IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 132 OF 2016
(High Court No. HAC 57 of 2013)

BETWEEN : **PENI NASAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Gamalath, JA
Bandara, JA

Counsel : **Ms S. Ratu for the Appellant**

Ms R. Uce for the Respondent

Date of Hearing : **06 September, 2022**

Date of Judgment : **29 September, 2022**

JUDGMENT

Prematilaka, JA

[1] I had the benefit of reading the draft judgment of Gamalath, JA and agree with his reasoning and orders.

Gamalath, JA

The Nature of the Charges and the Sentence

[2] According to the information filed at the High Court of Suva the only charge against the appellant had been Rape contrary to Section 207(1) and (2)(c) and (3) of the Crimes Act (Decree) No.44 of 2009. The particulars of the offence states that the appellant on the 12th December 2012, at Flagstaff in the Central Division penetrated the mouth of SQ (name suppressed), a child under the age of 13 years with his penis. Following the conviction the learned Trial Judge imposed a sentence of imprisonment of 12 years, 10 months and 2 weeks with a non-parole period of 10 years 10 months and 2 weeks.

[3] The appellant filled a timely appeal against both the conviction and sentence and the leaned single Judge granted leave to proceed only against the sentence of imprisonment. The appellant being dissatisfied with the ruling of the learned single Judge is seeking to review his ground of appeal against the conviction. It is to be noted that in the Single Judge's hearing the appellant had the assistance of legal representation from the Legal Aid Commission who prepared the grounds of appeal for him against the conviction. At the hearing before us, the appellant informed the Court at the very outset that he relies on the same grounds against the conviction as were relied on in the Single Judges hearing.

[4] Those grounds were as follows;

(i) "the learned trial Judge erred in principle and fact by acting to provide a fair and balance summing up when directing the assessors in particular to the following;

(a) directing to the assessors the experience regarding reaction of a child of rape and/or sexual offences; and

(b) directing the assessors on a different count; and

(c) directing to the assessors the complainant's understanding of the term 'balls' thereby resulting in establishing the State's case to prove beyond reasonable doubt the element of penetration of penis; and

(d) mentally and emotionally influencing and challenging the assessors when considering the evidence of complainant who is a child; and

(e) directing the assessors to consider the inconsistencies of the appellant's case regarding the obtaining of his caution statement thereby influencing the minds of the assessors to consider the prosecution witnesses evidence to be more reliable and credible.

(ii) That the conviction was unsatisfactory having regard to the totality of the evidence at the trial, in particular to the following;

(a) Reasoning and complainant referral to her 'balls' denoted the genitals generally and not to describe the testicles of the accused when no evidence was adduced by the prosecution to prove this is what the complainant meant."

Appeal against the Sentence

[5] The learned Single Judge granted leave against the sentence at the leave stage. The appellant has legal assistance coming from the Legal Aid Commission in the appeal against the sentence. The grounds against the sentence are as follows;

'that the learned trial judge erred in principle when sentencing the

(a) double counting an aggravated feature to enhance the sentence; and
(b) relying on unsupported facts to enhance the sentence; and
(c) not properly considering the mitigating factors to adequately decrease the sentence.(sic)

Based on the said grounds, the Counsel is seeking the intervention of this Court, presumably to adjust and alter the sentence imposed in the High Court.

The Ruling of the Single Judge

[6] As already stated, before the learned Single Judge the appellant's grounds of appeal against the conviction had been similar in contents to the present reviewed application. The learned Single Judge held in the ruling that the grounds lack merits and hence the refusal to grant leave against conviction. Leave was only granted against the sentence on the premise that there had been double counting on aggravating circumstances.

The trial against the appellant, the evidence in brief

[7] The prosecution relied mainly and basically on the evidence of the 13 years old child complainant and the caution interview confession of the appellant, held to be made voluntarily following the voire dire inquiry by the learned trial judge. The evidence at the trial in summary is as follows:

