

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

CRIMINAL APPEAL NO. AAU 74 of 2021
[In the High Court at Lautoka Case No. HAC 123 of 2019]

BETWEEN : **ISIRELI SOVAU**

AND : **THE STATE**

Appellant

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **22 January 2024**

Date of Ruling : **25 January 2024**

RULING

[1] The appellant had been convicted in the High Court at Lautoka with one count of rape contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009 and one count of indecent assault contrary to Section 212 (1) of the Crimes Act 2009. The charges were as follows:

‘FIRST COUNT
Statement of Offence

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

Particulars of Offence

ISIRELI SOVAU on the 27th day of July, 2019 at Nadi, in the Western Division, penetrated the vagina of MICHELLE PAULINE VERONICA SMITH with his tongue, without her consent.

SECOND COUNT
Statement of Offence

INDECENT ASSAULT: *Contrary to Section 212 (1) of the Crimes Act 2009.*

Particulars of Offence

ISIRELI SOVAU on the 27th day of July, 2019 at Nadi, in the Western Division, unlawfully and indecently assaulted MICHELLE PAULINE VERONICA SMITH by touching her breasts.'

- [2] After the appellant pleaded guilty, the trial judge had convicted the appellant on the above counts and sentenced him on 13 October 2021 to an aggregate imprisonment of fifteen (15) years with a non-parole period of 13 years (the actual sentencing period is fourteen (14) years and seven (7) months with a non-parole period of 12 years and 07 months).
- [3] The appellant's appeal 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 is 'reasonable prospect of success' [see **Caucu 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 trial judge had summarized the facts in the sentencing order as follows:

3. According to the summary of facts, which you admitted in open court, you had gone to the complainant at around 4.15 a.m. on the 27th of July 2019. She was sleeping at that time. She had woken up, when she felt that you were trying to

lift her skirt up. You had threatened her with a knife, saying that you had come to lick her vagina and if she shout, you will kill her. You had then removed her shorts and underwear, and started to penetrate her vagina with your tongue. You had told the complainant to shut up, when she pleaded you to stop it. While penetrating her vagina with your tongue, you had indecently and unlawfully pressed the breasts of the complainant. You are the step-uncle of the complainant. She was 14 years old at the time of this incident took place.

[6] 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 accepted the guilty plea where the appellant had not had effective assistance of counsel.

Ground 2:

THAT the Learned Trial Judge may have fallen into an error when his lordship failed to consider the circumstances surrounding the entering of a guilty plea which include ignorance, fear, duress and mistake of facts.

Ground 3:

3.1 *THAT the Learned Trial Judge failed to enquire whether the appellant was pleading guilty due to any force, pressure or threat or on his own free will since the offence charge were serious.*

3.2 *THAT the Learned Trial Judge erred in not making sure that the appellant understood the truth of the charge and summary of facts in the language the appellant understood.*

Sentence:

Ground 4:

THAT the Learned Trial Judge may have fallen into an error of law and fact when his lordship failed to consider and give sufficient discount on the previous good character of the appellant.

Ground 5:

THAT the failure of the Trial Judge in not deducting one third remission properly has erred in law alone and failed to follow proper sentencing guidelines due the appellant early plead guilty from January 2020 and was sentencing to October 2021 the long period of time given to consider the appellant sentence.

Ground 1

- [7] The appellant had one Ms. Reddy from the Legal Aid Commission appearing for him and his complaint of not having ‘effective’ assistance of counsel has no basis. He has not elaborated as to what he meant by lack of ‘effective’ legal assistance.

Ground 2 and 3

- [8] In Nalave v State [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) the Court of Appeal said:

[23] *It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VicRp 19; [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).*

- [24] *In Maxwell v The Queen (1996) 184 CLR 501, the High Court of Australia at p. 511 said:*

The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.’

- [9] The trial judge had said that he was satisfied that the appellant had fully comprehended the legal effect of his guilty plea and his plea was voluntary and free from influence. The appellant had also admitted the summary of facts. Thus, I do not see any evidence of equivocation on the record. The onus of establishing the facts upon which the validity of the plea is challenged on the basis of equivocation is on the appellant [see

Tuisavusavu v State [2009] FJCA 50 AAU 0064 of 2004S (03 April 2009)] and the appellant has not succeeded in doing that.

- [10] It was also stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132):

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

Ground 4

- [11] Contrary to the appellant's assertion, the trial judge had indeed dealt with the appellant being a first time offender and allowed for his previous good character one (1) year discount. There is no sentencing error here.

14. *The learned Counsel for the Defence submitted that you are a first offender; hence, you are entitled to a substantive discount. I find that your previous good character, especially the fact that you have not been tainted with any previous conviction for an offence of sexual nature, would have definitely allowed you to freely move around in the community without any suspicion of risk. The community has perceived you as a man of good character and not as a child pedophile and allowed you to be feely moved in the community. Therefore, I do not find your previous good character has any significant mitigatory value. Hence, you are only entitled to a meager discount for your previous good character.*

Ground 5

- [12] The trial judge had allowed the appellant three (3) years' discount for the early plea of guilty.


[13] In Fiji there is neither 1/3 discount nor 1/4 discount automatically granted to an early guilty plea (see **State v Ravasua** [2023] FJCA 95; AAU153.2020 (9 June 2023)). It is high time that the sentencers in Fiji avoid following Madigan J's remarks in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) and follow, as they are bound to do, the guidance in **Mataunitoga –v- The State** [2015] FJCA 70; AAU125 of 2013 (28 May 2015) and **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)] in the matter of discounts for guilty pleas which is in line with section 4(2)(f) of the Sentencing and Penalties Act 2009 rather than a mechanical percentage of discounts as suggested Madigan J (see **State v Bolobolo** [2023] FJCA 281; AAU055.2022 (18 December 2023)).

[14] I cannot see any sentencing error here as well.

Orders of the Court:

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




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

Solicitors:

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