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

CRIMINAL APPEAL NO. AAU 179 of 2016
[In the High Court at Labasa Case No. HAC 11 of 2016]

BETWEEN	:	**RAJNIL NAVIN CHANDRA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	:	**Mr. A. K. Singh and Mr. A. Sen for the Appellant** **Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**07 November 2022**
Date of Judgment	:	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Nawana, JA and agree with reasons therein and orders proposed.

Gamalath, JA

[2] I have read the judgment in draft and the conclusion of Nawana, JA and I agree.

Nawana, JA

[3] This is an appeal against the conviction of the appellant by the High Court of Fiji sitting in Labasa on one count of rape punishable under Section 207 (1) and (2) (a) of the Crimes Act, 2009. The statement and the particulars of the offence, as presented by the Director of Public Prosecutions (DPP) in his information dated 18 April 2016, were as follows:

> *"**Statement of Offence***
>
> ***RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***RAJNIL NAVIN CHANDRA**, on the 17th day of March 2016, at Tuatua, Labasa in the Northern Division, had carnal knowledge of **SHIVAGNI KRISHNA**, without her consent."*

[4] The offence of rape, in terms of Section 207 of the Crimes Act, 2009, is constituted as follows:

> *"207.-(1) Any person who rapes another person commits an indictable offence.*
>
> *Penalty– Imprisonment for life.*
>
> *(2) A person rapes another person if-*
>
> *(a) the person has carnal knowledge with or of the other person without the other person's consent; or,*
>
> *(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or,*
>
> *(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*
>
> *(3) For this section, a child under the age of 13 years is incapable of giving consent."*

[5] The issue that became contentious at the trial was the principal constituent element of the offence of rape. That was whether there was consent on the part of the complainant for the act of sexual intercourse in light of the completely opposite narrations of facts proffered by the prosecution and the defence before the High Court.

[6] At the trial, the complainant, against whom, the commission of the offence was alleged; the mother of the complainant; and, the medical doctor, who examined the complainant, gave evidence on behalf of the prosecution. The appellant testified on his own behalf.

[7] At the close of the trial, the assessors returned opinions of 'guilty', with which, the learned trial judge agreed, reasons for which, were set-out in his judgment dated 24 November 2016. The appellant was, thereupon, sentenced to a term of thirteen year-imprisonment with a non-parole period of ten years.

[8] The appellant filed a timely application dated 08 December 2016 for leave to appeal against the conviction and the sentence based on eight grounds. A single justice of appeal, by his ruling dated 02 August 2019, granted leave on the first ground against the conviction; and, on the fifth to the seventh grounds against the sentence. The second ground of appeal was disallowed holding that that ground was not arguable as the learned trial judge had adequately dealt with the defence case quite contrary to the contention of the appellant. Ground Nos (iii) and (iv) were not pursued by the appellant.

[9] The instant appeal before the Full Court is, therefore, founded on following grounds of appeal. They are:

> *"(i) The Learned Judge erred in law and in fact in failing to allow the counsel for the Appellant to cross-examine the complainant on the circumstances surrounding the commission of the purported offence and after the commission of the purported offence that was integral to the defence of the Appellant.*
> *…*
> *(v) That the Learned Trial Judge imposed the sentence which was harsh, excessive and unconscionable and further took into*

consideration irrelevant matters and failed to take into consideration relevant matters.

(vi) That the Learned Trial Judge erred in law in failing to correctly apply the principles of sentencing before setting a minimum term to be served before pardon may be considered.

(vii) That the Learned Trial Judge took into consideration irrelevant matters and further matters which were not in evidence and failed to take into consideration relevant matters when sentencing the appellant to thirteen years and ten years non-parole period."

[10] At the hearing, learned counsel for the appellant quite properly conceded that the learned trial judge had adequately afforded opportunities for the appellant to cross-examine the witnesses for the prosecution; hence, he did not pursue the sole ground of appeal to challenge the conviction. Learned counsel submitted that, the reason for formulation of the appeal ground, as it was formulated above, was the non-availability of the transcript of proceedings for the counsel to understand the matters fully before the prescribed period of time for appealing.

[11] Learned counsel's concession, which was made before the commencement of the hearing, however, evoked some criticism from the learned counsel for the state, on the basis that the abandonment was not made in a timely manner resulting in loss of time, resources and effort as the state had got ready to meet the appellant's challenge to the conviction on the basis of that ground of appeal. Learned counsel for the state rightly submitted that it became incumbent on the learned counsel for the appellant to give notice of abandonment of the appeal against the conviction in a timely manner no sooner he got to know that there was no basis to proceed with the challenge against the conviction after the transcript of proceedings was made available to the parties.

[12] This court is inclined to agree with the position advanced by the learned counsel for the state and hold that it is a matter of great procedural importance to place on record the abandonment of any matter by way of advance notice so that the resources of all parties concerned and those of court could be best-preserved.

[13] Learned counsel for the appellant, in the circumstances, confined himself to challenge only the sentence on the basis of the grounds as urged above. Although the grounds are segregated into three, an examination of the contents of the appeal grounds against

the sentence, in effect, is a challenge to the overall application of sentencing principles. This court will, therefore, consider all three grounds together in order to determine whether there exists an error of law affecting the lawfulness of the sentence for its enforcement against the appellant.

[14] The complaint of the learned counsel was that the learned trial judge had erred in selecting 10 years as the starting point in the absence of any evidence of violence on the complainant. It was further submitted that the learned judge's picking-up of the starting point at 10 years evidenced the lack of consistency in the context of similarly circumstanced cases. Learned counsel relied on three decisions in the cases of (i) **State v Ibrahim** [2013] FJHC 264; HAC031.2012 (28 May 2013) (ii) **State v Chand** [2014] FJHC 901; HAC043.2013LAB (10 December 2014) and, (iii) **Tora v State** [2015] FJCA 20; AAU0063.2011 (27 February 2015).

[15] The case of Paula Tora was a case involving aggravated robbery. The principles of sentencing adopted in that case would have a no application; and, hence irrelevant.

[16] In Mohammed Ibrahim's case, the High Court had picked-up 7 years as the starting point in a different set of facts. The accused and the complainant in that case were in an agreement, which appeared to be commercial, for sexual activity for some time; and, the complaint of rape was triggered as the accused had engaged the complainant for sexual intercourse against her will at a particular point of time of their pre-arranged meeting.

[17] In Rahul Ritesh Chand's case, the High Court had picked-up 7 years as the starting point where the accused and the complainant were almost of similar ages of early twenties. They were living in the same neighborhood with no evidence on the complainant being tricked into submission for forcible sexual intercourse.

[18] Upon consideration of the material, I am of the view that, facts of the two cases relied upon by the learned counsel for the appellant, are not similar to facts of the case at hand to justify a complaint on the lack of consistency in the matter of sentencing by the High Court. I would, therefore, hold that the learned counsel's submission on the point bears no merit and ought to be rejected.

[19] Learned counsel further submitted that the learned trial judge's selection of 10 years as the starting point, which is at the middle of the prescribed range of sentence for the offence of adult rape, could risk double-counting violating the principles of sentencing. This court accommodates learned counsel's submission as reasonable, which could give rise to such a scenario of double-counting affecting the legality of the sentence. However, this matter has to considered in light of the approach that the learned trial judge had made on the basis of the judicial precedents on the point.

[20] Learned trial judge had been cautiously guided by the judgment of this court in the case of **Koroivuki v the State** [2013] FJCA 15; AAU0018.2010 (5 March 2013), where it was held that:

> *"[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

[21] The process of sentencing and its decision-making is a complicated exercise of judicial functioning, which, more often than not, appears to get affected by lack of uniformity. As a result, disparity in sentences is often seen, which certainly causes concern to accused-persons, who stand charged for the same offence in identical circumstances; and, also to the system of justice.

[22] It is, therefore, necessary to have a structured mechanism and an easily comprehensible sentencing formula for the trial judges to conform to them so that uniformity in sentencing can be ensured.

[23] The concept of tariff that is hardened into the sentencing structure in Fiji seeks to ensure uniformity and consistency in sentencing. The selection of the starting point of the sentence, which is an important step in the process, in my view, is an opportunity

where a great deal of consistency and uniformity can be infused into, on the basis of acceptable principles.

[24] In **Koroivuki** *(supra)* it was held that:

> *[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
>
> (Underlined for emphasis)

[25] The above principles should be applied in a way that aggravating factors are not counted for a second time resulting in an enhancement of the sentence disproportionately. This can be done best by selecting the appropriate starting point in relation to the offence at hand.

[26] Justice Brian Keith, after relying on **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) and, **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018), said in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019):

> *"[41] …The fact is, though, that we just do not know whether the judge in arriving at his starting point of 12 years had already reflected any of the aggravating factors, which caused him to go up to 15 years before allowing for mitigation. In case he had done that, and had, therefore, fallen into the trap of double counting…"*

[27] The decision of the Supreme Court in the case of **Kumar v State** *(supra)* would also be instructive in that regard. The Supreme Court in that case stated:

> *"[56] …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. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.*
>
> *[57] ...First, a common complaint is that a judge has fallen into the trap of "double-counting", ie: reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *[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."*

[28] The learned trial judge, in his sentencing ruling dated 25 November 2016, was obviously guided by the above principles. The learned judge, in selecting the starting point at ten years, however, stated *'considering the nature of offending*', which was not accounted for, by way of some explanation to bear on the record whether or not some or all of the aggravating factors, too, had been taken into account when the learned judge '*[considered] the nature of offending*'. It would appear that, when one looks at the aggravating factors referred to in the sentencing ruling, they also could encompass in the '*nature of the offending'*. The aggravating factors considered by the learned trial judge were:

> *"a. significant degree of opportunistic planning;*
> *b. taking advantage of the victim's vulnerability;*

c. display of total disregard to the victim's wellbeing;
d. the significant age gap between the complainant and the accused;
e. breach of trust; and
f. continuing psychological trauma of the victim."

[29] In the circumstances, I am of the view that the element of double counting appears to have innocuously found its way in the making of the ultimate sentence. I hold that such a scenario has the effect of making an error in the application of sentencing principles.

[30] However, the matter would not end there because the issue that this court is usually confronted with in relation to the determining of the legality of a sentence is whether the sentence imposed by a trial judge could be considered appropriate considering the offence and all other circumstances including those of aggravation.

[31] The learned trial judge in his sentencing ruling stated as follows:

> *"(i) The 22 year-old complainant was employed by [appellant's] mother in her shop. On 17th March 2016, the complainant was invited by [the appellant's] mother into her house to help her with some house work. After her work, when she was to return home, [the appellant] took her in his vehicle to drop her. Instead, [the appellant] took her to [appellant's] house ignoring her pleas to let her get off.*
> *(ii) Upon reaching [appellant's] house, [the appellant] forcefully removed her clothes and inserted [his] penis into her vagina in the vehicle. [The appellant] gave a piece of cloth to wipe blood from her vagina. Before dropping her off that evening [the appellant] promised to marry her.*
> *(iii) She returned to her house and reported the matter to her mother. Her mother then reported the matter to Police.*
> *(iv) Her marriage, which was to take place in December 2016 has been put on hold due to this incident."*

[32] It is in the context of the above evidence that this court is required to consider the propriety of the sentence in the exercise of the powers of review of a sentence in appeal under Section 23 of the Court of Appeal Act.

[33] I conclude that, having regard to the evidence, which indubitably discloses the manner of offending as stated by the learned trial judge, a term of imprisonment for a period of thirteen years with a non-parole period of ten years, is well within the prescribed sentencing range of 7-15 years for adult rape.

[34] The sentence is just and it meets the ends of justice. It also serves to satisfy the objects and purposes of sentencing under Section 4 of the Sentencing and Penalties Act, 2009. In the circumstances, I am not inclined to interfere with the sentence. I would, acting in terms of Section 23 (3) of the Court of Appeal Act, make order dismissing the appeal against the sentence.

Orders of the Court:

(i) Appeal against the sentence dismissed; and

(ii) Sentence affirmed.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL