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

CRIMINAL APPEAL NO.AAU 0075 of 2016
[In the High Court at Suva Case No. HAC 013 of 2015]

BETWEEN	:	**ERNEST PETUELI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**23 October 2020**
Date of Ruling	:	**26 October 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of rape contrary to section 207 (1) and (2) (b) of the Crimes Act, 2009 committed on 19 December 2014 in Nausori, in the Central Division.

[2] The information read as follows.

'First Count
Statement of Offence

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

Particulars of Offence

ERNEST PETUELI *on the 19th day of December 2014, in Nausori, in the Central Division, penetrated the vagina of* ***SERALYN NAWACIONO*** *without her consent.*

[3] After the summing-up on 08 April 2016 the assessors had unanimously opined that the appellant was guilty of the charge of rape and in the judgment delivered on 11 April 2016 the learned trial judge had agreed with them and convicted the appellant as charged. On 19 April 2016 the appellant had been sentenced to 09 years and 05 months of imprisonment with a non-parole period of 08 years.

[4] The appellant in person had signed an untimely notice of application for leave to appeal against conviction and sentence on 20 June 2016. The delay is about 30 days and the state does not object to the delay. The amended ground of appeal and against conviction along with written submissions had been tendered by the Legal Aid Commission on 31 December 2019. The state had responded by its written submission on 13 August 2020. Thereafter, the appellant withdrew from the services of the LAC and had filed further grounds of appeal against conviction and sentence and written submissions in person on 11 June 2020. The state had filed further written submissions in reply on 14 August 2020.

[5] 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.

[6] 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 filed within time 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.*

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

Against conviction

Ground 1 – *That the learned Trial Judge erred in law and in fact when he convicted the appellant without adequately assessing the totality of evidence.*

Ground 2 – *That the learned Trial Judge erred in law and in fact by failing to consider and give a special warning about the dangers of relying in a recent complaint without independent sources to establish the testimonial trustworthiness of the witness and complainant.*

Ground 3 - *That the learned trial Judge erred in law and when he failed to take into account the significant contradictions of the evidence by the prosecution case.*

Against Sentence

Ground 1- *That the learned sentencing Judge made a sentencing error in the absence of a parole order to determine the appellants release from custody after the completion of his non-parole under Section 18 of the sentencing and penalties act of 2009. Failure to give the order caused a gross failure in the administration of the criminal justice system.*

Ground 2 - *That the sentence is unlawful and if it is not unlawful, it is harsh and oppressive taking into account the irrelevant matters that the learned sentencing Judge admitted into evidence whilst enhancing the sentence. Reduce sentence in light of the pandemic corona virus.*

[8] The trial judge had summarised the evidence for the complainant and appellant as follows in the judgment.

> *4. 'It is an undisputed fact that the complainant and her sister had been drinking alcohol with the accused and some others behind MH Supermarket. Complainant's evidence is that the accused had tried to touch and kiss the complainant which she did not like. Complainant had then gone to 'Blackzone' and then with her sister and others had continued to drink at Syria Park.*
>
> *5. Accused had joined them again. The complainant had laid down on the grass. Then the accused had lifted her and had thrown her to the Rewa River. When the complainant screamed, her sister had come for help. However, the accused had pushed her and come down to the river to the complainant. She had been wearing a mini dress. When the complainant was screaming for help the accused had pulled her panty down and inserted his finger into her vagina. This has happened for about 15 – 20 minutes. Then the complainant had kicked the accused when she got the chance and had started swimming. She was pulled out of the river by 3 other girls, she said.*
>
> *6. She said that it was painful when the accused inserted his finger into her vagina.*
>
> *7. The accused in his evidence admitted drinking with the complainant and the others. He said that the complainant fell into the river and that he jumped to the river to save her. He said that he had to struggle to save his life as the complainant held on to her at the river. He had escaped from the complainant and had come to the shore and had slept. When he heard a noise of some people shouting, he had again gone to the water as he panicked. He said that he panicked because he thought that those people would do something to him for saving the complainant.*
>
> *8. The medical doctor who examined the complainant the following day gave evidence and produced the medical examination form in evidence. There had been a bruise in the complainant's vaginal vault and the doctor said it could have caused by penetration. It had been painful for the complainant when the vaginal area was touched. The medical report says that the injury was recent.*

01st ground of appeal

[9] The appellant seems to argue that the complainant was fully intoxicated and could not have remembered things as she had been drinking from 2.00 p.m. to 7.00 p.m. and she had said that she could not take hold of herself. The appellant's complaint, therefore, is that on the totality of evidence, which according to him had not been considered by the trial judge, he could not have been convicted for rape.

