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

CRIMINAL APPEAL NO.AAU 126 of 2019
[In the High Court at Lautoka Case No. HAC 97 of 2016]

BETWEEN	:	**MITIELI NABORISI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. R. Uce for the Respondent**
Date of Hearing	:	**22 November 2021**
Date of Ruling	:	**23 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one representative count of sexual assault contrary to section 210 (1) and (a) of the Crimes Act No. 44 of 2009 and one representative count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed at Lautoka in the Western Division.

[2] The information read as follows:

'COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210 (1) and (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

MITIELI NABORISI *between the 1st of January, 2013 and 31st of December, 2013 at Lautoka in the Western Division, unlawfully and indecently assaulted "**AT**".*

COUNT TWO

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

MITIELI NABORISI *between the 1st of January, 2014 and 30th of April, 2014 at Lautoka in the Western Division, penetrated the vagina of "**AT**" with his penis without the consent of the said **"AT"**.'*

[3] At the end of the summing-up, the assessors had by a majority opined that the appellant was guilty of sexual assault and unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of both counts and sentenced him on 08 August 2019 to an aggregate sentence of 18 years and 04 months of imprisonment (after the remand period was deducted) with a non- parole period of 16 years.

[4] The appellant's private lawyers had filed a timely appeal against conviction and sentence (06 September 2019). Thereafter, the Legal Aid Commission had tendered amended grounds of appeal and written submission on 26 April 2021. The state had tendered its written submissions on 27 October 2021.

[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 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), **Chaudry 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** 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.*

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

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in fact and in law in allowing the evidence of Atelaite Ravu – PW2 without either adducing the original document in Court nor the document via the laptop it was supposedly saved on.*

Ground 2

THAT the Learned Trial Judge erred in fact and in law when he did not properly consider and analyze the inconsistency in the evidence of the State witnesses thus rendering the conviction unsafe.

Sentence

Ground 1

THAT the sentence imposed on the appellant is harsh and excessive.

[8] The trial judge in the sentencing order had summarized the prosecution evidence against the appellant as follows:

> 2. *In 2013 up to early 2014 the victim who was nearly 14 years of age was living with her mother and the accused her step father and his five children.*
>
> 3. *The house was a one bedroom house, the victim slept on the bed in the sitting room where as her mother and the accused slept in the bedroom. The children of the accused would sometimes sleep in the sitting room on the floor but most of the time they would sleep at their grandfather's house a few blocks away.*
>
> 4. *When everyone would be asleep nearly every night the accused would come into the sitting room molest, kiss, squeeze the victim's breast and also fondled her vagina initially he would do this from on top of her clothes but as days went by the accused would do this by forcefully removing her clothes.*
>
> 5. *Since the accused cupped her mouth with his hand the victim was not able to scream. The accused also threatened the victim if she screams he will do something to her. The victim was also not able to move because the accused would lock her thighs in between his.*
>
> 6. *One night during the beginning of 2014 while the victim was asleep the accused came and woke her she was shocked when she saw the accused standing. On this night the victim had come back from a "soli" or a fundraising organized at a nearby school. According to the victim it was probably past midnight when the accused and her mother came back home.*
>
> 7. *The accused started to kiss, molest, squeeze the victim's breasts and then went on to fondle her vagina at this time he removed her pants. The victim tried to stop him, but could not, the victim saw the accused put some coconut oil on his penis. She felt very scared and started to cry the accused came on top of her spread her legs apart and then penetrated his penis into her vagina.*

8. *When the victim told the accused to stop he cupped his hand on her mouth and threatened her that he will do something to her or to her mother. She tried to push him away, but could not since she was feeling weak.*

9. *The accused penetrated his penis into the vagina of the victim three times that night after the accused ejaculated she forcefully turned over since she felt pain from what was being done to her. The accused had penetrated her vagina on three other occasions she did not tell anyone until she went to her grandmother's house to stay.*

10. *Since the victim loved to write she wrote about what the accused had done to her and had saved the document on a laptop. The victim's grandmother read what was written by the victim when she was using the laptop. This prompted her grandmother to ask the victim about what she had written, at this moment she told her grandmother everything the accused had done to her.*

11. *After the matter was reported to the police the accused was arrested and charged.*

[9] In addition to the complainant, Atelaite Ravu the grandmother of the complainant had given evidence.

[10] The appellant had denied committing the offences in his evidence and said that his house was a small one bedroom house where he and his wife used to sleep in the bedroom and the complainant on the bed in the sitting room with his five children. He had further stated that if there was anything done as alleged the whole family would have known them and also that though the alleged incidents happened in 2013 and 2014 and the matter was reported in 2015.

01st ground of appeal

[11] The complaint under this ground of appeal is that the contents of a word document on a laptop had been allowed by the trial judge in the form of evidence of PW2 (complainant's grandmother Atelaite Ravu) without the document itself being produced in court.

[12] It appears that since the complainant loved to write she wrote about what the appellant had done to her and had saved the document on a laptop. In 2013 the complainant had

gone to stay with her mother but in 2014 she came back to live with PW2. When the complainant was living with PW2, she noticed that the complainant wanted to tell her something but was reluctant to come out with it. On many occasions PW2 had asked the complainant if anything had happened to her. She had not replied but was in tears. One night when she was using the laptop, PW2 saw and read a document in the laptop which the complainant had typed. This prompted PW2 to ask the complainant about the contents of the document or what she had written and at that moment she told her everything the appellant had done to her. After listening to the complainant PW2 had taken her to the police station the next morning.

[13] Thus, it is clear that PW2 had not come out with the contents of what she saw in the document typed by the complainant in evidence. She had only referred to that fact to explain as to how the material relating to acts of sexual abuse came to the surface. Therefore, it is understandable why the appellant's trial counsel had not objected to PW2's evidence as to what she saw and read on the laptop.

[14] In the circumstances, it was not imperative for the prosecution to bring the document itself to court to be produced in evidence as the State did not reply on such contents to prove the truth of what was written there. There is no breach of best evidence rule. The real and best evidence was what the complainant had verbally revealed to PW2 (as opposed to what PW2 had seen on the laptop) and the complainant's own evidence in court as to what the appellant had done to her. PW2 had stated that the complainant told her that the appellant would touch her breasts, kiss her, poke his tongue on her vagina, suck her vagina and had sex with her. The complainant in her evidence had confirmed that she told PW2 everything the appellant had done to her which she appears to have told in her police statement too.

[15] In any event, this is a trial issue and not an appeal point. Therefore, I do not see a reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[16] The complaint under this ground of appeal is that the trial judge had not analyzed the inconsistencies in the evidence between the complainant and PW2.

[17] One such inconsistency highlighted by the appellant is that the complainant had supposedly told everything to PW2 in the presence of her mother while the appellant was inside the room whereas PW2's evidence is that the complainant had told her of the incidents only in July 2015.

[18] However, upon a perusal of the summing-up it is clear that what the complainant had told in evidence is that she was at her father's village in April 2014 where she had told her uncle some things about what the appellant was doing to her but not the whole story. When her father came to know this he had become furious and one day at her grandmother's house the complainant's father had told everything to her grandmother in the presence of her mother whilst the appellant was inside the room. At that time no one believed the complainant and they said she was lying. PW2's evidence is that when the complainant was living with her in 2014, she noticed that the complainant wanted to tell her something but was reluctant to come out with it. Thus, PW2 had not heard any allegation from the complainant in 2014.

[19] Apparently, the rejection of her allegations by others led the complainant to document her ordeal at the hands of the appellant in the laptop. PW2 had confirmed that the first time she heard about the allegation from the complainant was on 30 July 2015 and the second time she confirmed it with the complainant was on 12 August when she went through the laptop and on 13 August she called the complainant and asked her about the allegations and on 14 August she took the complainant to report the matter to police.

[20] Thus, there is no material inconsistency between the prosecution witnesses as argued by the appellant on this point. The trial judge had said of inconsistencies as follows in the judgment:

33. *During cross examination both the prosecution witnesses were referred to some inconsistencies and omissions between their evidence in court and their police statements. In my judgment the inconsistencies and omissions did not go to the root of the matter and shake the basic version of their evidence. Considering the age of the complainant at the time of the alleged incidents, the time lapse which is about 5 to 6 years inconsistencies, omissions and discrepancies are bound to arise. I would have been surprised if both witnesses had given evidence word to word in accordance with their police statements.*

34. *The inconsistencies and omissions were insignificant which did not adversely affect the credibility of both the prosecution witnesses. The Supreme Court of India in a judgment arising from a conviction for rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) made the following pertinent observations:*

> *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when all the important "probabilities factor" echoes in favour of the version narrated by the witnesses..."*

[21] The appellant also contends that the allegations could be a fabrication arising from the argument between the complainant's mother and PW2. The insinuation is that PW2 was instrumental in getting the complainant to falsely accuse the appellant.

[22] I think this hypothesis is far-fetched. There had been an argument between the complainant's mother and her grandmother but to attribute the allegations against the appellant reduced to writing by the complainant in the laptop to that is nothing short of incredible and being over simplistic. In any event, the argument was between the complainant's mother and her grandmother and the appellant was not involved in it.

[23] If the allegations were fabrications the complainant would not have made 13 suicide attempts and would not have got sick and mentally ill once ending up at the Hub Center for treatment.

[24] Her documentation of sexual abuses of the appellant on the laptop appears to have been motivated by others not believing her allegations and her sense of helplessness as PW2 was unable to stop her mother and the appellant coming home continuously. The trial judge had said in the judgment:

> *'31. The complainant at the time of the alleged incidents was helpless and vulnerable since she had nowhere to go and no one to rely on. The complainant's grandmother and other family members did not believe her when she brought to their attention what the accused had done to her this added to her miseries hence the delay in reporting the matter to the police cannot be taken against the complainant since the circumstances were beyond her control.'*

[25] 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** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[26] In my view the trial judge had discharged his obligation in the judgment beyond what is expected of him by law.

[27] This ground of appeal too has no reasonable prospect of success in appeal.

03rd ground of appeal (sentence)

[28] The appellant's complaint is that the sentence is harsh and excessive and the trial judge had not given any weight to him being a first offender. The trial had followed sentencing tariff for juvenile rape *i.e.* 11-20 years set in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[29] I have examined the lengthy sentencing order of the High Court judge and it is clear that he had examined all relevant matters before the sentence was meted out. The trial judge had not given a discount for the appellant on account of his past good record because he still had an active previous conviction (though not of sexual nature) against his name.

[30] In New Zealand it has been held that in sentencing those convicted of dealing commercially in controlled drugs, the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant. Rather, such circumstances are to be weighed in the balance with the needs of deterrence, denunciation, accountability and public protection. These considerations, in conjunction with the maximum sentence scale enacted, require a stern response to offending of this kind [vide **Zhang v R** [2019] NZCA 507; [2019] 3 NZLR 648 (21 October 2019)**.** Fiji seems to have already adopted more or less a similar approach to serious sexual offences in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). Accordingly, the trial judge had attached little value to the appellant's mitigating factors of personal nature.

[31] The aggravating circumstances in the case as highlighted by the trial judge are very serious; so are the maters revealed in the Victim Impact statement.

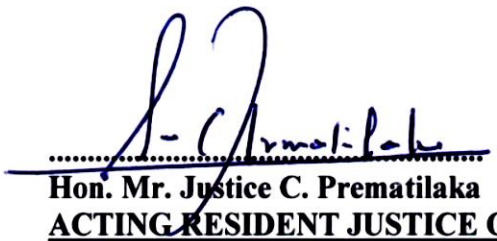
[32] Nevertheless, when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried 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 had followed sentencing tariff in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[33] I see no real prospect of success in the appellant's appeal against sentence which given the seriousness of the crime cannot be called disproportionate, harsh or excessive. Quantum of the sentence can rarely be a ground for the intervention by the appellate court [vide **Raj v State** (supra)].

[34] In my view, as a whole the appeal has no real prospect of success against conviction and sentence [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

Orders

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



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