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

CRIMINAL APPEAL NO.AAU 0009 of 2017
[High Court Suva Criminal Case No. HAC 305 of 2014]

BETWEEN : **INOKE CUMU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. T. Lee for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **25 September 2020**

Date of Ruling : **28 September 2020**

RULING

[1] The appellant had been charged in the High Court of Suva on a single count of rape committed on 12 May 2014 at Nasigatoka Village, in Rewa in the Central Division contrary to section 207(1) and (2)(b) and (3) of the Crimes Decree No.44 of 2009. The particulars of the offence were that;

(COUNT 1)

Statement of offence

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

Particulars of the Offence

> ***INOKE CUMU,*** *between the 12th day of May 2014 and the 15th day of August 2014, at Nasigatoka Village, in Rewa, in the Central Division, penetrated the vagina of* ***A.B.****, a child under the age of 13 years, with his tongue.*

[2] After summing-up, on 08 December 2016 the majority of the assessors had expressed an opinion of guilty of rape against the appellant. The learned High Court judge in the judgment dated 13 December 2016 had agreed with the majority of the assessors and convicted the appellant of the count of rape. He was sentenced on 15 December 2016 to imprisonment of 12 years with a non-parole period of 09 years.

[3] A timely notice of appeal against conviction and sentence had been signed by the appellant on 06 January 2017. Written submissions on behalf of the appellant had been tendered on 23 May 2017. The Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence along with written submissions on 27 July 2020. The state had responded by way of some, regrettably, sketchy written submissions on 25 September 2020 forcing the state counsel appearing at the leave to appeal hearing to rely on his oral submissions.

[4] The evidence against the appellant had been summarised by the learned trial judge in the judgment as follows.

> ***'[6]*** *Prosecution case was based primarily based on the evidence of the 10 year old complainant and the caution interview of the accused, which contained some admissions. According to the complainant, the accused after pulling her into his house, pulled down her panties and licked her vagina. She was on her way back to her house after borrowing some matches from her grandmother. This happened during her August 2014 school holidays in her village.*
>
> ***[7]*** *Her teacher Mrs. Bula, who was called by the prosecution in order to place recent complaint evidence, stated that what the complainant told her was that she had gone to a neighbour's house to borrow some matches and when she knocked on its door, Inoke pulled her in and then licked her vagina after removing her pants. During her cross examination, A.B. admitted that she knew the accused as Inoke and only this year she was told by someone that his name is Inoke Cumu.'*

[5] The appellant had been attending court until the *voir dire* inquiry was over and thereafter had abstained himself from the rest of the proceedings but had been continuously defended by his counsel throughout the trial.

[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.

[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

Against Conviction

(1) 'THAT the learned Trial Judge may have fallen into an error in fact and law to provide a fair; balance and objective Summing Up when directing the assessors, in particular, to the following:

(a) No reasonable and independent evidence was adduced to prove the identity of Appellant as the alleged perpetrator

(b) Not directing the assessors on the competency and importance of a child witness as required by section 10(1) of the Juveniles Act (Cap 56).

(2) THAT the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:

(a) Failure to assess the competency and importance of a child witness as required by section 10(1) of the Juveniles Act (Cap 56) resulted in the inconsistencies of the State witness's evidence;

(b) Accepting the admissions made in the caution interview statement is sufficient to establish all the elements of rape when the accused constitutional rights as per Chapter 2 Article 13 (1)Ik) of the Constitution of Fiji was breached thereby nullifying the admissibility of the caution statement; and

(c) Finding that the identify of the accused was established beyond a reasonable doubt, when in fact State was not relieved of the burden of proving beyond a reasonable doubt that there is only one person by the name of 'Inoke' who resides in Nasigatoka Village and/or Lomanikoro Village.

Against sentence

(3) THE Learned Trial Judge may have fallen into an error in principle when sentencing the Appellant, in particular, to the following:

(a) Allowing extraneous or irrelevant matters to guide or affect the Sentencing Judge."

Grounds of appeal 01(a) and 2(c)

[9] The appellant argues that the identity of the perpetrator had not been established beyond reasonable doubt. He insists that it was a case of mistaken identity as there was another Inoke Cumu in the village.

[10] The relevant paragraphs in the summing-up directly relevant to the issue of identity of the appellant are as follows.

> *'**[88]** The identity of the accused too must be proved by the prosecution beyond a reasonable doubt. In order to prove that it is this accused who had penetrated the vagina of A.B. with his tongue, the prosecution relied on evidence of the complainant and also on the admissions contained in the caution interview statement of the accused marked and tendered as **P.E. No. 1A**.*
>
> ***[89]** The accused wants you to believe that it was a different Inoke Cumu who is responsible for this incident and not him. He claims that the prosecution has accused a "wrong man". He relies on the evidence of the complainant that the incident was with Inoke Cumu of Nasigatoka, who is her neighbour and the accused is from the village of Lomanikoro not of Nasigatoka. In cross-examination, the complainant admitted that she was told by someone that Inoke is known as Inoke Cumu. The prosecution says these two villages are only separated by a foot path. <u>It might be relevant to note that there is no evidence before Court that there were others who were also known as Inoke Cumu in the area.</u>*
>
> ***[90]** It is for you to decide this highly contested question of fact. If you entertain a reasonable doubt that whether it was Inoke Cumu of Nasigatoka who is responsible for this incident, then that benefit of doubt should go to the accused. If you have no such doubts that it was the accused in this case is the person who is responsible for the act of penetration of the complainant's vagina by tongue, then you may convict him as charged.'*

[11] The learned trial judge had given his mind to this aspect once again in his judgment in paragraph 7 and 14.

> *'**[7]** Her teacher Mrs. Bula, who was called by the prosecution in order to place recent complaint evidence, stated that what the complainant told her was that she had gone to a neighbour's house to borrow some matches and when she knocked on its door, Inoke pulled her in and then licked her vagina after removing her pants. During her cross examination, A.B. admitted that she knew the accused as Inoke and only this year she was told by someone that his name is Inoke Cumu.*

> *'**[14]** This Court is also satisfied that evidence of the prosecution presented through the complainant and the admissions made in the caution interview statement, is sufficient to establish all the elements of Rape, namely penetration of vagina by tongue by the accused. It also established the identity of the accused also beyond a reasonable doubt, as there is no evidence to show there was another or several others who also known as "Inoke" in the village of Nasigatoka.'*

[12] Therefore, on the one hand there had been no evidence that there was another or several others known as "Inoke" in the village of Nasigatoka. A mere suggestion on behalf of an accused would not become evidence unless accepted by the witness. It appears that the proposition relating to the presence of another Inoke Cumu from Nasigatoka village and that the appellant was from the adjoining Lomanikoro village, if put to the victim in cross-examination, had remained a suggestion only.

[13] Secondly, in any event the appellant had admitted his identity in the cautioned interview. Thus, even in the total absence of any evidence on his identity from the victim the appellant's confession to having committed the crime alleged is sufficient evidence to establish his identity beyond reasonable doubt.

[14] Therefore, these two grounds of appeal have no reasonable prospect of success.

Grounds of appeal 01(b) and 2(a)

[15] The appellant's contention is that the trial judge had not assessed the competency of the child witness and failed to direct the assessors on the competency of a child witness as required by section 10(1) of the Juveniles Act and.

[16] The basis of appeal ground 2(a) is not borne out by the summing-up, judgment or the sentencing order. The counsel for the appellant submitted that he had not had a chance of perusing the trial proceedings to find out whether the trial judge had in fact inquired into the competency of the 10 year old child victim.

[17] The State counsel submitted that the learned trial judge would have found the complainant who was 10 years of age to be a competent and compellable witness and

that the trial judge must have inquired into the competence of the child as a witness before taking her evidence.

[18] It is the duty of the counsel in drafting and arguing grounds of appeal to act responsibly and not to make sweeping and unjustified attacks on the summing-up of the trial judge unless such attacks can be justified [vide **Morson** (1976) Cr App R 236]. Thus, counsel should not settle or sign grounds of appeal unless they are reasonable, have some real prospect of success and are such that he is prepared to argue before the court [vide paragraph 2.4 of the '**A Guide to Proceedings in the Court of Appeal Criminal Division** ('the Guide') published in the UK in 77 Cr App R 138].

[19] At this stage in the absence of the full appeal record, there is no material at all to justify the criticism that the trial judge had failed to look into the competence of the child victim and therefore there is no weight to the appellant's complaint. Nor does it appear that there had been any objection raised at the trial by the counsel appearing for the appellant as to the competency of the victim to give evidence. If there was such a contest, I would expect it to have figured in the summing-up and the judgment. In the recent past the Court of Appeal examined in detail *inter alia* the legal framework of a competency test in **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018) and it is only with the benefit of the appeal record this ground of appeal could be examined in the light of ***Alfaaz.***

[20] Regarding the appellant's complaint in appeal ground 1(b) that the trial judge had not directed the assessors on the competency and importance of a child witness, I find that particularly in paragraphs 48 – 58 of the summing-up the trial judge had directed the assessors on the victim's evidence in relation her being a child. Thereafter, from paragraphs 59-75 the judge had dealt with other aspects of evaluating her evidence.

[21] The appellant has cited the case of **Kumar v State** [2016] FJCA 44; CAV0024 of 2016 (27 October 2016) and submits that the trial judge had failed to give a warning as to the danger of convicting an accused on the uncorroborated evidence of a child.

[22] In **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018) the Court of Appeal having considered several previous decisions including **Kumar** stated:

> *'[25] Thus, in the light of the decision in Kumar the current legal position, in my view, could be stated as follows.*
>
> *(i) There is no longer any legal requirement for the unsworn evidence of a child to be corroborated to secure a conviction.*
>
> *(ii) Although there should no longer be any legal requirement on trial judges to give a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, they may do so if they think that it is appropriate in a particular case.*
>
> *(iii) The Trial Judge should conduct a 'competence inquiry' required by section 10(1) of the Juvenile Act before a child can give evidence to ascertain whether the child could give sworn evidence and if not unsworn evidence. However, failure to do so would not per se be fatal to a conviction but it is a good practice for a judge to tell the child that he or she must tell the truth.*

[23] In the first place, there is no material at this stage to conclude that the victim in this case had given unsworn evidence. If she had given sworn evidence then no question of 'corroboration' or 'warning' arises at all. If her evidence had been unsworn evidence, still it does not mean that it should be corroborated as a matter of law and the judges must always give a warning of the danger of convicting on such evidence. Such a warning is necessary if the trial judge thinks that it is appropriate to do so in a given case.

[24] Thus, the learned trial judge's failure to warn the assessors of the danger of convicting the appellant on allegedly unsworn evidence cannot form the basis of a legitimate appeal ground at this stage.

[25] Thus, there is no reasonable prospect of success in the above grounds of appeal.

Ground of appeal 2(b)

[26] The appellant contends that his cautioned interview had been taken in violation of his constitutional rights under section 13(1)(k) of the Constitution and therefore should not have been admitted. The factual basis alleged by the appellant is that his request for his mother to be present during the interview was turned down by the police as he had been assaulted by them.

[27] The appellant refers to paragraph 9 of the judgment.

> *'[9] In relation to his caution statement, where he made certain admissions on relevant matters to this case, the accused claimed through his suggestions, that the Police treated him unfairly by refusing to his mother to be present during his interview and it was made involuntarily due to assault by three Police officers.'*

[28] The trial judge had addressed the assessors in great detail on his cautioned interview in paragraphs 77-87 despite the absence of the appellant during the trial. Nowhere had it been stated that it had been suggested on behalf of the appellant at the trial that the police had prevented the appellant's mother from being present during the cautioned interview. Thus, it appears that what the trial judge had referred to in paragraph 9 of the judgment is based on the *voir dire* inquiry proceedings. The question arises if that allegation had contained any truth why the appellant's counsel failed to at least suggest to the police witnesses that position at the trial. Thus, there had been no reason for the judge to address the assessors on the appellant's allegation in the summing-up as cautioned interview had already been admitted in evidence following the *voir dire* inquiry.

[29] The trial judge had further given his mind to the cautioned interview evidence in paragraph 13 of the judgment and stated that having ruled it admissible after the *voir dire* inquiry (where the appellant had offered evidence), three was no reason to change his mind regarding the appellant's confessions even after the trial proper.

> *'[13] It is the considered opinion of this Court that the caution interview statement, tendered as P.E. No. 1A is voluntarily made by the accused. His suggestions relating to the circumstances under which it was made is improbable, inconsistent and denied by the interviewing officer. <u>This Court already ruled in favour of its voluntariness after a voir dire, during which the accused offered evidence. Upon reconsideration of the evidence, this Court finds no reason to change its view. It contained a truthful statement, voluntarily made by the accused.'</u>*

[30] Therefore, there is no reasonable prospect of success in the above ground of appeal.

03rd ground of appeal (*sentence*)

[31] The appellant argues that the out of the aggravating factors, the age gap between the victim and the appellant and the fact that after the crime the victim had to relocate her residence are extraneous and irrelevant factors and should not have been taken into by the trial judge. I disagree. Some assistance in this regard could be summoned from the sentencing guide from UK formulated by the Sentencing Council for rape of children less than 13 years of age. *'Age and/or lack of maturity where it affects the responsibility of the offender'* is considered a mitigating circumstance. The age gap of 14 years goes to demonstrate how mature the appellant was compared to the 08 year old victim and produces the opposite effect to this mitigating circumstance and could be considered as an aggravating feature. Similarly, '*Victim compelled to leave their home, school, etc.'* has been considered an aggravating factor and therefore the appellant having to relocate herself from the village due to this incident could be considered an aggravating factor.

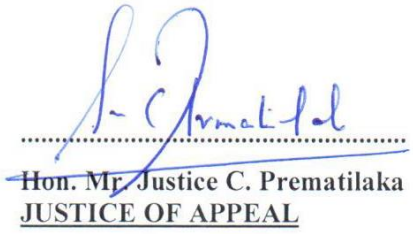
[32] In any event, the ultimate sentence of 12 years of imprisonment is well within the tariff applicable to juvenile rape of 10-16 years of imprisonment [vide **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Now it is 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018).

[33] 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 (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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 (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[34] The appellant has no reasonable prospect of success in this ground of appeal as there is no sentencing error.

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