[10] Perusing the summing-up and the judgment I do not find that the appellant had pursued this line of argument at the trial. He had not run his case on that basis. At paragraph 22 of the summing-up there is a statement to the effect that the complainant had stated in evidence that she was not drunk to an extent that she was not aware of her surroundings and she had denied the appellant's suggestion that she slipped and fell into the river. Had she been as drunk as claimed by the appellant she perhaps may not have been able to swim ashore to safety and recollected what happened to her so clearly.

[11] In any event the trial judge had explained to the assessors the evidence of the complainant, doctor and police officer in paragraphs 16-33 of the summing-up and the appellant's evidence in paragraphs 35-41. Thereafter, he had analysed both versions from paragraphs 43-49 and left it to the assessors to decide which version they were going to accept after evaluating all the evidence as follows in paragraph 50.

> *'[50] Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in Court. You decide which witnesses were forthright and truthful, and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Observe and assess the evidence of all witnesses and their demeanor in arriving at your opinions.'*
>
> *'[51] I have explained the legal principles to you. You will have to evaluate all the evidence and apply the law as I explained to you, when you consider the charge against the accused have been proved beyond reasonable doubt.'*

[12] At the same time the trial judge had not failed to remind the assessors of the burden of proof and standard of proof in paragraphs 5, 6 and 34 of the summing-up.

[13] In the judgment also the trial judge had given his mind to the totality of evidence of the prosecution and the appellant and concluded as follows.

> *11. I observed the demeanour of the accused and he was evasive when giving evidence. He said that when he heard the people shouting, he went again to the water as he panicked. He has panicked thinking that the people would do something to him for saving complainant from the river. It is highly improbable that the people around would do any harm to the accused if he saved her from drowning. Obviously the accused went back to water as he panicked, but he did so because he knew what he did to the complainant. I find that the version of the accused that he jumped to the river to save the complainant and that he did not insert his fingers into her vagina is far from the truth.*
>
> *12. I find that the prosecution proved beyond reasonable doubt that the accused penetrated his finger into the complainant's vagina without her consent and that he knew that the complainant was not consenting.*

[14] As observed by the trial judge the prompt police complaint enhances the credibility of the complainant's version to the extent that it leaves little room for fabrication. In any event, the appellant had not suggested any sinister motive for the complainant to falsely implicate him in an act of rape. Further, medical evidence has corroborated a recent penetration of the complainant's vagina. The appellant's evasive conduct when the police came looking for him is evidence of subsequent conduct influenced by the fact in issue.

[15] The trial judge had more than adequately performed his role in agreeing with the assessors in the judgment. What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2;

CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)].

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

02nd and 03rd grounds of appeal

[17] It is convenient to consider both grounds of appeal together. The appellant seems to suggest that the complainant's prompt complaint to the police made shortly after the incident cannot be a reliable test as to the truth and credibility of the complainant as it did not come from an independent source.

[18] I do not think so. This complaint is ill-founded and misconceived. The trial judge had addressed the assessors in paragraph 46 of the summing-up on this point as follows.

> *'[46] In this case the complainant has made the complaint on the very next day. It may enhance the credibility of the complainant. However, the fact that the complaint was recent cannot be taken as corroborative evidence. You decide whether the complainant is a reliable witness or not. If you decide that she is a reliable and credible witness, then you need not seek for corroborative evidence.'*

[19] In **Lulu v State** [2016] FJCA 154; AAU0043.2011 (29 November 2016) the Court of Appeal dealt with matters that are usually considered relevant to assess the credibility of a witness.

> *'[79] In arriving at my conclusions earlier on the credibility of the prosecution case and that of the defense, I have posed to myself the following questions. Both go to the credibility of the witness.*
>
> *(i) Is a witness truthful?*
> *(ii) Is a witness's testimony reliable?*
>
> *[80] A truthful witness could sometimes be unreliable or his or her version could be distorted due to the intervention of extraneous factors. Therefore both tests are important. In determining whether a witness is truthful and reliable the court would be assessing the testimonial trustworthiness of the witness. Such assessment would have to be based on an objective application of several tests of credibility, such as the tests of **promptness/spontaneity**, probability/improbability,consistency/inconsistency, contradictions/omissions (inter se & per se),*

interestedness/disinterestedness/bias, the demeanour and deportment in court, and the availability of corroboration where relevant.

[20] Therefore, there is nothing wrong in the trial judge's directions on the complainant's prompt complaint to the police.

[21] The appellant also argues that the trial judge had failed to direct and guide the assessors on the contradictions or inconsistencies of the prosecution witnesses namely the complainant and the police officer by relying on **Swadesh Kumar Singh v The State** [2006] FJSC15 as cited in **Ram v State** [2012] FJLawRp 67; (2012) 2 FLR 34 (9 May 2012) CAV0001 of 2011in support of his argument. The Supreme Court said in ***Ram***:

> *'[61] It is pertinent to note in this connection that in Swadesh Kumar Singh v The State [2006] FJSC 15 at paragraph 51, this Court emphasised that "where a witness has made a statement on oath directly inconsistent with evidence he or she gives in court and particularly when that evidence implicates the accused person, the assessors should be informed of the importance of statements made on oath. They should also be told that they should be cautious before they accept a witness's sworn evidence that conflicts with a sworn statement the witness previously made. Having said that, this Court also went on to lay down the following guidelines for trial judges:-*
>
> > *"The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that the evidence in court should be regarded as unreliable unless the assessors are satisfied in two particular respects. Firstly, that the explanations are genuine. Secondly, that, despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth." (Emphasis added)*

[22] The Court of Appeal discussed both decisions above in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and stated 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)*

[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.

*[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra)*

> *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen: ..... (3) The powers of observation differ from person to person. What one may notice, another may not. .... It is unrealistic to expect a witness to be a human tape recorder;"*

[23] This is how the trial judge had dealt with the alleged contradictions in the summing-up.

> *"[44] You may have observed that when some witnesses gave evidence there were some inconsistencies between the evidence before this court and the statement given to the police. For example in her evidence the complainant said that the accused pulled her panty down in the river and inserted his finger into her vagina. In her statement to the police she has not said that her panty was pulled down. She said that she was ashamed to tell that. When the arresting officer S/C Amato Naitavu gave evidence he said that the accused was lying on the grass hiding. However, in his statement to the police he had said that the accused was lying on the ground sleeping and that he woke him up. He also said in evidence that when he pointed the torch at him his eyes opened. What you should take into consideration is only the evidence given by the witness in court and not any other previous statement given by the witness. However, you should also take into consideration the fact that such inconsistencies between the evidence before court and statement to police can affect the credibility of the witness.*

[24] The above direction may not contain a verbatim account of what **Singh** (supra) and **Ram** (supra) have articulated but as the Supreme Court in **Boila vs State** [2008] FJSC

35; CAV005 of 2006.S: (25 February 2008) said, the adequacy of a particular direction will necessarily depend on the circumstances of the case. There is no incantation to be read and the required guidance needs not be formulaic (**Khan v State** [2014] FJSC 6: CAV009 of 2013: (17 April 2014).

[25] The trial judge had also addressed in the judgment the issue of contradictions as follows.

> *'9. The complainant was consistent in her evidence right through out. I bear in mind that there was an inconsistency in her evidence and the statement to the police where she had omitted to tell the police that her panty was pulled down by the accused in the river. In her evidence in court she made it clear that she had not told that part to the police. From the place of incident, she was straight away taken to the police station that night and her statement was taken the following morning. I find that this inconsistency does not affect her credibility.'*

[26] The trial judge had determined that the complainant's failure to tell the police that the appellant had pulled her panty down did not affect her overall credibility. I tend to agree with the learned trial judge and go further to say that the said omission did not go to the root of the matter and shake the basic version of the complainant and therefore should not be annexed with undue importance so as to disbelieve her particularly in the light of corroborative medical evidence and the appellant's own subsequent evasive conduct.

[27] The decision of the trial judge on the said omission is consistent with the position of the trial judge at a trial with assessors in Fiji *i.e.* the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016). The decisions cited by the appellant namely R v Governor of Pentonville Prison, ex p Alves [1993] AC 284 and R v Golder [1960] 1 WLR 1169 as to directions on inconsistent previous statements were decided in the context of jury trials and have to be considered being mindful of the local context of trails by assessors and the judge who is the ultimate decider of matters of facts and law.

[28] Therefore, the 02nd and 03rd grounds of appeal have no reasonable prospect of success.

04th ground of appeal (sentence)

[29] The appellant argues that in order for section 18 of the Sentencing and Penalties Act to be effective the trial judge should have given a direction in the sentencing order to the Corrections Department to release the appellant conditionally at the end of non-parole period.

[30] Corrections Service (Amendment) Act 2019 states:

> *'2. Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—*
>
> *"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.*
>
> *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019."*
>
> *Consequential amendment*
>
> *3. The Sentencing and Penalties Act 2009 is amended by—*
>
> *(a) in section 18—*
> *(i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and*
> *(ii) deleting subsection (2); and*
>
> *(b) deleting section 20(3).*

[31] Prior to the promulgation of Corrections Service (Amendment) Act 2019 in the matter of sentence the court had an extremely wide discretion to fix a non-parole period as articulated in paragraph [26] of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22) where the Supreme Court did not recommend any directions to the Fiji Corrections Service to release the appellant on parole upon completing the non-parole period despite noting that the parole board had not been constituted and not in operation.

[32] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence

[33] Corrections Service (Amendment) Act 2019 seems to affirm the following direction by the Supreme Court in **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22.

> *'The remission period must be calculated on the basis of the total sentence awarded to a convict (head sentence plus the set off period) and the convict given the benefit thereof subject to the non-parole period (if any) fixed by the Court and the practice followed by the Commissioner of calculating the remission period on the expiry of the non-parole period, being the head sentence minus the non-parole period ought to be discontinued forthwith. (per Lokur J)*

[34] Therefore, given that the appellant's sentence is 09 years and 05 months, his actual period of imprisonment (assuming that he is given 1/3 remission) appears to be around 6 ½ years (not an exact figure) which means that upon completion of the non-parole period of 08 years he could be expected to be released.

[35] While there are no merits in the appellant's submission, his substantive period of sentence to be served appears to be less than the non-parole period. Thus, there is no need for any order by the court for the appellant's release at the end of the non-parole period as the law stands today. In any event, there was no provision in section 18 of the Sentencing and Penalties Act, prior to its amendment by Corrections Service (Amendment) Act 2019 and there is no such provision even thereafter *i.e.* after the amendment for the trial court to issue directions to the Fiji Corrections Service as contemplated by the appellant.

[36] This ground of appal has no merits.

05th ground of appeal

[37] The appellant argues that the sentence is harsh and excessive but not demonstrated why he thinks that it is so.

[38] Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment following **State v. Marawa** [2004] FJHC 338.

[39] The trial judge had taken the lower end of the tariff to start the sentencing process and added 04 years for the aggravating factors and reduced 06 months for personal circumstances which the appellant did not really deserve. One year and one month had been taken into account as the period of remand. There is nothing objectionable in this process. The ultimate sentence of 09 years and 05 months imposed on the appellant is well within the sentencing tariff.

[40] Sentencing 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 arriving at a sentence that fits the crime. Recognising 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May

2006) and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. 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).

[41] There is no sentencing error or a reasonable prospect of success in this ground of appeal.

Order

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

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL