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

CRIMINAL APPEAL NO. AAU 21 of 2021
[In the High Court at Suva Case No. HAC 104 of 2020]

BETWEEN	:	**SUKULU TIKOITOGA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**13 March 2024**
Date of Ruling	:	**14 March 2024**

RULING

[1] The appellant had been found guilty at Suva High Court on the following counts:

*'**COUNT 1***

Statement of offence

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

Particulars of offence

Sukulu Tikoitoga *on the 10th day of March, 2020 at Nasinu in the Central Division, had carnal knowledge of DT without her consent.*

COUNT 2

Statement of offence

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

Particulars of offence

Sukulu Tikoitoga *on the 10th day of March, 2020 at Nasinu in the Central Division, penetrated the vagina of DT with his fingers without her consent.*

COUNT 3

Statement of offence

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

Particulars of offence

Sukulu Tikoitoga *on the 10th day of March, 2020 at Nasinu in the Central Division, penetrated the vagina of DT with his fist, without her consent.*

COUNT 4

Statement of offence

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

Particulars of offence

Sukulu Tikoitoga *on the 10th day of March, 2020 at Nasinu in the Central Division, penetrated the anus of DT with the handle of a hammer, without her consent.*

COUNT 5

Statement of offence

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

Particulars of offence

Sukulu Tikoitoga *on the 10th day of March, 2020 at Nasinu in the Central Division, penetrated the mouth of DT with his penis without her consent.*

COUNT 8

Statement of offence

WRONGFUL CONFINEMENT: *Contrary to section 286 of the Crimes Act 2009.*

Particulars of offence

Sukulu Tikoitoga *between the 10th day of March, 2020 and 13th day of March 2020 at Nasinu in the Central Division, wrongfully confined DT.*

[2] After the assessors' opinions, the High Court judge found the appellant guilty of counts 1, 2, 3, 5 and 8 on evidence and 6 on his own confession. The appellant was also found guilty of attempted rape instead of rape on count 4. The trial judge on 31 July 2020 sentenced the appellant to an aggregate period of 14 years imprisonment with a non-parole period of 12 years.

[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 **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 sentencing order as follows:

> *9. The facts of the case are that, at the time of the offence, you were in a short romantic relationship with the complainant. On 9 March 2020, the complainant left the house and went to her aunty's house in Caubati. She left the house because you were late that night and she was scared to be in the*

house alone, without lights. You were angry at her conduct and suspicious that she had left the house to sleep with another man.

10. You brought her back to Sakoca. You picked up a metal hammer and threw it at her. She got a shock because it was painful. After that, you told her to move forward and take off her clothes. You then told her to lie down on the bed and spread her legs. Then you inserted your two fingers into her vagina. She felt pain inside her vagina. You did not heed her call to stop. You kept inserting your two fingers into her vagina. Then you inserted your fist into her vagina. It was so painful that she felt like her vagina was going to burst. She was crying and begging you to stop, but you kept on inserting your fist into her vagina. You threatened her to keep quiet or else you will hit her head with the hammer. You took her panty and put it inside her mouth. You tied her mouth around the head with a sock. You then told her to turn around and bend down on a side of the bed. You picked up a hammer and attempted to insert its handle into her anus. She could not say anything because her mouth was tied up. She was weak so she fell on the floor. Then you inserted two fingers again into her vagina. She told you to stop, but you kept inserting your finger into her vagina. You took out the panty from her mouth and forced her to suck your penis. You threatened to strike her face with a pair of scissors and cut her hair. She then sucked your penis. While she was sucking, you got the pair of scissors and cut her hair. She could not do much and run away. Then you told her to lie down and you forced her to have sex with you. When she refused, you punched her ear. When she was lying down on the floor, you inserted your penis into her vagina. She was crying, she was scared and weak. She asked you to stop. You then pulled out your penis from her vagina and told her to sleep. You woke up first and stepped on her head while she was still sleeping. You stomped her head with the sole of your foot. She was scared and shocked.

11. At the incident, the complainant had received visible injuries and an ugly hair-cut. You were scared that she would leave the house and report the matter to police. Although the door was not properly locked, you ensured that the victim did not leave the house. When she went to sleep, you went and slept beside her. You confined her into the house from 10-13 March 2020. She finally managed to escape when you were fast asleep and report the matter to police.

[7] In addition to the complainant, her brother, Mosese (distress evidence) and neighbour, Eseta (recent compliant evidence) and Dr. Shalvin Kapoor had given evidence for the prosecution. The appellant had given evidence on his own behalf admitting having had an argument with the complainant, assaulting her and cutting her hair but denying having committed any sexual abuse on her.

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

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the summing up had miscarried by virtue of the Learned Trial Judge failure to properly and adequately direct on the defence case the allocating of a mere paragraph [para 73] which consists of 3 sentences [48 words] to draw the assessors attention on the defences case, without drawing any analysis or inferences which is favourable to the defence contravenes the appellants constitutional right to a fair trial [Section 15 (1) of the 2013 Constitution] and further demonstrates a failure to adhere to the guidelines established in R v Lawrence and Tamaibeka v State.*
>
> ***Ground 2:***
>
> *THAT the Learned Trial Judge erred in law and fact in convicting the appellant when there were substantial doubts in the prosecution case thus the Judge ought to have given the benefit of the doubt to the appellant.*
>
> ***Ground 3:***
>
> *THAT the Learned Trial Judge erred in law and fact in convicting the appellant for the offence of wrongful confinement.*
>
> ***Ground 4:***
>
> *THAT the Learned Trial Judge erred in law and fact in convicting the appellant for the offence of Attempted Rape when there was an absence of the alleged hammer used to penetrate the anus of the complainant produced in court.*
>
> ***Sentence***
>
> ***Ground 5:***
>
> *THAT the Learned Trial Judge erred in principle by double counting having considered aggravating factors that reflected already in selecting a starting point.*
>
> ***Ground 6:***
>
> *THAT the sentence imposed by the Learned Sentencing Judge is harsh and excessive in comparison to other similar rape (Adult cases).*

Ground 1

[9] The trial judge had specifically highlighted the defense evidence at paragraph 72, 73, 79 and 80 of the summing-up. This is not a case of the complainant's word against the appellant's word. Therefore, I do not find any deficiency in the summing-up in

dealing with the appellant's defense. Thus, the modified ***Liberato*** directions as formulated in **Anderson** [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 adopted in Fiji in **Naidu v State** AAU 0158 of 2016 (24 November 2022) are not required in this case.

Ground 2

[10] In a nutshell, the appellant seems to argue that the verdict is unreasonable or cannot be supported by evidence. In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) and **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) it was emphasised that in terms of section 23 (1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed but the proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

[11] The test to be applied under section 23 of the Court of Appeal in considering a challenge to a verdict of guilty on this basis has been elaborated again in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [the assessors were dispensed with by the Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] as follows:

> *'[23] ……**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's*

guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors****'*

[12] This is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47).

[13] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court. In **Vulaca v State** [2012] FJSC 22; CAV0005.2011 (21 August 2012) the Supreme Court elaborated the pronouncement in ***Ram*** as follows:

> *35. Praveen Ram Vs Sate (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors or differ from the opinion of the assessors. If the Judge differs he has to give his reasons.*
>
> *36. ……..... As the appellate courts have not seen and heard the witnesses it cannot independently assess and evaluate the evidence led at the trial to the extent of a trial court judge. But an analysis of evidence is necessary for two reasons one is to ascertain whether there is evidence to convict the accused. If there is no evidence it is a question of law, the Court of Appeal have to take into consideration in arriving at its finding. The other is to ascertain whether on the given facts if a properly directed panel of assessors would have come to the same decision. This is to ascertain whether the assessors were properly directed in the application of law on the given facts. However the Court of Appeal will not set aside a verdict of a High Court on a question of law (s.21(1)(a)) or fact (s.21(1)(b)) unless a substantial miscarriage of justice has in fact occurred (s.22(6)).*

[14] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their*

> *grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[15] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether the verdict is reasonable and supported by evidence ***and*** whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt; as expressed by the Court of Appeal in another way, whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). This exercise involves both subjective and objective elements which, however, do not exist in watertight compartments.

[16] Considering the complainant's cogent and direct evidence, distress evidence of Mosese [see **Tuagone v State** [2021] FJCA 86; AAU136.2018 (31 March 2021) for a full discussion on distress evidence] and recent compliant evidence of Eseta and the medical evidence of Dr. Kapoor at paragraphs 68-70 of the summing-up, I do not find any merit in the argument that verdicts are unreasonable or unsupported by evidence. The judge had fully ventilated the evidence led by both sides in the summing-up and engaged in an independent evaluation and assessment of it in the judgment.

Ground 3

[17] The trial judge had given convincing reasons at paragraph 18 of the judgment as to why he was convicting the appellant for wrongful confinement as well. Paragraph 50-

54 of the summing-up discuss the evidence pertaining to this aspect of the case in detail.

Ground 4

[18] There was no requirement in law at all for the hammer to be produced in court as an exhibit in order to convict the appellant of attempted rape. The evidence of the complainant buttressed by medical evidence was quite sufficient for it. In fact, the appellant got the benefit of medical evidence in getting convicted for attempted rape rather than rape.

Ground 5 *(sentence)*

[19] There seems to be merit in the appellant's complaint of double counting (see **Kumar v Kumar** [2018] FJSC 30; CAV0017.2018 (2 November 2018)]. The issue for the appellate court is that it cannot understand what aggravating factors out of those listed or even not listed, the trial judge took into consideration in fixing the starting point at 10 years and whether the same or at least some of them were again considered in enhancing the sentence by 05 years for aggravating features.

[20] At the same time one must bear in mind the following words in State **v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023) of this court in this regard.

> *'[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**).*

[21] Similarly, when a sentence is reviewed on 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)]. The approach taken by the appellate court in an appeal against sentence 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)].

[22] The sentencing tariff for adult rape is between 07 and 15 years of imprisonment - Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. 14 years imprisonment with a non-parole period of 12 years is within the tariff.

[23] Therefore, it is for the full court to decide whether the ultimate sentence is proportionate to the gravity of the appellant's crime despite the concern for double counting.

Ground 6

[24] This ground of appeal could be considered and dealt with under the previous ground of appeal and need not be considered as a separate ground.

Orders of the Court:

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

COURT OF APPEAL FIJI

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

Solicitors:

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