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

CRIMINAL APPEAL NO.AAU 112 of 2019
[In the High Court at Lautoka Case No. HAC 145 of 2016]

BETWEEN	**:**	**BILL JACKSON**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. R. Kumar and Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**07 October 2021**
Date of Ruling	**:**	**08 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 at Mataniqara, Ba, in the Western Division between 11 July 2016 and 12 July 2016.

[2] The information read as follows:

*'**First Count***
(Representative count)
Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act of 2009.*

Particulars of Offence

BILL JACKSON, *between the 11th day of July 2016 and the 12th day of July, 2016 at Mataniqara, Ba, in the Western Division, had unlawfully and indecently assaulted* ***VACISEVA WATI.***

Second Count
(Representative count)
Statement of Offence

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

Particulars of Offence

BILL JACKSON, *between the 11th day of July, 2016 and the 12th day of July, 2016 at Mataniqara, Ba, in the Western Division had carnal knowledge of* ***VACISEVA WATI****, without her consent.'*

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 26 June 2019 to an aggregate imprisonment of 12 years and 05 months with a non-parole period of 10 years.

[4] The appellant had in person appealed against conviction and sentence out of time by less than a week (02 August 2019) and therefore would be considered a timely appeal. He had subsequently tendered additional and further grounds of appeal from time to time. The Legal Aid Commission had lodged amended grounds of appeal and written submissions on 21 September 2020. The state had tendered its written submissions on 04 November 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 in a timely appeal for leave to appeal against conviction and sentence 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)].

[6] 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.*

[7] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

> ***Conviction – (by LAC - 21 September 2020)***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to properly and fully consider the defence case and material doubts that was caused by the defence case in the State's case which would have in turn lead to his acquittal.*
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> ***Conviction – (by appellant – 15 September 2020)***
>
> ***Ground 1***
>
> *THAT the whole summing up by the Learned Trial Judge was against the defence case, in that he failed to highlight or out to the assessors any prospects of defense of the appellant.*

Ground 2

THAT the Legal Aid Counsel did misinterpreted the appellant and failed to advise him adequately or even at all the consequences of remaining silent during trial.

Ground 3

THAT the defence counsel did misrepresent the appellant and was incompetent to regard the appellant's instruction in calling his witnesses.

Ground 4

THAT the Learned Trial Judge erred in law in failing to make an in depth assessment to all the evidence before agreeing with the assessors that the appellant was guilty of Rape.

Ground 5

THAT the Learned Trial Judge erred in law when he failed to put the defence case to the assessors in a balance even handedness and objectiveness manner in a fairness of the trial.

Ground 6

THAT the Learned Trial Judge erred in law in shifting the burden of proof to the appeal to prove his innocence.

Sentence – (by LAC - 21 September 2020)

Ground 1

THAT the Sentencing Judge failed to give a proper discount for the Appellant's mitigation thus making the sentence harsh and excessive.

Sentence – (by appellant filed – 15 September 2020)

Ground 1

THAT the sentence is harsh and excessive in the circumstances of the case.

[8] The trial judge in the sentence order had set out the prosecution and defense cases as follows. The appellant had remained silent at the trial.

2. The brief facts were as follows:

On 11th July, 2016 at about 7pm the victim reached Ba Town from Nausori, thereafter she went to Vadravadra Village. After getting off the carrier

while walking home the victim saw the accused drinking alcohol with some others.

3. *The victim knows the accused since they were neighbours, when the accused saw her he told her to wait so that he can accompany her home.*

4. *As they went near the house of the accused which was before the victim's house the accused asked the victim to accompany him to his house for a drink. The victim refused, saying she was going home.*

5. *At this time, the accused started pulling the victim's t-shirt, since the victim was unable to push the accused away, she started to scream for help. The accused punched the victim and after holding the collar of her t-shirt tightly forcefully took the victim to his house.*

6. *When the victim reached the house of the accused she thought of escaping. The victim ran out of the accused house towards the neighbour's house. While running the victim fell towards the fence of the neighbour's house at this time the victim screamed on top of her voice again, she was punched by the accused and brought to the house of the accused for the second time.*

7. *Inside the house, the accused started kissing the victim, forcefully removed the victim's t-shirt, bra, removed her pants and start licking the victim's vagina. The victim did not like what the accused was doing after this the accused had forceful sexual intercourse with the victim.*

8. *When the accused had finished, he stood up and walked around the house. After a while, the accused came and sat beside the victim and once again started kissing her mouth and then went on to lick her vagina and then inserted his penis into the victim's vagina and had forceful sexual intercourse with the victim.*

9. *The victim pretended to sleep, after a while the accused fell asleep when the accused was snoring the victim after wearing her clothes left the house of the accused without closing the door and started running towards her house. At home, the victim told her boyfriend Tevita Buto what the accused had done to her.*

10. *The victim did not consent to what the accused had done to her. The next day the victim reported the matter to the police. The accused was arrested and charged.*

22. *The accused on the other hand, denies committing any of the offences as alleged. The defence contention is that the incidents as narrated by the complainant did not happen, the accused had not accompanied the complainant as stated by the complainant. In respect of the accused seeking forgiveness he denies going to the house of the complainant as stated by the prosecution witnesses.*

01st ground of appeal (by LAC - 21 September 2020)

[9] The main contention is that PW2 – Tevita Buto had not seen any injuries on the complainant despite her having claimed to have been punched by the appellant.

[10] The complainant had stated that the appellant punched her mouth inside his house and once again near his neighbours' house. She had been taken to the hospital for a medical check-up. She had, however, stated that the injuries she received on her lips from the punches were not serious. According to PW2 he did not see any visible injuries on the complainant but saw injuries inside her mouth but did not tell it to the police.

[11] Thus, it is clear that the complainant had suffered a minor injury in the mouth due to the appellant's punch and lack of medical evidence (not mandatory) on her minor injury cannot affect her credibility at all.

[12] There is no reasonable prospect of success in this ground of appeal.

01st and 05th grounds of appeal (by appellant – 15 September 2020)

[13] The appellant complains that the trial judge had not highlighted the defence case adequately to the assessors.

[14] The appellant had not given evidence or called any witnesses but his denial had been vigorously raised through the cross examination to the effect that he did not commit the offences as alleged and he did not go anywhere with the complainant that night. Further, it had been suggested that the complainant had asked him to accompany her, but he refused since he had been drinking. He had also challenged the evidence against him that the next morning he went and met the complainant and therefore seeking forgiveness from the complainant and her family as stated by the prosecution witnesses did not arise.

[15] The trial judge had addressed the assessors on the above positions taken up by the appellant in cross-examination of prosecution witnesses at paragraphs 64-66 and 70 of the summing-up. Then the trial judge had directed the assessors as follows:

> *74. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
>
> *75. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
>
> *76. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*

[16] The trial judge had considered the appellant's defence in the judgment as well but rejected it as unreliable as his denial was unbelievable and improbable considering the totality of the evidence. The judge had also rejected the appellant's assertion that the he had not sought forgiveness from the complainant and her family and stated that there was no need for him to seek forgiveness if he had not done anything wrong to the complainant. The evidence of the complainant, recent complaint evidence of PW2, PW4's evidence of hearing cries, PW3 having seen the complainant's clothes scattered on the road, appellant's subsequent conduct and even the evidence of the complainant's distressed state of mind (though not even considered in favour of the prosecution at the trial) establish an overwhelmingly strong case against the appellant.

[17] There is no merit in this ground of appeal.

02nd and 03rd grounds of appeal

[18] The appellant criticises his trial counsel from Legal Aid Commission in her advice to remain silent and failure to call witnesses. However, he had reposed enough confidence in his appellate counsel who is also from the LAC.

[19] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground of appeal in so far as it criticises the trial counsel cannot be even entertained.

[20] In any event, in **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam [**1988] Crim. LR 109 CA (Crim Div):

> *' ... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*

[21] Yet, O' Connor LJ said in **Swain** [1988] Crim LR 109 that if the court has any lurking doubt that an appellant might have suffered some injustice as result of flagrantly incompetent advocacy by his advocate it would quash the conviction. In **Boal** [1992] QB 591 where the appellant pleaded guilty on the basis of his counsel's mistaken understanding of the law, despite having a defense which was likely to have succeeded, was regarded as grounds of appeal though not being a case of *'flagrantly incompetent advocacy'*.

[22] The trial counsel had robustly canvassed the appellant's denial of the allegations and his having sought forgiveness in the cross-examination of prosecution witnesses. His own evidence (and/or that of undisclosed witnesses, if any) on the same lines would not have made a significant difference. Perhaps, it may well have been counterproductive to his defence positions given that the assessors and the trial judge then would have had a chance to assess his demeanour. There is no *'flagrantly incompetent advocacy'* at all displayed by the appellant's trial counsel.

[23] In **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court stated:

> *'[21] ……. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. ……But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client…….'*

[24] There is no merit in this ground of appeal.

04th ground of appeal

[25] The appellant alleges that the trial judge had failed to make an in depth assessment of all the evidence before agreeing with the assessors. This argument is by and large misconceived.

[26] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) and **Fraser v State** AAU 128 of 2014 (05 May 2021)].

[27] The trial judge's judgment substantially conforms to the above principles of law relating to his agreement with the assessors. Nevertheless, the judge through 35

paragraphs had in fact looked at the evidence independently. There is no merit in this ground of appeal.

06th ground of appeal

[28] The appellant contends that the trial judge had shifted the burden of proof to the appellant to prove his innocence.

[29] The trial judge had directed the assessors as follows on burden of proof and standard of proof.

> *8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.*
>
> *9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.*

[30] Thereafter throughout the summing-up the trial judge had emphasised that the burden of proof was on the prosecution and not on the defence and finally said as follows:

> *75. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
>
> *76. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*

[31] There is no merit in this ground of appeal.

01st ground of appeal (sentence - by LAC - 21 September 2020)

[32] The argument here is that the discount of 06 months afforded for mitigating features was not adequate compared to the increase of 05 years for aggravating factors. No trial judge needs to achieve mathematical parity in adding and discounting for aggravating and mitigating factors respectively in the sentence process.

[33] As the trial judge had correctly pointed out [by following **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] at paragraph 13 of the sentencing order that most of the factors, if not all, submitted by the appellant for mitigation were personal circumstances which had little mitigatory value.

[34] 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. The trial judge had taken 08 years as the starting point and added 05 years for aggravating factors and given a reduction of 06 months considering *'all the letters written on behalf of the appellant'* making the sentence 12 years and 06 months. The trial judge had correctly not considered the appellant as a first time offender due to his previous conviction (though not of sexual nature). A generous 10 years' non-parole period had been imposed.

[35] I do not see any sentencing error in the process adopted by the trial judge. 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).

[36] Given all the circumstances of the offending the ultimate sentence is not only well within the tariff but also proportionate to the gravity of the offending.

[37] There is no reasonable prospect of success in this ground of appeal against sentence.

02nd ground of appeal (by appellant filed – 15 September 2020)

[38] The appellant submits that the sentence is harsh and excessive. As I have already held that the ultimate sentence of 12 years and 05 months with a non-parole period of 10 years is not harsh and excessive for the nature, gravity and the manner in which the offending had been carried out by the appellant.

Orders

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

COURT OF APPEAL FIJI

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