section 312 (1) of the Crimes Act, 2009, one count of rape contrary to section 207 (1) and (2) (a) of the Crime Act, 2009 and one count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009. The charges against the appellant were as follows:

First Count

Statement of Offence

BURGLARY: *Contrary to section 312 (1) of the Crimes Act of 2009*

Particulars of Offence

NIKO ROKARA LEVULA *on the 5th day of November, 2017, at Nasinu in the Central Division, broke into the property of KG with intention to commit theft.*

Second Count

Statement of Offence

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

Particulars of Offence

NIKO ROKARA LEVULA *on the 5th day of November, 2017, at Nasinu in the Central Division, penetrated the vagina of KG, with his penis, without her consent.*

Fourth Count

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311 (1) (b) of the Crime Act of 2009.*

Particulars of Offence

NIKO ROKARA LEVULA *on the 5th day of November, 2017, at Nasinu in the Central Division, being armed with an offensive weapon, namely a knife, stole 1 X handbag brown in colour valued at $15.00, 1 x dark blue BLU brand mobile phone valued at $50.00, 1 x brown Roxy brand purse valued at $30.00, cash amounting to $100.00 and coins amounting to $5.00, all to the total value of $200.00, the property of KG.*

[2] After trial, the assessors had unanimously opined that the appellant was guilty of all charges. The Learned High Court judge had agreed with the assessors, convicted the appellant and sentenced him on 19 February 2019 to an imprisonment of 20 years with a non-parole period of 19 years.

[3] The appellant's appeal against conviction and sentence is out of time by about a month (17 April 2019) but the respondent has no objection to treat it as a timely appeal. Legal Aid Commission appearing for the appellant had subsequently filed an amended notice of appeal against conviction and sentence along with written

submissions on 20 October 2020. The state had tendered its written submissions on 23 March 2021.

[4] 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.

[5] 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 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.*

[6] The grounds of appeal urged by the appellant are as follows:

> *'**Conviction***
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> ***Ground 1***
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> *THAT the Learned Trial Judge had erred in law and in facts to have usurped the function of the assessors when directing the assessors on how to approach the confession of the Appellant.*
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> ***Ground 2***
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> *THAT the Learned Trial Judge had not directed the assessors and himself on how to approach circumstantial evidence.*
>
> ***Sentence***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge had erred in his sentencing discretion by double counting in considering aggravating factors that is reflected in the starting points and part of the offending for the respective offence of rape and aggravated robbery.*
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> ***Ground 2***
>
> *THAT the Learned Trial Judge had erred in his sentencing discretion to have sentenced the Appellant for the offence of burglary which is wrong in law and thereafter passing a consecutive sentencing that is not reasonably justified.'*

[7] The learned High Court judge had set out the prosecution evidence led at the trial as follows:

> 3. *'The brief facts of the case were as follows. The complainant (PW1) was 39 years old. She resided with her 3 young children and 2 nieces in Nasinu. She works in Suva. The accused was 26 years old. He was unemployed and resided in a village in Naitasiri. When he comes to Suva, he resided with his uncle, whose house is near to the complainant. It appeared the accused had been observing the complainant for a while. On 4 November 2017, a Saturday, the complainant went out with friends to a nightclub. Liquor was consumed. Later, she went with friends to Nabua, and further consumed liquor. At 3 am on 5 November 2017, a Sunday, she returned home in a taxi.*
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> 4. *She went into her mother's bedroom and slept. She was alone in the same. At about 5.00 am in the early morning, she was awoken by the accused. The accused had covered his face with a piece of cloth. The accused had a knife in his hand. The accused later stabbed the complainant in the lip and chin*

and proceeded to forcefully take off the complainant's clothes. He later raped her. Then he stole the complainant's properties as itemized in count no. 4. Thereafter he fled the crime scene……'

[8] The appellant had opted to give evidence but called no witnesses at the trial. He had denied all the allegations against him and said that the police administered 30 hard punches to his ribs when he was in their custody and as a result, he was frightened and scared and confessed to the police. According to him, he did not give his caution interview statement voluntarily.

01st ground of appeal

[9] The appellant's complaint is based on what the trial judge told the assessors at paragraph 33 of the summing-up:

> *33. After question and answer 5, the allegations was put to the accused. From questions and answers 30 to 46, 63 to 82, 91 to 100 and 105 to 111, the accused allegedly admitted count no. 1, 2 and 4. He basically admitted that he burgled the complainant's residence at the material time. He also allegedly admitted that he raped and robbed the complainant as alleged in count no. 2 and 4. If you accept the above alleged confessions, then you must find the accused guilty as charged on all counts. If otherwise, you must find the accused not guilty as charged on all counts. It is a matter entirely for you.*

[10] The appellant contends that the trial judge instead of letting the assessors assess the probative value of those questions and answers had directed them that they must find the appellant guilty if they accepted the same.

[11] I do not think that the above paragraph should be considered in isolation. The trial judge had stated in the following paragraph as follows:

> *34. In any event, when considering the above alleged confession by the accused, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution*

statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.

[12] It is clear that the directions at paragraph 34 substantially conforms to guidelines given in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017).

[13] In **Tuilagi v State** (supra) the Court of Appeal said analyzing previous decisions including **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30, **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.

> *'The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows:*
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> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the confession (vide **Volau**).*
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> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*

(iv) *Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) *However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[14] Although the trial judge had not specifically directed the assessors to consider whether the relevant questions and answers were sufficient for the conviction, there is no submission made by the appellant that they were in fact not sufficient to prove the elements of all charges levelled against him. In that context the directions that '*If you accept the above alleged confessions, then you must find the accused guilty as charged on all counts. If otherwise, you must find the accused not guilty as charged on all counts. It is a matter entirely for you'* cannot be faulted and would certainly not result in prejudice or a miscarriage of justice. It appears that the conviction for all charges was inevitable the moment those questions and answers were accepted by the assessors.

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

02nd ground of appeal

[16] The appellant submits that the trial judge had failed to give any directions on how to approach circumstantial evidence. The state too had conceded there is truth in this complaint.

[17] The circumstantial evidence referred to is the recovery of items belongings to the complainant made by the police. Her mobile phone had been recovered from the possession of the appellant's wife who had not given evidence and explained how she

came to possess it. It is not clear from whom the other items such as the complainants' bag, purse and knife had been recovered. No explanation had been forthcoming from the appellant either.

[18] It appears that the appellant had been shown those items during the cautioned interview and he had admitted to have stolen the same during the incident.

> *'36.* ***The Complainant's Brown Bag (Prosecution Exhibit No. 1); Complainant's Mobile Phone (Prosecution Exhibit No. 2); Complainant's Roxy Purse (Prosecution Exhibit No. 3) and Complainant's Knife (Prosecution Exhibit No. 4)***
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> *In her oral sworn evidence, the complainant said, the above properties belonged to her, and at the material time, it was stolen from her by the man who attacked her on 5 November 2017. The complainant said, all the above properties were brought to her by the police on 8 November 2017 to identify. This was 3 days after the alleged incident. She identified them to the police as hers. The police later took the properties back to Valelevu Police Station. Corporal 3573 (PW3) said, the complainant's above mobile phone was given to him by the accused's wife, in the course of police investigation, on 7 November 2017 - two days after the alleged incident. The mobile phone was in the complainant's bag which was stolen by her attacker, at the material time. In question and answer 91 of the accused's caution interview statement (Prosecution Exhibit No. 7), the accused admitted he stole the bag (Prosecution Exhibit No. 2) from the complainant at the material time. In question and answer 95 of his caution interview statement, the accused admitted he stole the complainant's mobile phone, at the material time. In question and answer 93 of his caution interview statement, the accused admitted he stole the burnt purse from the complainant, at the material time. In question and answer 97 of his caution interview statements, the accused admitted the above knife was what he used on the complainant, at the material time. What do the above evidence tell you.'*

[19] Thus, it is clear that there are direct admissions by the appellant relating to all the stolen and recovered items in the cautioned interview. In the circumstances, lack of directions on circumstantial evidence as to what inferences could be drawn from the recoveries would not have any material impact on the conviction. No substantial miscarriage of justice could ensue as a result of this omission. In any event, had such directions been given the assessors may well have been placed to draw adverse inferences against the appellant circumstantially. The failure of the trial judge seems

to have deprived the prosecution of additional strength to its case and not worked to the detriment of the appellant.

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

03rd ground of appeal (sentence)

[21] The complaint is based on possible double counting. The trial judge had correctly taken sentencing tariff for aggravated robbery as 08-16 years following **Wise v State** [2015] FJSC 7; CAV0004 of 2015 (24 April 2015) and as 07-15 years for adult rape (see **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338).

[22] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting'.

[23] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that 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.

[24] The Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[25] The trial judge had listed aggravating factors for both aggravated robbery and rape at paragraph 09 of the sentencing order and started with a sentence of 12 years for rape before adding another 05 years for aggravating factors. The learned judge had not set down any other aggravating factors other than what had been listed earlier at paragraph 09 to effect the enhancement. On the other hand, the trial judge had not indicated any other factors other than those listed at paragraph 09 to pick the starting point of 12 years. Thus, this court is now faced with the same concern expressed in ***Nadan.*** This is the same with the charge of aggravated robbery.

[26] On the other hand, 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). The appellant's final sentence for rape and aggravated robbery is within the stipulated tariff. However, whether it is the appropriate sentence fit for the two offences given the circumstances of the offending on the one hand and given the concern for double counting on the other hand is a matter for the full court to decide.

