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

CRIMINAL APPEAL NO. AAU 0169 of 2019
High Court No. HAC 059 of 2018 Lautoka

BETWEEN	:	**SITIVENI TUINASERAU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Mataitoga, AP**
		Morgan, JA
		Andrews, JA
Counsel	:	**Mr M. Fesaitu and Mr S. Ravu for Appellant**
		Ms K. Semisi for Respondent
Date of Hearing	:	**7 May 2024**
Date of Judgment	:	**30 May 2024**

JUDGMENT OF THE COURT

1. In a judgment delivered on 15 February, 2019 the High Court at Lautoka, found the appellant guilty and convicted him for one count of rape. The information states:

ONE COUNT

Statement of Offence

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

Particulars of Offence

SITIVENI TUINASERAU, between the 1st day of March, 2018 and the 15th day of March, 2018 at Maururu, Ba, in the Western Division penetrated the vagina of **AB**, a child under the age of 13 years, with his finger.

2. The brief facts were as follows: between the 1st day of March, 2018 and 15th day of March, 2018 the victim "AB" who was 4 years of age was taken by the accused her paternal uncle to a guava patch to pick some guavas. At the guava patch the accused poked the victim's vagina referred by the victim as her "pipi" with his little finger. The victim was lying down when the accused poked her "pipi". This resulted in blood coming out of the victim's vagina. The accused wiped the blood with some mango leaves, when the victim started to cry the accused gave her some guavas.

3. The accused told the victim not to tell her mum about what he had done, however, the victim told her mummy about what the accused had done to her. The victim's mother reported the matter to the police. the victim was medically examined and the accused was subsequently charged.

4. The appellant was sentenced to a final sentence of 17 years 8 months effective from 28 February 2019.

5. The appellant's untimely notice of appeal against conviction and sentence was late by 8 months. With the assistance of Legal Aid Commission, a Notice of Motion seeking enlargement of time was filed, with the appellant's affidavit and an amended notice of appeal and written submissions against conviction and sentence on 23 November 2020. The Justice of Appeal during the Leave Appeal hearing considered the grounds submitted on behalf of the appellant by the Legal Aid Commission counsel for enlargement of time, due to the 8 months delay in the filing of the appeal. The learned Justice of Appeal after reviewing relevant legal principles and evaluating the submissions, granted the enlargement of time application and also granted leave to appeal against sentence only.

6. In allowing enlargement of time the court was satisfied that no prejudice was likely to be suffered by the state as far as conviction is concerned, yet it may cause mental trauma to

the victim who is still a child to relive her experience in court again. The same would not be the case in the sentence appeal.

The Appeal

7. Grounds of appeal urged on behalf of the appellants are as follows:

(i) Against Conviction

Ground 1

The trial judge had erred in law and in facts having not properly assessed the inconsistencies as to the date of the incident and the medical findings that would have created a reasonable doubt

Ground 2

The trial judge had erred in law and in facts having not adequately directed the assessors on the burden of proof, given the conflicting versions between the account of the prosecution and the appellant.'

(ii) Against Sentence

Ground 1

The learned trial judge had erred in principle having accounted for aggravating factors that is reflected in the starting point that has resulted in double counting.

8. Following a full and detail consideration of the evidence and submission from both the Appellant and the State, the Resident Justice of Appeal concluded that ground 1 of the appeal against conviction is frivolous and dismissed it, under section 35(2) Court of Appeal Act. As regards, ground 2 against conviction the Justice of Appeal found that it had no reasonable prospect of success on appeal.

9. The appellant's ground of appeal against sentence was allowed.

Renewed Application Before Full Court

10. The appellant has renewed his appeal grounds before the court with supporting submissions challenging the sentence passed in the High Court alleging:

> *'the trial judge had erred in principle having accounted for aggravating factors that is reflected in the starting point that has resulted in double counting.'*

11. The essence of the submission of the appellant against the sentence are:

    (i) that the sentencing judge was erroneous, with the possibility of having subsumed the aggravating factors with the starting point and re-accounting the same aggravating sentence resulting in double counting in the selection of the selection of the starting point of the sentence;

    (ii) as a consequence of the double counting the appellant sentence was enhanced excessively making the final sentence disproportionate to the offending in light of the facts of the case.

Relevant Principles – Appeal Against Sentence

12. The Supreme Court in **Naisua v. The State** [2003] FJSC 14 (CAV 0010 of 2003), set out the correct approach to sentencing appeals. It is worth repeating those clear directions:

> *"[19] It is clear that the Court of Appeal will approach an appeal against sentencing using the principles set out in **House v The King** (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
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> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration."*

13. Since 2009, and following the promulgation of the Sentencing and Penalties Decree (Act), sentencing courts in Fiji must also consider the sentencing guidelines set out in section 4 of the Act.

14. As a matter of good practice, a sentencing judge must "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached

about the appropriate sentence to be imposed": **Muldrock v The Queen** (2011) 244 CLR 120 at [29]. In this regard, the judge's assessment of the objective seriousness of an offence must be clear upon a fair reading of the sentencing remarks and mere recitation of the facts of an offence is unlikely to be sufficient: **Kearsley v R** [2017] NSWCCA 28 at [64] - [66].

15. In **Kochai v R** [2023] NSWCCA 116, it was clear the sentencing judge was satisfied the offending was objectively serious because they had enumerated all of the relevant factors, and all of those factors elevated the seriousness of the offending: [46], [54]. This is the practice to be adopted to ensure the courts of appeal can reasonably review the basis of the sentencing process.

16. Under section 23(3) of the Court of Appeal Act, the court if they think a different sentence should have been passed, quash the sentenced passed at the trial and pass such other sentence according to law in substitution thereof as they think ought to have been passed.

Review of the Sentence

17. It is clear to the court that the sentence that was passed by the sentencing judge in the High Court were made without following relevant principles of sentencing and should be quashed and a new sentence passed. In reaching this conclusion the following factors from **Kim Nam Bae v State** [1999] FJCA 21 (AAU 15 of 1998) were noted:

    i) Wrong principle was applied in computing the sentence;

    ii) Irrelevant factors were considered in passing sentence;

    iii) Failure to taken into consideration relevant factors.

18. In this case, the first error made by the sentencing judge was in not stating clearly the factors he considered in selecting the starting point within the tariff of 11 to 20 years, for child rape set by the Supreme Court in **Gordon Aitcheson v State** [2018] FJSC 29 (CAV 0012 of 2018). The selection of the starting point for a sentence must address factors that underpin the objective seriousness of the offence for which the appellant has been convicted. It must start with the sentencing judge assessing the factors set out in section 4(1) of the Sentencing and Penalties Act in considering the starting point of the sentence

within the tariff. Once those factors are taken into consideration, then a starting point in the tariff may be made. Care must be observed not to take the same factors into consideration as an aggravating factor in the sentence computation, if they were considered for starting point selection.

19. In **Koroivuki v the State** [2013] FJCA 15 (AAU 0018 of 2010) the Fiji Court of Appeal discussed the guiding principles for determining the starting point in sentencing and observed:

> *"[26] The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are even-handedly given in similar cases. When punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.*
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> *[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."*

20. In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range".

21. The Fiji Court of Appeal in **O'Keefe v State** [2007] FJCA 34 ; AAU 0029.2007(25 June 2007) observed that when sentencing, the Court has to strike a balance between the seriousness of the offence as shown through the maximum penalty and seriousness of the actual acts of the accused that is to be sentenced.

22. At paragraph 10 and 11 of the sentence ruling, the sentencing judge states:

"[10] The maximum penalty for the offence of rape is life imprisonment the Supreme Court of Fiji in the recent judgment of Gordon Aitcheson vs. the State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018) has confirmed that the new tariff for the rape of a juvenile is now a sentence between 11 years to 20 years imprisonment.

[11] ***After assessing the objective seriousness of the offence committed I take 12 years imprisonment as the starting point of the sentence. I add 7 years for the aggravating factors, arriving at an interim total of 19 years imprisonment.*** *Since the personal circumstances and family background of the accused has little mitigatory value, however, I find his good character has substantive mitigating value. I therefore reduce the sentence by 1 year. Although mentioned in mitigation but clearly there was no remorse expressed by the accused throughout the trial. The interim sentence is now 18 years imprisonment.*

[12] I note from court file that the accused was remanded for 4 months in accordance with section 24 of the Sentencing and Penalties Act I further deduct 4 months as a period of imprisonment already served. The final sentence is 17 years 8 months imprisonment."

23. As is stated in paragraph 14 above, the sentencing judge should always identify the facts, matters and circumstances that he relies on to support the sentence passed and it is not enough to simply recite the facts. Failure to do so, results in sentencing becoming mechanistic and suffers the pitfalls in double counting of factors in the selection of stating point on a tariff, which was what took place in this case. In **Kumar v State** [2018] FJSC 30 at paragraph 57 and 58, the Supreme Court warned of this danger, thus:

"[57] Two words of caution. First, a common complaint is that a judge has fallen into the trap of "double-counting", ie reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. 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.

[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors the features of the case which will already have been reflected in the tariff itself. That would be another example of "double-counting", which must, of course, be avoided."

24. It is clear from the factors discussed in paragraphs 13 to 15 of the sentencing ruling in this case, that the judge likely double counted the factors already part of the selection of the starting point in the tariff. On that basis it would be unfair to the appellant and it is in the interest of justice that the sentence be quashed and a new sentence substituted.

25. The appellant had submitted as part of his appeal against sentence that the sentence passed against him also breached the principle of proportionality in sentence, due to the double counting of the aggravating factors discussed above. The High Court of Australia, defines the principle of proportionality as requiring that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from risk of recidivism on the part of the offender: **Veen v R** (1988) 164 CLR 465. The sentence should not be less than the objective seriousness of the crime. To achieve proportionality regard must be had to the gravity of the offence viewed objectively because without that assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be made: **R v. Geddes** (1936) 36 SR (NSW) 554.

26. The Court of Appeal in **Vura v State** [2023] FJCA 191 (AAU 012/2017) recently stated:

> *"[33] The proportionality principle, on the other hand, is a broader concept that applies to individual sentences for single offenses. It emphasizes that the punishment for a particular crime should be proportionate to the seriousness of that specific offense. In other words, the punishment should fit the crime. This principle ensures that sentences are not unduly harsh or lenient, and it aims to strike a balance between the severity of the crime and the punishment imposed.*
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> *[34] In summary, while both the totality principle and the proportionality principle seek to achieve fairness in criminal sentencing, the former focuses on the combined impact of multiple sentences in cases of multiple offenses, while the latter addresses the appropriate punishment for each individual offense. Both principles are important in ensuring that the criminal justice system administers just and equitable sentences."*

27. The appellant in this case submits that the final sentence of 17 years 8 months imprisonment with a non-parole period of 16 years was disproportionate. The appellant claims that the ultimate sentence is disproportionate to the actual facts of this case. The appellant refers to three High Court cases where the sentences in factual instances similar to the one here, that of a tender aged victim where the final sentences was 11 years

imprisonment with a non-parole period of 6 to 9 years. The court noted recent sentences passed in High Court, in cases with similar facts situation as this one and set it out in table format. The range of sentences where the victim of the rape and sexual violations are 13 years of age or below.

28. Having established that the sentence appealed against is incorrect it now necessary that a new sentence is passed. The Supreme Court on **Koroicakau v State** [2006] FJSC 5 (CAV 006/2005) observed that;

CASE	FACTS	SENTENCE
State v Masilevu [2022] FJHC 433 (HAC 68/2021)	Victim 11 years old 3 Counts of Rape 40 years old Accused	8 years 1 month imprisonment 5 years 1 month Non Parole
State v Corivuka [2023] FJHC 5 (HAC 146/2022)	Victim 10 years old Accused 44 years	16 years 6 months imprisonment 15 years Non Parole
State v Masilevu [2023] FJHC 106 (HAC 68/2011)	3 Counts of Rape of 11 year old	13½ years imprisonment 10 years Non Parole
State v Raj [2024] FJHC 44 (HAC 249/2020)	2 Counts of Rape 1 Count of Sexual Assault	9 years 9 months imprisonment 9 years 3 months Non Parole
State v Josefa Vunibaka [2022] FJHC 149	Victim 4 years 2 months 1 Count of Rape	11 years 6 months imprisonment Non Parole
State v Bala [2022] FJHC 127 (HAC 101/2020)	Victim 10 years old 1 Count of Rape and 1 Count of Sexual Assault	14 years imprisonment 12 years Non Parole
State v Kishore [2017] FJHC 563 (HAC 70/2015)	Victim 8 years old. 1 count of Rape & 1 count of sexual assault. Accused 58 years old at time of offence	11 years imprisonment 9 years Non Parole
State v Ali [2023] FJHC 61 (HAC 12/2019)	Victim 13 years old 1 Count of Rape and 1 Count of Sexual Assault Accused 38 years old at time of offence	13 years imprisonment 10 years Non Parole

'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, against the ultimate sentence rather than each step in the reasoning process that must be considered.'

29. In light of the above review of the applicable principles and facts in the sentence of the appellant, the sentence passed in the High Court trial is quashed. In substitution thereof the new sentence is 11 years imprisonment with 9 years non-parole period effective from 28 February 2019 is imposed on the appellant.

ORDERS:

1. Appeal against sentence succeeds;
2. Sentence in the High Court on 28 February 2019 is quashed. In substitution thereof a new of sentence of 11 years imprisonment with a non-parole period of 9 years imprisonment effective from 28 February 2019 is imposed.

Hon. Justice I. Mataitoga
ACTING PRESIDENT, COURT OF APPEAL
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice W. Morgan
JUSTICE OF APPEAL

Hon. Justice P. Andrews
JUSTICE OF APPEAL