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

CRIMINAL APPEAL NO.AAU 33 of 2021
[In the High Court at Suva Case No. HAC 194 of 2020]
[Magistrate's court at Ba case No. 047 of 2007]

BETWEEN	**:**	**MOHAMMED HAROON RASHEED**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person (absent)**
	:	**Ms. Luisa Latu for the Respondent**
Date of Hearing	**:**	**11 August 2023**
Date of Ruling	**:**	**14 August 2023**

RULING

[1] The appellant had been charged with two counts of rape and two alternative counts of incest by males under the Penal Code Cap. 17 at the Ba Magistrate's Court. The victim was his 11 year old biological daughter. The amended charges were as follows:

FIRST COUNT

(Representative count)
Statement of Offence
RAPE*: Contrary to section 149 and 150 of the Penal Code, Cap 17.*

Particulars of Offence
MOHAMMED HAROON RASHEED *between the months of December 2005 and January 2006 at Tavua in the Western Division, had unlawful carnal knowledge of Z. S. N, without her consent.*

SECOND COUNT

Statement of Offence
RAPE*: Contrary to section 149 and 150 of the Penal Code, Cap 17.*

Particulars of Offence

> ***MOHAMMED HAROON RASHEED*** *on the 29th day of November, 2006 at Tavua in the Western Division, had unlawful carnal knowledge of Z. S. N. without her consent.*

[2] The prosecution called three witnesses whereas the appellant exercised his right to remain silent. On 27 November 2020, the learned Magistrate found the appellant guilty of both counts and he was convicted as charged. The case was then sent to the High Court for sentencing pursuant to section 190 (1) of the Criminal Procedure Act.

[3] The victim was the biological daughter of the appellant. In 2005 the victim was 11 years of age and a class 6 student. On one occasion during the school holidays in December, 2005 the victim was alone at home with the appellant. At around midday the appellant was watching a blue movie and he forced the victim to watch it as well. The victim tried to run away but the appellant had caught her and forcefully taken her into the bedroom. In the bedroom he had removed her clothes and his clothes and he pushed the victim onto the bed and started kissing her.

[4] Thereafter the appellant had inserted his penis into the victim's vagina and engaged in forceful sexual intercourse with her and she had felt pain. After the appellant finished he had warned the victim not to tell her mother about what he had done to her.

[5] The next day during night time the appellant had taken the victim from her mother's bedroom to her grandmother's bedroom where he forcefully had sexual intercourse with her. The victim had tried to escape but could not because the door of the room was locked by the appellant.

[6] On 29 November 2006 the victim was sleeping when she was awoken by the appellant and she was then forcefully taken to the appellant's bedroom. In the bedroom he had forcible sexual intercourse with her.

[7] On all occasions the victim did not consent to what the appellant did to her. According to the victim, her father was not supposed to be doing all these things to her. During a school counselling program she had told one of her friends about what the appellant had done to her. Thereafter, the victim's school teacher was informed and the matter was reported to the police. The appellant had been arrested, caution interviewed and charged.

[8] The appellant had lodged a timely appeal against conviction and sentence. 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)].

[9] Further guidelines to be followed 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].

[10] The grounds of appeal urged by the appellant are as follows.

Conviction

Ground 1

THAT the learned trial Judge erred in law when His Lordship misdirected himself with regards to the burden of proof causing a miscarriage of justice..

Ground 2

THAT the trial learned trial Judge erred in law when His Lordship did not direct the assessors hold to assess the inconsistent statement of the complainant victim a miscarriage of justice.

Ground 3

THAT there is a very likely hold of chances of success (not just arguable) of appeal against conviction for reasons for being that there are series of misdirections, inconsistencies, improbabilities and infirmities in the learned trial Judge judgment that he failed to care of take into account to reach a just and fair decision in his judgment.

Sentence:

Ground 4

THAT the sentence is harsh and the learned sentencing Judge failed to consider the mental situation of the accused. .

Ground 5

THAT the learned sentencing judge failed to consider that the accused was charged under Penal Code Cap 17 and he should be sentenced under the Penal Code.

01st ground of appeal

[11] Contrary to the appellant's assertion, the learned Magistrate had dealt with burden and standard of proof at paragraph 26 of the judgment. He had examined the prosecution witnesses' testimonies at paragraphs 5-19 of the judgment and analysed the ingredients of the offence and the supportive evidence at paragraphs 27-32 and concluded that the prosecution had proved the case beyond reasonable doubt at paragraph 33.

[12] The nature of the enquiry to be carried out by the High Court under section 190(3) of the CPA is to ascertain the facts found by the magistrate, as well as any other facts, which may be relevant to the determination of the proper sentence. The argument that somehow section 190 creates some form of mechanism for the procedure by which the conviction was reached to be reviewed – in addition to an appeal under section 190(4) – falls away [vide **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)]

02nd ground of appeal

[13] The inconsistency highlighted by the appellant relates to where the grandmother and other siblings were at the time of the incidents. For example the appellant posed the question whether the grandmother and other siblings would not have been alerted by the victim's struggle to escape. However, this is essentially a trial issue which should have been canvassed at the trial and not taken up as an appeal point for the first time.

[14] Similarly, the appellant points out the inconsistency in the victim's evidence as to who wrote the letter dated 15 August 2017 on which the victim was cross-examination. She first said that it was by an uncle but explained later that it was her mother's brother.

[15] I do not think that the alleged inconsistencies affect the gravamen of the victim's evidence in any way. They do not go to the root of the victim's evidence or shake the foundation of her testimony (see **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)

03rd ground of appeal

[16] The appellant had not particularised the alleged misdirections, inconsistencies, improbabilities and infirmities in the judgment. The only aspect the appellant seems to have canvased is corroboration of the victim's evidence.

[17] While in terms of section 129 of the Criminal Procedure Act, 2019 there was no need of corroboration of the victim's evidence, nevertheless there was adequate corroboration in the form of medical evidence and the appellant's own confessions in his cautioned interview.

04th and 05th grounds of appeal (sentence)

[18] The maximum sentence for rape under the Penal Code was life imprisonment. Section 6(2) of the Sentencing and Penalties Act, 2009 requires the sentencer to take into account and apply any sentencing guideline judgment.

[19] According to **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff for juvenile rape is between 11 to 20 years' imprisonment. The approach adopted in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) is that a new tariff applies to all sentencing that takes place after that date regardless of when the offending took place (see **Zhang v R** [2019] NZCA 507).

[20] There is nothing objectionable in the two-tier methodology adopted by the learned High Court judge in the matter of sentence. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. 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)]. The approach taken by the appellate court in an appeal against sentence 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)].

[21] For the appellant, the sentence is neither excessive nor harsh for committing rape of his biological daughter aged 11 years and showing no remorse at all till the very end.

Orders

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
RESIDENT JUSTICE OF APPEAL