02nd ground of appeal

[27] The appellant complains that the trial judge had erred in imposing a sentence (04 years) outside the tariff for burglary and making the sentence for aggravated robbery partly consecutive (05 years) to the sentence of 15 years on rape. Thus, the total sentence became 20 years. The other sentences would run concurrent to each other.

[28] I have dealt with the issue of the prevailing concern on dual sentencing tariffs practised in the High Court, of course, for aggravated burglary in **Naulivou v State**

[2020] FJCA 166; AAU0043.2019 (9 September 2020). The trial judge seems to have adopted the increased tariff of 20 months to 06 years in sentencing the appellant for burglary. However, though the trial judge had departed from the old tariff for burglary the sentence of 04 years on burglary charge has little impact on the overall sentence as it will run concurrently with the 20 years' sentence.

[29] Nevertheless, the more important issue is whether there was a sentencing error in making the sentence for aggravated robbery partly consecutive (05 years) to the sentence of 15 years on rape.

[30] The trial judge had obviously acted under section 22 (1) of the Sentencing and Penalties Act in making the aggravated robbery sentence partly consecutive to rape sentence. There is no doubt that the trial judge had the discretion to do so [see **Vaquwa v State** [2016] FJSC 12; CAV0016 of 2015 (22 April 2016)] and **Tuibua v State** [2008] FJCA 77; AAU0116 of 2007S (07 November 2008) for the totality principle and observations thereon by the Court of Appeal].

[31] The trial judge had stated the reasons for this course of action as follows:

> *16. You stabbed the complainant on the lip and chin when she resisted you. You then raped her. As a further insult to her, you robbed her of her properties, as itemized in count no. 4. What you did to this woman is the utmost concern of all women and girls in this country. I will therefore have to make an example of you. I direct that 5 years from the sentence in count no. 4 be made consecutive to the 15 year sentence in count no. 2, making a total sentence of 20 years imprisonment. The sentence in count no. 1, 2 and the 10 year balance in count no. 4, be made concurrent to each other, leaving a final total sentence of 20 years imprisonment.*
>
> *18. Pursuant to section 4 (1) of the Sentencing and Penalties Act 2009, the above sentence is designed to punish you in a manner that is just in all the circumstances, to protect the community, to deter other would-be offenders and to signify that the court and the community denounce what you did to the complainant on 5 November 2017, at Nasinu in the Central Division.*

[32] In **Vukitoga v State** [2013] FJCA 19; AAU0049.2008 (13 March 2013) the Court of Appeal said:

> *'[23] Guidance for this situation can still be gleaned from the earlier decision of the Supreme Court in **Joji Waqasaqa** (supra) by analogy. If the Court said (and it did) that where the "default" position was consecutive, then a Court would have to give "reasoned justification" to depart from that position in making sentences concurrent, then a Court must now when the "default" position is concurrency make a reasoned justification to depart from the "default" position in making sentences consecutive or partly consecutive.'*

[33] In my view, the automatic application of section 22 of the Sentencing and Penalties Act (default position) would still achieve a substantial sentence of 15 years. On the other hand, is the sentence of 20 years of incarceration harsh and excessive in the circumstances and offend the proportionality principle? In other words, has the trial judge erred in the exercise of his discretion under section 22 of the Sentencing and Penalties Act in making the sentence for aggravated robbery partly consecutive (05 years) to the sentence of 15 years on rape and whether the trial judge had given a 'reasoned justification' to depart from the default position?

[34] In **Sauduadua v State** [2019] FJCA 86; AAU0053.2016 (6 June 2019) I had the occasion to consider section 22(1) of the Sentencing and Penalties Act, 2009:

> *'[39] Section 22(1) of the Sentencing and Penalties Act, 2009 reads as follows*
>
> *'Concurrent or consecutive sentences:*
>
> *22. — (1) Subject to sub-section (2), every term of imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.'*
>
> *[40] It is clear that the imprisonment imposed on the appellant does not come under sub-section (2) of section 22. Therefore, the justification for the consecutive sentence should be considered under section 22(1) itself. It looks as if the words 'unless otherwise directed by the court' in section 22(1) permits the trial judge to make a sentence consecutive to another sentence even when section 22(2) does not apply. The issue is in what circumstances the discretion vested in the trial judge by those words should*

be exercised and whether the discretion exercised in this instance could be justified.'

[35] In **Donu v State** [2021] FJCA 81; AAU0005.2020 (25 March 2021) I remarked:

> *[33] There is another aspect to this issue. That is the totality principle. The totality principle depends on the sentence for each of the offences committed in one transaction having been correctly determined [vide **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The totality principle requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interest of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct [vide **Rawaqa v State** [2009] FJCA 7; AAU009.2008 (8 April 2009)].*

[36] In my view, the full court may consider this aspect of the sentence and decide whether it is desirable in the interest of justice to make the sentence for aggravated robbery partly consecutive (05 years) to the sentence of 15 years on rape as done by the trial judge.

[37] Therefore, I grant leave to appeal against sentence.

Orders

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL