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

CRIMINAL APPEAL NO. AAU 40 of 2022
[In the High Court at Suva Case No. HAC 219 of 2020]

BETWEEN : **KAVENI MOCEICA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
Mr. L. Burney for the Respondent

Date of Hearing : **15 January 2024**

Date of Ruling : **26 January 2024**

RULING

[1] The appellant had been charged in the High Court at Suva on the following charges:

'COUNT ONE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA , *between 1st of January 2017 and the 31st of December 2017 at Nadali Village, Nausori, in the Eastern Division, penetrated the vagina of **M.T,** a child under the age 13 years, with his tongue.*

COUNT TWO

Statement of Offence

ATTEMPTED RAPE: *Contrary to Section 208 of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 1st of January 2017 and the 31st of December 2017 at Nadali Village, Nausori, in the Eastern Division, attempted to penetrate the anus of* ***M.T,*** *a child under the age 13 years.*

COUNT THREE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 1st of January 2018 and the 31st of December 2018 at Nadali Village, Nausori, in the Eastern Division, penetrated the anus of* ***M.T,*** *a child under the age 13 years, with his penis.*

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: *Contrary to Section 208 of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 1st of January 2019 and the 31st of December 2019 at Nadali Village, Nausori, in the Eastern Division, attempted to penetrate the anus of* ***M.T,*** *a child under the age 13 years.*

COUNT FIVE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 1st of January 2019 and the 31st of December 2019 at Nadali Village, Nausori, in the Eastern Division, penetrated the vagina of* ***M.T,*** *a child under the age 13 years, with his tongue.*

COUNT SIX

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 3rd of April 2020 and the 30th of June 2020 at Nadali Village, Nausori, in the Eastern Division, penetrated the anus of* ***M.T,*** *a child under the age 13 years, with his finger.*

COUNT SEVEN

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 3rd of April 2020 and the 30th of June 2020 at Nadali Village, Nausori, in the Eastern Division, had carnal knowledge of* ***M.T,*** *a child under the age 13 years.*

COUNT EIGHT

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act, 2009.*

Particulars of Offence

KAVENI MOCEICA, *between 3rd of April 2020 and the 30th of June 2020 at Nadali Village, Nausori, in the Eastern Division, penetrated the mouth of* ***M.T,*** *a child under the age 13 years, with his penis.'*

[2] After trial, out of the 08 counts preferred against the appellant the High Court found him guilty and convicted for 05 counts of Rape contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act and 02 counts of Attempted Rape, contrary to section 208 of the Crimes Act, 2009. However, due to lack of evidence, he was acquitted of count No.6.

[3] The trial judge on 16 May 2022 had sentenced the appellant to a period of twenty-one (21) years imprisonment for the counts of rape and attempted rape with a non-parole period of 15 years [after discounting 21 months for pre-trial remand, the actual sentencing period was nineteen (19) years and three (03) months imprisonment with a non-parole period of thirteen (13) years and three (03) months].

[4] The appellant's appeal against conviction and sentence is timely.

[5] 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)].

[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 trial judge had summarized the facts in the sentencing order as follows:

> 2. *The complainant is M.T, born on 22 March 2009, was 8 years in 2017. M.T's mother is Litiana Ranadi. Kaveni the accused is the de facto partner of Miriama who is the sister of Litiana and the aunt of the victim M.T. As Litiana and her husband were unemployed M.T had been handed over to Marama to look after and to be brought up. M.T has gone to Marama when she was 7 years. Marama and Kaveni had been in this de facto relationship may be since 2004 for 19 years as at the date of this trial. Kaveni born on 28 October 1965 was 52 years old in 2017. It is admitted that M.T was looked after by Marama and Kaveni at Nadali, Nausori from 2017 to 2020. During this time M.T lived with Marama and her two daughters fathered by Kaveni. Except during the lockdown Kaveni lived with his wife and children at Sawani Village but used to visit Nadali and during the lockdown has lived at Nadali. During the said period of 3 ½ years Kaveni has sexually abused M.T.*

3. *The 7 charges you were convicted are in respect several acts of sexual abuse you have committed during the 3 ½ year perverse sexual escapade from 1st January 2017 to 30th June 2020. Now, if I may recap the said acts, you in 2017 asked M.T to undress and then lustfully observing her naked body caressed her right down to her thighs and licked her vagina penetrating her vagina with your tongue (count No.1). Then once again touched her breasts, buttocks and having got her to lie down you fondled and licked her vagina and the anus and have got her to touch your penis and made an unsuccessful attempt penetrate her anus with your penis (count No. 2). However, in 2018 you have applied oil on your penis and succeeded in penetrating her anus (count No. 3). You asked her to have sex with you but when she disagreed, you threatened to hit her with "Sasa" broom. You also threatened to hit her when she refused to touch your penis. You very artfully used to give the phone to your daughter who was in this house so she would be otherwise occupied and not come to the room when you were abusing M.T.*

4. *In 2019 you have continued to commit the said sordid perverted sexual acts and even tried to kiss her in her mouth. Then you touch her breasts, vagina and attempted to penetrate her anus with the penis but has not succeeded (count No. 4). He also had made her suck your penis. You during this period too continued to licked her vagina and the anus as described before and penetrating the vagina with your tongue until she went to class 6 in 2019 (count No. 5). You also have made her watch phonographic videos and forced her to re-enact and perform those sexual acts. You have artfully and cunningly continued to satisfy your perverted desire of licking the prepubescent vagina of M.T in to 2020 and also you have then inserted your penis into her vagina (count No. 7) and you put your penis into her mouth got her to suck your penis and ejaculated (count No.8). These are the sordid acts I was reluctantly compelled to reproduce to lay the bare facts of this offending which necessary.*

[8] The complainant's mother gave recent complaint evidence and Dr. Lusana testified that medical findings were consistent with the complainant's allegations of rape. The appellant had given evidence and taken up the position of total denial and that the allegations had been fabricated at the instance of the complainant's mother. He also called his de-facto partner Miriama Marama in support of the narrative of 'fabrication' and lack of opportunity for him to commit the offending.

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

Ground 1:

THAT the Learned Trial Judge erred in law and in fact by failing to make an independent assessment of the evidence and in affirming a verdict which was

unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.

<u>Ground 3 and 7:</u>

<u>THAT</u> the Learned Trial Judge erred in law and in fact when he failed to consider in his judgment the inconsistent evidence of the complainant and the significant material medical evidence in determining any forced sexual intercourse resulting in a substantial miscarriage of justice.

<u>Ground 4:</u>

<u>THAT</u> the Learned Trial Judge had made improper directions relating circumstantial evidence and relating to contradictory statements made by the witnesses.

<u>Ground 5 and 6:</u>

<u>THAT</u> the Learned Trial Judge had erred in law and in fact when he did not carefully, properly analyse in paragraph (20) of the judgment which the house in the photo was not there and the appellant never stayed with the complainant in 2017.

<u>Sentence</u>

Ground 7

The sentence is harsh and excessive.

<u>Ground 1</u>

[10] The trial judge had delivered a comprehensive and reasoned judgment. As per the judgment, there had been ample evidence to support the conviction and the trial judge had found the complainant to be truthful and reliable (see paragraphs 30-35 of the judgment) and found the defense to be inherently implausible and therefore rejected it (see paragraph 43 of the judgment).

[11] The appellant was acquitted of count 06 as the insertion of the finger into the vagina had been committed when the complainant was in class 3 but the charge alleged that it was between April and June 2002. As result the trial judge had concluded that there was no evidence as regards such an act being committed during that period. Thus, the acquittal of count 6 does not in any way affect the convictions on other counts as the complainant was abused for over 3 ½ years when she was 08 - 11 years old. It was a

campaign of rape and her memory would have easily failed her with regard to the incident referred to in count 6.

[12] By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) & **Naulumosi v State** [2018] FJCA 24; AAU0021.2014 (8 March 2018)]. This is even greater when a witness such as the complainant of tender years testifies to a campaign of rape carried out for a number of years.

[13] Similarly, the fact that the doctor had not observed any injury in or around the anus in any way discredit her evidence as meticulously probed by the trial judge at paragraphs 36-38 of the judgment.

Ground 3 and 7

[14] As pointed out above although medical evidence did not show that the complainant's anus had been penetrated but the charges were only '*attempted to penetrate the anus'* and her evidence was that on several occasions when the appellant attempted to insert his penis into the anus, it was painful and on occasions there was bleeding when she went to the toilet but the bleeding was minute. The trial judge had dealt with this as follows in the judgment:

> *37. 'What does this mean? As far as I understand there had not been blood trickling down but some semblance of blood present when she goes to the toilet. This being so the injury caused to the anus does not appear to have been significant and it appears that the bleeding was noticed when she went to the toilet thus certainly it does not appear to have been an open external injury. If so, one would expect bleeding before going to the toilet and also to be on the clothing. Thus in all probabilities this appears to be blood that had emanated from within the rectum internally and not from an external injury around the anus externally. If it was external there should have been blood on the undergarments but it was not so. Hence, the injury that led to bleeding in all probabilities appear to have been an internal injury, as such the Doctor will not be able to observe this type of injury by the external medical examination as done by her. As such there is no inconsistency between M.T's evidence and the medical evidence but is in harmony.*

> *38. As narrated by the victim she had been subjected to numerous and various forms of vaginal penetration as well as interference into her anus and surrounding area. The doctor has observed a positive tear or an injury on the lower end of the labia minora which she explained to be towards the lower end close to vaginal orifice. Exhibit 2 the Medical Examination Form contains a diagram or a sketch of the said tear on the labia minora at page 5 of the said medical form. This clearly shows the said tear lower down towards the anal area. Therefore it is highly probable that she has sustained injuries that may have cause some bleeding. M.T is a small girl of 8 years when the alleged abuse had commenced. In the normal course of events there is a greater possibility that injuries may been caused at the early stages of abuse. These injuries are consistent with the events as narrated by MT.*

[15] Thus, medical evidence does not exclude an attempted penetration of the complainant's anus as reasoned out by the trial judge. The complainant was emphatic that the appellant did indulge in attempts to penetrate her anus. Her evidence on attempted rape and medical evidence are not mutually contradictory as observed by the trial judge.

Ground 4

[16] This ground of appeal appears to be based on lack of opportunity for acts of sexual abuse. The trial judge had dealt with it with his customary scrutiny as follows:

> *35. According to M.T all these acts of sexual abuse during the 3 ½ years has taken place in the house. This house is a small corrugated steel and wood house. In these circumstances is it probable that she would have been sexually abused without anyone else noticing? Her evidence was that the accused commits these acts generally in the room and usually on such occasions one of the daughters is gone to church and then the other is given the mobile phone by the accused to keep her in her room. There was no other evidence as led to the specific time and occasions as to when such acts have taken place. The accused did have free access to the house and undoubtedly he had the opportunity to come in when Marama may be at work or even when she is working from home when she was otherwise busy. Marama admits even when she worked from home it was the night shifts and that she rests during day. With the accused having free access it is certainly possible for him to select such times and occasions when others may not be around or attentive. There are two rooms in the house. There was also the occasion when the accused stayed over in the house before the lock down. Therefore, I see no improbability in accused being able to pursue with his acts of abuse not been observed by the others. He certainly had the*

opportunity and the occasion to do so. However take for instance Marama, she is an adult and would have she not at least realized that something sinister was happening in the house? In this respect I made an observation in the evidence of Marama where she says that after being informed, she did inquire from the accused but that the accused did not respond. Litiana has informed Marama of the abuse before going to the police. In the normal course of event when she is informed of an incident of his nature especially between her adopted daughter and her partner you would expect her to be petrified, surprised and to react angrily and inquire and act in a certain manner. No such thing had happened. She seems to have merely asked about it and left it at that. She is in fact depended on the accused and continues with the de facto relationship. Considering these circumstances, it is extremely probable that Marama would have known that something was happening and had maintained blind eye or just ignored it and let it happen. Her passive inaction is highly probable in these circumstances as she had been dependent on the accused. Thus M.T's evidence and the position is probable and realistic.

[17] On the argument based on improbability of sexual abuse in a small house and in the presence of the accused's sleeping siblings, Philippine Supreme Court (Manila – First Division) in **PEOPLE OF THE PHILIPPINES, Plaintiff–Appellee, v. BERNABE PAREJA Y CRUZ**, Accused– Appellant. G.R. No. 202122, January 15, 2014, Leonardo-de-Castro, J with Sereno, C.J., (Chairperson), Bersamin, AJ (Associated Justice) , Villarama, Jr. AJ, and Reyes, JJ AJ. concurring said:

Improbability of sexual abuse in their small house and in the presence of AAA's sleeping siblings

Pareja argues that it was improbable for him to have sexually abused AAA, considering that their house was so small that they had to sleep beside each other, that in fact, when the alleged incidents happened, AAA was sleeping beside her younger siblings, who would have noticed if anything unusual was happening. This Court is not convinced. Pareja's living conditions could have prevented him from acting out on his beastly desires, but they did not. This Court has observed that many of the rape cases appealed to us were not always committed in seclusion. Lust is no respecter of time or place, and rape defies constraints of time and space. In People v. Sangil, Sr.,we expounded on such occurrence in this wise: In People v. Ignacio, we took judicial notice of the interesting fact that among poor couples with big families living in small quarters, copulation does not seem to be a problem despite the presence of other persons around them. Considering the cramped space and meager room for privacy, couples perhaps have gotten used to quick and less disturbing modes of sexual congresses which elude the attention of family members; otherwise, under the circumstances, it would be almost impossible to copulate with them around even when asleep. It is also not impossible nor incredible for the family members to be in deep slumber and not be

awakened while the sexual assault is being committed. One may also suppose that growing children sleep more soundly than grown–ups and are not easily awakened by adult exertions and suspirations in the night. There is no merit in appellant's contention that there can be no rape in a room where other people are present. There is no rule that rape can be committed only in seclusion. We have repeatedly declared that "lust is no respecter of time and place," and rape can be committed in even the unlikeliest of places. (Citations omitted.)

5th and 6th grounds of appeal

[18] The appellant argues that he never stayed in the house in 2017 and had no opportunity of committing the abusive sexual acts particularised in counts 01 and 02.

[19] The trial judge had rejected this narrative at paragraph 41- 43 of the judgment with convincing reasons as follows:

> 41. *'It is common ground that he accused was not resident in Nadali continuously except during the lock down in 2020. During that period Marama had been working from home. Though the accused suggests that he did not come to Nadali in 2017 as he did not have permission from the leader of Marama's clan he admits coming that in 2018 to construct the house and then he had all the power to chase off the mother and the step father of the complainant from that house which in their traditional family land. This unambiguously establishes that the Accused had veiled a great deal of power and control over Marama and children and in the house, she lived in. Accused had been in a de facto relationship for 19 years which would have started in 2004. Thus it is improbable and unrealistic that he will keep off for a whole year on the face of the so called lack of permission of the chief. To my mind this so called lack of permission is no more than a figment of the accused's imagination put forward as a defence and in any event in the circumstances even if such permission was not granted accused had been in a de facto relationship for 14 years with 3 children from Marama in 2017 will not remain without coming to the house in Nadali. Is highly improbable.*
>
> 42. *Now I will consider the truthfulness of Marama's evidence. At the point of giving evidence she continues to be in the de facto arrangements with the accused and certainly is hoping and wishing that the accused will be free and be there for her and her children as a provider in view of her 19 year relationship. Thus no doubt she is an interested witness. She also stated that in the year 2017 the accused did not visit her or the children. In the normal course of event is this improbable as evaluated above. Accused and his witness Marama both say that in 2017 Marama and the children were living elsewhere and not at Nadali. Marama says that in 2016 she was residing at*

Lokia with her parents and then at Auckland Street thereafter both of them claim that Marama came to her house constructed at Nadali. However at the commencement of trial the accused had admitted that during the period 2017 to 2020 M.T was looked after by Marama and Kaveni ***at Nadali, Nausori*** *2017 to 2020 - vide, admission (j). Having so admitted the accused and Marama have attempted to change and contradict this admitted fact as aforesaid. This clearly is an inconsistent and a contradictory position taken up by the accused in his defence. The whole purpose in taking a different position is not accidental. The accused is attempting to impress upon this court that in 2016 and 2017 they were not in Nadali. By this the accused is trying to create a doubt on MT's evidence that the sexual acts were committed at Nadali.*

43. Considering improbabilities and inconsistencies the evidence of the accused and the defence witness the entire defence evidence including that of the accused is unreliable and is false. These inconsistency namely the contradiction between the admission and the evidence is vital. It is the result of attempt to deliberately change the version as admitted in order to pursue with another line of defence after the trial commence. This couple with improbability leads to the only inference that the accused evidence is false and untrue. Accordingly, I totally reject the accused and his witness's evidence on that bases.

07th ground of appeal (sentence)

[20] The trial judge had correctly guided himself by the sentencing tariff in **Aitcheson v. State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) of 11-20 years of imprisonment. However, the maximum sentence is life imprisonment.

[21] The trial had said as follows in the sentencing order:

14. I am satisfied that you are manipulative; you are somewhat of a sexual predator of prepubescent children to some extent; you are dangerous. The public and in particular young females and prepubescent children need protection from you. On the one hand this is a case which would justify a long 'denunciatory' sentence. I bear in mind that, such a sentence is one of last resort. However, in the circumstances of this offending in my judgment, justice and protection of the public can and should be achieved by such a very long sentence.

15. Thus, to in my thinking the sentences on your offences must be consecutive. However, I have to bear in mind totality. To that end and to meet the a just compromise between the competing factors and interest of the society and that of the accused, the sentences of Rape counts 1, 3, 5, 7 and 8 will run concurrently.

16. In the same vein sentences of Attempted Rape counts 2 and 4 too will run concurrently. But these concurrent sentences will run consecutively to the concurrent sentences of Rape counts 1, 3, 5, 7 and 8.

17. Total sentence therefore is 21 year's imprisonment.

18. In view of the reasons discussed above, I sentence you to a total period of twenty one (21) year's imprisonment for the counts of Rape and Attempte

20. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was the your virtual step-daughter aged between 8-11 years compels me to state that the purpose of this sentence is to punish you in a manner that is just in all the circumstances, protect the community, deter like-minded offenders and to clearly manifest that the court and the community denounce what you did to the complainant between for 3 ½ years and in a manner which is just in all the circumstances of the case.

[22] Thus, the trial judge had explained the basis of his sentence of 21 years imposed on the appellant. In **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023) this court said:

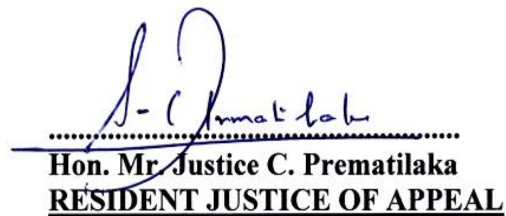
'[54] ……………..Sentencing must achieve justice in individual cases and that requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed. The prime justification and function of the guideline judgment is to promote consistency in sentencing levels nationwide. Like cases should be treated in like manner, similarly situated offenders should receive similar sentences and outcomes should not turn on the identity of the particular judge. Consistency is not of course an absolute and sentencing is still an evaluative exercise. The guideline judgments are 'guidelines' (and not tramlines from which deviation is not permitted), and must not be applied in a mechanistic way. The bands themselves typically allow an overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified (vide ***Zhang****).'*

[23] The only sentencing error, if at all, that I can think of is with regard to the non-parole period of 15 years which in my view stands at odds with the above reasoning and the principle that the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation; *nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent* (vide **Tora v State** [2015] FJCA 20; AAU0063.2011 (27 February 2015). I think that the

full court should consider whether the non-parole period of 15 years is ineffective as a deterrent in the light of the trial judge's own reasoning for imposing a sentence of 21 years.

Orders of the Court:

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



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

Solicitors:

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