IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0092 of 2014
(High Court HAC 143 of 2014)

BETWEEN : **ELIKI TURAGANABORISI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Mr S Waqainabete for the Appellant**
Mr Y Prasad for the Respondent

Date of Hearing : **18 April 2018**

Date of Ruling : **18 May 2018**

RULING

[1] The Appellant was found guilty of and convicted of one count of Rape by the Magistrate's Court at Suva. Thereafter the learned Magistrate acting in terms of section 190(1)(b) of the Criminal Procedure Act, 2009 the matter was transferred to the High Court for sentencing.

[2] The High Court sentenced the Appellant to 14 years imprisonment with a non-parole period of 13 years.

[3] The Appellant is seeking leave to appeal against the sentence imposed on him setting out the following ground of appeal:

> *"The learned sentencing Judge erred in principle by adding as an aggravating feature of the offending matters which had already been accounted for".*

[4] The Appellant was found guilty after trial for raping a girl of 8 years, by taking her away from the house where she was sleeping, laying her on the grass and forcefully raping which resulted in severe injuries to the girl. She required extensive medical treatment and ongoing psychiatric consultations and management to help her overcome the psychological trauma of her sexual abuse.

[5] Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

(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.

The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles set out above in **Kim Nam Bae v. The State** [1999] FJCA 21;AAU0015u.98s (26 February 1999).

[6] The tariff for rape of juveniles is 10 to 16 years as set out in **Ananda Abhay Raj v. State** AAU 0038 of 2010.

[7] The sentencing High Court Judge took the higher end of the tariff by taking a starting point of 16 years, added 4 years for aggravating features, deducted 1 year on account of his young age and his own young family, 4 years for the guilty plea and 1 year for the time spent in custody, which resulted in a final sentence of 14 years with a non parole period of 13 years.

[8] Although the sentencing High Court Judge deducted 4 years for the guilty plea, it would appear the learned Judge erred in stating so, as the Appellant had been found guilty after trial in the Magistrate's Court.

[9] The error enured to the benefit of the Appellant as it brought down his sentence together with his period in custody and the other mitigating factors to a sentence of 14 years.

[10] It is usual to start from the lower end, or midway of the tariff when embarking on the exercise of sentencing an accused. It appears that the learned sentencing Judge started at the highest end of the tariff due to the extremely violent nature of the offending, which brings in the question of whether there was double counting in choosing the starting point on that basis and considering the same factor as an aggravating feature. Such a situation may be considered in determining whether the learned Judge acted on a wrong principle as stated in **Kim Nam Bae** (supra).

[11] I would consider such a situation as being arguable and I would grant leave to the Appellant.

Order of Court

Leave to appeal against sentence is granted.

COURT OF APPEAL FIJI

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL