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

CRIMINAL APPEAL NO.AAU 0070 of 2019
[In the High Court at Lautoka Case No. HAC 165 of 2015]

BETWEEN : **ROHIT RIKASH CHAND**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. Iqbal Khan for the Appellant**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **12 January 2021**

Date of Ruling : **13 January 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on a single count of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Nadi in the Western Division on 14 August 2015. The victim had been a 08 year old child and the appellant had been 23 years of age at the time of offending.

[2] The information read as follows.

*'**COUNT ONE***
Statement of Offence

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

Particulars of Offence

***ROHIT RIKASH CHAND**, on the 14th day of August, 2015 at Nadi, in the Western Division, penetrated the vagina of **"DG"**, with his finger, a child under the age of 13 years.*

[3] The brief facts, as could be gathered from the sentencing order are as follows.

> *3. On 14th August, 2015 the victim "DG" who was 8 years of age was returning home from town with her grandmother in a mini bus. While the victim was standing in the bus the accused who was sitting beside the victim's grandmother asked her grandmother if the victim could sit on his lap. The victim's grandmother agreed.*
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> *4. As the bus was travelling the victim who was wearing a dress felt the accused touched her vagina with his finger from underneath her dress. He kept on touching her vagina throughout the journey. When the accused inserted his finger into the victim's vagina she felt bad after the bus stopped near her house the accused quickly left the bus. The victim was scared so she did not tell her grandmother what the accused was doing to her in the bus.*
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> *5. The victim told her grandmother about what the accused had done to her after she got off the bus. The matter was reported to the police and the victim was medically examined.*

[4] At the conclusion of the summing-up, on 30 April 2019 the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors in his judgment delivered on 06 May 2019, convicted the appellant and sentenced him on 21 May 2019 to 17 years, 05 months and 16 days of imprisonment with a non-parole period of 16 years.

[5] The appellant's timely notice of appeal and application for leave to appeal against conviction and sentence had been filed by Iqbal Khan & Associates on 21 June 2019 as solicitors for the appellant. On 09 September 2010 Mr. Iqbal Khan of Messrs. Iqbal Khan & Associates had filed written submissions as solicitors for the appellant with a footnote to that effect. The state had responded by its written submissions filed on 14 October 2020.

[6] Leave to appeal hearing was fixed for 12 January 2020 after the matter was mentioned for written submissions of the parties on 14 July 2020, 21 September 2020, 04 November 2020 and 10 December 2020.

[7] At the leave to appeal hearing Mr. Khan moved for 14 days to elaborate and supplement the written submissions on grounds of appeal already filed on the basis that he had not been able to go through the judge's notes. He also stated to this court that the CA registry had informed him that judge's notes were not yet ready but be made available after the leave to appeal hearing is over depending on the outcome *i.e.* grant of leave to appeal or renewal of the leave to appeal application before the full court (in the event of refusal of leave by the single Judge). Mr. Burney appearing for the respondent vehemently objected to any postponement of the leave to appeal hearing and submitted that the practice of this court in the past has always been to go through the leave to appeal hearing with the summing-up, judgment, sentencing order and other incidental orders such as *voir dire* ruling and the judge's notes or transcripts of audio recordings (if available) should not be insisted upon at this stage, for the appellant has the right to renew his leave to appeal application before the full court even if leave to appeal is refused at the threshold of leave.

[8] It has been my experience too that appellate counsel do not insist on judge's notes or transcripts of proceedings recorded, at the stage of leave to appeal hearing but grounds of appeal are raised and elaborated in written submissions with the summing-up, judgment, sentencing order and other incidental orders such as *voir dire* ruling. In fact, it appears that most, if not almost all, grounds of appeal are based on the summing-up, judgment, sentencing order or *voir dire* ruling. If there is a ground of appeal which could be examined only with the judge's notes or transcript of proceedings, it is for the appellant to take it up before the full court where complete appeal records are made available to all the parties.

[9] There appears to be many reasons for this long established practice. In the first place, if the appellate counsel is the same as the trial counsel or even otherwise, if both represent the same law firm, they are fully aware of what transpired at the trail and in a good position not only to raise grounds of appeal but also supplement them with relevant submissions without judge's notes or transcripts.

[10] Even if the appellate counsel is not the trial counsel it is always possible for the former to speak to the latter and obtain details required for setting out grounds of appeal and submissions with the help of the summing-up, judgment, sentencing order and other

incidental orders such as *voir dire* ruling sans judge's notes or transcripts. In my view, a trial counsel, not just as a matter of courtesy, is professionally obliged to provide such information to the appellate counsel to enable him to prosecute the appeal on behalf of the appellant.

[11] It also has been my experience as a single judge that preparation of judge's notes and transcripts by the High Court take a considerable time after the conclusion of the trial and a leave to appeal hearing may be delayed by years if it is insisted that judge's notes and transcripts should be available in every appeal prior to the leave to appeal hearing. On the other hand, the appellant are keen to have their appeals taken up for leave to appeal hearing as soon as possible so that they would know what chances they have in appeal and decide whether to proceed any further or not. Therefore, the adverse consequences of substantial delay in having to wait for leave to appeal hearing with the judge's notes and transcripts may be far greater than the inconvenience, if any, of passing the threshold of leave with the summing-up, judgment, sentencing order and other incidental orders sans the judge's notes and transcripts. No appellant could reach the full court without first passing the stage of leave to appeal.

[12] Further, there is, with a few exceptions, a considerable cost involved in obtaining judge's notes and transcripts from the CA registry and not knowing the prospects of their appeals at the leave stage the great majority of appellants particularly represented by private counsel may not be capable or willing to bear such a financial burden.

[13] On the other hand, there are a considerable number of appellants who abandon their appeals fully or partially at some stage before the leave to appeal threshold and the time, cost and resources allocated to prepare judge's notes and transcripts in respect of their appeals before the leave to appeal hearing may become a complete waste.

[14] These are some of the practical reasons which, I believe, have led to the practice of counsel not insisting upon the availability of judge's notes or transcripts until the leave to appeal hearing is over. This has also led to the practice of the CA registry of making the judge's notes and transcripts available to the appellants at the usual charges or otherwise only after leave is granted or the appeal is renewed before the full court.

[15] Coming back to Mr. Khan's application for postponement of the leave to appeal hearing and the strong objection by the Mr. Burney, I am compelled to make the following observations. Mr. Khan admitted that the appellant's trial counsel were from Iqbal Khan & Associates and it is they who settled grounds of appeal. As already pointed out, it is Mr. Khan who had filed written submissions based on those grounds of appeal. Therefore, I do not see any reason why Mr. Khan could not have had access to full information from trial counsel as to what transpired at the trial and the points of disputes to be urged before this court and prepare written submissions accordingly. It also appears that in any event Mr. Khan would not have access to the judge's notes within the 14 day postponement he sought.

[16] I also note from the court record that at no stage prior to the day of leave to appeal hearing had there been any application for judges' notes though all counsel who had appeared before this court for 04 days since 14 July 2020 were acting on the instructions of Iqbal Khan & Associates. This court on 10 December 2020 fixed the matter for leave to appeal hearing on 12 January 2021 with the full understanding of both counsel that it was ready to be taken up for hearing. No timely motion had been filed by Mr. Khan seeking a postponement of the hearing either so that this court could have fixed another leave to appeal matter for the day. Considering the long queue of appellants who have been waiting for years to have their leave to appeal hearings taken-up by the single judge, this court could not waste the day by postponing the leave hearing without any justifiable reason as requested by Mr. Khan.

[17] Therefore, this court had no reason to adjourn the leave to appeal hearing and the matter was accordingly, taken up and Mr. Khan did not proceed to make any oral submissions to elaborate the grounds of appeal or written submissions at the hearing despite having full opportunity to do so but opted to rely on his written submissions already filed. Mr. Burney made some oral submissions on his objection to any postponement and relied on his written submissions on the merits of the appeal. In the end Mr. Khan usefully handed over copies of the summing-up, judgment and the sentencing order to this court which could have been used to elaborate the grounds of appeal in his written submissions.

[18] 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.

[19] Grounds of appeal urged on behalf of the appellant are as follows. There is no fifth ground of appeal.

> *'**Appeal against Conviction***
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> *Ground 1* - *THAT the Learned Trial Judge erred in law and in fact in not taking into consideration that apart from the evidence of the Complainant, there was no other independent/credible evidence to support the complainant's evidence against the Appellant.*
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> *Ground 2* – *THAT the learned Trial Judge erred in law and in fact in relying on and/or considering and/or taking into consideration inadmissible and/or prejudicial evidence in finding the Appellant guilty.*
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> *Ground 3* - *THAT the learned Trial Judge erred in law and in fact in not fully analyzing/and/or inadequately analyzing the evidence before the Court and hence there was a substantial miscarriage of justice.*
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> *Ground 4* - *THAT the learned Trial Judge erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the Complainant and as such there has been a substantial miscarriage of justice.*
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> *Ground 6* - *THAT the learned Trial Judge erred in law and in fact in not directing himself the possible defense on evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.*

Appeal against Sentence

Ground 1 - *THAT the learned Trial Judge erred in law and in fact in not taking into consideration that the Learned Trial Judge did not take irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.*

Ground 2 - *THAT the learned Trial Judge erred in law and in fact in no taking into relevant consideration* ***SENTENCING AND PENALTIES DECREE 2009*** *namely:*

1. *Section 3 of the Sentencing and Penalties Decree;*
2. *Section 4 of the Sentencing and Penalties Deree; and*
3. *Section 5 of the Sentencing and Penalties Decree.*

[20] The respondent strongly resists leave to appeal *inter alia* that the written submissions have failed to illuminate the grounds of appeal in any meaningful manner with little regard to the case-specific particulars of the summing-up, the judgment and the sentence order. The respondent has been very critical of the manner in which the grounds of appeal had been advanced by Iqbal Khan & Associates in the following words.

> *'12. So manifestly are the grounds and written submissions advanced by Messrs. Iqbal Khan & Associates that it is difficult to imagine that they were drafted, or quality vetted, by a legal, practitioner admitted to practice in the courts of Fiji'*

[21] Referring to **Prasad v State** [2020] FJCA 178; AAU049.2019 (24 September 2020) the respondent has stated in its written submissions:

> *'14. It is not as if Messrs. Iqbal Khan & Associates have not been given fair notice that generalized grounds of appeal are unacceptable and bound to fail. Judicial edicts on the importance of diligent drafting of appeal grounds abound.'*
>
> *'17. Whilst Messrs. Iqbal Khan & Associates are plainly not the only practitioners to honour this rule of practice more in the breach, the firm may fairly lay claim to be the market leader in poorly advanced appeals.'*
>
> *'20. The respondent would respectfully add that the day cannot be too far off when the flagrant incompetence of practitioners who frame unarguable grounds of appeal will be brought to the attention of the Chief Registrar.'*

[22] I have dealt with this aspect in great detail in **Prasad v State** (supra) and therefore, do not intend to repeat myself here except to reproduce the following paragraphs.

> *'[25] In **Rauge v State** [2020] FJCA 43; AAU61.2016 (21 April 2020) the Court of Appeal remarked as follows [see also **Kishore v State** [2020] FJCA 70; AAU121.2017 (5 June 2020), **Vunisea v Fiji Independent Commission Against Corruption** - Ruling [2020] FJCA 169; AAU83.2018 (16 September 2020) and **Vunisea v Fiji Independent Commission Against Corruption** [2020] FJCA 169; AAU98.2018 (16 September 2020)] on framing of appeal grounds.*
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> > *'[14] It is clear that the sole ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant was. The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said*
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> > *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*
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> *'[26] Similar observations were earlier made in the case of **Rokodreu v State** [2016] FJCA 102; AAU0139.2014 (5 August 2016) by Goundar J. as follows.*
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> > *'[4] I have read the appellant's written submissions. In his submission, apart from reciting case law, counsel for the appellant made no submissions on the grounds of appeal. The grounds of appeal are vague and lack details of the alleged errors. The Notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.*
> >
> > *[5] In the present case, the State was not able to effectively respond to the grounds because they were vague and lack details. It appears that the alleged errors concern directions in the summing up. A copy of the summing up, the judgment and the sentencing remarks were made available to the appellant after the conclusion of the trial. In these circumstances, the appellant cannot be excused for not providing better particulars of the alleged complaints in the summing up. Without reasonable details of the alleged errors, this Court cannot assess whether this appeal is arguable.'*

[23] In **Talala v State** [2019] FJCA 50; AAU155.2015 (7 March 2019) Fernando J had remarked on the same topic as follows.

> *'[7] I intend to deal with the 22 issues raised in relation to the 40 grounds of appeal in the Appellants Counsel's submissions of 8 January 2019 repetitively, haphazardly and confusingly by categorizing and dealing with them under the following headings:…'.*

[24] The respondent has submitted that in all the above cases except ***Rauqe v State*** (supra) the appellants had been represented by Messrs. Iqbal Khan & Associates.

[25] **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006) had critically described this approach as a 'scatter gun' approach in drafting the grounds of appeal where they are not substantiated with sufficient details at least in the written submissions.

[26] I also warned the practitioners as to the possible consequences of this practice in appeals in **Prasad v State** (supra) in the following terms as it was felt that repeated observations on this issue by the appellate courts have not had the desired effect as far as some counsel are concerned. See for example the recent cases of **Atama v State** [2020] FJCA 253; AAU172.2017 (15 December 2020), **Naqau v State** [2020] FJCA 258; AAU173.2017 (22 December 2020) and **Tasere v State** [2020] FJCA 262; AAU175.2017 (29 December 2020)

> *'[30] I should for the record mention that in future a notice of appeal or an application for leave to appeal (or an application for extension of time or bail pending appeal application) containing grounds of appeal which do not substantially meet the above requirements or are filed in negligent or careless disregard of them may also run the risk of the single judge of the Court dismissing the appeal on the basis that it is vexatious or frivolous under section 35(2) of the Court of Appeal Act.'*

[27] With these observations in the background I shall still consider the grounds of appeal in the interest of justice as far as the appellant is concerned.

01st ground of appeal

[28] No submissions whatsoever had been made on the first ground of appeal on behalf of the appellant.

[29] Nevertheless, contrary to the assertion that there was no other evidence against the appellant other than the evidence of the victim, the summing-up and the judgment make it clear that there had been recent complaint evidence of the victim's grandmother and medical evidence supportive of the victim's evidence. In any event, there is no need for corroboration of the victim's evidence for the verdict against the appellant to be sustained.

[30] There is no foundation for this ground of appeal.

02nd and 03rd grounds of appeal

[31] The written submissions of the appellant have not demonstrated what inadmissible evidence the trial judge had taken into account and in what respect he had failed to analyze the evidence.

[32] No further consideration is possible in respect of these two grounds of appeal.

04th ground of appeal

[33] The appellant's counsel had not shown what the previous inconsistent statements of the victim were and how the trial judge had failed to direct the assessors on them.

[34] I find that in paragraphs 37-39 of the summing-up the trial had in deed referred to some inconsistencies elicited under cross-examination of the victim with her police statement and in the judgment the trial judge had considered the same at paragraph19.

[35] Therefore, there is no basis for the appellant's complaint under this ground of appeal.

06th ground of appeal

[36] The counsel for the appellant has not demonstrated in the written submissions what other possible defenses were available on evidence other than the appellant's total denial of the impugned criminal act.

[37] There is no merit of this complaint by the appellant.

01st and 02nd grounds of appeal against sentence

[38] The first ground states that the trial judge had not taken irrelevant matters into consideration (?) and also relevant matters into consideration. Due to the careless manner in which this appeal ground had been drafted and reproduced in written submissions it does not make any sense. If what the counsel attempts to convey is that the trial judge had failed to take relevant matters into consideration and taken irrelevant matters into consideration in the matter of sentence, then he had not elaborated at all what those relevant and irrelevant matters are.

[39] Therefore, the first appeal ground has no merits at all.

[40] The counsel under the second ground of appeal has stated that the trial judge had not taken into account section 3, 4 and 5 of the sentencing and Penalties Act but not highlighted in what manner or instances the trial judge had failed to do so.

[42] Therefore, there is no merit in this appeal ground as well.

[43] Purportedly under both grounds of appeal the counsel has stated in the written submissions that the sentence is harsh and excessive in the light of **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) where the starting point for adult rape was fixed at 07 years.

[44] It is beyond my comprehension as to why the appellant's counsel has made a submission in challenging the sentence based on a judicial decision relating to adult rape when the victim was 08 years old. It is either chronic forgetfulness or gross negligence or an outrageous attempt to mislead this court.

[45] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the sentencing tariff for child rape was set between 10-16 years of imprisonment.

> *"[66] The learned sentencing judge was correct in his approach. The Court of Appeal in its judgment at paragraph 18 said:*
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> *'Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years. There can be no fault in the sentencing approach of the learned Judge referred to above (in para 13), save as to say we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve.'*
>
> *We indorse those remarks."*

[46] In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff for juvenile rape was enhanced and fixed between 11 to 20 years.

> *'[25] The tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.'*

[47] The appellant was sentenced on 21 May 2019 and the trial judge had correctly followed the new tariff set in ***Aitcheson*** in the case of the appellant. He had picked 12 years towards the lower end of the tariff as the starting point based on 'objective seriousness' of the crime. Having considered aggravating features he had added 06 years and reduced 06 months for mitigation. The appellant did not receive any discount for being a first offender due to his three previous convictions on abduction, defilement and indecent assault. After deducting the remand period the final sentence became 17 years, 05 months and 16 days. The final sentence is still within the tariff.

[48] The appellant's counsel has not demonstrated why the ultimate sentence is said to be harsh and excessive.

[49] However, the respondent has pointed out in its written submissions and the counsel for the state made oral submissions as well that there may be an error of double counting in the enhancement of the sentence by 06 years for aggravating factors on the premise

that the fact that the victim was unsuspecting and naïve as an aggravating factor may be subsumed in the sentence tariff for child rape itself and when the trial judge took that along with three other aggravating features he may have inadvertently double counted in the aggravation. Nevertheless, it appears to me that the trial judge had not considered the some more aggravating features of deception practiced on the victim's unsuspecting grandmother by the appellant in getting her consent to get the victim to sit on his lap which facilitated the act of digital rape and also the fact that he had been absolutely opportunistic and had craftily designed the committing of the crime during the short journey in the bus. It is not as if the appellant had used an opportunity that presented itself but intentionally created an opportunity with an evil design. His conduct clearly shows his propensity to commit sexual crimes at the slightest opportunity available and his readiness to deliberately create such an opportunity. Offenders in the caliber of the appellant are a threat to children and adults alike and should be kept separated from the society as long as the law permits and justifies.

[50] That said I would further examine the respondent's submission that the trial judge might have indulged in double counting.

[51] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[52] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the

exercise *all* the aggravating features of the case as well as the mitigating features. The Supreme Court also said

> *'[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided.'*

[53] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[54] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[55] The methodology commonly followed by judges in Fiji is the two-tiered process expressed in the decision in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) which was further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015). It operates as follows:

> *(i) The sentencing judge first articulates a starting point based on guideline appellate judgments, the aggravating features and seriousness of the offence i.e. objective circumstances and factors going to the gravity of the offence itself [not the offender]; the seriousness of the penalty as set out in the relevant statute and relevant community considerations (tier one). Thus, in determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or after the guilty plea was entered. In doing this the court is taking cognizance of the aggravating features of the offence.*
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> *(ii) Then the judge applies the aggravating features of the offender i.e. all the subjective circumstances of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence,*

(i.e. a bundle of aggravating and mitigating factors relating to the offender) leading to a sentence end point (tier two).

[56] However, in applying the two-tiered approach the judges should endeavor to avoid the error of double counting as highlighted by the Supreme Court. The best way obviously to do that is to follow the two-tiered approach diligently as stated above**.** In this regard, it is always helpful for the sentencing judges to indicate what aggravating factors had been considered in picking the starting point in the middle of the tariff and then to highlight other aggravating factors used to enhance the sentence. If the starting point is taken at the lower end without taking into account any aggravating features, then all aggravating factors can be considered to increase the sentence.

[57] The observations of the Supreme Court in **Qurai v State [2015]** FJSC 15; CAV24.2014 (20 August 2015) are also instructive in this regard.

> *'[49] In Fiji, the courts by and large adopt a two-tiered process of reasoning where the sentencing judge or magistrate first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one), and then considers all the subjective circumstances of the offender (often a bundle of aggravating and mitigating factors relating to the offender rather than the offence) (tier two), before deriving the sentence to be imposed. This is the methodology adopted by the High Court in this case.*
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> *[50] It is significant to note that the Sentencing and Penalties Decree does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis", by which is meant a more intuitive process of reasoning for computing a sentence which only requires the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors.*
>
> *[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing*

consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.

[58] This court is faced with exactly the same dilemma in this appeal. It looks as if the first, third and fourth aggravating features highlighted by the trial judge are associated with the crime and the second one with the offender. Had the trial judge already counted any one of the first, third and fourth aggravating features in picking the starting point of 12 years as objective seriousness of the offence? If not, what made the trial judge start with 12 years? Is the first aggravating feature anyway part of the tariff for juvenile rape? If so, there may be double counting when the sentence was enhanced by further 06 years for the same factors. Moreover, the fourth aggravating factor seems to have been the result or the evidence of the digital rape and not a separate injury. Should the trial judge have increased the sentence once again on account of that factor? If so, there may be double counting.

[59] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:

> *'[30] In the present case, however, it is clear what features the learned trial judge had considered in selecting the starting point. Therefore, it becomes clear that there had been double counting when the same or similar factors were counted as aggravating features to enhance the sentence. Like in this case, if the trial judges state what factors they have taken into account in selecting the starting point the problem anticipated in **Nadan** may not arise. Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed 'somewhere in the middle of the range' of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **Naikelekelevesi** and **Koroivuki** may provide useful tools to navigate the process of sentencing thereafter.'*

[60] If ***Naikelekelevesi*** guidance is carefully followed *i.e.* first set out the objective circumstances *i.e.* the factors going to the gravity of the offence to pick the starting point and then state the aggravating features of the offender *i.e.* all the subjective circumstances of the offender to enhance the sentence, the danger of double counting expressed by the Supreme Court may be able to be avoided.

[61] However, 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).

[62] Nevertheless, whether the ultimate sentence imposed on the appellant is justified should be decided by the full court in view of the possible sentencing error of double counting. If so, the full court would decide what the ultimate sentence should be. The full court exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act would have to decide that matter after a full hearing.

[63] Therefore, I am inclined to allow the appellant leave to appeal against sentence on this possible sentencing error of double counting which may have resulted in the current sentence. The appropriate sentence is a matter for the full court to decide [Also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020) for detailed discussions].

Order

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

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL