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

CRIMINAL APPEAL NO.AAU 0171 of 2016
[In the High Court at Lautoka Case No. HAC 111 of 2012]

BETWEEN	:	**EPELI SAUKURU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. L. Vateitei for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**09 September 2020**
Date of Ruling	:	**14 September 2020**

RULING

[1] The appellant along with another (Apisai Natuitagalua, the appellant in AAU 164 of 2016) had been indicted in the High Court of Lautoka on three counts of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act, 2009 and two counts of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act, 2009 committed at Nadi in the Western Division on 25 August.

[2] The particulars of the offences are as follows.

'*Count 1*

> *"Apisai Natuitagalua on the 25th of August 2012, at Nadi in the Western Division inserted his penis into the vagina of ROSALIA TINANISOKULA without her consent"*

Count 2

*"**Epeli Saukuru** on the 25th of August 2012 at Nadi in the Western Division inserted his penis into the vagina of ROSALIA TINANISOKULA without her consent"*

Count 3

"Apisai Natuitagalua on an occasion other than that referred to in Count 1 on the 25th of August 2012 at Nadi in the Western Division inserted his penis into the vagina of ROSALIA TINANISOKULA without her consent".

Count 4

"Apisai Natuitagalua on the 25th of August 2012, at Nadi in the Western Division assaulted ROSALIA TINANISOKULA with intent to rape her"

Count 5

*"**Epeli Saukuru** on the 25th of August 2012 at Nadi in the Western Division assaulted ROSALIA TINANISOKULA with intent to rape her"*

[3] The evidence placed against the appellant in brief as could be gathered from the sentencing order dated 17 October 2016, is as follows.

'It was proved at the conclusion of the hearing, that you consumed alcohol with the victim, the first accused and few others at the house of one Joji on the 25th of August 2012. After the drinking party, you, the first accused, the victim and one Sitiveni went to the Nawaka River to drink more beer. While drinking beer, you pulled and dragged the victim to the nearby bush and forcefully removed her cloths. She got injured while she was dragged to that place. You then forcefully inserted your penis into her vagina and had sexual intercourse without her consent. The victim was seventeen years old at the time of this alleged incident took place.'

[4] At the close of the summing-up on 03 October 2016 the assessors had returned with a divided opinion. Two assessors had found the appellant (and the other) guilty of all the counts as charged in the information. However, the other assessor had found the appellant not guilty of all the counts he was charged with.

[5] The learned trial judge had agreed with the majority opinion and convicted the appellant (and the other) as charged in his judgment delivered on 07 October 2016 and on 17 October 2016 sentenced the appellant to 13 years of imprisonment on the second count of rape and 03 years of imprisonment on the fifth count of assault with

intent to commit rape; all sentences to run concurrently with a non-parole period of 11 years.

[6] The appellant's timely appeal against conviction and sentence had been signed on 15 November 2016. Asta's Law had tendered seven amended grounds of appeal against conviction and one ground of appeal against sentence along with written submissions on 09 July 2018. The state had tendered its written submissions on 05 June 2020.

[7] 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.

[8] 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.*

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

Against conviction.

1. *That the learned trial judge failed to direct on how the evidence of an accomplice should be considered.*

2. *That the learned trial judge failed to direct on how the evidence of the wife of the first accused should be considered.*

3. *That the learned judge did not sufficiently direct on the inconsistencies of the evidence of the complainant which led to a great miscarriage of justice.*

4. *That the learned judge did not sufficiently direct on the consistency of the appellant's evidence and this led to the acceptance of the prosecution's version of events.*

5. *That the learned judge was wrong in fact when he stated that the appellant ought to have been looking down at the complainant's stomach during the intercourse.*

6. *That the learned judge erred when he did not sufficiently direct on the weight that should be given to the contents of the medical report.*

7. *That the learned judge was wrong in referring to witnesses' statements where the witnesses were not called to cross-examination.*

Against sentence.

8. *That the learned judge erred in law and fact when passing a harsh and excessive sentence.*

01st ground of appeal

[10] The appellant argues that the trial judge had failed to address on how the evidence of an accomplice should be considered. The accomplice referred to by the appellant is the first accused (who is the appellant in AAU 164 of 2016). The appellant was the second accused in the High Court. This argument is based on what the trial judge had said in paragraph 11 of the summing-up where he had addressed the assessors on the evidence of the first accused as follows.

> *'111. When they reached to the mango tree, Rosa also came and sat with them. In a while Apisai went down to answer to the nature's call. When he came back, he did not see Epeli and Rosa. He asked Sitiveni about them and found that both of them had gone up. While he was answering the nature's call, he did not hear any scream of a girl from the direction of the drinking place. He then went up and saw Epeli and Rosa. He just stood up and spoke to them. He then came back and sit and continue to drink. When Epeli and Rosa came back, she complained to him about the sexual intercourse she had with Epeli. He then slapped her and told her that she already got her fare and why she was not going back. He saw injuries around the stomach of Rosa.*

[11] It is clear from the evidence of the appellant and his witnesses as summarized by the trial judge in paragraphs 132- 146 of the summing-up that the appellant's position had been that he had consensual intercourse with the complainant. What the trial judge had stated in paragraph 111 above as narrated by the first accused is not contrary to the appellant's position. According to paragraph 111 the complainant does not seem to have told the first accused that the appellant had engaged in forcible sexual intercourse with her.

[12] Secondly, how exactly what the first accused had stated about the complainant's statement that the appellant had engaged in sexual intercourse with her does make the first accused an accomplice is not clear.

[13] There is no prohibition for one accused to give evidence against another at the trial. This can always happen in the case of conflicting defenses taken up by multiple accused. What is barred is to use what one accused had stated in a cautioned police statement against another at the trial. Therefore, the decisions in **Baleilevuka v State** [2017] FJCA 95; AAU0058.2015 (8 August 2017) on how to direct on the evidence of an accomplice *i.e.* that the law requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated, does not apply to the present case.

[14] It was held that **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) by the Court of Appeal

> *'[37] A major flaw and a fatal irregularity in the summing up of this case and in the judgment is the failure of the learned Trial Judge to consider the evidence of each of the Appellants where it corroborates the evidence of another Appellant or where such evidence is in any way favourable to any of*

*the other Appellants. It is trite law that a reference made in a caution statement by one accused cannot be made use of against another accused. It is also trite law that if an accused while testifying on oath at the trial implicates another accused that will be evidence against the other accused. It may be in the form of an admission that he committed the crime along with the other accused or it may be in the form of a 'cut-throat defence' (**R V Turner & Others** [1979]70 Cr App R 256; **R V Varley** [1982] Cr App R 242; **Bannon V Queen** [1995] 185 CLR 1) where he implicates the other accused in the crime exonerating himself. It is my view that where an accused corroborates the evidence of another accused or gives evidence favourable to any of the other accused; that is also evidence that must be considered by the Assessors and the trial Judge in coming to a finding against the accused. I have examined both the summing up and the judgment in this case and find that this matter has not been specifically addressed at all. The learned Trial Judge's statement at the end of his summing up in regard to what I have stated above is misleading, namely: "If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of each accused's guilt of each charge you must find him guilty for that charge. You have to consider evidence against each accused and each charge separately". There is no mention of the defence version of events and a direction to consider whether the evidence of one Appellant is favourable to another.*

[15] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[16] The appellant argues that there was no direction on how to assess the weight to be attached to the evidence of the wife of the first accused and therefore that omission had resulted in more suspicion being cast on the appellant.

[17] I think the basis of this submission is based on the evidence of the first accused's wife that the first accused Apisai has certain objects in his penis namely marbles and due to these objects, she receives injuries in her vaginal area whenever she engages in sexual intercourse with Apisai. Dr. Baladina who had examined the first accused had said that there could have been laceration if a seventeen years old girl had forceful sexual intercourse with a man having a penis containing foreign objects on three occasions but it would depend on whether she was aroused and ready for sexual intercourse or had given birth to a child etc. However, Dr. Anareta then had explained the medical report made by Dr. Baladina in respect of the foreign objects inserted in the penis of the first accused and said that if the first accused raped the victim twice with his penis

with foreign objects, still the tearing or laceration of the vagina depend on the force and the aggressiveness of the penetration.

[18] The appellant seems to suggest that because the medical evidence was inconclusive as to forcible sexual intercourse in explaining the old blood around vaginal canal thus not being able to attribute it to the presence of marble in the first accused's penis, there was a possibility of the assessors casting more suspicion on the appellant having had sexual intercourse with the complaint without her consent attributing blood around vaginal canal to his act of sexual intercourse. This, I think is a rather far-fetched theory. The majority of assessors in the end had seemingly decided independent of medical evidence and the evidence of the first accused's wife that both accused had had forcible sexual intercourse with the complainant.

[19] Therefore, this ground of appeal has no reasonable prospect of success.

03rd ground of appeal

[20] The appellant submits that the trial judge had mentioned the existence of inconsistencies in the evidence of the complainant but not sufficiently directed the assessors on them. Regarding the submission of counsel for both parties that there had been inconsistencies in the prosecution and defense cases the trial had stated as follows.

> *177. I will now explain you the purpose of considering the inconsistent nature of the evidence given by a witness in court and the previously made statement by the same witness. You are allowed to take into consideration about such inconsistencies and the omissions when you consider credibility and reliability of the evidence given by the witness.*
>
> *178. The evidence is what a witness told us in court on oath/affirmation. If you are satisfied that a witness has made a statement which is in conflict with his evidence given in court, you may take into account that inconsistency when you determine the credibility and reliability of the evidence given by the witness.*
>
> *179. In examining suggested inconsistencies, you have to first determine whether there is in fact and in true context, an inconsistency; and if you decide that there is one, then you have to decide whether it is material and relevant or, on the other hand insignificant or irrelevant. If there is an inconsistency, it might lead you to conclude that the witness is generally not to be relied upon;*

alternatively, that a part only of his/ her evidence is inaccurate; or you may accept the reason he has provided for the inconsistency and consider him to be reliable as a witness.

[21] In the course of the summing-up while summarizing the evidence of the prosecution witnesses from paragraphs 31-104 the trial judge had highlighted not only the evidence but where inconsistencies had appeared. Thus, I do not find the summing-up to be obnoxious to the sentiments expressed in **Prasad v State** FJCA 77; AAU0013U of 2002 (30 August 2002). In fact the Court of Appeal much later remarked in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) on inconsistencies, contradictions and omissions as follows.

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)'*

[22] The trial judge once again had considered the prosecution evidence in paragraphs 28-39 of the judgment which includes what he had stated in the summing-up as well. I commented in the ruling in **Waininima v State** AAU0142 of 2017 (10 September 2020) as follows

> *'[20] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard given to the assessors by the trial judge.*

[23] Therefore, there is no reasonable prospect of success in this ground of appeal too.

04th ground of appeal

[24] The appellant complains that the trial judge had not directed the assessors sufficiently on the consistency of the appellant's evidence. From paragraphs 105 – 130 (first accused) and 131- 148 the trial judge had summarized the evidence of the appellant. Then, he had in detail analyzed the evidence of the defense witnesses including the appellant in paragraphs 05-27 of the judgment and stated why the defense had failed to create a reasonable doubt on the prosecution case.

[25] What is stated on applicable law under the previous ground is equally applicable to this ground as well.

[26] Therefore, there is no reasonable prospect of success in this ground of appeal.

05th ground of appeal

[27] The appellant submits that the trial judge was wrong in stating in the judgment that the appellant ought to have been looking down at the complainant's injured stomach during intercourse. This is based on paragraph 24 of the judgment.

> *'24. In contrast, Epeli has not seen any injuries on Rosa's stomach area while they were drinking at the mango tree. <u>According to his evidence, she was naked and was on top of him when they had sexual intercourse. If she had any injuries as Apisai claimed, Epeli should have seen them when he had sexual intercourse with her.</u> When they came back to the mango tree, Rosa was about to cry and complained that she was hurt as her boyfriend Ratu has a child with her elder sister. Epeli did not say that Rosa cried and complained about the sexual intercourse.'*

[28] The above was not a direction to the assessors as wrongly claimed by the appellant in the submission. The trial judge had not given such a direction in the summing-up. Therefore, the appellant's criticism has no factual basis and in any event it is on a peripheral matter and not on a matter of crucial importance.

[29] Therefore, there is no reasonable prospect of success in this ground of appeal.

06th ground of appeal

[30] This complaint is on alleged insufficient directions on the weight to be given to the medical reports by the trial judge.

[31] The trial judge had directed the assessors on the evidence of Dr. Anareta in paragraphs 66-89, Dr. Baladina Kavoa in paragraphs 123 and 124 and finally in paragraph 156 of the summing-up and said as follows.

> *'157. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the victim subsequent to this alleged offence and also the foreign objects inserted in to the penis of the first accused and its impact in sexual encounters.*
>
> *158. With regard to these particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/ or to come to any conclusions on those issues on the basis of your own observations or experiences. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.'*

[32] The trial judge had also considered medical evidence in paragraphs 33-36 and 38 of the judgment and I do not think that there is any deficiency on the part of the trial judge in dealing with the medical evidence including its weight.

[33] Therefore, there is no reasonable prospect of success in this ground of appeal.

07th ground of appeal

[34] The appellant's counsel abandoned this ground of appeal at the leave to appeal hearing.

08th ground of appeal (sentence)

[35] The appellant's challenge is based on a misunderstanding of the tariff applied by the trial judge. He argues that it should have been 07 years as the starting point as the complainant was 17 years of age and also that the trial judge had not given sufficient weight for the mitigating factors.

[36] The trial judge had correctly applied the tariff for juvenile rape (under 18 years of age) based on **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) which was 10-16 years of imprisonment. The judge had selected 13 years as the starting point and reduced 02 years for the previous good character and relatively young age (which the appellant did not deserve at 32 years of age).

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

Order

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

COURT OF APPEAL FIJI

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