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

CRIMINAL APPEAL NO.AAU 183 of 2016
[In the High Court at Suva Case No. HAC 350 of 2016]

BETWEEN	:	**SERUPEPELI BOLALAILAI**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Mr. M. Fesaitu for the Appellant**	
	:	**Ms. R. Kumar for the Respondent**	
Date of Hearing	:	**20 July 2020**	
Date of Ruling	:	**21 July 2020**	

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of sexual assault, one count of rape and one count of attempted rape allegedly committed at Tailevu in the Central Division contrary to section 210, 207(1), (2) (b) and (3) and 208 of the Crimes Decree, 2009 respectively.

[2] The appellant had pleaded guilty to the charge on sexual assault and the case had proceeded to trial only on the other two charges.

[3] The information read as follows.

'SECOND COUNT

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 2009.*

Particulars of Offence

SERUPEPELI BOLALAILAI *on the 25th day of October, 2015, at Tailevu, in the Central Division, penetrated the vagina of* ***A.B.,*** *a child under the age of 13 years, with his finger.*

THIRD COUNT

Statement of Offence

ATTEMPTED RAPE*: Contrary to Section 208 of the Crimes Decree No. 44 of 2009.*

SERUPEPELI BOLALAILAI *on the 25th day of October, 2015, at Tailevu, attempted to have carnal knowledge of* ***A.B****., a child under the age of 13 years.*

[3] At the conclusion of the trial on 11 November 2016 the assessors' opinion was unanimous that the appellant was guilty of the 02nd and 03rd counts. The learned trial judge had agreed with the assessors in his judgment delivered on 11 November 2016, convicted the appellant and on 28 November 2016 sentenced him to 03 years and 06 months of imprisonment on sexual assault, 13 years of imprisonment on rape with a non-parole period of 10 years and 04 months and 03 years of imprisonment on attempted rape to run concurrently.

[4] The appellant's timely appeal only against sentence had been filed in person on 15 December 2016. Subsequently, the appellant had in person settled 'additional' grounds of appeal against conviction on 03 October 2017 (received by the CA registry on 25 October 2017). Thereafter, the Legal Aid Commission had filed an amended notice of appeal against conviction (without an application for enlargement of time) and sentence on 10 August 2018 along with written submissions. The state had tendered its written submissions on 20 March 2019.

[5] The appellant had filed an application to abandon his appeal against conviction and sentence on 14 June 2019 but had informed court on 20 November 2019 that he wanted to abandon the appeal only against sentence but would proceed against conviction. However, at the hearing on 20 July 2020 the counsel for the appellant informed that he would rely on the written submissions already filed in respect of both and the state counsel too indicated that he also would rely on the written submissions dealing with both conviction and sentence. Thus, since the appellant's and the respondent's written submissions have addressed both on conviction and sentence and

the state has stated that the leave to appeal is within time, I shall deal with both in this ruling.

[6] 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. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

> *(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.*

[8] Grounds of appeal urged on behalf of the appellant are as follows.

> ***Ground One (conviction):***
>
> *That the learned trial Judge erred in law and fact when he failed to fairly direct the assessors on the issue of penetration, which was paramount to the defense of the appellant.*
>
> ***Ground Two (sentence):***
>
> *That the learned trial Judge erred in law when he used similar aggravating features to enhance the sentence of the appellant.*

[9] The evidence of the complainant has been summarized by the learned trial judge in the judgment as follows.

> *'[5] Prosecution case was based primarily on the evidence of the 8 year old complainant and the caution interview of the accused which contained some admissions. According to her, the accused after calling her into his room by giving her a 2 dollar coin, tried to insert his penis into her vagina and then inserted two fingers into it.*
>
> *[6] During her cross examination, A.B. admitted that the accused did not insert his fingers into her vagina and repeated that claim in her re-examination. There were two other inconsistencies highlighted by the accused.*
>
> *[7] Witness Noela, has seen the accused kneeling in front of the complainant who was naked from her waist down, when she peeped into the room of the accused to see whether he was there.*
>
> *[8] The accused in his evidence admitted that he only kissed on top her vagina and suggested during the cross examination of the complainant that he kissed it "very fast". He denied any penetration of her vagina by fingers or attempting to commit Rape by trying to insert his penis into her vagina.*
>
> *[9] The medical evidence revealed that the complainant had dried blood clots in her groin when examined on the same day of the incident and her left labia minora had an abrasion, which could have bled forming dried blood clots.*

01st ground of appeal

[10] On a perusal of the summing-up, I find the following directions by the trial judge on the issue of penetration.

'[39] If you are satisfied beyond a reasonable doubt that the accused penetrated the complainant's vagina with his fingers in the instance as the information revealed, then you may find the accused guilty to the count of Rape.

'[42] If you find that the prosecution failed to establish any of these elements in relation to the count of Rape and or to the count of Attempted Rape, then you must find the accused not guilty on both counts or on that particular count.

*[47] **Evidence of the complainant A.B.***

(i) It is her evidence that she was schooling at St. Vincent Primary School in Class 2. She was 7 years old in 2015.

(ii) On the midday of 25th October 2015, A.B., watched movies at the male dormitory of her school as it was a Sunday. After watching a movie, she came up to Father Vincent who gave her a glass of juice. Then she went back but was called by one "Bola" into his room. He was showing a 2 dollar coin and was in his room. When she saw the coin, she went in. Only Bola was in his room.

(iii) The complainant then sat on his bed and then Bola "tried to insert his penis" into her vagina. She knew when he tried to insert into her vagina after laying on top of her. At that time the complainant was lying down on his bed face up. After that he inserted his index and middle fingers into her vagina. She felt pain when he inserted his fingers but unable to recall for how long he did it. Bola was at that time standing up.

(iv) Thereafter, he licked her vagina with his tongue, whilst bending down.

'[71] Another consideration would be the consistency of her version of events. In dealing with the issue of consistency, I shall first refer to the evidence of the complainant since she is the main witness for the prosecution. During cross-examination, the accused has highlighted an important inconsistency with her evidence in examination in chief.

[72] The inconsistency that was highlighted by the accused was that the complainant in her examination in chief said that the accused inserted fingers into her vagina. She showed her middle and index fingers when giving evidence. However, during the cross examination she was asked as to how did she see the accused inserting his fingers. She did not answer. Then she admitted she did not see his fingers. She also admitted she did not see it go inside. She also agreed that if it has gone inside and painful she would say "Stop it" or "Ow". When questioned as to why then she said that he did, in her examination in chief, she said "I forgot". But she denied the suggestion that someone said to her to say that in Court. In re-examination, the complainant said that she did not tell that the accused inserted his two fingers into her vagina.

[96] You would recall that the medical witness said in evidence that she clotted blood seen on the complainants groin and thighs could have come from the small abrasion observed on her left labia minora at 3 o'clock position. However, the accused claims that the prosecution did not clarify whether this could be due to penetration of vagina by an object like a finger and they also failed to clarify the timing of her injury. It is for you to decide whether to accept her opinion on these points and whether it supports the prosecution case or the denial of penetration by the accused.

[111] As already noted the complainant had said, in relation to the count of Rape that the accused inserted his two fingers into her vagina and she felt pain. Prosecution says the dried blood clots seen by the examining doctor on the same day supports their claim there was penetration. In addition, question Nos. 59 and 60, and the answers given by the accused in his caution interview statement are also relied upon by the prosecution. If you consider these items of evidence as sufficient proof of penetration of the complainant's vagina by the accused on that occasion, then you may find the accused guilty of Rape as A.B's consent is irrelevant. If you are not satisfied that penetration had occurred, then you must find the accused not guilty to the charge of Rape.'

[11] The learned trial judge had given his mind fully to the issue of penetration again and stated in his judgment in agreeing with the assessors as follows.

'[14] In my view, the assessor's opinion was not perverse. It was open for them to reach such conclusion on the available evidence. The "inconsistency" of A.B on penetration could probably due to her limited understanding of the propositions put to her during cross examination. She displayed confused state when conceptual positions are put to her in other instances as well. I concur with the opinion of the assessors.'

[12] In **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) the Court of Appeal stated that the medical distinction between vulva and vagina becomes immaterial in the light of section 207(2)(b) and any penetration of vulva, vagina or anus is sufficient to constitute the *actus reus* of the offence of rape. Therefore, while medical evidence seems to corroborate an invasion of parts of the victim's vulva (*labia minora* and *labia majora*), the appellant himself, though denying any penetration of the vagina, had admitted kissing the top of the vagina which necessarily means that he had invaded and gone past the victim's vulva to reach the top of the vagina. In ***Volau*** it was held

'[13] ..... It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy

protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina..... It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape..... Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established..... '.

[13] In the light of the above circumstances, I do not think that there is any reasonable prospect of success of the appellant's appeal on this ground of appeal.

02nd ground of appeal

[14] The appellant's complaint is based on paragraph 12 of the sentencing order where the learned trial judge had enumerated the aggravating factors as

(i) Breach of trust the victim had towards you;

(ii) Opportunistic planning;

(iii) Taking advantage of the victim's vulnerability;

(iv) Display of total disregard to the victim's wellbeing;

(v) The 46 years of age gap between you and the complainant;

[15] The appellant argues that the learned trial judge had double counted the factors under (iii), (iv) and (v) above. I do not agree. Taking advantage of the victim's vulnerability is not necessarily because the victim was a child of 07 years of age. An accused could take advantage of even an adult's vulnerability. Taking advantage of the victim's vulnerability can mean many things including the dominant psychological and physical posture over the victim given how the victim is placed in a particular situation. On the other hand, disregard to the victim's well-being means absolute lack of concern or callous indifference as to how the offending act would impact on the victim's life in many ways which becomes even graver in the case of a child victim. The near 40 years of age gap between the appellant and the victim goes to show *inter alia* the totally unacceptable social and human behavior on his part.

[16] Therefore, the appellant has not demonstrated any sentencing error which has a reasonable prospect of success in the sentence appeal.

[17] I am also mindful of the observations in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) where the Supreme held

> *'This argument misunderstands the sentencing process. 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.'.*

[18] The appellant's sentence imposed by the trial judge would certainly stand the test as to whether the ultimate sentence would be proportionate or match the gravity of the offending.

Order

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

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL