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

CRIMINAL APPEAL NO.AAU 0040 of 2019
[In the High Court at Lautoka Criminal Case No. HAC 34 of 2015]

BETWEEN	:	**NIKOLA ROKOCIKA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. E. A. Rice for the Respondent**
Date of Hearing	:	**25 October 2021**
Date of Ruling	:	**26 October 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka on one representative count of rape contrary to section 207 (1) and (2) (a) of the Crime Act, 2009 committed between the 01 May 2014 and 31 August 2014 at Nadi in the Western Division. The charge against the appellant was as follows:

'COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

> ***NIKOLA ROKOCIKA*** *between the 1st day of May, 2014 and the 31st day of August, 2014 at Nadi, in the Western Division, penetrated the vagina of "**VR**" with his penis, without her consent.'*

[2] After trial, two assessors (third one had been discharged due to absenteeism) had unanimously opined that the appellant was guilty of the representative count of rape. The learned High Court judge had agreed with the assessors, convicted the appellant and sentenced him on 22 February 2019 to an imprisonment of 17 years (effectively 16 years and 07 months and 10 days after deducting the remand period) with a non-parole period of 15 years.

[3] The appellant's appeal in person against conviction and sentence is out of time by about two weeks (12 April 2019) but could be treated as timely. He had subsequently filed amended grounds of appeal. Legal Aid Commission appearing for the appellant had filed an amended notice of appeal against conviction and sentence along with written submissions on 28 May 2021. The state had tendered its written submissions on 13 October 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***
>
> ***Ground 1 – Independent Assessment of Evidence***
>
> *THAT the Learned Trial Judge erred in in fact and in law when he did not independently assess all the evidence adduced during the trial and in not doing so resulted in the conviction being unsafe and further causing a grave miscarriage of justice.*
>
> ***Sentence***
>
> ***Ground 1 – Harsh and Excessive***
>
> *THAT the sentence imposed on the Appellant is harsh and excessive*

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

> *'2. The brief facts were as follows:*
>
> ***The victim was 14 years of age in 2014*** *she lived with her stepfather the accused, her mother and three step siblings. The victim recalled three Saturdays between 1st May, 2014 and 31st August, 2014.*

3. *On the first occasion the victim was at home with the accused after lunch she went to wash the dishes after which she went to rest in the bedroom.*

4. *As she was reading the holy Bible the accused came into the bedroom and locked the door. The accused then removed the victim's yellow skirt and panty with one hand and with the other he removed his pants. The victim tried to push the accused away, however, the accused forcefully inserted his penis on her vagina at this time the victim felt pain. The victim also felt wetness in her vagina. The accused then left the bedroom.*

5. *After the accused left the bedroom the victim saw blood stains on the mat and her clothes, blood had come out of her vagina. The victim further stated that she did not give her consent to the accused to have sexual intercourse with her.*

6. *In the afternoon the victim told her mother about what the accused had done to her.*

7. *On the second occasion the victim's mother had gone to catch mussels from the river, she was at home with the accused and her 4 year old step sister. The victim was in the bedroom trying to make her step sister sleep. The accused came into the room removed her skirt and panty and forcefully inserted his penis into her vagina, she felt the accused penis in her vagina.*

8. *The victim could not push the accused since he was strong she did not give consent to the accused to do what he had done. The accused told the victim not to tell anyone otherwise he will beat her but she told her mother about what the accused had done to her. Her mother told her not to lie and not to be cheeky.*

9. *On the third occasion the victim was making her step father and mother's bed when the accused came inside the room and locked the door she tried to leave the room but couldn't since the accused had the key. The accused made her lie on the bed removed her clothes and his ¾ pants and forcefully inserted his penis into her vagina. It was painful and she did not agree to have sexual intercourse with the accused. In the afternoon the victim told her mother about what the accused had done to her, her mother beat her with a hose pipe.*

10. *Every Saturday the victim's mother would not be at home and she would be left with the accused and her 4 year old step sister.*

11. *As a result of what the accused had been doing the victim got pregnant. The matter was later reported to the police.'*

[8] The appellant who is the victim's stepfather (aged 35) had opted to remain silent but called his wife (victim's mother) to give evidence on his behalf.

01st ground of appeal

[9] The appellant's complaint is that the trial judge had not independently assessed the evidence adduced during the trial and therefore the conviction was unsafe causing a miscarriage of justice.

[10] In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021) the Court of Appeal examined several past decisions and arrived at the following findings on the trial judge's function when agreeing with the assessors.

> *[20] 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) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]*
>
> *'[25] In my view, ……. the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.*

[11] The appellant's submission is that the trial judge had failed in assessing all the evidence of the complainant; nor did the judge independently assess the defence case.

He also seems to allege that the trial judge had believed the victim's evidence at the expense of evidence called on his behalf to the point of casting the burden of proving his innocence on him.

[12] None of these complaints hold much water. To start with, the trial judge was under no obligation to independently assess the evidence once again after his summing-up except briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as a sound and best practice in order to demonstrate that he had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse. It is a much less onerous task than engaging in a full-fledged independent analysis of the evidence as in a situation where the judge disagrees with the assessors.

[13] The trial judge had fully ventilated all the evidence in the summing-up and the appellant has no complaints on that score. The trial judge had then given his mind to the victim's evidence at paragraphs 4-14 and the evidence of the defence witness at paragraphs 16-24 of the judgment. Upon considering all the evidence, the trial judge had accepted the victim as a truthful and reliable witness as her credibility had stood unscathed under cross-examination despite some not so significant inconsistency with her police statement. On the other hand, the trial judge had rejected the evidence of defence witness (whose callous, if not wilful disregard of the victim's complaints had perpetuated the appellant's sexual abuse of the 14 year old victim until she got pregnant) for the reasons set out in the judgment and been satisfied beyond reasonable doubt that the appellant had penetrated the victim's vagina without her consent and that he knew that the victim was not consenting or did not care whether she was consenting. Therefore, the trial judge had agreed with the assessors. At no stage had the judge cast any burden on the appellant of having to prove his innocence which is clear from paragraphs 8, 9 and 75-77 of the summing-up.

[14] I am convinced that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of appellant's guilt beyond reasonable doubt [vide(see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v**

The Queen [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493)].

[15] Accordingly, I do not think that there is any reasonable prospect of success in this ground of appeal

01st ground of appeal (sentence)

[16] The appellant's argument is that the trial judge had not considered his full mitigation including the fact that he was a first offender and therefore, the sentence was harsh and excessive.

[17] The trial judge had correctly guided himself by ***Aitcheson*** sentencing guidelines [**Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018)] where sentencing tariff for juvenile rape was set at 11-20 years of imprisonment.

[18] The judge had also correctly stated that the appellant's mitigation consisting of personal circumstances had little migratory value in cases of sexual offences (vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). The trial judge nevertheless had accorded a discount of 01 year for his 'good character' despite the fact that the appellant had raped the victim not only once but thrice within about 04 months. In that context, the appellant did not deserve more than one year's discount for his 'good character'. Other aggravating factors were serious enough to enhance the sentence by 06 years.

[19] 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 of 17 years of imprisonment is within ***Aitcheson*** sentencing guidelines and cannot be said to be harsh and excessive given the gravity of his offending.

[20] Therefore, I see no sentencing error or a reasonable prospect of success against the sentence.

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