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

CRIMINAL APPEAL NO.AAU 093 of 2020
[In the High Court at Lautoka Case No. HAC 21 of 2017]

BETWEEN : **SOLOMONI TIKO**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. N. Mishra for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **13 July 2022**

Date of Ruling : **15 July 2022**

RULING

[1] The appellant had been charged in the High Court at Lautoka with four representative counts of rape contrary to section 207(1) and (2) (a) under the Crimes Act No. 44 of 2009 on LT (name withheld) on four different occasions from 2012 to 2015 at Maururu and Vutuni, Ba in the Western Division.

[2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was guilty rape under count 01, attempted rape under count 02 and not guilty under of count 03. He had been acquitted of count 04 at the close of the prosecution. The learned High Court judge had agreed with the assessors and convicted the appellant accordingly. The appellant had been sentenced on 26 June 2020 to an aggregate sentence of 17 years and 08 months and 25 days of imprisonment with a non-parole period of 15 years.

[3] The appellant's appeal is timely and he is canvassing both the conviction and sentence. Both the Legal Aid Commission and the state had tendered written submissions for the leave to appeal hearing.

[4] 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. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (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). For a ground of appeal timely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[6] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows.

Conviction

1. That the learned trial judge erred in law and fact when he failed to properly and fully assess the evidence in relation to the (i) conduct of the complainant at the time of the offending and surrounding circumstances in count 1 (ii) the offence

occurring I Maururu, Ba and not Vutuni, Ba in 2013 as alleged in count 2. Therefore, this has resulted in an unsupported conviction.

Sentence

2. *That the learned judge erred in law and principle in imposing a sentence that was excessive, severe, and manifestly harsh in the circumstances of the case by (i) electing a high starting point that may have well included aggravating factors and further enhancing the sentence by 06 years for aggravating factors thereby failing into the trap and error of double counting.*

01st ground of appeal

[7] Contrary to the appellant's complaint, the trial judge had in fact directed the assessors at paragraphs 53-60 of the summing-up on the circumstances surrounding count 01 including LT's age, her conduct, others living with her at the time of the incident, the room LT was sleeping etc. and addressed himself of the same at paragraphs 7 and 8 of the judgment.

[8] The appellant asserts that LT's evidence in relation to count 01 is improbable in as much as the appellant was sleeping with LT's sister in that night and LT had not attempted raise cries or to tell anyone as to what happened.

[9] It appears from evidence that it was not impossible for the appellant to move discretely to the other bed in the same room where LT was sleeping to commit the act of alleged rape and her mother was in any event sleeping in the living room and she could not have noticed the movement of the appellant.

[10] LT had explained in evidence why she could not raise cries (see paragraphs 58 of the summing-up and 8 and 34 of the judgment) and why she did not confide to anyone of what the appellant had done to her until her teacher Amalaini Vakatale had gained enough trust and confidence from LT for her to tell the teacher the past events (see paragraphs 17-19 of the judgment).

[11] The appellant also submits that recent complaint evidence is only relevant to events in 2015 of which the appellant was acquitted at the close of the prosecution case. However, recent complaint evidence is not a *sine qua non* in cases involving sexual offences. It

would only go to the complainant's consistency and thus, enhance the credibility of the complainant.

[12] Regarding the appellant's submission that the second count alleges that the act of rape had occurred at Vutuni, Ba whereas LT had said in evidence that the incident of attempted rape relating to the second count happened at Maururu, Ba making her evidence unreliable.

[13] If LT was not telling the truth but falsely incriminating the appellant, she could have simply asserted that the appellant committed rape instead of attempted rape in relation to count 02. Thus, the discrepancy in relation to the exact place (Ba is the place of offence according to count 02 and Vutuni and Maururu are places in Ba) in the context where several acts of sexual abuse had occurred over a long period of time is not fatal, in my view to the conviction on attempted rape under count 02. The appellant could not have been materially prejudiced or misled by the change of exact place of the offending. The appellant's stance was that of a denial in relation to all counts whether the alleged incidents took place in Vutuni or Maururu. The counsel for the appellant had not sought any redirections on the point of change of place of offence under the second count either which suggests that it was not material to his defense.

[14] Therefore, I do not think that there is a reasonable prospect of success in the first ground of appeal.

02nd ground of appeal (sentence)

[15] The appellant complains of double counting in the sentencing. The trial judge had picked 13 years as the starting point and added 06 years for aggravating factors. The complaint is that the aggravating factors such as breach of trust, age difference (LT was 12 years when the first act of rape took place and the appellant was 68 years), planning, exposure to sexual abuse at a young age etc. may have been considered in selecting the starting point based on supposed 'objective seriousness' of the offending.

[16] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) the Supreme Court raised concerns of the error of double counting.

[17] According to the Supreme Court many things which make these crimes 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 will already have been reflected in the tariff itself. The Supreme Court further 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.

[18] 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.

[19] The trial judge had set out aggravating factors at paragraph 10 of the sentencing order while he at paragraph 19 had fixed the starting pint of 13 years for 'objective seriousness' of the crime and enhanced it by 06 years for aggravation.

[20] Since the trial judge had not made it clear what exactly had gone into selecting the starting point of 13 years, 02 years above the lower end of the tariff, it is difficult at this stage to unequivocally conclude that he had not even unwittingly considered at least some of the aggravating features in selecting the starting point.

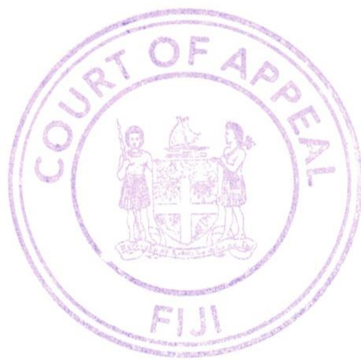
[21] However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [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). But, a sentence within the permissible range would not always fit the gravity of the crime.

[22] Therefore, I would rather leave it to the full court to decide on the ultimate sentence leaving the controversy of double counting aside. However, I cannot affirmatively say that the appellant has a reasonable prospect of success in that endeavor.

Orders

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



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