<u>IN THE COURT OF APPEAL, FIJI</u>
<u>[On Appeal from the High Court]</u>

<u>CRIMINAL APPEAL NO.AAU 102 of 2020</u>
[In the High Court at Suva Case No. HAC 196 of 2019]

<u>BETWEEN</u> : **<u>SANJEET SINGH</u>**

<u>Appellant</u>

<u>AND</u> : **<u>THE STATE</u>**

<u>Respondent</u>

<u>Coram</u> : **Prematilaka, RJA**

<u>Counsel</u> : **Ms. N. Mishra for the Appellant**
: **Ms. S. Swastika for the Respondent**

<u>Date of Hearing</u> : **07 June 2023**

<u>Date of Ruling</u> : **08 June 2023**

<u>RULING</u>

[1] The appellant had been charged and found guilty in the High Court at Suva on two representative counts of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009, three representative counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009, a single count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009, one representative count of sexual assault contrary to section 211(1)(a) of the Crimes Act, 2009 and one count of sexual assault contrary to section 211(1)(a) of the Crimes Act, 2009. Altogether he faced 06 counts of rape and two counts of sexual assault. The victim was the appellant's step daughter and two of the representative counts relating to rape had been committed when the victim was a child, starting when she was 10 and the rest of the acts of rape and sexual abuse had lasted till she was 15 years of age.

[2] The appellant faced the following charges:

'COUNT ONE
(Representative Count)
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

SANJEET SINGH, *between the 1st day of January 2014 to the 31st December 2014, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, had carnal knowledge of* ***SSN****, a child under the age of 13 years.*

COUNT TWO
(Representative Count)
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

SANJEET SINGH*, between the 1st day of January 2015 to the 31st December 2015, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, had carnal knowledge of* ***SSN****, a child under the age of 13 years.*

COUNT THREE
(Representative Count)
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

SANJEET SINGH*, between the 1st day of January 2016 to the 31st December 2016, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, had carnal knowledge of* ***SSN****, without her consent.*

COUNT FOUR
(Representative Count)
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***SANJEET SINGH**, between the 1st day of January 2017 to the 31st December 2017, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, had carnal knowledge of **SSN**, without her consent.*

COUNT FIVE
(Representative Count)
Statement of Offence

***SEXUAL ASSAULT:** Contrary to section 210 (1) (b) of the Crimes Act 2009.*

Particulars of Offence

***SANJEET SINGH**, between the 1st day of January 2017 to the 31st December 2017, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, unlawfully and indecently assaulted **SSN**, by fondling her breasts.*

COUNT SIX
(Representative Count)
Statement of Offence

***RAPE:** Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***SANJEET SINGH**, between the 1st day of January 2018 to the 21st October 2018, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, had carnal knowledge of **SSN**, without her consent.*

COUNT SEVEN
Statement of Offence

***SEXUAL ASSAULT:** Contrary to section 210 (1) (b) of the Crimes Act 2009.*

Particulars of Offence

***SANJEET SINGH**, on the 22nd day of October 2018, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, unlawfully and indecently assaulted **SSN**, by fondling her breast.*

COUNT EIGHT
Statement of Offence

***RAPE:** Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***SANJEET SINGH**, on the 22nd day of October 2018, at the Manoca Squatter Settlement, Nausori, in the Eastern Division, had carnal knowledge of **SSN**, without her consent.'*

[3] The trial against him was held in absentia but he was represented during the trial by his Counsel from the Legal Aid Commission. Two of the assessors had found the appellant not guilty of all eight counts, while one assessor found the appellant guilty of the six counts of rape, but not guilty of the two counts of sexual assault (Counts 5 and 7). Therefore, the assessors had returned a unanimous verdict of not guilty in respect of the two counts of sexual assault, and a majority verdict of not guilty in respect of the six counts of rape.

[4] The learned High Court judge had disagreed with the assessors' opinion, convicted him of all counts and sentenced him on 24 August 2020 as follows:

> *'**[53]** In the result, the final sentence is as follows:*
>
> *Head Sentence - Life imprisonment.*
> *Non-parole period - 45 years imprisonment.*
> *Considering the time the accused has spent in remand, the time remaining to be served is as follows:*
> *Head Sentence - Life imprisonment.*
> *Non-parole period - 43 years and 11 months imprisonment.'*

[5] The appellant's appeal in person only against sentence is timely. Though, he had raised a solitary ground of appeal against conviction in the additional grounds of appeal filed on 07 April 2021, the Legal Aid Commission in the amended notice of appeal tendered on 13 July 2022 had raised three grounds of appeal only against sentence.

[6] Guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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). The test for leave to appeal is not

whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points (*i.e*. sentencing error) under the four principles of ***Kim Nam Bae's*** case namely whether the trial judge:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[7] The grounds of appeal against sentence are as follows:

*'**Ground 1***

THAT the Learned Trial Judge erred in fact and law when he chose to sentence the appellant with the maximum penalty without reasoned justification for the same.

Ground 2

THAT the Learned Trial Judge erred in his sentencing discretion by imposing a consecutive sentence when the facts of this case do not fall under the exceptions as per section 22 of the sentencing and penalties act.

Ground 3

THAT the Learned Trial Judge erred in law and in fact by imposing a cumulative sentence which offends the totality principle of sentencing.

Ground 1

[8] The appellant submits that the trial judge had imposed the life imprisonment with a non-parole period of 45 years *'after much deliberations'* without stating as to the reasons or what factors guided him in his deliberations for choosing the maximum sentence. He cites paragraph 49 of the sentencing order in relation to this complaint.

'[49] However, this is where I am faced with a dilemma. The maximum sentence for Rape as provided by the Legislature is life imprisonment. My dilemma is whether to impose a high term of imprisonment (which I have computed as above to be 90 years) or whether to sentence the accused to a term of life imprisonment. After much deliberation I have decided that the accused should be imposed life imprisonment, which is the maximum sentence for the offence of Rape. In computing the non-parole period to be imposed on the accused I would take into consideration the sentence that I computed as above.

[9] Having considered section 4(1) of the Sentencing and Penalties Act, sentencing tariff for juvenile rape, several past decisions which from time to time have highlighted the seriousness and gravity of the offence of rape and particularly juvenile rape, the need to meet out harsher, long and deterrent custodian sentences, the need to protect the society along with factors that aggravate such offences at paragraphs 13-28 and the victim impact statement, the trial judge had selected the starting point of 11 years for rape counts. After adjusting for aggravating and mitigating factors, the trial judge at paragraph 34 had ended up with a sentence of 18 years which, of course, is beyond the sentencing tariff of 11-20 years set in **Aitcheson v State** [2018] FJSC 12; CAV0003 of 2014 (20 August 2014).

[10] However, sentencing outside the bands is not forbidden, although it must be justified (vide: **Zhang v R** [2019] NZCA 507 as quoted in **Jone Seru v The State** AAU 115 of 2017 (25 May 2023). If the final term either falls below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range (vide: **Koroivuki v State** AAU 0018 of 2010 [2013] FJCA 15 (05 March 2013)].

[11] Judges must be given the discretion to tailor a sentence that is appropriate on the facts of the particular case, but at the same time, mechanisms such as guidelines need to exist to ensure that like cases are treated alike. While there is a presumption that the guidelines would be followed, some room for departure in appropriate cases would ensure that there is flexibility for sentencing judges to depart from the guidelines as necessary – finally achieving the desired equilibrium between individualised justice and consistency.

[12] The trial judge having undertaken a similar exercise in respect of sexual abuse offences had set out the sentences as flows.

> *'**[42]** In the circumstances, the sentences imposed on the accused are as follows:*
>
> *Count 1 – Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act – 18 years' imprisonment.*

Count 2- Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act – 18 years' imprisonment.

Count 3 – Rape contrary to Section 207 (1) and 2 (a) of the Crimes Act – 18 years' imprisonment.

Count 4- Rape contrary to Section 207 (1) and 2 (a) of the Crimes Act – 18 years' imprisonment.

Count 5- Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 6 years' imprisonment.

Count 6 – Rape contrary to Section 207 (1) and 2 (a) of the Crimes Act – 18 years' imprisonment.

Count 7 - Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 6 years' imprisonment.

Count 8- Rape contrary to Section 207 (1) and 2 (a) of the Crimes Act – 18 years' imprisonment.'

[13] Having 'imposed' the above sentences, the trial judge at paragraph 43 had given his mind to section 22 of the Sentencing and Penalties Act. The trial judge had then relied on the clause *'unless directed by court'* in section 22(1) and set out reasons as to why he was going to depart from the default position of concurrency in favour of consecutive sentences at paragraphs 44-47. Thus, at paragraph 48 the judge had come to the conclusion that making all the sentences concurrent would be unjust and made 05 sentences of 18 years to run consecutively and then made the rest of the sentences concurrent to them so as to make the final sentence the appellant had to serve 90 years.

[14] Therefore, one cannot say that the trial judge had not given reasons for arriving at the consecutive sentences of 90 years in the sentencing order. However, the appellant's complaint relates to the imposition of the life imprisonment with a non-parole period of 45 years.

[15] It appears that the trial judge at that point was faced with, in his own words, a dilemma which he described at paragraph 49 (highlighted by the appellant) as to whether he should impose the term of imprisonment *i.e.* 90 years or to sentence the

appellant to a term of life imprisonment. He had overcome this quandary *'after much deliberation'* to impose the maximum sentence of life sentences on the appellant for all rape counts with a 45 year non-parole period (effectively 43 years and 11 months).

[16] Unfortunately, what matters went into the deliberations undertaken by the trial judge, which apparently persuaded him to opt for the life imprisonment instead of 90 years of total sentence, cannot be ascertained from the written sentencing order.

[17] **ARCHBOLD 2020 Criminal Pleading Evidence & Practice** at 5A-730 at page 834 has the following passage on imposing life sentence in common law.

> *"The decisions in **Attorney-General's Reference (No. 32 of 1996) (Whittaker)** [1997] 1 Cr. App. R. (S.) 261 and **Chapman** [2000] 1 Cr. App. R. (S.) 377 established a two-stage test for the imposition of discretionary 'common law' life sentences:*
>
> *(1) the offender has been convicted of a very serious offence; and*
> *(2) there are good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence.*
>
> *This modified the three-stage test established in the earlier cases of **Hodgson** (1968) 52 Cr. App. R. 113:*
>
> *(1) the offence(s) were grave enough to require a very long sentence;*
> *(2) it appeared from the nature of the offences or from the defendant's history that he or she was a person of unstable character likely to commit such offences in the future; and*
> *(3) if further offences were committed, the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.*
>
> *The two-stage test in **Whittaker and Chapman** was to be preferred to the three-stage test in **Hodgson; Ali** [2019] EWCA Crim 856."*

[18] There are also judicial pronouncements that the statutory maximum sentence is reserved for the worst possible cases of its kind (see **Harrison** (1909) 2 Cr App R 94, **R v Amber** Crim LR 266) or the judge should be satisfied that there were exceptional circumstances warranting the maximum sentence (see **D.P.P v D** [2004] IECCA 8_2 (21 May 2004) & **DPP v G** [1994] 1 IR 587).

[19] Since the trial judge does not appear to have considered the second stage of the two-stage test or other considerations above stated in imposing the life sentence it may constitute a sentencing error, and therefore, I am of the view that this matter should be left to the full court to deliberate upon applying the said two-stage test and other considerations in order determine whether the maximum sentence of life imprisonment is warranted and justified.

02nd ground of appeal

[20] The appellant argues that imposing consecutive sentences (which were in fact not imposed in the end) were not justified under the exceptions in section 22 of the Sentencing and Penalties Act.

[21] While this is true, the trial judge did not act under any of the exceptions but under the clause *'unless directed by court'* and as required by law he gave adequate reasons for departing from the default position of concurrency. The words *'unless otherwise directed by the court'* in section 22(1) permits the trial judge to make a sentence consecutive to another sentence even when section 22(2) does not apply (vide: **Sauduadua v State** [2019] FJCA 86; AAU0053.2016 (6 June 2019). However, in doing so, the court ought to state its reasons (or it is at least the best practice approach) or give a reasoned justification [vide: **Vaqewa v State** [2016] FJSC 12; CAV0016.2015 (22 April 2016) & **Bulivou v State** [2014] FJCA 215; AAU78.2010 (5 December 2014)]. There is no sentencing error here.

03rd ground of appeal

[22] The appellant submits that imposing cumulative sentences offends the totality principle. As I have already stated the trial judge in the end did not impose consecutive sentences but opted to impose life imprisonment.

[23] The totality or proportionality principle requires a sentencer who is considering whether to impose consecutive sentences for a number of offences to pause for a moment and review the aggregate term and then decide when the offences are looked

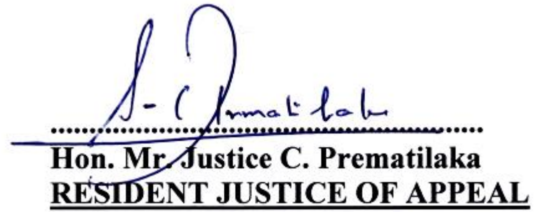
at as a whole whether it is desirable in the interest of justice to impose consecutive or partly consecutive and partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct [vide: **Donu v State** [2021] FJCA 81; AAU0005.2020 (25 March 2021)]. The totality principle is relevant to the final sentence (vide: **Sharma v State** (2015) FLR 883; AAU 48/2011 (03 December 2015)]. In other words the judge must be satisfied that final sentence should reflect the total criminality.

[24] Although the trial judge had not specifically referred to the totality or proportionality principle in the sentencing order, I suspect that that is what may have bothered him in the dilemma whether to impose the term of imprisonment *i.e.* 90 years or to sentence the appellant to a term of life imprisonment. The trial judge seems to have felt that when he looked at the offences as a whole the total sentence of 90 years may not have been desirable in the interest of justice while at the same time he had been firmly of the view that making all of the sentences run concurrently *(i.e.* 18 years of imprisonment) also would not meet the ends of justice. However, instead of the life sentence the trial judge still, for example, could have made one 18 years' sentence for rape and one 06 years' sentence for sexual assault run consecutively and made the rest of the sentences concurrent to those two, if he thought that a sentence of 24 years would have fit the gravity of the offending. Or, the trial judge could have straightaway considered whether to impose life imprisonment based on common law principles. The State has cited two cases where life imprisonment had been imposed in the High Court in Fiji previously for rape (**State v Vukici** [2018] FJHC 1193; HAC 104 of 2017 (14 December 2018) and **State v Bati - Sentence** [2020] FJHC 1076; HAC066.2020S (11 December 2020) which, unfortunately had not been cited to the learned High Court judge for consideration, possibly because the State had not sought a life imprisonment in the sentencing submissions in this case.

[25] Since the trial judge had not specifically referred to the totality or proportionality principle in the sentencing order in considering imposing consecutive sentences culminating in 90 years imprisonment, I would grant leave to appeal on this ground as well so that the full court may consider this aspect more fully at the hearing.

Order of the Court:

1. Leave to appeal against sentence is allowed only on the 01st and 03rd grounds of appeal.



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

Solicitors:

Legal Aid Commission for the Appellant
Office for the Director of Public Prosecutions for the Respondent