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

CRIMINAL APPEAL NO. AAU 098 of 2020
[In the High Court at Suva Case No. HAC 303 of 2018]

BETWEEN	**:**	**SIRELI KOYAMAIBOLE**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**03 March 2023**
Date of Ruling	**:**	**06 March 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Suva on a single count of assault with the intention to commit rape contrary to section 209 of the Crimes Act, 2009 and a single count of rape contrary to section 207(1) and (2) of the Crimes Act, 2009 committed on 15 July 2018 at Muana Village, Tailevu in the Eastern Division.

[2] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him on both counts and sentenced him on 29 July 2020 to a period of 14 years imprisonment with a non-parole period of 12 years.

[3] The appellant's appeal in person against conviction and sentence is timely.

[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 and sentence 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] 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 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[6] The sentencing order has summarized the evidence as follows:

> *'[2] The incident occurred on 15 July 2018 at Muana village, Tailevu. The couple shared a home with the victim's aunt. On the day of the incident the victim was preparing to celebrate her daughter's birthday when the offender approached her for sex. Her response to his request was that she was busy cooking for the celebration. He got agitated and accused her for being unfaithful. She did not react as she knew he had been drinking the previous night. In the evening when the victim entered her room the offender assaulted her and knocked her down. He kicked her while she was on the floor. She called out to her aunt in distress. Her aunt heard the call but she too was scared to intervene because she had witnessed violence on the victim by the offender in the past. The offender pushed the victim on the bed, removed her underwear and raped her. He was forceful. She was too weak to resist. After having sexual intercourse the offender told the victim that that is all he wanted.*

[3] The victim's pain was unbearable. She wanted to go to the hospital but he stopped her. He was concerned that he would be exposed when the doctor will see the victim's physical injuries. She had a bruise on her forehead and swelling on her scalp. Her arm was hurting. Two days later when the offender left the home for work, the victim reported the incident to police.'

[7] The aunt of the complainant, Ms. Nauluca had told that on 15 July 2018 at around 8pm she heard the complainant call out to her in distress from her room but she did not intervene because she was afraid of the appellant.

[8] Dr. Natuva, the doctor who examined the complainant on 17 July 2018, had found an abrasion on the complainant's forehead and swelling on her scalp. She did not find any vaginal injuries.

[9] The appellant in his evidence had said that on the day in question the complainant raised a cane knife on him and that is why he had assaulted her. He had said that he pushed her and she fell on to the steps. He had then stepped on her hand to grab the knife off her. He had also thrown punches on her forehead and ribs. However, he had denied having sexual intercourse with her on 15 July 2018. According to him, at midnight he woke up and saw her trying to hang herself. He had then rescued her and taken care of her. The next day he had asked her for her forgiveness and had consensual sex with her. On 17 July 2018 he left home for work and returned home with another woman.

[10] The complainant had been cross-examined about an argument that she had with the appellant when she noticed love bites on him. She had said that it was a different incident altogether. She said denied that she attacked the appellant with a knife on 15 July 2018.

[11] The grounds of appeal against conviction and sentence urged on behalf of the 01st appellant are as follows:

Conviction

Ground 1

THAT the Learned Trial Judge erred in law and facts having not directed the assessors and himself to assess and evaluate the issue of sexual intercourse since the appellant had denied the allegations of Rape but had consensual sex with the complainant.

Ground 2

THAT the Learned Trial Judge erred in law and facts having not directed the assessors and himself on how to approach the evidence of late complaint.

Ground 3

THAT the Learned Trial Judge erred in law and facts in failing to weigh the credibility of the Doctor's evidence (PW-3) in the issue of sexual intercourse that the (Doctor) did not find any vaginal injuries on the element of forceful sex without consent.

Ground 4

THAT the Learned Trial Judge erred in law and facts having not directing the assessors and himself to (pg28) of the Summing Up in regards to the issue of sexual intercourse, consented and non-consensual intercourse. The inconsistent evidence provided by the prosecution witness makes the conviction unsafe and stand to squash it should be allowed.

Ground 5

THAT the Learned Trial Judge erred in law and facts by not taking into account the evidence given by prosecution through there complainant that the time of the complainant was days after the incident or the alleged incident happened and this also stands to question the credibility of the complainant.

Ground 6

THAT the Learned Trial Judge erred in law and facts by not giving proper thought into the defence reasonable ground of acting towards the complainant. There was a reasonable doubt on the events that took place in which the complainant attacked the appellant with a knife and the appellant acted in self defence.

Ground 7

THAT the Learned Trial Judge erred in law and facts by not sufficiently adequately referring to the Medical Report by Dr. Natuva on trying to establish

the element of Rape. It's what Dr. Natuva stated that defeated the charge. Therefore, the question on how this charge of Rape was proved is questionable and there is element of bias in the Learned Trial Judge decision.

Ground 8

THAT the Learned Trial Judge erred in law by failing to warn himself and direct the assessors adequately and sufficiently on the danger of rely on the complainant evidence which is clearly contradicted and inconsistent by facts.

Sentence

Ground 9

THAT the Learned Trial Judge erred in principle in considering both the objective seriousness of the offence and the conduct of the appellant in enhancing the sentence that contributed to an element of the offences; and the factors that is already reflected in the starting point.

Ground 10

THAT the Learned Trial Judge erred in principle and in law when he deducted only 3 months of the period in custody or remand; and stating that 2 of his previous convictions are of sexual nature which is an error in law.

Ground 11

THAT the Learned Trial Judge erred in principle when he did not fully deduct the remand period of the appellant. Also the Learned Trial Judge misinterpreted the previous convictions of the appellant which stated that the appellant had previous sexual nature convictions. The appellant denies this.

01st and 04th grounds of appeal

[12] Both grounds appeal are concerned with the question of consent. The trial judge had addressed the assessors on this issue at paragraphs 26-30, 43 and 45. The trial judge had specifically addressed them on the conflicting versions where the prosecution case was that the appellant had intentionally applied actual force on the complainant by striking and kicking her without her consent and without lawful excuse and had sexual intercourse without her consent (paragraphs 33-37) and the defence case was that the appellant acted with lawful excuse in self-defence when the complainant attacked him with a knife but denied having sexual intercourse on that day but on the following day he had consensual intercourse with her (paragraph 41) and how to deal with these differing versions at paragraphs 6 and 42-44.

02nd and 05th grounds of appeal

[13] It does not appear that the defence had seriously contested the issue of delay of two days. The complainant's evidence was that she wanted to go to the hospital on 15 July but he stopped her. He had told her to lie to the doctor that she had fallen down. She did not go to the doctor that day. She went and reported the incident two days later and got medically examined after he left home for work on 17 July 2018. Thus, she had been held back for two days by the appellant from seeking medical assistance and reporting the incident. Though, there is no specific direction on delay, applying the 'totality of circumstances' test regarding how to assess a complaint of delay suggested in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), there cannot be a reasonable prospect of success based on this omission.

[14] The appellant's counsel had not sought redirections in respect of the alleged delay and such deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

03rd and 07th grounds of appeal

[15] The gist of the argument here is that medical evidence had not proved penetration thus casting a doubt about the allegation of rape.

[16] It is trite law that medical evidence is not direct evidence of penetration but secondary evidence of corroboration. However, in terms of section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence is necessary for that person to be convicted and in any such case the judge or magistrate is not be required to give any warning to the assessors relating to the absence of corroboration.

[17] The medical evidence in this case had corroborated the facial injuries suffered by the complainant allegedly at the hands of the appellant. However, no genital injuries had been found. Given the fact that the complainant was a married woman and could not offer much physical resistance, it is not altogether surprising to find lack of such injuries in her vagina. The appellant's counsel does not appear to have sought an explanation of this either from the doctor. Lack of medical evidence does not by itself prove lack of penetration or necessarily cast a doubt on penetration. The appellant's counsel had not sought redirections in respect of this aspect either.

06th ground of appeal

[18] The appellant's concern here is based on his evidence that he acted in self-defence. The trial judge had amply directed the assessors on self-defence at paragraphs 19 -23 and 41 and 43.

[19] Clearly, the assessors and the trial judge had disbelieved that the appellant acted in self-defence in inflicting some injuries on the complainant. Obviously, this defence was put forward in relation to the count on assault with the intention to commit rape and could not have been a defence for the allegation of rape.

[20] According to section 42 of the Crimes Act, 2009, the defence of self-defence is as a result of the words *"if and only if*", available as a statutory defence. However, there is no inconsistency between the common law principles of self-defence and section 42 of the Crimes Act, 2009. The defence will exonerate an accused person in the event that the prosecution fails to establish beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. This is the only basis upon which the use of force in self-defence will negate criminal responsibility for an offence. The test is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed. It follows that where self-defence is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of

his or her response to the threat [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[21] Paragraphs 19-21 of the summing-up have dealt with the above requirements adequately.

08th ground of appeal

[22] The appellant has not pointed out such inconsistencies or contradictions in the complainant's evidence as are fundamental to her narrative as to cause her testimony unreliable and untruthful.

[23] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), the Court of Appeal said:

> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, 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. As the 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.'*

09th ground of appeal (sentence)

[24] The trial judge had by and large not followed the two-tiered system of sentencing but adopted 'instinctive synthesis' method. There was no starting point highlighted. The trial judge has set out objective seriousness of the offence *per se* and subjective seriousness in terms of the conduct of the offender which exercise is, of course, part of the two-tiered methodology as well. However, no starting point or adjustments for aggravating or mitigating circumstances have been quantified in terms of the number of years. 03 months had been deducted for remand period. However, it is not clear from what sentence the 03 months were deducted. In the end the final sentence had been declared to be 14 years with a non-parole period of 12 years.

[25] The tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. Thus, the sentence is within but at the higher end of the tariff.

[26] The 'instinctive synthesis' approach has been recognized in the sentencing process in Fiji (see **Qurai v State** ([2015] FJSC 15; CAV24.2014 (20 August 2015) and approved in **Kumar & Vakatawa v The State** AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022).

[27] The Victorian Supreme Court in **R v Williscroft** [1975] VR 292 at 300 first coined the notion of an "instinctive synthesis" approach to sentencing in 1975, a concept which has been cited and refined multiple times since [see **R v Markarian** (2005) 228 CLR 357; **Hili v R** (2010) 242 CLR 520; **R v Morton** [1986] VR 863)] and which now refers to an exercise whereby "all relevant considerations are simultaneously unified, balanced and weighed by the sentencing judge" **(see Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 Law and Contemp Probs 265 at 268)**. As a result, the instinctive synthesis approach to sentencing has been characterised as "more art than science" (see **Krasnostein and Freiberg at 269.**).

[28] To this end, a judge does not need to explicitly lay out the reasons behind the sentence he or she arrives at, because all that matters is the sentence itself (see **Grant Hammond "Sentencing: Intuitive Synthesis or Structured Discretion?" [2007] NZ Law Review 211 at 213**). It is the intuitive weight that a sentencing judge decides to place on the circumstances of the offence and the offender after the benefit of hearing all the evidence which is important **(see JUDICIAL DISCRETION IN SENTENCING: A JUSTICE SYSTEM THAT IS NO LONGER JUST? Sean J Mallett)**.

[29] However, other judges and commentators have viewed this approach with a degree of consternation, noting a number of significant flaws. Kirby J of the Australian High Court felt that the approach lacked transparency and was a "retrograde step" (**Wong v R** (2001) 207 CLR 584 at [102] per Kirby J dissenting) because disclosure around how a particular sentence has been formulated and the reasons for that sentence should not be hidden by judicial reference to instinct or intuition, "which does little to provide any useful insight or engender public confidence in the task of sentencing" (see **Sally Traynor and Ivan Potas "Sentencing Methodology: Two-tiered or Instinctive Synthesis?" (2002) Sentencing Trends and Issues 25 at [4.2]**).

[30] Indeed, consistency itself is not of primary importance under the instinctive synthesis approach. Because judges do not need to explicitly set out the weight they give to certain factors when formulating their "intuitive" decision, it becomes virtually impossible to assess whether like offenders are routinely treated in the same way. This in turn means that "sentences can be inconsistent within a (potentially vast) margin of error yet [remain] legal" (see **Krasnostein and Freiberg at 269**.).

[31] A further problem around the instinctive synthesis approach is the underlying need for a clear rationale of sentencing. It is one thing to agree that judges should be left with discretion, so they may adjust the sentence to fit the particular combination of facts in the individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing to adopt in particular cases or types of case. Freedom to select from among the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts (**see Andrew Ashworth Sentencing and Criminal Justice (4th ed, Cambridge University Press, Cambridge, 2005) at [3.3.1**]). According to Ashworth, one of the major reasons for sentencing disparity are the different penal philosophies amongst judges and magistrates (At [3.3.1]). This problem would be magnified exponentially in a situation whereby sentencing judges have unlimited discretion to impose a sentence according to their subjective intuition. Intuitions will invariably differ, and can be plagued by bias, ignorance and prejudice (**see Mirko Bargaric "Sentencing: The Road to Nowhere" (1999) 21 Syd L Rev 597 at 609.**).

[32] On the other hand when a sentence is reviewed in 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). However, every sentence that lies within the accepted range may not necessarily fit the crime.

[33] Given the above discussion on the "instinctive synthesis" approach and the sentence lying at the top edge of the sentencing tariff for adult rape, I am inclined to grant leave to appeal against sentence so as to allow the full court to examine the propriety of the sentence.

10th and 11th grounds of appeal

[34] The appellant admitted at the hearing that he was in remand for this case only for 02 months and 12 days. The rest of the remand period is for a different case – CF 2096 of 2018. He had been accorded 03 months discount for the remand period by the trial judge.

[35] The appellant complains that the trial judge had treated two of his previous convictions as being of sexual nature when they were not. But, it is clear that those two offences were those of indecently annoying any person. Thus, they are of sexual nature.

[36] I have already discussed in **Naureure v State** [2022] FJCA 149; AAU151.2020 (12 December 2022) that a repeated offender obviously poses a greater threat to the community warranting a longer incarceration in order to keep him away from the community and facilitate a longer rehabilitation for him before being released to the society. This is not to punish the offender for his previous offences for which he has

already been punished. Thus, relevant previous statutory convictions could be considered as an aggravating factor when a court is considering the appropriate sentence for an offender in respect of the current offence subject, of course, to the nature of the offence to which the previous convictions relate and their relevance to the current offence and the time that has elapsed since the previous convictions.

Orders of the Court:

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent