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

**CRIMINAL APPEAL NO. AAU 093 of 2020**
**[In the High Court at Lautoka Case No. HAC 21 of 2017]**

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| **BETWEEN** | **:** | **SOLOMONI TIKO** |
| | | ***Appellant*** |
| **AND** | **:** | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | **:** | **Prematilaka, RJA**<br>**Qetaki, JA**<br>**Morgan, JA** |
| **Counsel** | **:** | **Mr. K. R. Prasad for the Appellant** |
| | **:** | **Mr. T. Tuenuku for the Respondent** |
| **Date of Hearing** | **:** | **01 May 2024** |
| **Date of Judgment** | **:** | **30 May 2024** |

# JUDGMENT

**Prematilaka, RJA**

[1] The appellant had been charged in the High Court at Lautoka with four representative counts of rape contrary to section 207(1) and (2) (a) under the Crimes Act No. 44 of 2009 on LT (name withheld) on four different occasions from 2012 to 2015 at Maururu and Vutuni, Ba in the Western Division.

[2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was guilty rape under count 01, attempted rape under count 02 but not guilty of count 03. He had been acquitted of count 04 at the close of the prosecution. The learned High Court judge had agreed with the assessors and convicted the appellant

accordingly. The appellant had been sentenced on 26 June 2020 to an aggregate sentence of 17 years and 08 months and 25 days of imprisonment with a non-parole period of 15 years.

[3] The appellant's timely appeal against conviction and sentence has been put through the leave to appeal stage where a judge of this court has refused leave to appeal against conviction but allowed leave to appeal against sentence[1]. The appellant has not renewed his leave to appeal application against conviction before the full court. Thus, this court has to consider only his sentence appeal.

[4] The guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011).

[5] The ground of appeal urged on behalf of the appellant against sentence is as follows:

> "*That the learned judge erred in law and principle in imposing a sentence that was excessive, severe, and manifestly harsh in the circumstances of the case by (i) electing a high starting point that may have well included aggravating factors and further enhancing the sentence by 06 years for aggravating factors thereby failing into the trap and error of double counting."*

***A brief summary of facts***

[6] The trial judge had described in the sentencing order the incidents for which the appellant was convicted for rape and attempted rape respectively as follows:

> *'The brief facts were as follows:*

[1] **Tiko v State** [2022] FJCA 79; AAU093.2020 (15 July 2022)

*'The victim was 12 years of age in 2012, in the night of 2nd October, whilst sleeping the victim felt her panty was wet, when she woke up she saw the accused removing her panty and licking her vagina. When the victim asked the accused what he was doing, he blocked her mouth with one hand and with the other he took out his penis and forcefully penetrated her vagina.*

*The victim was scared when the accused was doing this to her. The accused had forceful sexual intercourse with the victim on five different occasions in October, 2012.*

*Thereafter during night time in March, 2013 the victim whilst sleeping felt her panty was being removed when she woke up she saw the accused. The victim told the accused not to do anything to her but the accused did not stop. The accused tried to insert his penis into the vagina of the victim but could not. The accused did this to the victim on two different occasions in March, 2013. The victim is the niece of the accused.*

*Later the victim told her teacher about what the accused was doing to her she did not tell anyone at home since she was afraid of them. The matter was reported to the police.'*

***Sentence appeal***

[7] The appellant complains of double counting in the sentencing process. The trial judge had picked 13 years as the starting point and added 06 years for aggravating factors. The complaint is that the aggravating factors such as breach of trust (the appellant was considered the head of the family in the absence of LT's father), age difference of 56 years (LT was 12 years when the first act of rape took place and the appellant was 68 years), planning (acts or attempted acts of sexual abuse took place in the night while others were asleep), exposure of LT to sexual abuse at a young age etc. may have been considered in selecting the starting point of 13 years based on supposed 'objective seriousness' of the offending and the same had been considered again in increasing the sentence by 06 years.

[8] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) the Supreme Court raised concerns of the error of double counting in sentencing.

[9] In ***Senilolokula*** and ***Kumar*** the Supreme Court remarked that if judges choose to take as their starting point somewhere in the middle of the range, they can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be and they must be vigilant not to make that error of double counting. On the other hand, if trial judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. The court further added that the lower end of the tariff for the rape of children and juveniles is long and they reflect the gravity of these offences and it also means that the many things which make these crimes so serious have already been built into the tariff. Therefore, that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself as that would be another example of 'double-counting'.

[10] In ***Senilolokula*** the Supreme Court explained that this problem of double counting arises when there is no established authority for the starting point, but instead only an appropriate range of sentence [for example 11-20 years of imprisonment as per **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) for juvenile rape] and the trial judges simply follow the advice given in **Koroivuki v The State** [2013] FJCA 15 that as a matter of good practice, the starting point should be picked from the lower or middle range of the tariff.

[11] At the same time, the Supreme Court in ***Senilolokula*** seems to have suggested another sentencing methodology [somewhat different from two-tiered system as explicitly put in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008)] where the court identifies its *starting point*, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. However, even this method does not resolve the problem *'where within that range should the starting point have been?'* in a situation where a span of years represents the tariff without identifying a starting point within that tariff.

[12] As held in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015), Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as 'instinctive synthesis' although the two-tiered system when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability. The 'instinctive synthesis' method of sentencing is where the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case; only at the end of the process does the judge determine the sentence [see **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)] as opposed to the two-tiered system which involves a sentencing judge setting an appropriate sentence (starting point) commensurate with the objective severity of the offence and only then making allowances up and down, in light of relevant subjective aggravating and mitigating in the circumstances.

[13] 'Instinctive synthesis' will, by definition, produce outcomes upon which reasonable minds will differ. Among other tricky areas, a key problem with the instinctive synthesis is that it leads to inconsistent and unpredictable sentences. This is an obvious shortcoming of this approach and the criticism has not been missed by the High Court in **Hili v The Queen** [2010] HCA 45; (2010) 242 CLR 520, 527 [18], but French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated that consistency in sentencing is important, but the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence.

[14] A two-stage process would require more rigour and inject more complexity into an already difficult process. It would make sentencing a more exacting task, whereby judges would be required to set out their reasoning in greater detail infusing a certain degree of transparency into the sentencing process. It would, thus, produce more complex sentencing reasons and compel judges to think more deeply and precisely about their decisions. As a result, considerable benefit would accrue to the community and ultimately to judges, whose decisions would become more legally sound and

defensible. At the minimum it will require judges to think more carefully about sentencing decisions and resist any temptation to obfuscate or 'keep secret' the underpinnings of their reasoning. The temptation for judges to keep secret their real thinking has been recognized by Justice Kirby in **Markarian v The Queen** (2005) 228 CLR 357.

[15] In **Prosecutor v Dragomir Milosevic Public**[2] Case No. IT-98-29/1-A (12 November 2009, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, also made very pertinent observations on 'double counting' as follows:

> *'306. While the Appeals Chamber is satisfied that the Trial Chamber did not consider elements of the crimes which Milosevic was convicted of as aggravating circumstances, the Appeals Chamber observes that the language of the Trial Judgment may be read to conclude that certain factors were taken into account twice by the Trial Chamber in its assessment of the gravity of the crimes and the aggravating circumstances.* ***Where established, such double-counting amounts to a legal error since "factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa."*** *Although this issue was not explicitly raised by either party, the Appeals Chamber has considered that the interests of justice require it to address this matter proprio motu, and invited the parties to present oral submissions in this regard. At the Appeals Hearing, the Prosecution argued that "the Trial Chamber relied on different aspects under gravity and aggravating factors", rather than counting the same factors twice. Milosevic did not make any submissions directly addressing this question.*
>
> *309.* ***The Appeals Chamber is not convinced by the Prosecution's argument that relying on different aspects of the same fact is permissible****. In weighing a fact, either as an aspect of the gravity of the crime or as an aggravating circumstance, the Trial Chamber is required to consider and account all of its aspects and implications on the sentence in order to ensure that no double-counting occurs.* ***The Appeals Chamber thus finds that the said facts could only be taken into consideration once – either as factors relevant to the gravity of the crimes or as aggravating circumstances.***

[2] https://cld.irmct.org/assets/filings/Judgement-D-Milosevic.pdf

*310. For the foregoing reasons, the Appeals Chamber dismisses Milosevic's fifth ground of appeal.* ***The Appeals Chamber finds proprio motu that the Trial Chamber erred in taking into account the same facts when assessing both the gravity of the crimes and the aggravating circumstances****. The Appeals Chamber will address the impact of this conclusion on the sentencing, if any, in Sub-section D. below.'*

[16] In ***Nadan*** the Supreme Court further stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. I am in the same dilemma in this appeal.

[17] I find that the approach taken by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) while considering an appellate decision of the High Court, is one way of overcoming this dilemma. The court remarked:

*"[13] ……..It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence.* ***It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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****. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process.*

*[15]* ***Further, even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question****. This is amply demonstrated by the fact that Shameem J adopted a lower starting point but after allowing for the weighting she considered appropriate for matters of aggravation and mitigation reached the same total sentence as the learned Magistrate."*

[18] In **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Court Appeal echoed the same sentiments as follows:

> *'[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.'*

[19] In ***Milosevic*** the Appeals Chamber too adopted a similar approach in the face of 'double counting' in Sub-section D of their judgment as follows:

> *'336. Finally, with respect to the sentencing considerations of the Trial Chamber, the Appeals Chamber recalls its finding that on several occasions the Trial Chamber erroneously took into account the same facts when assessing both the gravity of the crimes and the aggravating circumstances. However, the Appeals Chamber finds that the said factors are relevant for determining Milosevic's sentence, and* ***even when properly taken into account only once, still warrant a sentence comparable to that imposed by the Trial Chamber****. Therefore, no reduction is warranted on this basis.'*

[20] In this appeal, I am going to be guided by those judicial precedents in addressing the issue of double counting. The trial judge had set out aggravating factors at paragraph 10 of the sentencing order while he at paragraph 19 had fixed the starting point of 13 years for 'objective seriousness' of the crime and enhanced it by 06 years for aggravation. I have a strong and reasonable suspicion that the trial judge, unwittingly though, had considered one, more or all of the aggravating factors which he used to enhance the sentence by 06 years in fixing the starting point at 13 years, particularly when had had done so without specifically mentioning what features of the offending, in his opinion, formed 'objective seriousness' warranting that starting point other than

those he identified at paragraph 10. When he specifically used the same aggravating features to enhance the sentence, the judge had committed the error of double counting. This concern is further reinforced by the fact that many things which make this crime so serious such as exposing the child victim (LT) to sexual abuse at a young age, have already been built into the tariff [In ***Aitcheson*** sentencing tariff for juvenile rape was enhanced and fixed between 11 to 20 years] used by the trial judge. One cannot commit rape on a juvenile without exposing the victim to a grave sexual abuse. Thus, presumably it is already inbuilt into the sentencing tariff. Therefore, in this respect too an error of double counting had occurred.

[21] I once again remind myself that when a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning in the impugned process that must be considered. This court does not rely upon the same methodology used by the sentencing judge and even if the starting point is too high, it does not necessarily follow that the sentence ultimately imposed is unreasonable or unjust. I pose myself the question '*Even when properly taken into account only once, do aggravating factors still warrant a sentence comparable to that imposed by the trial judge'.* I exclude exposing the child victim (LT) to sexual abuse at a young age in this consideration as I believe that it is already part of the sentencing tariff. Though, the sentencing discretion has miscarried as a result of double counting, my answer to that question is in the affirmative and I also take the view that assessing all the circumstances of the case the ultimate sentence is one that could reasonably be imposed by a sentencing judge and obviously the sentence imposed lies within the permissible range too. Therefore, no reduction of the sentence is warranted on the basis of double counting.

***Age as a mitigating factor***

[22] However, although this issue was not explicitly raised by either party, I consider that the interests of justice require me to address whether the appellant deserves a reduction of the sentence as a result of his current age of 80 years. He was 68 years of age at the time of the offending. In **Rabosea v State** [2023] FJCA 158; AAU025.2021 (21 August 2023) I had the occasion to express some views on this aspect.

*'[16] The appellant was 79 years at the time of sentencing. Should the trial judge have considered his age separately in the mater of sentence? Two views have been expressed in this regard.*

*[17] Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released (see **Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002). In this case, the 09 years' term of imprisonment was held to be excessive in totality and a five year term was deemed appropriate in the circumstances to reflect the seriousness of the offending (09 counts of indecent assault) having taken into account the age of the appellant (64 years).*

*[18] There is a principle in sentencing that a sentence should normally be shortened so as to avoid the possibility that an elderly offender will not live to be released from prison. However, it must be stressed that old age is not a mitigating factor especially in cases of sexual offence and old age is definitely not a licence to commit a crime [**State v Vukici** [2018] FJHC 1193; HAC104.2017 (14 December 2018)]. In this case the accused had been engaged in the worst form of sexual violence against his own children for a period of 31 years and was sentenced to life imprisonment though he was 74 years at the time of sentencing.'*

[23] In **Vila v State** [2016] FJCA 149; AAU0013.2012 (29 November 2016), Calanchini, P said:

*5. It is the combined effect of the Appellant being 67 years old with up to the time of sentencing a perfectly good record that, in my judgment, requires the age of the Appellant to be taken into account.*

*6. There are a number of unreported decision of the Court of Appeal to which reference has been made by Mr D A Thomas in his text "Principles of Sentencing" (1980) in support of the proposition at page 196 that "age is most effective as a mitigating factor when combined with another such as good character."*

*7. However recognition of age as a mitigating fact does not mean that appropriate prison sentences should not be imposed on elderly offenders……"*

[24] In the judgment in **R v BJW** [2000] NSWCCA 60 at [20], Sheller JA stated:

> *'The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim. See the remarks of Kirby ACJ in R v Skinner (1994) 72 A Crim R 151 at 154.'*

[25] The case of **R v Fisher** (unrep, 29/3/89, NSWCCA) at 6 is also frequently cited:

> *'This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations ...*
>
> *This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults ...'*

[26] Tampering with children of tender years is a matter of grave concern to the community (see **R v Evans** (unrep, 24/3/88, NSWCCA). In **R v MJR** (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

> *'... has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.'*

[27] The following signs and behaviour are *generally* seen in children who are already being sexually exploited. Missing from home or care; physical injuries; drug or alcohol misuse; involvement in offending; repeat sexually-transmitted infections, pregnancy and terminations; absent from school; change in physical appearance; evidence of sexual bullying and/or vulnerability through the internet and/or social networking sites; estranged from their family; receipt of gifts from unknown sources; recruiting others into exploitative situations; poor mental health and self-harm;

thoughts of or attempts at suicide[3]. Obviously, this is not an exhaustive list. The victim impact statement reveals some of the above signs and behaviour by the victim, LT and *inter alia* serious and long term emotional and psychological harm on her caused by the offending which had lasted from 02 October 2012 to March 2013. The impact on the victim had been severe, traumatic and continuing.

[28] Given the long duration of the offending and the number of times (rape on 05 occasions in October 2012 and attempted rape on 02 occasions in March 2013) it had been committed, the appellant cannot be considered as a first offender or having a good character. Therefore, unlike in ***Vila***, the appellant cannot be said to have had a perfectly good record or good character to prop up his age as an effective mitigating factor. Thus, one may say that he had received an undeserving reduction of 01 year for having been a first offender or for good character.

[29] Nevertheless, considering his current age of 80 years, this court is inclined to reduce the appellant's sentence by 02 years even as the strong aggravating factors escalate the gravity of his offending to a very high degree allowing little margin for mitigation on account of his advanced age.

**Qetaki, JA**

[30] I have read and considered the judgment of Prematilaka, RJA in draft, and I agree with it, the reasoning and the orders.

**Morgan, JA**

[31] I have read and concur with the judgment of Prematilaka, RJA.

[3] https://www.cps.gov.uk/legal-guidance/child-sexual-abuse-guidelines-prosecuting-cases-child-sexual-abuse

***Orders of the Court:***

1. The appeal against sentence is allowed.
2. The sentence of 17 years, 08 months and 25 days of imprisonment with a non-parole period of 15 years is set aside.
3. The appellant is sentenced to 15 years, 08 months and 25 days of imprisonment with a non-parole period of 12 years, 08 months and 25 days of imprisonment with effect from 26 June 2020.

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

COURT OF APPEAL FIJI

.....
**Hon. Mr. Justice A. Qetaki**
**JUSTICE OF APPEAL**

.....
**Hon. Mr. Justice W. Morgan**
**JUSTICE OF APPEAL**

**Solicitors:**

Legal Aid Commission for the Appellant
Office of the Director of Public Prosecution for the Respondent