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

CRIMINAL APPEAL NO. AAU 033 of 2022
[In the High Court at Suva Case No. HAC 194 of 2020]

BETWEEN	:	**JOSEFA TUINAWASABULA ULUDOLE**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. Unaisi M. Ratukalou and Mr. R. Kumar**
Date of Hearing	:	**29 July 2024**
Date of Ruling	:	**30 July 2024**

RULING

[1] The appellant had been charged and convicted with one count of rape and one count of sexual assault under the Crimes Act 2009 in the High Court at Suva. The charges were as follows:

COUNT 1
(Representative Count)
Statement of Offence

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

Particulars of Offence

JOSEFA ULUDOLE *between the 1st day of July 2019 and the 17th day of July 2019 at Vanuabalavu, in the Eastern Division, had carnal knowledge of* ***UNAISI ROSI TALEI****, without her consent.*

COUNT 2
(Representative Count)

Statement of Offence

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

Particulars of Offence

> ***JOSEFA ULUDOLE,*** *between the 1st day of July 2019 and the 17th day of July 2019 at Vanuabalavu, in the Eastern Division, unlawfully and indecently assaulted* ***UNAISI ROSI TALEI****, by touching her breasts and buttocks.*

[2] The High Court judge on 26 April 2022 sentenced him to an aggregate period of 16 years imprisonment (effective period being 15 years and 11 months after the remand period being discounted) with a non-parole period of 13 years and 11 months.

[3] The appellant's appeal against conviction and sentence could be considered timely though late by 05 days.

[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 **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] 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].

[6] The trial judge had summarized the facts in the judgment as follows:

> *3. The Prosecution alleges the Accused had carnal knowledge of the Complainant without her consent during the period between the 1st day of July 2019 and the 17th day of July 2019. It is further alleged that the Accused had unlawfully and indecently assaulted the Complainant by touching her breasts and backside.*
>
> *4. The Complainant stated in her evidence that the Accused had taken her to his house and made her lie down on the floor. He had then touched her breast and then her backside. The Accused then put his "polo" on her vaginal area. She felt pain inside when he put his "polo" in that manner.*

[7] The sentencing order states that:

> *2. It was proved during the hearing that you had taken the Complainant to your house and then indecently and unlawfully touched her breasts and backside. You had then forcefully had carnal knowledge of the Complainant without her consent. The Complainant was 14 years old intellectually impaired child. She is related to you as you are the maternal granduncle.'*

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

> '***Conviction***
>
> ***Ground 1***
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> ***THAT*** *the Trial Judge erred in law and in fact when accepting the evidence of three witnesses, not including the victim, as none of them witnessed with their own eyes what transpired or what really took place between the appellant and the victim.*
>
> ***Ground 2***
>
> ***THAT*** *as per para 3 of the judgment there was no proof of any penetration taking place and thus the trial judge erred in accepting the prosecutions allegation that the appellant had carnal knowledge of the complainant.*
>
> ***Ground 3***
>
> ***THAT*** *at para 4 of the judgment it is stated that the accused had taken the victim to his house and made her lie down on the floor, he then touched her breast and her backside and then put his polo on her vaginal area, but there is no mention at all that he penetrated her vagina and the trial judge erred in accepting that piece of evidence to be truthful.*

Ground 4

THAT *there is no mention at all by the complainant that the appellant took off her clothes but only laid on top of her while she was fully dressed [no penetration].*

Ground 5

THAT *apart from the evidence of the complainant no one else saw the appellants and the victim going to the accused's house and the trial judge erred in taking into account as evidence that statement by the complainant.*

Ground 6

THAT *in the judgment heading elements of the offence para 5 (iv) the accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner, what manner is the court referring to here is it the appellant lying on top of the complainant fully dressed because along the line there's no mention at all that the appellant undressed the complainant or she herself undressed herself and the trial judge again erred in law in not administrating that issue and accepting that version of the complainants story as evidence.*

Ground 7

THAT *the Trial Judge erred in law in accepting the complainants evidence as credible and on the other also admits that the complainant is an intellectually impaired child, how can that be?*

Ground 8

THAT *there's no mention at all as to what part of the day or night did the appellant and the complainant went to the accused's house because if it was in the night than it must be dark and identification could be a contributing factor in identifying the true identity of the offender.*

Sentence

Ground 9

THAT *the Sentencing Judge erred in law by imposing a non-parole period without a parole board to justify the release of the appellant at the end or completion of his known parole term failure to do so miscarried the right cause of justice in relation to the proper interpretation of parole.*

Grounds 1

[9] This complaint is without merit. Other than the testimony of the victim aged 14, her mother's evidence was to explain her daughter's physical and intellectual partial disability (see paragraph 48 of the judgment). The assistant teacher, who was also the

victim's child protection officer, spoke to the victim's mental capacity and in relation to the report of sexual abuse by her against the appellant which was then reported to the police. Dr. Gaikward of St' Giles Hospital gave evidence of psychiatric evaluation of the victim's mental capacity (see paragraphs 10-18, 46 and 47 of the judgment). Thus, the evidence of these witnesses were not led to support the specific allegations of the victim against the appellant as eye-witnesses. They were witnesses speaking to various circumstances relevant to the prosecution case and helpful to the judge to analyses and evaluate the victim's direct evidence on the two acts of sexual abuse.

Grounds 2, 3, 4 and 6

[10] The gist of all the above grounds of appeal is to challenge the question of penetration. The victim had said that that she was wearing clothes when Tua Jo put his *"polo"* on her vaginal area and also said that her clothes had blood when she was asked what happened to her clothes and when Tua Jo put his *"polo"* in her vaginal area. She had specifically pointed at the vaginal area of the female doll as the place where Tua Jo put his *"polo"* and the place where she felt pain from inside. At the village, the victim used to refer to the appellant as "*Tua Jo*" or "*grandfather Jo*".

[11] The trial judge had stated that the victim was not only a 14 years old child but also an intellectually impaired child and the court must carefully evaluate her evidence considering the strengths and weaknesses related to her age, mental development, understanding and ability in communication. The judge had correct said gaining support from the observations in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) that the court could not expect her to explain all these details using the words and terms that adults usually employ[1]. The trial judge had concluded that considering the evidence that Tua Jo put his *"polo"* on her vaginal area and she felt pain from inside, he was satisfied that there was an intrusive penetration of her sexual organ by the appellant's penis thus establishing the element of "penetration".

[1] See also **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)

[12] The Court of Appeal again said in **Palani v State** [2024]; AAU 111.2020 (26 July 2024):

> *'[28] ……Would it be reasonable for any rational mind to expect a 14 year old girl experiencing an act of forceful sexual penetration, most likely for the first time in her life, to describe the act to a mathematical accuracy differentiating vaginal and vulva penetration?; to be more precise, how far the penis went inside her genitalia; whether it penetrated her vagina or vulva. Would she know the bodily difference between her vulva and vagina, where vulva ends and vagina begins? I think not.*

[13] In ***Volue*** the Court of Appall said in relation to count under section 207 (2) (b) of the Crimes Act 2009 committed by digital penetration of the vagina that penetration of vulva too constitutes rape. In ***Palani***, the Court of Appeal held that penile *vaginal* penetration is not essential to carnal knowledge (and consequently for rape) under section 207(2)(a) and even in the absence of a specific statutory definition of carnal knowledge in the Crimes Act, carnal knowledge is complete not only when penetration of vagina occurs but also with penetration of vulva. The reasoning in ***Palani*** is equally applicable to penile *anal* penetration constituting carnal knowledge (and consequently rape) under 207(2)(a) of the Crimes Act.

[14] Thus, it does not matter whether the appellant's penis went inside the victim's vagina or not as long as it had penetrated her vulva. But, the evidence shows that there had in fact been penetration of the victim's vagina. It does not also matter whether the penetration occurred when she was wearing her cloths or not. With or without cloths, even the slightest penetration is penetration for the completion of the offending.

Grounds 5 and 8

[15] The appellant challenges his identity as the perpetrator. The appellant had admitted that he was the uncle of the victim's mother (hence, her grand uncle) and she used to refer to him as "*Tua Jo*" or "*grandfather Jo*". Moreover, he had also admitted that he and the victim resided at Namalata Village, Vanuabalavu, where she has been living in the village since her birth, during the period relevant to the charges. At the trial, the appellant has not suggested to the victim that she was mistaken in her recognition or the identification of the perpetrator.

[16] The trial judge had meticulously evaluated and analyzed the evidence regarding the appellant's identity at paragraphs 24-30 of the judgment and concluded that he was satisfied that the victim had clearly recognized the appellant as the perpetrator who committed this crime. I see no fault in this finding at all.

Grounds 7

[17] The appellant has seen a contradiction between the trial judge accepting the victim's evidence as credible on the one hand and also concluding she was indeed an intellectually impaired child on the other.

[18] Dr. Gaikwad had said that the victim is an intellectually impaired child whose mental maturity is not similar to her physical age. However, she can engage in conversation and answer questions appropriately. The state counsel had posed several questions to her asking about her surroundings, for which she had answered appropriately. Having observed how she understood those questions and the answers she gave, and the expert opinion given by Dr. Gaikwad, the trial judge had recorded her unsworn evidence under section 117 (2) (b) of the Criminal Procedure Act. He had evaluated the victim's evidence by reference to factors according to her strengths and weaknesses related to her age, mental development, understanding and ability to communicate. The judge had observed that the victim had no difficulties in seeing things while giving evidence in court in that she clearly identified the colours and the people standing around her during the hearing and also identified her house and the appellant's house in the photos without difficulty. The defense had neither challenged nor suggested otherwise about the accuracy of the identifications of her house and his house in the photos.

[19] Therefore, I see no arguable issue as far as the trial judge accepting the victim's intellectual impairment but still relying on her testimony as reliable and credible to convict the appellant.

Grounds 9 (sentence)

[20] The trial judge was bound by section 18 of the Sentencing and Penalties Act to fix a non-parole period as the sentence of imprisonment was over 02 years irrespective of the existence or operation of the Parole Board or not. Section 18(1) requires a non-parole period to be fixed in every case in which the sentence was for a term of two years or more – Per Keith J in **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023) paragraph 46

[21] The issues surrounding fixing the non-parole period had been settled by the Supreme Court in **Ratu v State** [2024] FJSC 10; CAV24.2022 (25 April 2024) where the court remarked:

> *'[33] ..... The fixing of a non-parole is an innovative feature of Fiji's criminal justice system. Its purpose is well-established. It is intended to be the minimum period which an offender has to serve so that the offender will not be released earlier than the court thinks appropriate by the grant of parole or the practice of remitting one-third of the sentence for "good behaviour" in prison. However, since a Parole Board has never been established in Fiji, the only route by which an offender can be released earlier than the expiration of his head sentence, but for a* ***non-parole period*** *being fixed in his case, is by the operation of the practice relating to remission of sentence: see Ilaisa Bogidrau v The State [2016] FJSC 5 at para 4.'*

[22] How the remission should be calculated was decided by the Supreme Court in **Kreimanis v The State** [2023] FJSC 19 at para 17 (*per* Calanchini J) in that in terms of section 27 of the Corrections Service Act 2006, the Commissioner has to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence ***or*** has completed his non-parole period, whichever is the later.

[23] There is no sentencing error at all in the process of delivering the appellant's sentence.

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