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

CRIMINAL APPEAL NO.AAU 0022 of 2019
[In the High Court at Suva Case No. HAC 300 of 2018]

BETWEEN	:	**UMESH CHAND**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Ms. E. A. Rice for the Respondent**
Date of Hearing	:	**12 August 2021**
Date of Ruling	:	**13 August 2021**

RULING

[1] The appellant (48 years old and step father of the victim) had been indicted in the High Court at Suva upon four counts of rape of the victim (09/10 years old) contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Vatuwaqa in the Central Division in 2017 and 2018.

[2] The information read as follows:

COUNT 1

Statement of Offence

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

Particulars of Offence

Umesh Chand*, between the 1st day of December, 2017 and 31st day of December, 2017 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.*

COUNT 2

Statement of Offence

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

Particulars of Offence

Umesh Chand*, between the 1st day of December, 2017 and 31st day of December, 2017 at Vatuwaqa in the Central Division, on an occasion other than the one mentioned in the count 1, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.*

COUNT 3

Statement of Offence

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

Particulars of Offence

Umesh Chand*, between the 1st day of January 2018, and 12th day of July, 2018 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his tongue.*

COUNT 4

Statement of Offence

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

Particulars of Offence

Umesh Chand*, on the 13th day of July, 2018 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.*

[3] At the end of the summing-up, the assessors had in unanimity opined that the appellant was guilty of count 03 and by majority they had found him guilty of counts 01 and 04 and not guilty of count 02. The learned trial judge had agreed with the assessors' opinion on counts 01, 03 and 04 and overturned the majority decision of not guilty on count 02 and convicted the appellant of rape on all four counts. The trial judge had sentenced the appellant on 12 February 2019 to an imprisonment of 16 years with a non-parole period of 14 years on each count (effective serving period being 15 years and 05 months on account of the period of remand with a non-parole period of 13 years and 05 month); all sentences to run concurrently.

[4] The appellant through the Legal Aid Commission had appealed against conviction and sentence in a timely manner (just one day out of time). Thereafter, the Legal Aid Commission had tendered an amended notice of appeal against conviction and sentence along with written submissions on 29 September 2020. The state had tendered its written submissions on 08 December 2020. 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. For a timely appeal, the test 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 are as follows:

Conviction

Ground 1

THAT the Learned Trial Judge erred in law and fact when he mentioned the following which portrays a lack of impartiality and ultimately depriving the Appellant his right to a fair trial;

- *"I see no reason for a timid and shy 9 year old to lie unjustifiably tarnishing her character. I am certain that the assessors too were of the same view."*
- *"Though there is nothing more to substantiate the explanation of delay, the defence has not seriously challenged that position."*
- *Since the defence fails to create a reasonable doubt as I have set out above, the version of the Prosecution should be accepted."*

Sentence

THAT the Learned Trial Judge erred in law and fact when he did not give a separate deduction for the fact that the Appellant was a first time offender.

[8] The victim, her mother and the doctor who examined the victim had given evidence for the prosecution while the appellant, his sister, and two of his neighbours had given evidence for the defence.

[9] The evidence on the four counts coming from the victim is as follows. Once in December 2017, during the night, when the victim's mother was asleep the appellant had touched her private parts. When touching her private parts his 3rd and 4th fingers had gone little inside her private parts (vagina) and she had felt pain. In the same month during one night in the sitting room, while her mother was asleep the appellant had done the same thing to the victim. Again in 2018, while her mother had gone to the town and she was sleeping in her mother's room, the appellant had come to her and started taking off her clothes. Thereafter, he had sucked her private parts by placing his mouth there and using his tongue. Finally, on 13 July 2018 the appellant had pulled her into the bathroom and poked inside her private part with his fingers. At that time her mother had been sent away by the appellant to the shop. The victim had not told the incidents to the mother or anyone else as the appellant had threatened her that he will hit her with the knife if she were to tell anyone.

[10] The gist of the appellant's stance expressed by himself, his witnesses and cross-examination of the prosecution witnesses had been that he did not do the alleged acts of rape on the victim but he had been framed due to the fact that he had chased the victim and her mother away.

01st ground of appeal

[11] The appellant's counsel alleges impartiality on the part of the trial judge depriving him of a fair trial.

[12] It appears that the examples cited by the appellant's counsel have been taken from paragraphs18, 19 and 23 of the judgment. They form only parts of those paragraphs. Upon an examination of the summing-up it is clear that the trial judge had delivered a well-balanced, fair and objective discourse dealing *inter alia* with burden and standard of proof. The appellant has no complaint of the summing-up. The complaint is in relation to selected parts of the said paragraphs in the judgment.

[13] The complete paragraphs are as follows:

> *'18. When analysing the above evidence I am mindful that only direct evidence which relates to the alleged incidents is the evidence of the PW1. Therefore, the ultimate question would be whether her evidence would be trustworthy and reliable. Though alleged by the defence that the accused is framed, in consideration of all the material before me, I see no reason for a timid and shy 9 year girl to lie unjustifiably tarnishing her character. I am certain that the assessors too, were of the same view.*
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> *19. Another important factor would be the delay in making the first complaint to the police. Though the incidents are alleged to have happened on the 13th of July 2018 and before, PW2 became aware of them on the evening of 14th of July 2018. The recorded first complaint was made on the 18th of July 2018. The explanation offered by the prosecution witness was that though she reported the matter to the police immediately on the late evening of 14th of July 2018, police did not write it down then and wanted them to come back on Monday the 16th of July 2018. When they went there on that day the matter was referred to the Child Abuse Unit. Ultimately the complaint was recorded on the 18th of July and the PW1 has been medically examined on the 18th of July 2018. Though there is nothing more to substantiate the explanation of delay, the defence has not seriously challenged that position. In my view the witness has given a reasonable explanation for the delay of about 3 and half days and it has been justified.*
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> *23. The 1st and 2nd counts relates to the same period of time between the 1st of December 2017 and the 31st of December 2017. In addition to him being framed, the main defence is that the witness has not been there with the accused during that time. PW2 affirms that they were back by the early December 2017. The stance of the defence has been that PW1 came back only a week before the commencement of schools in January 2018. However, when confronted the accused deviates from his original stance. Having observed the demeanour in addition to the instability of the evidence of the accused, I am of the view that defence fails to create a reasonable doubt of the prosecution case. If the assessors rejected the prosecution version, that PW1 and PW2 were back by December 2017, they could not have found the accused guilty of the 1st count. Since defence fails to create a reasonable doubt as I have set out above, the version of the prosecution should be accepted. Therefore, though the assessors by majority decision found the accused not guilty of the 2nd count, I quash that finding and convict the accused for the 2nd count.'*

[14] What the trial judge had stated at paragraph 18 is that he had no reason to doubt the credibility of the victim's testimony which was the foundation of the case against the

appellant. At paragraph 19 the judge had given his mind to the question of delay in reporting the matter and accepted the explanation given by the prosecution. On the totality of the evidence, it could reasonably be concluded that the delay had been satisfactorily explained. In any event, it seems that the explanation provided by the prosecution for the delay had not been seriously challenged by the defence. The trial judge's impugned statement at paragraph 23 should be viewed in relation to his overturning the assessor's majority opinion on count 02. What the trial judge seems to have meant is that the assessors by a majority could not have found the appellant guilty of count 01 and at the same time decided that he was not guilty of count 02 as both counts relate to the same time period when the appellant's position was that the victim was not with him during that time. In other words, had the assessors accepted the appellant's position or thought there it cast some doubt that PW1 and PW2 were not there they could not have found him guilty of count 01 as well. However, since the assessor in unanimity had accepted the prosecution version that the victim and her mother were there during the time period relating to count 01 there was no rationality to their decision not to have found the appellant guilty of count 02. Thus, the trial judge had overturned their decision on count 02. Therefore, what the trial judge had stated at paragraph 23 cannot be interpreted as having shifted the burden of proof to the appellant. It is another way of saying that the prosecution had proved its case beyond reasonable doubt in respect of count 02 as well. There is not even a hint of partiality towards the prosecution in the summing-up or the judgment taken as a whole.

[15] Therefore, there is no reasonable prospect of success in the appeal against conviction.

01st ground of appeal (sentence)

[16] The counsel for the appellant submits that the trial judge had failed to give a separate discount for the appellant being a first time offender or his previous good character or lack of previous convictions against him. The judge had in fact treated the appellant as a 'first time offender' and along with other mitigation factors he had given 01 year reduction in the sentence.

[17] The state submits that the trial judge was correct in not affording such a discount in as much as the appellant had committed more than one act of rape over a period of time (over 08 months) before he was reported to the law enforcement authorities. If not, the appellant may well have continued with his offending on the hapless child/juvenile victim several more times. The respondent also argues that in this type of situation giving credit to the so called previous clean record would be rewarding him for not getting caught or not being reported early which was *inter alia* the result of his own threats on the victim. After the appellant committed the first act of rape, he effectively ceased to be a first time offender or someone with a clean record. He avoided a conviction for the first act at that time only because the victim out of fear and other reasons did not report him.

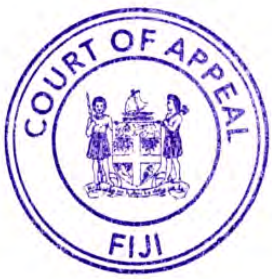
[18] I tend to agree with the submissions of the respondent. In a somewhat similar situation where the appellant had been convicted on two counts of rape contrary to section 207(1), (2)(a) and (3) and 207(1), 2(b) and (3) of the Crimes Act, 2009, and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act of 2009, I remarked in **Valo v State** [2020] FJCA 239; AAU0035.2018 (3 December 2020):

> *'[33] Therefore, the trial judge had clearly considered the appellant's age and 'being a first offender' and afforded him a discount of 02 years. In fact the appellant should not have been considered as a first offender because he had been abusing the child victim from 2011 to 2015 which began when the appellant was 60 years old and the victim was 06 years old. Thus, to that extent he had got a discount that he did not deserve.'*

[19] There is no sentencing error and therefore, a reasonable prospect of success in the appeal ground against sentence.

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