The evidence

[1] Complainant was merely 10 years old when testified at the trial, and studying in grade 6 in the school. According to her evidence at the trial the complainant was living in Raiwai with her mother and the two sisters. Relating to the alleged incident that had happened in the night of 12 December 2012, the complainant and her mother had paid a visit at the house of the appellant, whose wife Ana is a friend of the complainant's mother. After their arrival the appellant went into the kitchen to prepare some meal. While in the kitchen the appellant had called the complainant into the kitchen; with the mother's permission, she had done as requested by the appellant. The appellant had got the complainant to sit up on the table in the kitchen; a little later he had asked her to lower her pants and panty. While these things were happening , there was a laptop placed beside the kitchen sink, which displayed a naked man and a woman, presumably a pornographic image. The complainant had inquired as to why he wanted him to remove her clothes and in replying the appellant had asked her not to tell anyone what was going on. The appellant, thereafter had lowered his trousers, pulled out his penis and put the cream of a cake that was on the table on his penis and asked the complainant to suck it. Further, the appellant had told the complainant that if she

sucked the penis it would give the child the taste of the cake. The complainant had done as she was asked to do and while this was happening the appellant had touched her "private parts" (p.382 ; the evidence of the complainant and p128 vol. the caution interview statement)). Later when the appellant heard someone coming towards the kitchen he had asked the complainant to pull up the clothes, while pulling up his own trousers and the underwear. He had told the complainant to tell no one about this incident and if she had ever told anyone he would do something to her, presumably a veiled threat of harm. She was told to go back to the living room.

A few days later, on being questioned the complainant had told her sister that the appellant had got her to suck his penis. The sister, AO (name suppressed) evidence would be dealt with later. The parents were informed by the sister who in turn reported the matter to the police.

The complainant was extensively cross-examined and I do not find anything that had transpired through the lengthy cross-examination to materially discredit the complainant's evidence in chief.

[8] As transpired in the evidence given by the complainant the appellant has touched the 'urau' meaning the private part and the complainant had categorically stated that the appellant touched her 'urau' top of it meaning vagina. In the evidence given by the appellant at the trial, the appellant had not denied the fact that he touched the complainant's private part. He had admitted in his evidence that the complainant who was 7 years old had told him that she wanted to feel his testicles, page 573. Since she was insisting on touching his testicles he had allowed her to touch his testicles and admitted the fact that he put cream of the cake that was lying on the table on the left side of his testicles and asked her to lick off the cream from his testicles. Going by this evidence it is clear that the intention of the appellant had been to make it look like that there had been no penial penetration. But when one examines his caution interview statement which was admitted in evidence at the trial he had stated that he put out his penis for the complainant to suck (page 127 of Vol. 1).

[9] Importantly in relation to the evidence of touching the complainant's private parts, in the evidence of the appellant he had stated that he touched the private part of the complainant but never removed her clothes. He had touched her private part to mention it to her,

inferring to educate her, that girls have different parts of the body from men. (See page 581).

On a close examination of this incriminating piece of evidence it is clear that there had been a complete consummation of the full offence of indecent assault committed by the appellant when he touched the private part of the complainant.

However there had been no preference of any charge against him based on the uncontroverted evidence relating to that act.

The evidence of the sister of the complainant AO (name suppressed)

AO is the older sister of the complainant who testified at the trial about the unusual behavior of the complainant a few days later from the alleged incident of rape which had caused her to question the complainant as to why she behaved in that peculiar manner. According to the evidence of the sister , she had observed the complainant sucking a soursop stem in a peculiar manner and being concerned by the way she did it the witness had questioned the complainant as to why she was sucking the soursop stem in that peculiar manner. At that point the complainant had told the sister what had happened between the appellant and the complainant and had described how the appellant wanted the complainant to suck his penis. The matter was reported to the mother. According to the sister's evidence the complainant was visibly in fear as she was narrating the incident.

The Single Judge's Ruling on the ground of appeal against the sentence

[10] In relation to the grounds on sentencing, the appellant relied on the submission that in addition to double counting on aggravating factors as laid down in the sentencing order, there had been a perceivable insufficient discount granted based on the mitigating factors as adduced at the trial. No complaint was made in relation to the accuracy of the tariff for child rape which is 10 to 16 years imprisonment.

In the impugned sentencing order the aggravating factors had been enumerated as follows;

(1) the breach of trust of the victim as she was a guest.

(2) the significant degree of opportunistic planning.

(3) taking advantage of the complainant's vulnerability.

(4) the display of total disregard to the victim's well-being.

(5) the age gap of 30 years between the complainant and the appellant.

` (6) the continuing psychological impact on the complainant.

Having considered the mitigating factors, the learned Trial Judge had deducted 3 years from the total sentence of 13 years.

In the hearing before the Single Judge it was held that the deduction of three years was generous, as amongst the three mitigating factors found in the sentencing order only one item could be rightly described as forming a mitigating factor. The learned Single Judge further held that the aggravating factors stated above seemed as that there was an error in the exercise of the judicial discretion, in the sense of double counting, and as such the ground against the sentence should be considered at the hearing of a Full Bench.

Based on these matters the learned Single Judge held that the leave against the sentence should be granted while refusing the leave against conviction.

The Appeal against sentence

[11] In addressing the issue of wrongful counting of the aggravating factors, it is the counsel for the appellant's submission that the learned trial judge erred when he ignored striking similarities between (i) and (iv) aggravating factors referred to above as well as the similarities between (ii) and (iii) factors as stated above.

[12] Upon a close examination of the matters referred to above it is not clear if the issue raised has a justification which could be considered in favor of altering the final sentence imposed on the appellant. What is clear from the ultimate sentence to which the learned trial judge had arrived at is that the imposition of a total 4 year period based on aggravating factors had not been made by making any individual evaluation of each aggravating factor on an

independent and distinct basis but rather by taking them all on a totality basis that made the length of the sentence for aggravating circumstances four years.

[13] It is a well settled principle of law that double counting of aggravating factors amounted to error in sentencing and sentencing judges should refrain from falling into that error in deciding on particularly the aggravating factors; see **Robin Surya Subha Shyam v. The State**, Criminal Petition No CAV0024 of 2019 [On Appeal from the Court of Appeal Criminal Appeal No; AAU 0103/17; HAC146 of 2010] the Supreme Court held;

> *"It is important that sentencing courts do not double count circumstances of aggravation. This is done when a point on the tariff is found in the initial calculation of sentence, having regard to aggravating circumstances. Then the sentence is further advanced having regard to the same aggravating circumstances which have already been considered in considered in fixing the starting point on the tariff. Several cases have indicated the pitfall here,* ***Vishva Nadan v.The State****, CAV0007/19;13 October 2019."*

[14] However, as it is the settled law as laid down in **Naisua v. State** [2013] FJSC 14; CAV00010.14 2013 (20/Nov/2013) and in **Kim Nam Bae v The State** (Criminal Appeal No. AAU 0015 of 1985), the Court of Appeal will interfere with a sentence only in the following circumstances;

(i) that the learned Judge had acted on a wrong principle.

(ii) that the learned Judge allowed extraneous or irrelevant matters to affect the judgment.

(iii) that the learned Judge mistook the facts.

(iv) that the learned Judge failed to take into account some irrelevant considerations.

[15] Based on the above *dicta* and in a general sense in relation to the issue of double counting, which is *ex facie* an act of operating on a wrong principle of law as decided in *Naisua* and *Kim Nam Bae (supra) ,* sentencing judges falling into the error of considering the same aggravating factors or similar factors twice over to make an increase in the cumulative sentences should be avoided consciously.

[16] In the center of the issue of double counting is the need to accurately identify what may constitute aggravating factors and mitigating factors on a broad based conceptual basis and once this area of rather opaque subject is demystified by the application of some defined guidelines the errors that are possible in adding or subtracting the factors that could be counted in arriving at an accurate finality in the acceptable, justifiable sentence could be avoided. Each case revolves around its own peculiar facts and circumstances. Any broad based guideline principles on sentencing has to be justified having regard to the facts and circumstances peculiar to each case.

[17] As decided in the case of **Ram v. State** [2015] FJSC 26; CAV 12.2015(23October 2015) "whilst bearing in mind statutory variations between England and Fiji, courts will nonetheless derive useful assistance and persuasive directions from the UK Sentencing Guidelines in the approach to sentencing philosophy and the calculation of sentence" (see para [22]).

In relation to that in the U.K. Sentencing Council, on 8 September, 2022 a revised guideline on sentencing have been published as follows:-

> *"Taken from Sentencing Guidelines Council Guidelines Overarching Principles are;*
>
> *The list below brings together the most important aggravating and mitigating features with potential application to more than one offense or class of offenses. They include some factors which are integral features of certain offenses; in such cases, the presence of the aggravating factor is already reflected in the penalty for the offense and cannot be used as justification for increasing the sentence further. The lists are not intended to be comprehensive and the factors are not listed in any particular order of priority. If two or more of the factors listed describe the same feature, case needs to be taken to avoid double counting."*

Aggravating Factors:-

Factors indicating higher culpability;

1) Offence committed whilst on bail for other offences.
2) Failure to respond to previous sentences.
3) Offences were racially or religiously aggravated.

4) Offence motivated by or, demonstrating hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
5) Offence motivated by or demonstrating hostility based on the victims disability (or presumed disability).
6) Previous convictions particularly where a pattern of repeat offending is disclosed.
7) Planning of an offence.
8) Offender's operating in groups or gangs.
9) "Professional" offending;
10) Commission of the offence for financial gain (where there is not inherent in the offense itself).
11) High level of profit from the offense.
12) An attempt to conceal or dispose of evidence;
13) Failure to respond to warnings or concerns expressed by others about the offender's behavior.
14) Offence committed whilst on license.
15) Offence motivated by hostility towards a minority group or a member or members of it.
16) Deliberate targeting of vulnerable victims.
17) Commission of an offence while under the influence of alcohol or drugs.
18) Use of weapons to frighten or injure victims
19) Deliberate and gratuitous violence or damage to property over and above what is needed to carry out the offense.
20) Abuse of power.
21) Abuse of position of trust.

Factors indicating a more than usually serious degree of harm;

1) multiple victims
2) an especially serious physical or psychological effect on the victim, even if unintended.
3) a sustained assault or repeated assault on the same victim.
4) victim in particularly vulnerable.
5) location of the offence (for example in an isolated place).
6) offence is committed against those working in the public sector or providing a service to the public.
7) presence of others for example, relatives especially children or partner of the victims.
8) additional degradation of the victim (for example taking photographs of a victim on a part of sexual offence)

9) in property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (for example where the theft of equipment causes serious disruption to a victims life or business).

Mitigating Factors;-

Factors indicating lower culpability:-

1) a greater degree of provocation than normally expected.
2) mental illness or disability.
3) youth or age where it affects the responsibility of the individual defendant.
4) the fact that the offender played only a minor role in the offence.

Offender Mitigation:-

a) genuine remorse.
b) admissions to the police interview.
c) ready to co-operate with the authorities.

[18] Also in the case of ***Ram* v. *State*** [2015] FJSC 26; CAV12.2015 (23 October 2015) Supreme Court of Fiji has laid down certain guiding principles which bear a striking recognizable similarity to the aforementioned UK Sentencing Guidelines. What is enunciated in ***Ram*** could be summed up as that it is the overall circumstances relating to a crime that is needed to be taken into consideration in determining what may have been the aggravating factors as opposed to mitigating factors (see paragraphs 25 of **Ram**) and it is on that basis the final calculation of the sentence should be made..

[19] In the case of **Ram** the Supreme Court of Fiji had laid down the factors to be considered in cases of sexual offences that would form aggravating circumstances. They are as follows:

> *"[26] Factors to be considered in such cases could be:*
>
> *(a) whether the crime had been planned, or whether it was incidental or opportunistic;*
>
> *(b) whether there had been a breach of trust;*
>
> *(c) whether committed alone;*

(d) whether alcohol or drugs had been used to condition the victim;

(e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;

(f) whether the impact on the victim had been severe, traumatic, or continuing;

(g) whether actual violence had been inflicted;

(h) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;

(i) whether the method of penetration was dangerous or especially abhorrent;

(j) whether there had been a forced entry to a residence where the victim was present;

(k) whether the incident was sustained over a long period such as several hours;

(l) whether the incident had been especially degrading or humiliating;

(m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;

(n) Time spent in custody on remand.

(o) Extent of remorse and an evaluation of its genuineness;

(p) If other counts or if serving another sentence, totality of appropriate sentence."

[20] As can be recognized through the UK Sentencing Guidelines it lays down the principle, which is in fact what is being already practiced in Fiji as well, that when some factors which are recognizably inbuilt ingredients of certain offences, such factors may not be counted as forming aggravating circumstances for the sentencing purposes. In the same way and importantly, if two or more of the factual positions bears a sticking similarity avoidance is required not to count them separately for reaching at the correct point of sentence. This I must state is an obvious concern upon which the appellant in the instant appeal also places reliance in inviting the Court to revisit his sentence.

[21] Another related matter of general importance in determining aggravating factors and mitigating factors in sentencing to which my consideration is constantly drawn is what must be the general criteria or even could there be any method upon which reliance can be placed by a tribunal in deciding on aggravating circumstance or mitigating circumstance independently of the listed items as enumerated in the guiding principles? In the sense, complexity of human nature and its affairs are such it may offer different challenges to a sentencing court to be totally innovative in determining what may be construed as aggravating factors or mitigating factors *vis a vis* a set of facts that come up for consideration for determining a just sentence.

[22] In relation to that issue in my view "the test of degree of culpability" as inferred in the U.K. Sentencing Council Guidelines provides a reasonable clue based on a rather general approach for which a sentencing tribunal could divert its attention without falling into unjustifiable errors in determining the aggravating factors or mitigating factors. A close examination of the Guiding Sentencing Principles of the UK would make it clear that they have been evolved based upon the following basic criteria;

(1) The culpability test; factors indicating higher culpability.

(2) The degree of harm test, aggravating factors based matters indicating a more than usually serious degree of harm.

(3) In relation to mitigating factors, the existence of factors indicating lower culpability.

[23] In a general sense, although it is not directly relating to the instant appeal, it could be comfortably stated, that in relating to the determination of aggravating or mitigating factors, which are not within the list shown above in the guiding principles, by applying the above criteria as in the above paragraph, a sentencing tribunal may derive one's own guidance in determining what may form the aggravating factors as opposed to mitigating factors that may be used in arriving at a just and justifiable sentence. This, in my view is a commonsensical approach rather than a one supported by any authority with force in law.

[24] Reverting to the instant appeal against the sentence, the State concedes in its submissions that there had been double counting in the sense that "the appellant having significant degree of opportunist planning is so close to taking advantage of the victim's vulnerability" (see respondents submissions).Thus the State maintains that the double counting as conceded by them needs adjustment as it is an arguable matter.

[25] Referring to the aggravating factors as identified by the learned sentencing Judge (p.98 of the proceedings), having set out 6 factors as aggravating factors according to his perception, the learned trial Judge imposed a total of 4 years for that alone. The State concedes in its written submissions (p.18 proceedings) that;

> *"The display of total disregard of the victim's wellbeing may refer to the victim's young age and her status in a family. The two separate aggravating features are close in terms of their meaning.' Further, State submits that "appellant's having significant degree of opportunist planning is so close to taking advantage of the victim's vulnerability. The appellant being an opportunist in this crime may refer to the fact that the appellant had preplanned the time to execute his plan, whilst taking advantage of the victim's vulnerability is the appellant knowing really well that the victim is a 7 year old and is vulnerable. They seemed to be similar in terms of their close meaning"*

[26] Although it is the position of the State that there had been a double counting on certain items as enumerated in the grounds of appeal one has to bear in mind it is not the items of circumstances that form the aggravating factors or mitigating factors that would be counted numerically in deciding on what should be the totality of the sentence to be handed down to meet the needs of justice. In this particular instance I am constrained to state that surprisingly, despite the availability of strong uncontroverted evidence that the appellant had touched the private part of the 7 year old complainant it had withered into oblivion and the appellant had been placed in an advantageous position of not being confronted with a charge of indecent assault based on that evidence. That in my view is a concession which has come in his way as a stroke of luck, to say the least. In the circumstances I do not wish to interfere with the sentence of imprisonment as finally handed down by the trial judge.

Appeal against the conviction

[27] As already stated at the leave stage the grounds advanced against the conviction did not receive leave. The grounds upon which the appellant relied in challenging the conviction are as follows

> *"1. That the learned Trial Judge erred in principle and fact by lacking to provide a fair and balance Summing Up when directing the assessors, in particular, to the following:*
>
> *(a) Directing to the assessors the experience regarding reactions of a child of rape and/or sexual offenders; and*
>
> *(b) Directing the assessors on a different Count; and*
>
> *(c) Directing to the assessors the complainant's understanding of the term "balls" thereby resulting in establishing the State's case to prove beyond reasonable doubt the element of penetration of penis; and*
>
> *(d) Mentally and emotionally influencing and challenging the assessors when considering the evidence of complainant who is a child; and*
>
> *(e) Directing the assessors to consider the inconsistencies of the Appellant's case regarding the obtaining of his caution statement thereby influencing the minds of the assessors to consider the Prosecution witness's evidence to be more reliable and credible.*
>
> 2. *That the conviction was unsatisfactory having regard to the totality of the evidence at trial, in particular, to the following:*
>
> *(a) reasoning that complainant referral to her "balls" denoted the genitals generally and not to describe the testicles of the accused when no evidence was adduced by Prosecution to prove this is what complainant meant.*

[28] A close examination of the aforementioned grounds would make it clear that the grounds are vague in nature and imprecise. The main complaint being that the evidence for the prosecution does not support the fact unequivocally that the appellant tricked the complainant to perform oral sex on his penis. The trail judge, based on the evidence for the prosecution, in his summing up as well as in his judgement had dealt with this aspect in the following manner;

"[77] The accused wants you to consider particularly the 4th inconsistency. The complainant has said in her examination in chief that the accused asked her to suck his penis. She stated to Police that he told her that he would 'touch my ball and I have to touch his ball.' The accused admitted in his evidence that he got the complainant to lick his testicle after applying some cream on it. It is his claim that when the complainant said to Police 'balls' she was referring to his testicles and not his penis.

[78] The complainant, during her re-examination, stated when asked what 'balls' means she replied as 'a man's balls'. However, in considering these conflicting claims, it is also relevant to note that she had said to Police that the accused said that he would also touch her balls. It is up to you to decide in consideration of these items of evidence that the terms 'balls' used by the complainant in her statement to Police refers to the penis or to the testicles of the accused."

Page 69, paragraph 16.

"[16] It is clear from this portion from the statement that AB referred to her balls as well and that simply means she had used this term to denote the genitals generally and not to describe the testicles of the accused. I concur with the opinion of the assessors."

[29] Further in the caution interview statement the appellant had admitted the following:

A.45 Yes that is true.

Q46. After she put off her clothes then what did you do?
A. I touch her private part (vagina).

Q47. It is alleged that after you put your penis out then you spread cream of the cake on your penis. What can you say about that?
A. Yes, that is true.

Q48. After that then what did you do?
A. I told Sai to suck my penis by putting it on her mouth which she did for a few minutes.

Q49. Who else was there in the kitchen?
A. Only myself and Sainiana.

Q50. Did anybody come to you that time?
A. No body.

Q51. How do you feel when you were doing that to Sai?
A. I was scared.

[30] In dealing with the issue of penetration the learned trial judge had placed these facts before the assessors clearly and had invited them to decide what may have been meant by the complainant when she stated the appellant asked her to feel his 'balls'.

Based on the directions given by the learned trial judge the assessors opined unanimously that the appellant is guilty as charged for rape by penetrating the mouth of the victim with his penis. Further, in relation to that matter the learned trial judge concluded in his judgment that the victim's reference to the 'balls' was in fact 'denoted' the genitals generally and not to describe the testicles of the accused. Accordingly he had concurred with the opinion of the assessors. It is important to recall that the sister of the victim gave evidence at the trial and described how she observed the victim was sucking the sour soup stem, which had caused the suspicion in her mind as to the peculiar behavior of the victim.

[31] I have perused the Victims Impact Statement of the complainant and according to the observations made by the medical experts the complainant is showing signs of being frightened and according to her mother's observations the complainant fears to be left alone and there is certainly signs of having an impact on the complainant as a result of the experience she had to undergo at the age of 7. These facts stand uncontroverted and unchallenged at the trial. In the circumstances I do not see any merits to any grounds of appeal against the conviction.

[32] The learned trial had adequately dealt with these factual matters and the learned single judge was correct in refusing to grant leave to proceed on any grounds of appeal against the conviction as relied on by the appellant.
In the circumstances I do not see any merits to any grounds of appeal against the conviction.

Bandara, JA

[33] I have read in draft the judgment of Gamalath JA and concur with the reasons and proposed orders therein.

Order of the Court:

1. Appeal against the sentence disallowed.
2. Renewed application for leave against conviction is refused.
3. Appeal against conviction is dismissed.

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice W. Bandara
JUSTICE OF APPEAL