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

CRIMINAL APPEAL NO.AAU 144 of 2015
[In the High Court at Labasa Case No. HAC 050 of 2014LAB]

BETWEEN	**:**	**KATOKAITI TUTARA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Mr. K. R. Prasad for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**24 September 2020**
Date of Ruling	**:**	**25 September 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa on five counts of rape committed in Rabi against two complainants in the Northern Division between 20 July 2013 to 28 January 2014 contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 respectively.

[2] The information read as follows.

First Count
Statement of Offence

***RAPE**: Contrary to section 207 (1) and 2 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

***KATOKAITI TUTARA**, on the 20th day of July 2013, in Rabi, in the Northern Division, had carnal knowledge of **A**, without her consent.*

Second Count
(Representative)
Statement of Offence

RAPE: *Contrary to section 207 (1) and 2 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

KATOKAITI TUTARA*, on the 24thday of January 2014, in Rabi, in the Northern Division, had carnal knowledge of* ***A****, without her consent.*

Third Count
Statement of Offence

RAPE: *Contrary to section 207 (1) and 2 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

KATOKAITI TUTARA*, on the 12th day of January 2013, in Rabi, in the Northern Division, had carnal knowledge of* ***B****, without her consent.*

Fourth Count
Statement of Offence

RAPE: *Contrary to section 207 (1) and 2 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

KATOKAITI TUTARA*, on the 20th day of January 2014, in Rabi, in the Northern Division, had carnal knowledge of* ***B****, without her consent.*

Fifth Count
Statement of Offence

RAPE: *Contrary to section 207 (1) and 2 (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

KATOKAITI TUTARA*, on the 28th day of January 2014, in Rabi, in the Northern Division, had carnal knowledge of* ***B****, without her consent.*

[3] The brief facts, as could be gathered from the summing-up are as follows.

> *'13. The prosecution's case was as follows. The accused is 65 years old. The first complainant (PW1) is now 16 years old. The second complainant (PW2) is now 15 years old. Both the complainants' mothers are the accused's (DW1) biological daughters. So both complainants are the accused's granddaughters. The accused is their grandfather. In 2013, according to the prosecution, PW1 was living with her grandfather, in a village in Rabi. On 20 July 2013, according to the prosecution, the accused woke PW1 up, and told her, they were going into the bush to collect some "papai" (root crop).*
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> *14. Once in the bush, the accused cut PW1's trousers with a cane knife, and threw the same into the bush. He then ordered PW1 to lie down on the ground. He was holding a cane knife at the time. He then took off his pants, went on top PW1 and inserted his penis into her vagina. She did not consent to the above, and the accused well knew she was not consenting to sex at the time. He warned her not to tell anyone, or he will kill her (count no. 1). On 24 January 2014, according to the prosecution, the accused again repeated the above episode to PW1 (count no. 2).*
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> *15. As for PW2, on 12 January 2013, she was staying at the house of the accused. According to the prosecution, on that day, the accused and PW2 went to the family plantation in the bush to clean the same. PW2 was under 13 years old at the time. The accused later cleared a space in the bush. He ordered PW2 to take off her clothes and lie on the ground. She refused, and he pushed her to the ground. He went on top of her, and inserted his penis into PW2's vagina.* ***As a matter of law, she was under 13 years and was thus incapable of consenting to sex****. He well knew she was incapable of consenting to sex at the time, as she was under 13 years old (count no. 3). On 20 January 2014, the accused repeated the above episode to PW2. He warned her not to tell anyone about the incident or he will kill her (count no. 4).*
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> *16. On 28 January 2014, PW2 was folding clothes in a bedroom in the accused's house. The accused came into the bedroom and forced himself on PW2. At the time, he was holding a kitchen knife. He tied PW2's mouth with a piece of cloth. He tied her wrists with ropes tied to a stick. He forced her onto a mattress which was on the floor. He tied her ankles with a rope. He then inserted his penis into PW2's vagina without her consent. He well knew she was not consenting to sex at the time, because he had to tie her hands and legs, including gaging her, before he inserted his penis into her vagina (count no. 5).*
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> *17. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on all counts. That was the case for the prosecution.*
>
> *19. The accused's case was very simple. On oath, he denied ever inserting his penis into PW1 and PW2s' vaginas, as alleged in counts no. 1, 2, 3, 4, and*

5. He denied the first element of rape as described in paragraph 9 (i) hereof. If you accept the above, then you will have to find the accused not guilty as charged on all counts. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged on all courts. That was the case for the defence.'

[4] At the conclusion of the trial on 22 October 2015 the assessors unanimously had opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant and sentenced him on 23 October 2015 to 16 years of imprisonment on each count of rape to run concurrently with a non-parole period of 15 years.

[5] The appellant's timely application for leave to appeal against conviction had been signed on 03 November 2015. He had then signed amended grounds of appeal against conviction and sentence on 30 January 2017 and therefore his sentence appeal is out of time by about 01 year and 02 months. The appellant had tendered three abandonment notices in Form 3 in respect of his conviction and sentence appeals on 19 March 2019, 02 July 2019 and 11 July 2019. However, in May 2019 he had changed his mind and wanted to proceed with his appeal. Again in October 2019 he had stated that he would proceed against his conviction appeal. R Vananalagi & Associates had filed an application for extension of time in respect of the appellant's sentence appeal along with submissions. Thereafter, the Legal Aid Commission had taken over the appellant's appeal and indicated to this court on 22 June 2020 that the appellant would proceed only against sentence and abandon the conviction appeal and tendered written submission only on the issue of enlargement of time and sentence on the same day. The state had responded on 29 July 2020.

[6] The appellant is said to be speaking Rambian or Gilbertese language and had the assistance of a translator who was present in court on 24 September 2020. Although the matter was only to be mentioned on 24 September 2020 the court asked both counsel whether they were ready to proceed with the leave to appeal hearing as the appellant was now said to be of 70 years of age, the proceedings in the appeal had been long delayed since 2015, the written submissions of both parties had already been filed and a translator was present in court. Since both counsel agreed, the court proceeded to

conclude the inquiry by way of oral submissions made by both counsel who also relied on the written submissions already filed.

[7] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. This is relevant to the appellant's sentence appeal.

[8] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
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> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[9] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[10] Under the third and fourth factors in ***Kumar,*** test for enlargement of time now is **'real prospect of success'.** I would rather consider the third and fourth factors in ***Kumar*** regarding the sentence appeal first before looking at the other factors which will be considered, if necessary, in the end.

[11] 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.*

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

> *1. The Learned Trial Judge erred in law when he subsumed the Appellant's period of remand in the mitigating factors.*
>
> *2. The sentence is harsh and excessive.*

01st ground of appeal

[13] The appellant argues that his remand period of 01 year and 04 months being subsumed in the mitigating factors is an error in principle. In paragraph 5 of the sentencing order the learned High Court judge had itemized the said remand period under mitigating factors and in paragraph 6 the judge had stated:

> *'6. On count no. 1, I start with 14 years imprisonment. I add 5 years for the aggravating factors, making a total of 19 years imprisonment. I deduct 1 year 4 months for time already served, while remanded in custody, leaving a balance of 17 years 8 months. For not offending in the last 10 years, I deduct another 1 year 8 months, leaving a balance of 16 years imprisonment. On count no. 1, I sentence you to 16 years imprisonment.'*

[14] Therefore, it is clear that though the trial judge had considered the appellant's period of remand as a mitigating factor, the full period of remand had been separately deducted from the sentence and not subsumed in the total discount for mitigating factors.

[15] In **Vasuca v State** [2015] FJCA 65; AAU011.2011 (28 May 2015) it was held

> *'[17] So how should sentencing courts consider remand period in sentence. In my opinion, the answer lies with how the remand period was considered under*

*the common law as outlined in **Basa's** case, that is, when calculating the appropriate sentence for any offence, sentencing courts should allow for any substantial period in custody but it is not necessary to make a precise calculation. What is a substantial period, of course, will depend on the facts of each case and the sentence that has been imposed on the offender.*

[16] In **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017) the Court of Appeal said:

> *'[12] Furthermore, there is no error of law regarding the method the learned trial judge used to discount the appellant's remand period. Sentencing is not a mathematical exercise. Sentencing involves an exercise of discretion involving the difficult and inexact task of weighing factors to arrive at a sentence that fits the crime (Koroicakau v State unreported Cr App No CAV0006 of 2005S; 4 May 2006). The relevance of the remand period to the exercise of that discretion is provided by section 24 of the Sentencing and Penalties Act 2009. Section 24 reads:*
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> > *If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.*
>
> *[13] There is no ambiguity in the wording of section 24. It clearly sets out the sentencing court's obligation to consider the remand period in sentence. In the present case, the sentence was reduced to reflect the remand period. The appellant's argument is that the method that was used to make the reduction is incorrect. However, the methodology used for discounting does not involve an error of principle (Qurai v State unreported Cr App No CAV24 of 2014; 20 August 2015). Some judges discount the remand period by subsuming it with the mitigating factors, while others discount it separately from the mitigating factors. Unlike a recent decision of this Court in Domona v State unreported Cr App No AAU0039 of 2013; 30 September 2016, in Sowane v State unreported Cr App No CAV0038/2015; 21 April 2016, the Supreme Court did not prefer one method over the other (see, [16]). The principle that the Supreme Court endorsed was stated at [14]:*
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> > *..., the clear wording of section 24 states it is for the sentencing court to have regard to the remand period and to make the necessary order. The burden is cast upon the court. In doing so it is not necessary to make exact allowance for days and even weeks spent on remand. It depends upon its total significance. (per Gates CJ)*
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> *[14] In the present case, the length of the remand period was significant. The learned trial judge considered the remand period and reduced the sentence to reflect that period. Any further reduction will amount to double discounting for the same factor and will constitute an error of principle…'*

[17] Although in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) it was held that the Supreme Court had favoured the approach to granting the discount to be that the remand time is to be dealt with last, once the term and non-parole period is arrived at and the court will set out a suitable discount, it did not consider any other method to constitute a sentencing error.

[18] Therefore, this ground of appeal too has no real prospect of success.

02nd ground of appeal

[19] The appellant's complaint is that his sentence is at the higher end of sentencing tariff applicable at the time of sentencing. The sentencing tariff applicable to juvenile rape was 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)] until it was increased to 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). Where within that range should the starting point be?

[20] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[21] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. Sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[22] The Supreme Court once again said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that whatever methodology judges choose to use, the ultimate sentence should be the same. If judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating

features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise ***any*** of the aggravating factors, and they will then have to factor into the exercise ***all*** the aggravating features of the case as well as the mitigating features. Either way, you should end up with the same sentence. If you do not, you will know that something has gone wrong somewhere.

[23] The Supreme Court in ***Kumar*** identified another instance of double counting by stating that many things which make a crime so serious have already been built into the tariff and that puts a particularly important burden on judges not to treat as aggravating factors those features of the case which already have been reflected in the tariff itself. That would be another example of 'double-counting', which must be avoided.

[24] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[25] The learned trial judge had stated regarding the aggravating features in the sentencing order as follows.

> *'4. In this case, the aggravating factors were as follows:*
>
> *(i) Breach of Trust. You were the complainants' grandfather. Their mothers were your biological daughters. At the time of the offences, they were 13 to 15 years old. As their grandfather, they look up to you for guidance and security. As their grandfather, you were supposed to look after them, and see that no-one harms them. However, you did the unthinkable. Instead of protecting them, you raped them. This was a serious breach of the trust they had in you.*
>
> *(ii) Rape of children. This type of offending is becoming prevalent in our community. The courts had said so many times before that, it will not idly stand by and let children be treated in this way. It will step in and pass heavy sentences, as a warning to others, not to abuse children. As the courts had repeatedly said before, the children of this country are its future.*
>
> *(iii) The use of a cane knife to threaten the child complainants. During the offences, you continually used a cane knife and a kitchen knife to threaten your*

granddaughters before raping them. You are really a coward by threatening children with knives. This is the lowest type of act a person could do to children.

(iv) Use of a rope and cloth to subdue complainant No. 2 in count no. 5. You used a cloth to tie around the complainant's mouth to stop her from raising the alarm. Then you tied her wrists and ankles with a rope to stop her from resisting you. Then you raped her, while your wife was lying down sick in another room. You should not complain when you are given a heavy sentence to pay for your crimes.

[26] Firstly, it appears that the trial judge may in all probability have taken at least some of the factors set out under aggravating features in picking the starting point close to the higher end of the tariff of 10-16 years. Then, he had added 05 years for the 'aggravating factors'. It is not on record as to what aggravating factors had been taken into account in taking a high starting point of 14 years but in enhancing it to 19 years all the aggravating factors set out in paragraph 4 had presumably been taken into consideration. There seems to be double counting in the process.

[27] Secondly, rape of children had been considered as one of the aggravating factors in enhancing the sentence by 05 years. However, the tariff of 10-16 years had been set for rape offences involving juveniles (less than 18 years of age) who obviously include children. Thus, the issue is whether there is another form of double counting there as well.

[28] The first aggravating factor seems to relate to the offender while the third and fourth factors appear to relate to the offending.

[29] Thus, the issue of the sentencing error of possible double counting in itself may have a real prospect of success in appeal. However, 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).

[30] The ultimate sentence of 16 years is still within the tariff. The facts as stated in the summing-up are shocking, disturbing and damning where the appellant had preyed on his two granddaughters several times over. I think there are more aggravating features than even listed by the trial judge. The appellant did not deserve any discount for having not offended in the last 10 years, for he had committed not only one act but five acts of rape spanning over 07 months.

[31] Therefore, I do not think that the appellant has a real prospect of success with his ultimate sentence in this appeal before the full court.

[32] The delay is substantial and the reasons are all too common. However, the delay may not prejudice the respondent.

Order

1. Enlargement of time to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL