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

CRIMINAL APPEAL NO.AAU 027 of 2021
[In the High Court at Suva Case No. HAC 284 of 2016]

BETWEEN	**:**	**UPENDRA DASS**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	**:**	**28 August 2023**
Date of Ruling	**:**	**29 August 2023**

RULING

[1] The appellant, aged 50 had been charged with one count of sexual assault and one count of rape under the Crimes Act, 2009 at Suva High Court. The victim was a 15-year-old female. The charges were as follows:

*'**FIRST COUNT***

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***AD** on the 24th day of July 2016 at Nasinu in the Central Division penetrated the vagina of **AC** with his tongue, without her consent.*

SECOND COUNT

Statement of Offence

***SEXUAL ASSAULT**: Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***AD** on the 24th day of July 2016 at Nasinu in the Central Division unlawfully and indecently assaulted **AC** by sucking her breast.*

[2] The assessors had unanimously opined that the appellant was guilty. The learned High Court judge found the appellant guilty of rape and he was convicted accordingly. On 22 February 2018 the appellant was given a sentence of 14 years imprisonment for rape and 04 years for sexual assault with a non-parole period of 12 years; both sentences to run concurrently. After the pre-trial remand period was discounted the sentence became 12 years and 04 months with a non-parole period of 10 years and 04 months.

[3] The High Court judge had summarised the facts in the summing-up as follows.

37. The Complainant was staying with her father at his home on the 23rd of July 2016. She had been living with her mother, but moved to live with her father recently. Her father came home in the evening with a friend of him, the accused. The accused slept at their home in that night. The following morning, her father went to work, leaving the accused and the Complainant at home. The Complainant woke up and found the Accused was still asleep. She asked him when he will leave, for that he answered that he was going soon.

38. The Complainant then attended her normal house work. After completing her house works, she went to her room to have some rest. While she was lying on the bed, the Accused came into her room. She asked him why he was coming into her room. He did not answer, but kept on coming towards her. She got up and tried to push him. The Accused pushed her down to the bed. He then covered her mouth with one of his hands, when she tried to scream and shout. He then removed her upper dress and started to suck her breast. He then went down to the lower part of her body and started to suck inside her vagina. The Complainant in her evidence said that she felt that he sucked inside her vagina. The accused did it for sometimes. When she tried to get her mobile phone and call her father, he threw it away. After that he left the room, but remained inside the sitting room. The Complainant received a call from her father, asking her to bring him the bottle of honey. She then went to the bus-stand and gave it to him. The Complainant, in her evidence, said that she wanted to tell her father, but she felt scared, without knowing whether her father would shout at her or believe her story. The Complainant then comes home.

39. The Complainant further explained in her evidence that she was new to the area and did not know the people who are living in the vicinity. She said that

she had no place to go. That was the reasons she stayed inside the house even after this incident. While she was staying inside her room, the Accused came into the room again, asking her to have sex with him. At that point of time, she heard that someone was knocking the front door and calling the name of her father. It was uncle Filimoni. The Complainant said that she felt that there is someone who can help her. She went and opened the door and ran into him. She hugged him and cried. According to the evidence given by Filimoni, she was scared, sweating, crying and shaking. She told him that a man who was inside the house was trying to rape her. Uncle Filimoni then saw the Accused was trying to flee way from the back door. He chased him after and caught him. Uncle Filimoni brought the Accused back to the house. He then called the father of the Complainant and the Police. The Police then came and took the Accused to the Police Station

[4] The appellant had admitted in agreed facts that he entered the room of the complainant, when she was lying down on the bed and sucked her breast and her vagina. The appellant had been present when the trial commenced but had chosen not to attend during the hearing after the morning tea break. Therefore, the High Court had proceeded with the hearing in the absence of the appellant.

[5] The appellant in person had filed an untimely appeal against conviction and sentence. The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] 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].

[7] The delay is about 02 years and 11 months which is very substantial. The appellant has blamed the trial counsel for the failure to file appeal papers in time. I have no material before me to substantiate his explanation. However, I have seen many an appellant filing appeals in person either without delay or with a minimal delay. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds of appeal urged by the appellant are as follows:

Conviction:

Ground 1

THAT the learned trial Judge may have fallen into an error of law when His Lordship failed to give the appellant the right of election as per section 4 (1) (b) of the Criminal Procedure Act on the charge of Sexual Assault

Ground 2

THAT the learned trial Judge may have fallen into an error of law when His Lordship failed to direct himself about the defective charge of Rape as it is irrelevant to the summary of facts.

Ground 3

THAT the learned trial Judge may have fallen into an error of law when His Lordship misdirected himself and the assessors and the disputed issues to be determined in respect of the offence of Rape and the direction on the issues of consent when he stated several times that the appellant inserted his tongue into the vagina of the complainant thereby directly implicating the appellant to the issue of penetration causing a substantial miscarriage of justice.

Ground 4

THAT the learned trial Judge has caused a miscarriage of justice without having regard to the totality of evidence at trial, in particular to (i) to finding that there was penetration but the State failed to prove beyond reasonable doubt that the sucking of the vagina amounts to inserting and /or penetration; and (ii) in accepting the complainant and her evidence as credible with total disregard to the failure of the State to establish that the sucking of the vagina is similar to the inserting of the vagina and /or penetration.

Ground 5

THAT the verdict is unreasonable having regard to the evidence.

Ground 6

THAT the learned trial judge erred in law when he contradicted and misdirected himself in the direction given in the summing up when assessing the testimony of the witnesses.

Ground 7

THAT the learned trial Judge erred in law when he failed to consider that there were severe inconsistencies in the complainant's report to the police and the evidence given in court thus causing a substantial miscarriage of justice.

Ground 8

THAT the learned trial Judge erred in law in not accepting the evidence given by the appellant without cogent reasons.

Sentence

Ground 9

THAT the learned trial Judge erred in principle by double counting having considered aggravating factors that reflected already in selecting a starting point.

Ground 10

THAT the learned trial Judge erred in law by failing to deduct the 1 year and 8 months remand period.

Ground 11

THAT the learned trial Judge took into account irrelevant factors in considering the sentence.

01st ground of appeal

[9] The State admits that the appellant does not appear to have been given the right of election either in the Magistrate court or in the High Court (there is no right of election in the High Court anyway) with regard to the charge of sexual assault which is an indictable offence triable summarily [section 210(1)(b)] in terms of section 4(1)(b) of the Criminal Procedure Act, 2009 (CPA).

[10] In **Tasova v Office of the Director of Public Prosecutions** [2022] FJSC 43; CAV0012.2019 (26 September 2022) the accused was charged with indictable offences and a summary offence arising out of the same facts. The magistrate in the

exercise of discretion conferred upon him transferred the entire case to the High Court. Considering section 100(3) of the Constitution and sections 188 and 191 of CPA, the Supreme Court held that that

> *'36. It is more appropriate for Magistrates to transfer proceedings to High Court where the accused is charged with indictable offence (over which High Court has exclusive jurisdiction), and summary offence arising out of same facts for the simple reason that common sense and public interest dictates that the offences arising out of same facts ought to be tried once before one Judicial Officer. This will surely ensure that victims of crimes are not put to undue inconvenience and that there is no inconsistency in finding of facts and application of legal principles in addition to the delay that will ensue if two judicial officers will be involved in dealing with charges arising out of same facts.'*

[11] The Supreme Court further held that

> *39.b '**Indictable Offence Triable Summarily**: The accused has right to elect to be tried in the Magistrate Court or the High Court pursuant to ss4(1) (b) and 35(2) of the CPA.*
>
> *If the accused elects trial by Magistrate and if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in the exercise of his or her discretion transfer the proceedings to the High Court.*

[12] In this case, the appellant had apparently not been informed of the right to election and as a result he had made no election at all. The question is whether even in that situation the magistrate had the power to transfer the summarily triable indictable offences to the High Court along with the indictable offence/s.

[13] In **Batikalou v State** [2015] FJCA 2; AAU31.2011 (2 January 2015) the Court of Appeal held with reference to a summarily triable indictable offence that the appellant possessed a legal right to choose to be tried either in the Magistrate's Court or the High Court, a right given by law and this right cannot be arbitrarily be taken away. However, in **Kumar v State** [2021] FJCA 243; AAU0009.2019 (29 October 2021) where the appellant was charged in the High Court with one count of rape and one count of sexual assault (which was not in the charge sheet in the Magistrates court but included by the DPP in the High Court), the State argued that section 191 of the Criminal Procedure Act, 2009 empowers a magistrate to transfer any charges or proceedings to the High Court and in terms of section 198(2), in the information, the

Director of Public Prosecutions may charge an accused with any offence. Section 59 of the Criminal Procedure Act supports that proposition. Thus, the single Judge of this court held in ***Kumar*** that

> *'[40] Thus, an information may contain not only indictable offense but also indictable offences triable summarily and summary offences.*
>
> *'[41] ……..that public interest and efficient administration of justice achieved by joinder of charges upon a single trial into all offences would be lost if the appellant's contention is upheld. In other words, if the appellant had been given the election and he had elected to be tried in the Magistrates Court on the sexual assault charge there would have been two parallel trials in the High Court (rape) and the Magistrates court (sexual assault) where the same evidence would be led; one before the High Court judge with assessors and the other before the Magistrate. I do not think that the legislature would have intended such an outcome and no interpretation that would lead to absurdity should be adopted.'*

[14] If ***Tasova*** is considered an authority for the proposition that even when the accused elects to be tried by the Magistrates court, the Magistrate may still in his discretion transfer the case to the High Court, the question still remains whether such course of action could be adopted when the right to election had not been put to the accused at all rendering section 4(1)(b) of the Criminal Procedure Act, 2009 (CPA) a nullity.

[15] If an accused is charged with only an indictable offence and he is transferred to the High Court by the Magistrate then adding a summarily triable indictable offence to the information for the first time by the DPP seems quite possible because the DPP may charge an accused with any offence in the High Court. However, can the DPP do so when the accused is already arraigned for a summarily triable indictable offence with or without an indictable offence before the Magistrates court but sent to the High Court unless the right to election is given to the accused in respect of the summarily triable indictable offence in the MC and against his election the Magistrate in his discretion transfers the case to the High Court?

[16] I think this is a pure question of law that no leave is required to go before the full court.

02nd ground of appeal

[17] This ground of appeal is misconceived. I do not see any defects in the two charges.

03rd ground of appeal

[18] The trial judge at paragraphs 20, 21, 32 and 33 had directed the assessors that they should find the appellant guilty only of sexual assault if they did not find penetration of the victim's vagina (in fact should have been vulva too) by the appellant with his tongue but he only sucked her vagina. The trial judge had stated in the judgment also that upon careful perusal of the evidence presented during the hearing and the agreed facts tendered by the parties, he found that the two main disputed issues in respect of the offence of rape were whether the appellant penetrated the vagina of the victim with his tongue, and whether the victim consented for the appellant to penetrate her vagina in that manner. In respect of the offence of sexual assault, according to the trial judge the main issue was whether the appellant had a lawful authority or excuse (in this case the consent of the victim) to suck her breast in that manner. At no stage had the trial judge stated several times that the appellant had indeed inserted his tongue into the victim's vagina.

04th ground of appeal

[19] The totality of evidence unmistakably points to the appellant having not only sucked the victim's vagina but had also inserted his tongue into her vagina. Even if the penetration was into her vulva that was sufficient to constitute rape.

[20] According to the victim's evidence, the appellant having removed her upper dress started to suck her breast. He then went down to the lower part of her body and started to suck inside her vagina. She had felt that he sucked inside her vagina for some time. This clearly constitutes penetration. Even slightest penetration is sufficient.

05th ground of appeal

[21] The test for a verdict being unreasonable or cannot be supported having regard to the evidence is that by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including that of the appellant, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt or not as to proof of guilt beyond reasonable doubt (vide **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) at para [8] to [24] and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) at para [36] to [44] and whether the trial judge could have reasonably convicted on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[22] Having perused the summing-up and the judgment, I do not see any real prospect of the verdict being declared as unreasonable or cannot be supported having regard to the evidence based on the above criteria. On the totality of evidence it was open to the assessors to find the appellant guilty of rape and the trial judge too could have reasonably convicted the appellant for rape on the evidence before him.

06th ground of appeal

[23] This ground is simply unsustainable, for I see no basis for the appellant's complaint on the trial judge's summing-up which is a very fair, well-balanced and objective.

07th ground of appeal

[24] The trial judge was fully conscious of certain inconsistencies or discrepancies in the victim's evidence *vis-à-vis* her police statement. He had directed the assessors how to deal with such inconsistencies and omissions in the summing-up (see paragraphs 47-51) and considered them in the judgment as follows.

> *8. The learned counsel for the defence urges that the inconsistency nature of the evidence given by the Complainant in court with the statement made to the Police, renders the evidence of the Complainant unreliable. It is true that the*

> *Complainant in her evidence admitted that certain incidents, which she testified in evidence, have not been recorded in the statement that she made to the police. However, I find those incidents are peripheral issues and have not affected the root of the main dispute. Therefore, I do not find the alleged inconsistencies or the omissions have affected the credibility or the reliability of the evidence given by the Complainant.*

[25] An undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses and therefore the broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. Mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [14] & [15].

08th ground of appeal

[26] The appellant did not give evidence and therefore what was before the trial judge was his admission that he sucked the victim's breast and vagina. The trial judge fully addressed the assessors and himself on this aspect of the case.

09th ground of appeal (sentence)

[27] The appellant complains of the sentencing judge having taken the starting point at 12 years resulting in double counting. According to **Raj v State** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014) sentencing tariff for juvenile rape was between 10 to 16 years' imprisonment [which was later increased in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) to 11-20 years]. The complainant was 15 years of age at the time of the incident and a juvenile.

[28] The trial judge had set out the facts of the case including at paragraph 4 the gross breach of trust committed by the appellant and then why child rape had been treated seriously warranting heavy sentences before picking the starting point of 12 years

considering level of harm, culpability and seriousness. In **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) Keith J said that

> *[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,….'*

[29] In **Kumar v The State** [2018] FJSC 30 Keith J had earlier said that 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. Lower [end] of the tariff for the rape of children and juveniles is long and they reflect the gravity of these offences which 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.

[30] As stated in ***Nadan*** it appears that at least breach of trust had been a factor in taking the starting point of 12 years which was again considered as an aggravating factor at paragraph 12 of the sentencing order to enhance the sentence by 03 more years. Thus, there is a lurking doubt whether the trial judge double counted the same aggravation in the sentencing process.

[31] 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)].

[32] Due to these reasons, I think it is best that the full court may revisit the sentence and decide the propriety of the sentence.

10th ground of appeal

[33] The trial judge had indeed discounted the pre-trial remand period of 01 year and 08 months in arriving at the final sentence.

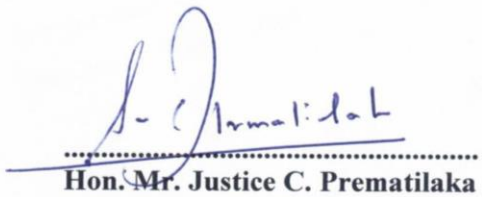
11th ground of appeal

[34] The trial judge is not shown to have taken into account any irrelevant matters in the sentencing process. The sentence of 12 years and 04 months with a non-parole period of 10 years and 04 months is within the tariff set in ***Raj.***

Orders

1. Appeal against conviction could proceed to the full court only on the 01st ground of appeal involving a pure question of law. In respect of other grounds of appeal enlargement of time to appeal against conviction is refused.

2. Enlargement of time to appeal against sentence is allowed only on the 09th ground of appeal.



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