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

CRIMINAL APPEAL NO.AAU 080 of 2019
[In the High Court at Labasa Case No. HAC 61 of 2018]

BETWEEN	**:**	**FILIPE KOROI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Ratu for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**29 November 2021**
Date of Ruling	**:**	**30 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Labasa on one count of rape contrary to section 207(1) and 2(a) and (3) of the Crimes Act, 2009, the particulars of which are that on the 18 July 2018 at a village in Cakaudrove he anally raped his 6 year old boy cousin.

[2] At the end of the summing-up, the assessors had opined that the appellant was guilty rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 22 March 2019 to a sentence of 12 years of imprisonment with a non- parole period of 10 years.

[3] The appellant's appeal against conviction and sentence (18 June 2019) is out of time but within 03 months after the lapse of the appealable period. Therefore, the respondent waived the requirement for enlargement of time and accordingly, the

Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence and written submission on 10 March 2021. The state had tendered its written submissions on 08 November 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 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), **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)].

[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 on behalf of the appellant against conviction and sentence are as follows:

Ground 1

THAT the Learned Trial Judge erred in law and fact when he unfairly commented on the evidence of the appellant which caused the trial to miscarry.

Ground 2

THAT the Learned Trial Judge erred in principle by accounting for aggravating factors that was extraneous in nature to enhance the sentence.

[7] The trial judge in the judgment had summarized the prosecution and defense evidence against the appellant as follows:

'3. The evidence of the prosecution was led through the young boy himself, his mother and a Woman Police Constable.

4. The mother told the Court that she had left the two having dinner and when she returned, she switched on the light in her young son's bedroom to see the two of them on the bed together. The boy's pants were off. The accused immediately got up and left the room and the young boy was crying, telling his mother that the accused had "done something to my back side".

5. The boy himself gave cogent and specific evidence through the sympathetic and careful interpretation by the Court's itaukei interpreter. He told the Court that he remembered the time that he and the accused were on the bed together. A direct quote from his evidence is this: ***"He did it on my backside. I felt pain. He inserted it inside. He did it for a short time. The place where to pass out the stool".***

6. In cross-examination however he appeared to contradict himself by saying that "he did something on the outside and he tried to insert it inside" In my summing up, I told the assessors that it was a factual issue for them to resolve.

7. The WPC produced the record of interview of the accused under caution, the production of which was with the consent of the defence. In that interview the accused admitted to being on the bed with the victim but then gave the breathtakingly absurd explanation, which he repeated in his defence evidence, that the boy instigated the sexual activity and positioned himself to encourage and enable himself to be penetrated by the accused.

8. The accused gave evidence in his defence and called no witnesses. In his defence the accused said that after dinner he was lying on the bed playing with his phone and the boy came and lay beside him. The boy touched him sexually and the accused told him not to do that and turned away. The boy then jumped over to face him and told the accused to lie face up. He undid the accused's trousers and took hold of his penis. He was trying to insert the penis into himself when the mother came into the room.'

01st ground of appeal

[8] The appellant submits that the trial judge had unfairly commented on his evidence in the summing-up.

'33. Filipe said that he was 18 on the 18th July and he still is. He remembers that on that day he was at Kelevi's house and met the boy on the verandah. Kelevi hugged him before Filipe went into the house. He said that he was lying on the bed playing with his phone and Kelevi came and lay down beside him. He was playing around and touch his private parts. Filipe told him not to do that and turned away. Kelevi jumped over him and told him to lie face up. He undid Filipe's trousers and then told him to wait while he took off his trousers. Kelevi got hold of his penis and was trying to insert it into himself when the mother came and turned on the light. The accused then left the room.

34. You must of course decide what to make of this evidence. I think it is preposterous, ridiculous and absurd but it doesn't matter what I think. You are in charge of the facts and it is what you make of his evidence that is important.'

[9] The appellant's evidence was that the victim (aged 06) touched him (aged 18) sexually and he told the boy not to do that and turned away. However, the boy then jumped over to face him and told him to lie face up. The victim then undid the appellant's trousers and took hold of his penis and was trying to insert the penis into himself when the mother came into the room. In my view, this position is clearly far-fetched.

[10] Nevertheless, it is clear that the trial judge's comments at paragraph 34 were unnecessary and should have been avoided. Instead he should have simply left it to the assessors to evaluate the appellant's evidence or at least should not have used such

a strong language to express his own opinion on the appellant's seemingly improbable defence. The impugned comments had gone beyond a trial judge's right to comment robustly on either the prosecution or defence case (see **Tamabeka v State** [199) FJCA1; AAU0015u of 1997 s (08 January 1999).

[11] Nevertheless, the trial judge had discussed the appellant's evidence and the issue of penetration arising out of the victim's evidence in the judgment as follows:

> *'11. Obviously, consent is not an issue when the victim is 6 years old and the only issue to be found is whether there was penetration or not. Even if one were to believe the absurd defence that it was all the boy's doing it doesn't matter if as a result there was penetration.*
>
> *12. In resolving the seemingly contradictory evidence of the boy (outside or inside?) the Court takes the view that for the boy to be crying and in pain, penetration must have occurred. The Court saw the boy; he was very small and it is preposterous to say that he could force a well-built 18 year old to do such an act against the 18 year old's will.*
>
> *13. I direct myself on my own summing up and I am acutely aware of my duty not to find guilt when I completely discard the evidence of the accused.*
>
> *14. The evidence of the young boy is convincing enough however for me to be in agreement with the assessors and the Court finds the accused guilty of anal rape and convicts the accused accordingly.'*

[12] It looks as if the crucial issue was whether the evidence proved the act of penetration as having said in evidence that *"He did it on my backside. I felt pain. He inserted it inside. He did it for a short time. The place where to pass out the stool"* the victim however had under cross-examination appeared to contradict himself by saying that *"he did something on the outside and he tried to insert it inside"*.

[13] Therefore, the trial judge had directed the assessors on rape as well as attempted rape and sexual assault as follows:

> *'35. Even if you agree with me, and I urge you to form your own opinions, it doesn't make him guilty. If you put his evidence to one side as impossible you must still come to your opinions on the prosecution case. Has the State made you sure beyond reasonable doubt that Kelevi was penetrated by Filipe?*

36. I spoke to you earlier about alternative opinions you can find in this case and I suggest the way you should approach your task.

37. First decide whether the State has proved to you so that you are sure that Filipe penetrated the anus of Kelevi. If you are sure then you will find Filipe guilty of rape and go no further. If you think that there was no penetration but Filipe was trying to penetrate him, then you will find him not guilty of rape but guilty of attempted rape. Lastly if you do not think that Filipe was trying to penetrate Kelevi but was just trying to relieve himself sexually by genital to skin contact you will find him not guilty of rape and not guilty of attempted rape but guilty of sexual assault. If you think that there was no contact between Filipe and Kelevi, you will find him not guilty of anything.'

[14] In the cautioned interview led with the consent of both parties the appellant had apparently admitted to being on the bed but said that the boy instigated the sexual activity and positioned himself to encourage and enable himself to be penetrated by the appellant. Thus, in his own admission the appellant appeared to have admitted penetration but blamed the victim for that.

[15] The trial judge in the judgment had concluded that there had been penetration on the following basis:

'12. In resolving the seemingly contradictory evidence of the boy (outside or inside?) the Court takes the view that for the boy to be crying and in pain, penetration must have occurred.'

[16] Thus, despite the trial judge's strong unfavourable comments on the appellant's defence, I do not think that as a whole the appeal has a reasonable prospect of success against conviction on this ground of appeal [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)] as in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].

02nd ground of appeal (sentence)

[17] The appellant complains that the trial judge had taken extraneous matters into account in the matter of sentence as evidenced by paragraph 6 of the sentencing order.

> *'6. The aggravating features of this case include his shocking abuse of trust when his young cousin was entrusted to his care in the absence of the mother. It is also an aggravation that he attempted to defend himself by blaming the child for instigating and physically enabling the offence, a defence that is impossible to believe. It is beyond imagination that a 6 year old boy would have lustful desires that would embolden him to stimulate a well-built 18 year old into such sexual activity.'*

[18] The argument put forward is that the trial judge had used the appellant's defence of himself against the case presented by the prosecution which was his constitutional right under section 14(2) of the Constitution, as an aggravating factor.

[19] I cannot agree, for what the trial judge had considered as aggravating the offence was not the appellant's right to defend himself but his blaming the victim for instigating and physically enabling the commission of the offence in the process of defending him.

[20] The applicable sentencing tariff as set in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) is 11-20 years. The appellant's ultimate sentence is 12 years at the lower end of the tariff.

[21] 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)].

[22] Thus, I see no reasonable prospect of success in the appellant's appeal 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