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

CRIMINAL APPEAL NO. AAU 052 of 2021
[In the High Court at Suva Case No. HAC 091 of 2019]

BETWEEN	:	**ILIESA CUANILAWA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**24 April 2024**
Date of Ruling	:	**29 April 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva on one count of aggravated robbery, one count of assault with intent to rape and one count of rape under the Crimes Act 2009.

[2] The High Court judge on 25 January 2021 sentenced him to a period of 20 years imprisonment with a non-parole period of 16 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:

> *'[4] The facts of the case are as follows. The victim is a young mother of three children – two daughters and a son. She lived with her husband and three children at the outskirt of Nausori town. She was full time stay home mum.*
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> *[5] On the morning of the incident, you gained entry to her home by removing the louver blades from one of the windows. The entry to the house was made after the victim's husband had left for work and her daughters had left for school. There is some degree of planning involved. The victim was alone at home with her 3 year old.*
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> *[6] After gaining entry into the victim's home, you punched her several times and demanded money from her. You were armed with a knife. You had wrapped a cloth around your face to conceal your identity. After inflicting physical violence on her, you tied her mouth, hands and legs with cloth. You raped her and inflicted further violence on her by banging her head on the wooden wall when she begged you to stop. You threatened to kill the victim's 3 year old son if she raised alarm. You placed the knife close to the neck of the child on the bed where the incident took place.*
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> *[7] You fled the scene after stealing cash, jewellery and mobile phones from the victim's home. After committing the offences you went on a spending spree on alcohol, food and cigarette. You were arrested on the same evening. The police found with the victim's gold chain and $100.00 cash on you. The*

victim's other jewellery and mobile phones were recovered from your sister. Your sister gave evidence that the items were given to her by you.

[8] The victim sustained physical injuries during the incident. She was punched several times resulting in bleeding from the nose and mouth. She sustained swelling, bruises and lacerations on her face, neck, scalp, chest, hands and legs. The physical trauma suffered by her is significant.

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

*'**Conviction:***

Ground 1:

THAT the Learned Trial Judge had erred in law and in fact by misdirecting himself and the assessors on the evidence that was produced in trial.

Ground 2:

THAT the Learned Trial Judge had erred in law and in fact by not giving the benefit of doubt to the appellant.

Ground 3:

THAT the Learned Trial Judge erred in law and in fact when he did not consider all the evidence in a fair, objective and balanced manner.

Sentence:

Ground 4:

THAT the Learned Trial Judge had erred in law and in fact when he did not apply the statutory of equality that is before the law to the appellant when sentencing him.

Ground 5:

THAT the Learned Sentencer had erred in law and in fact when he consider some irrelevant matters by sentencing the appellant into a harsh and excessive penalty.

Ground 1

[8] The appellant has not demonstrated as to how the trial judge had misdirected the assessors on the evidence led at the trial. The appellate court cannot and should not be expected to go on a voyage of discovery to find out what purported errors on the part of the trial judge have given rise to an appellant's grounds of appeal or the factual or

legal foundations thereof (see [19] of **Pal v State** [2020] FJCA 179; AAU145.2019 (24 September 2020). The 'scatter gun' approach in drafting the grounds of appeal and not substantiated those with sufficient details and particulars at least by way of written submissions would not help the appellant.

[9] In **Rauqe v State** [2020] FJCA 43; AAU61.2016 (21 April 2020) the Court of Appeal remarked:

> *'[14] It is clear that the sole ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant was. The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said:*
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> > *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*

Ground 2

[10] If I am to take the appellant's criticism of the judge not giving him the benefit of doubt as broadly on the concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[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****'*

[11] 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.

[12] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[13] 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 carry 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 or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide 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).

[14] Having considered the summing-up, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence. On the totality of evidence before her, it was open to the assessors and the trial judge trial judge to have reasonably convicted the appellant.

Ground 3

[15] Once again, the appellant has not pointed out to this court how the summing-up had become lopsided as to lack objectivity and fairness.

[16] I cannot examine the merit of this ground of appeal for the reasons already adduced under the 01st ground of appeal. .

Ground 4 and 5 (sentence)

[17] The appellant complains that the trial judge had not applied "statutory equity" (what he meant by that is not clear) in sentencing him and also states that the judge had considered 'some' irrelevant matters to make the sentence harsh and excessive.

[18] I cannot fathom what is meant by "statutory equity". Certainly, the sentence has not violated any provisions in the Crimes Act or the Sentencing and Penalties Act.

[19] As for the complaint of the sentence being harsh and excessive, the appellant has not shown what 'irrelevant' matters the judge had taken into account. Secondly, 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)].

[20] The appellant's sentence is outside the tariff for adult rape. 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**).*
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> *[55] The Court of Appeal said in **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) that*
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> > *'[45] Sentencing is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.*
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> > *[46] Sentencing guidelines are designed to find the correct equilibrium between giving a sentencing magistrates or judges sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases. Justice O'Regan in **R v Taueki** [2005] NZCA 174; [2005] 3 NZLR 372 (CA) went to significant lengths to highlight the need to avoid a 'rigid or mathematical approach'.'*

[21] The trial judge had given very cogent reasons for imposing a sentence beyond tariff for adult rape (i.e. 07 to 15 years) and aggravated robbery in the form of home invasions (*i.e.* 08 to 16 years). I see no reason to interfere with the trial judge's sentencing decision, for there is simply no sentencing error. The length of the sentence alone cannot be a successful ground of appeal against the sentence (see **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

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