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

CRIMINAL APPEAL NO.AAU 0032 of 2018
[In the High Court at Suva Case No. HAC 287 of 2017]

BETWEEN	**:**	**NEMANI MUSUDOLE**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Ratu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	**:**	**05 March 2021**
Date of Ruling	**:**	**08 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of rape contrary to section 207(1) & (2) (b) and (3) of the Crimes Act, 2009 and two counts of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 committed at Raiwaqa in the Central Division on 10 September 2017.

[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

NEMANI MUSUDOLE *on the 10th of September 2017 at Raiwaqa in the Central Division penetrated the anus of* ***AB*** *a child under the age of 13 years with his finger.*

COUNT TWO

Statement of Offence

SEXUAL ASSAULT*: Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

NEMANI MUSUDOLE *on the 10th of September 2017 at Raiwaqa in the Central Division, unlawfully and indecently assaulted* ***AB****, by licking the vagina of the said* ***AB*** *by the use of his tongue.*

COUNT THREE

Statement of Offence

SEXUAL ASSAULT*: Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

NEMANI MUSUDOLE *on the 10th of September, 2017 at Raiwaqa in the Central Division, unlawfully and indecently assaulted* ***AB****, by licking the anus of the said* ***AB*** *by the use of his tongue.*

[3] At the conclusion of the prosecution case, the High Court had found that there was no evidence adduced by the prosecution in order to establish the main elements of the third count of sexual assault and the trial judge had accordingly dismissed the third count and acquitted the appellant of the same pursuant to section 231(1) of the Criminal Procedure Act.

[4] The victim had been the appellant's half-sister and 05 years of age at the time of the commission of the offences against her.

[5] The facts of the case had been summarized by the trial judge in the sentencing order as follows:

> *6. The Complainant in her evidence specifically stated that the Accused touched her backside with his finger. The accused had taken the*

Complainant into the toilet. He has touched inside her back with his finger. The Complainant used the word "bum" and said that he touched inside of her "bum" with his finger. The Complainant further said in her evidence that the accused licked her "pipi" with his tongue.

7. *The mother of the complainant, in her evidence explained that the Complainant uses the word "bum" to refer her anus and "pipi" to refer her vagina. The mother of the complainant said that she saw the complainant was coming out of the toilet, just after the accused came out from the same toilet.*

8. *Doctor Elvira in her evidence explained about the specific medical findings that she found during the medical examination of the complainant. She has found bruises on both sides of labia minora. According to the medical opinion given by the Doctor, such bruises could not have caused by the touching of tongue. The Doctor further explained that such wound that she noticed around labia minora could have caused if a finger entered into the anus of a small child as of the complainant. At such a small age, the distance between the labia minora and the anus is very close. Therefore, an injury that applies on anus can also reach to the labia minora.*

9. *Moreover, the Doctor has noted bruises close to perineum. Such bruises could have caused by an erected penis or a finger. According to her evidence, such wound could last for seven days before it heals. She further said that the bruises that she noticed in the Complainant would have occurred anytime between 10th to 14th of September 2017.*

[6] At the end of the summing-up on 28 February 2018 the assessors had unanimously opined that the appellant was guilty of both counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 01 March 2018, convicted the appellant on both counts and sentenced him on 02 March 2018 to 14 years of imprisonment on the first count and 04 years of imprisonment on the second count (both to run concurrently) with the final sentence being 13 years and 07 months of imprisonment (after deducting the period of remand) with a non-parole period of 11 years and 07 months.

[7] The appellant had signed a timely notice of appeal/application for leave to appeal on 25 March 2018 (reached the CA registry on 11 April 2018) against conviction and sentence. He had filed amended grounds of appeal on 24 June 2019. The Legal Aid Commission had filed an amended notice of appeal for leave to appeal against conviction and sentence and written submissions on 27 October 2020. The state had tendered its written submissions on 21 November 2020.

[8] 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.

[9] 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.*

[10] Grounds of appeal urged on behalf of the appellant are as follows:

> ***Conviction***
>
> *That the Learned Trial Judge erred in fact and in fact with his inadequate directions towards the disputed or incriminating caution interview answers of the appellant.*

Sentence

That the Learned Trial Judge erred in fact and fact when he considered extraneous factors as an aggravating factor thus enhancing the sentence of the appellant.

Conviction

[11] The appellant submits that he had challenged the cautioned interview in a *voir dire* inquiry and at the trial. The appellant had not given evidence at the *voir dire* inquiry but challenged the cautioned interview on the basis that (i) his right to consult his parents, guardians or relatives were not given during the cautioned interview and (ii) he was not given the opportunity to read over the cautioned interview at the completion of the interview but only told to sign it. The trial judge in his ruling on 27 February 2018 had considered both grounds and rejected them stating *inter alia* as follows:

> *'8. In view of the evidence given by the Interviewing Officer, the accused was asked at question number 63 whether he wish to read the record of the interview. The accused had replied that he does not want to read it, as he was reading it while it was being typed. The Interviewing Officer then concluded the record of the interview and escorted the accused back to the cell. He had to find papers to get the record of the caution interview printed. According to the evidence given by the Interviewing Officer, there were no other officers present at the Police Station as all of them have gone to attend to another crime investigation. He finally got the printout of the caution interview around 5 pm and gave it to the accused, who was locked in the cell, to sign. The accused then signed it, but he did not read it before he put his signature.'*
>
> *9. During the course of the hearing, the defence did not provide any evidence to suggest there was a possibility that the record of the interview, that was recorded in the personal computer of the interviewing officer, would have been changed before it was printed out and given to the accused to sign. Neither the learned counsel for the Defence suggested such a proposition to the Interviewing Officer, when he gave evidence.*
>
> *11. The Interviewing Officer specifically stated that he gave the accused his rights and explained to him that if he wishes he could consult a private lawyer or a lawyer from Legal Aid Commissions. The accused was further explained that he could consult his parents, guardians or relatives if he wishes to do so. The Accused had informed the Interviewing Officer that he does not wish to exercise that right.*

12. I am mindful of the fact that the accused was given the printout of the caution interview to sign after nearly three hours it was concluded. However, as per the question and answer number 63, the accused had informed the Interviewing Officer that he does not wish to read the record, as he read it while it was being typed. There is no evidence or anything to suggest that the record of the interview would have been altered or changed before it was printed out.

[12] The appellant had not given evidence at the trial or called any witnesses but is said to have suggested to the police witnesses that he was not given the opportunity to read over the cautioned interview at the completion of the interview but only told to sign it. He contends that directions at paragraph 65 are not sufficient in this regard. However, in order to consider the appellants' complaint one has to look at the trial judge's directions from paragraphs 64-69:

64. I now draw your attention to the caution interview of the accused, which is tendered by the prosecution as prosecution exhibit one.

65. The prosecution presented in evidence the record of the caution interview of the accused. The prosecution contends that the accused in fact made an admission that he licked the vagina of the Complainant with his tongue. Moreover, the accused has denied that he penetrated the vagina of the Complainant with his finger. In question number 43, 44 and 45 of the caution interview the accused has admitted that he licked the vagina of the Complainant. The Prosecution further presented evidence to establish that those admissions of the accused have been recorded in the caution interview accurately and truly. The prosecution says the accused was treated well and he gave those answers in the caution interview freely and voluntarily. The Interviewing Officer in his evidence said that he recorded those answers in the caution interview. According to the evidence given by the Interviewing Officer, the accused was given an opportunity to read the record of the interview. However, the accused had declined it, saying that he had already read it while it was being typed.

66. Meanwhile the learned counsel for the defence proposed you to consider the time difference between the conclusion of the caution interview and the signing of the printed copy of the caution interview. He further submitted that the accused was never given an opportunity to read the printed record of the caution interview before he put his signature. Therefore, the learned counsel suggested you to put a less or no weight in the confession made by the accused in the caution interview.

67. In order to determine whether you can safely reply upon the admissions made by the accused in the caution interview, you must decide two issues.

68. *Firstly, did the accused in fact **make** this caution interview? Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure of that the accused has actually made this caution interview, you must ignore the admission made in the caution interview.*

69. *Secondly, if you are satisfied, that the accused has made this caution interview, then it is for you to decide whether the contents of the caution interview are **truthful**, and what **weight** you give them as evidence. It is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness and the reliability of the confessions and it acceptability.'*

[13] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal laid down the relevant law as follows:

*'[54] Having examined several previous authorities the Court of Appeal in **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 stated as a general proposition on how to direct the assessors on a caution interview as follows.*

> *' 20 (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'*

[60] Therefore, it appears that (though due reverence is still accorded) there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant.'

[14] I have no doubt that the trial had adequately addressed the assessors on the appellant's complaint under this ground of appeal as prescribed in ***Korodrau*** and on the evidence of the victim, her mother and medical evidence no reasonably minded assessors would have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment.

[15] In any event the appellant's counsel should have sought redirections in respect of the complaint now being made on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). The deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[16] Therefore, this ground of appeal had no merits and no prospect of success at all.

Sentence

[17] The appellant's contention is that the trial judge had considered extraneous maters in the matter of sentence at paragraph 11 of the sentencing order regarding the appellant having denied the victim's natural growth in her life without evidence to that effect:

> *'11. You have blatantly breached the trust reposed in you by the Complainant as her brother. The age difference between you and the Complainant was substantially high at the time of this crime took place. By committing this crime, you have denied the Complainant the natural growth in her life. I consider these factors as aggravating circumstances of this crime.'*

[18] A judge does not need scientific evidence or any other specific evidence to make a comment of this nature. No such evidence is necessary for any rational human being to understand that when a female child of such a tender age as 05 years is exposed to sexual experiences of the kind proved in this case, such unnatural exposure could have physical and unimaginable psychological consequences on her natural growth as a female.

[19] In any event, it is just one of the maters the trial judge had considered to enhance the sentences by 03 years. 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).

[20] The ultimate sentence of 13 years and 07 months of imprisonment is well within the tariff applicable to juvenile rape of 10-16 years of imprisonment [vide **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Now it is 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). As said in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) quantum can rarely be a ground for the intervention by an appellate court.

[21] Therefore, there is no sentencing error or a reasonable prospect of success in the matter of sentence.

Order

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
JUSTICE OF APPEAL