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

CRIMINAL APPEAL NO.AAU 144 of 2015
[In the High Court at Labasa Case No. HAC 050 of 2014LAB]

BETWEEN	**:**	**KATOKAITI TUTARA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	**:**	**Appellant in person** **Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**05 September 2022**
Date of Judgment	**:**	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court of Labasa on five counts of rape committed in Rabi against two complainants 'A' and 'B' (names withheld) in the Northern Division between 20 July 2013 to 28 January 2014 contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 respectively.

[2] Two acts of rape were allegedly committed against A while three were against B. A and B were 15 and 13 years of age respectively at the time of the commission of offences and when B was raped as alleged in count 3 she was still under 13 years of

age. The appellant was the grandfather of both A and B whose mothers were his biological daughters and he was 63-64 years old at that time.

Facts in brief

[3] At the time material to the charges A was living with the appellant in a village in Rabi. On 20 July 2013 the appellant woke A up and told her that they were going into the bush to collect some "papai" (root crop). Once in the bush, the appellant cut A's trousers with a cane knife, and threw them into the bush. While still holding the cane knife he ordered A to lie down on the ground. He then took off his pants, went on top of A and inserted his penis into her vagina. He warned her not to tell anyone, or he would kill her. On 24 January 2014, the appellant had allegedly repeated the act of rape on A.

[4] On 12 January 2013, B was at appellant's house and he and B went to the family plantation in the bush to clean it. B was under 13 years old at the time. The appellant later cleared a space in the bush, ordered B to take off her clothes and lie on the ground. She refused but he pushed her to the ground. He then went on top of her and inserted his penis into B's vagina. On 20 January 2014, the appellant repeated the same act of rape on B. He warned her not to tell anyone about the incident or he would kill her. On 28 January 2014, when B was folding clothes in a bedroom in the appellant's house, he came into the bedroom and forced himself on B. At the time, he was holding a kitchen knife. He tied B's mouth with a piece of cloth, tied her wrists with ropes and tied them to a stick. He forced her onto a mattress on the floor and tied her ankles with a rope. He then inserted his penis into B's vagina.

[5] The appellant under oath denied ever penetrating A and B as alleged.

[6] The assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors in his judgment, convicted the appellant and sentenced him on 23 October 2015 to 16 years of imprisonment on each count of rape to run concurrently with a non-parole period of 15 years.

[7] The appellant had filed a timely application for leave to appeal against conviction. His sentence appeal filed on 30 January 2017 was out of time by about 01 year and 02 months. Thereafter, the appellant had tendered three abandonment notices in Form 3 in respect of his conviction and sentence appeals on 19 March 2019, 02 July 2019 and 11 July 2019. However, in May 2019 he had changed his mind and wanted to proceed with his appeal. Again in October 2019 he had stated that he would proceed against his conviction appeal. R Vananalagi & Associates had filed an application for extension of time in respect of the appellant's sentence appeal along with submissions. Thereafter, the Legal Aid Commission had taken over the appellant's appeal and indicated to this court on 22 June 2020 that the appellant would proceed only against sentence and abandon the conviction appeal and tendered written submission only on the issue of enlargement of time to appeal against sentence. The state had responded only on the sentence appeal.

[8] The appellant speaks Rambian or Gilbertese language and had the assistance of a translator who was present in court for the hearing into the appellant's application for extension of time to appeal against sentence which was refused on 25 September 2020 and the appellant had renewed his sentence appeal before the full court and the Legal Aid Commission in consultation with the State had prepared appeal records for the sentence appeal. The translator was present and assisted the appellant during the full court hearing as well.

[9] Guidelines to be applied when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

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

1. *The Learned Trial Judge erred in law when he subsumed the Appellant's period of remand in the mitigating factors.*

2. The sentence is harsh and excessive.

01st ground of appeal

[11] The appellant argues that his remand period of 01 year and 04 months being subsumed in the mitigating factors is an error in principle. In paragraph 05 of the sentencing order the learned High Court judge had identified the said remand period under mitigating factors and in paragraph 06 the judge had stated:

> *'6. On count no. 1, I start with 14 years imprisonment. I add 5 years for the aggravating factors, making a total of 19 years imprisonment. I deduct 1 year 4 months for time already served, while remanded in custody, leaving a balance of 17 years 8 months. For not offending in the last 10 years, I deduct another 1 year 8 months, leaving a balance of 16 years imprisonment. On count no. 1, I sentence you to 16 years imprisonment.'*

[12] Section 24 of the Sentencing and Penalties Act requires the sentencing court to regard the time in custody before trial as a period of imprisonment, unless ordered otherwise, in sentencing an offender to a term of imprisonment. The heading of section 24, however, has used the word 'deducted' instead of 'regarded'. The Court of Appeal interpreted the operation of section 24 in **Vasuca v State** [2015] FJCA 65; AAU011.2011 (28 May 2015) and stated *inter alia* that it is discretionary (as opposed to 'mandatory') for sentencing courts to consider the period of remand as a period of imprisonment already served and when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period (depending on the facts and the sentence in each case) in custody but it is not necessary to make a precise calculation (see **Basa v The State** Crim. App. No. AAU0024.2005, 24 March 2006). The period of remand of 02 months as against the sentence of 14 years was not considered significant.

[13] The Supreme Court in **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016) without any reference to ***Vasuca***, however, held that section 24 of the Sentencing and Penalties Act is mandatory in that the court **shall** regard any period of time during which the offender has been held in custody prior to the trial as a period of imprisonment already served by the offender, 'unless a **court** otherwise orders'.

Nevertheless, the Supreme Court stated that in doing so it is not necessary to make an exact allowance for days or even weeks spent on remand. It depends upon its total significance. The burden under section 24 is cast not upon the Corrections Department but upon the sentencing court.

[14] The Supreme Court in ***Sowane*** observed that the practice of discounting the remand period by subsuming it in the mitigating factors also served the spirit of the Sentencing and Penalties Act similar to discounting it separately from the mitigating factors. However, the methodology of deducting the time spent on remand at the end after arriving at the appropriate sentence following the usual sentencing procedure and then specifying the head sentence and non-parole period was recommended as the preferred or proper way to give effect to section 24. In the end, the Supreme Court, considering the time spent in custody awaiting trial, discounted 01 year and 04 months from the sentence of 12 years of imprisonment.

[15] In the recent case of **Eremasi Tasova v The State** Criminal Petition CAV 0012 of 2019 (25 August 2022) the Supreme Court, again without any reference to ***Vasuca,*** has confirmed ***Sowane*** and given the benefit of 01 year and 11 months in remand to the appellant and adjusted the sentence accordingly.

[16] The appeal ground raised by the appellant concerns only the methodology of discounting the period of remand, for it is clear from paragraph 6 of the sentencing order that though the trial judge had considered the appellant's period of remand under mitigation, the full period of remand had been separately deducted from the sentence and not subsumed in the total discount for mitigating factors. In other words, out of 19 years of imprisonment (14 years starting point plus 05 years for aggravating factors) the trial judge had deducted 01 year and 04 months of remand period leaving a balance of 17 years and 08 months before arriving at the final sentence of 16 years of imprisonment.

[17] Appellate courts have held in the past that the method or methodology used to discount the appellant's remand period involves no error of law or principle, for sentencing is not a mathematical exercise but an exercise of discretion involving the

difficult and inexact task of weighing factors to arrive at a sentence that fits the crime (see **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017). In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) it was reiterated that the Supreme Court favoured the approach of granting the discount for the remand time to be dealt with last (*i.e.* once the term and non-parole period is arrived at the court will set out a suitable discount for the period of remand) but it did not rule out or consider any other method to be an error of law.

[18] In my view, although the application of section 24 involves a question of principle, the method or methodology of discounting the remand period does not, as long as an offender is given the benefit of his remand period to be reflected in the sentence to be served by him. In this appeal, even if the trial judge had followed the preferred methodology of discounting the period of remand at the end of the usual sentencing process, he would still have ended up with the same head sentence. Therefore, there is no sentencing error in principle.

02nd ground of appeal

[19] The appellant's complaint is that his sentence is at the higher end of sentencing tariff applicable at the time of sentencing. The sentencing tariff applicable to juvenile rape was 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)] until it was increased to 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). Where within that range should the starting point be?

[20] 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.

[21] 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 stated that it is too mechanistic an approach, for sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[22] The Supreme Court once again said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that whatever methodology judges choose to use, the ultimate sentence should be the same. 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.

[23] The Supreme Court in ***Kumar*** identified another instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. That would be another example of 'double-counting', which must be avoided.

[24] 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.

[25] The learned trial judge at paragraph 4 had stated regarding the aggravating features in the sentencing order as follows:

> *'4. In this case, the aggravating factors were as follows:*
>
> *(i) Breach of Trust. You were the complainants' grandfather. Their mothers were your biological daughters. At the time of the offences, they were 13 to 15 years old. As their grandfather, they look up to you for guidance and security. As their grandfather, you were supposed to look after them, and see that no-one harms them. However, you did the unthinkable. Instead of protecting them, you raped them. This was a serious breach of the trust they had in you.*
>
> *(ii) Rape of children. This type of offending is becoming prevalent in our community. The courts had said so many times before that, it will not idly stand by and let children be treated in this way. It will step in and pass heavy sentences, as a warning to others, not to abuse children. As the courts had repeatedly said before, the children of this country are its future.*
>
> *(iii) The use of a cane knife to threaten the child complainants. During the offences, you continually used a cane knife and a kitchen knife to threaten your granddaughters before raping them. You are really a coward by threatening children with knives. This is the lowest type of act a person could do to children.*
>
> *(iv) Use of a rope and cloth to subdue complainant No. 2 in count no. 5. You used a cloth to tie around the complainant's mouth to stop her from raising the alarm. Then you tied her wrists and ankles with a rope to stop her from resisting you. Then you raped her, while your wife was lying down sick in another room. You should not complain when you are given a heavy sentence to pay for your crimes.'*

[26] Firstly, it appears that the trial judge may in all probability have taken at least some of the factors set out under aggravating features in picking the starting point close to the higher end of the tariff of 10-16 years. Then, he had added 05 years for the 'aggravating factors'. It is not on record as to what aggravating factors had been taken into account in taking a high starting point of 14 years but in enhancing it by 05 more years all the aggravating factors set out in paragraph 04 had presumably been taken into consideration. There seems to be double counting in the process.

[27] Secondly, rape of children had been considered as one of the aggravating factors in enhancing the sentence by 05 years. However, the tariff of 10-16 years had been set for rape offences involving juveniles (less than 18 years of age). They include

children (under 14 years - children and 14 - 18 years - young persons). Thus, there can be a concern as to whether there is another form of double counting here as well.

[28] Thus, there appears to be a sentencing error of possible double in the sentencing process. 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).

[29] The ultimate sentence of 16 years is still within the then existing tariff. The facts as stated in the summing-up where the appellant had preyed on his two granddaughters several times over in a most intimidating manner shock the conscience of any decent human being. I think there are more aggravating features than even listed by the trial judge. The appellant did not deserve the discount of 01 years and 08 months for having not offended in the last 10 years, for he had committed not only one act but five acts of rape spanning over 07 months. As the Supreme Court remarked in ***Aicheson*** the trial court is entitled to impose a harsh sentence to reflect the overall criminality of the appellant's several acts of rape, for he was the biological grandfather of the victims who were two of his granddaughters. The degree of the aggravating under which the offences was committed was very high.

[30] After ***Aicheson*** the range of sentences for juvenile rape now stands at 11-20 years of imprisonment. It has been consistently held that the offender must be sentenced in accordance with the sentencing tariff applicable at the date of sentencing [**Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200, **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) and **Tagidugu and another v State**

AAU 109 of 2016 and AAU 137 of 2016 (26 May 2022)]. Therefore, the sentence imposed on the appellant by the trial judge should be considered by this court in the light of the tariff of 11-20 years of imprisonment for juvenile rape. On that score too the sentence of 16 years is well within the tariff.

[31] Therefore, both grounds of appeal urged by the appellant cannot succeed and the appeal should stand dismissed.

Gamalath, JA

[32] I agree with the draft judgment of Prematilaka, RJA.

Bandara, JA

[33] I have read in draft the judgment of Prematilaka, RJA and concur with the reasons and proposed orders therein.

Order of the Court:

1. Appeal against sentence dismissed.

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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 W. Bandara
JUSTICE OF APPEAL