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

CRIMINAL APPEAL NO.AAU 20 of 2019
[In the High Court at Lautoka Case No. HAC 205 of 2013]

BETWEEN : **STATE**

Appellant

AND : **SOHEB NASIR ALI**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Vosawale for the Appellant**
: **Mr. A. J. Singh for the Respondent**

Date of Hearing : **07 December 2020**

Date of Ruling : **08 December 2020**

RULING

[1] The respondent, aged 19, had been indicted in the High Court of Lautoka on a single count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009, committed at Nadi in the Western Division. The victim was aged 12 years and 11 months at the time of the offence.

[2] The information read as follows

Statement of Offence

RAPE: *Contrary to section 207(1) and 2(a) and (3) of the Crimes Act 2009.*

Particulars of Offence

> ***SOHEB NASIR ALI*** *between the 1st day of October 2013 and 31st day of October 2013 at Nadi in the Western Division, penetrated the vagina of* ***CRYSTAL DIVASHNI GRACE,*** *aged 12 years and 11 months with his penis.*

[3] At the conclusion of the summing-up on 06 February 2019 the majority of assessors opinion that the respondent was guilty of the charge of rape. The learned trial judge had agreed with the assessors in his judgment delivered on 07 February 2019, convicted the respondent and on 08 February 2019 sentenced him to 03 years of imprisonment without fixing a non-parole period.

[4] The appellant had filed a timely notice of appeal against sentence on 08 March 2019 and written submissions on 18 August 2020. The respondent had tendered its written submissions on 16 October 2020.

[5] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against 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 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.*

[7] The grounds of appeal urged on behalf of the appellant against sentence are as follows.

> *(a) That the Learned Judge erred in principle when he took 6 years as a starting point for the offence of rape which is well below the tariff of 11 years to 20 years as per the Supreme Court decision in Aitcheson CAV 0012 if 2018 for rape of child victims;*
>
> *(b) That the Learned Trial Judge failed to take into account relevant aggravating factors;*
>
> *(c) That the Learned Trial Judge erred in fact and in law when he sentenced the Respondent to three years imprisonment without setting a non-parole period which was manifestly lenient in the circumstances."*

[8] The learned trial judge had summarized the evidence led by the prosecution and the defense in the judgment as follows.

> *(Prosecution)*
>
> *'[7]. The thrust of the prosecution case came from the complainant, Crystal who was 12 years and 11 months at the time of the offence. She gave evidence of having met the accused, then aged 20, at a youth club that they both attended weekly. They appeared to have struck up a casual friendship although they each denied in their respective evidence that they were close.*
>
> *[8.] Crystal said that on the 8th October, she was home alone when he came to her house wanting to use some computer device. She admitted him and after giving him refreshments he followed her into her bedroom and forced himself upon her penetrating her with his penis. She said that he forcibly held her hands, covered her mouth and undressed her before removing his own trousers.*
>
> *[9.] This relationship (if it was indeed such) came to the notice of the girl's mother on the 23rd October 2013 when the mother came home from work early and found them both dressed but under a blanket on Crystal's bed. The mother, quite understandably, was furious that her 12 year old was in such a compromising position with the boy and she proceeded to beat them and berate*

them As a result of this discovery the mother reported a case of trespass to the Police. The Police enquiries led to a medical examination of the girl from which the mother learned that the girl was not a virgin. The daughter then relayed the rape complaint as detailed above to the mother and the boy was charged accordingly. He was interviewed under caution by the Police.

[10.] The mother gave evidence, as did the Investigating Officer.

This Police witness produced the girl's birth certificate proving that she was under 13 at the time and he told the Court that he had interviewed the boy under caution. As a "follow up" to that evidence the Court enquired as to the response of the boy in the interview to which the officer said that he confessed.

[11.] The inculpatory interview under caution was not led by the Prosecution.

(Defense)

[14.] The accused agreed the evidence that he had met the girl at the youth club and that they had become casual friends. He agreed that he went to her house when she was alone and had played computer games (he didn't say when). He also admitted that he had returned to visit on October 23 and was on the bed with Crystal when Mum came home and started "belting" him. When asked in chief by his Counsel whether he had told the Police he had raped or had sex with Crystal, he told the Court that he had told the Police no rape and no sex.

[15.] This unfortunate question by counsel of course opened the Record of interview in rebuttal and it was put to the accused. The answer to Question 54 clearly shows him to have answered: "we had sex on the bed" which belied his answer to counsel in chief, and called his credibility into question.

[16.] The accused called no witnesses in his defence.

01st ground of appeal

[9] The appellant argues that the learned trial judge had erred in principle when he took 6 years of imprisonment as a starting point for the offence of rape which is well below the tariff for rape.

[10] The 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)] prior to the Supreme Court setting an enhanced tariff between 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). Thus, it was tariff set in ***Aicheson*** that was applicable to the respondent.

[11] The trial judge had dealt with the sentence imposed on the appellant as follows.

> *'[**8.] The Law***
>
> *Section 207 of the Crimes Act provides for a maximum penalty of life imprisonment for rape and s.207 (3) stipulates that carnal knowledge of a child under 13 cannot be consented to.*
>
> *I. Section 214 creates the offence of defilement of a child under 13 and also has a maximum penalty of life imprisonment. Those convicted of defilement have until now avoided the harsh penalties for rapes of children now meted out to those convicted of rape.*
> *II. The State however charged Rape and he is convicted of rape, the Court having believed the girl. The accused will be sentenced for Rape accordingly.*
> *III. In the case of **Aitcheson** CAV 0012 of 2018 the Supreme Court has determined that the tariff band for rapes of children should be a term of imprisonment of between 11 and 20 years.*
>
> ***[9.] Mitigation***
>
> *I. The facts of this case are out of the ordinary. The perpetrator was not a family member and he wasn't in a special position of trust. He was a casual friend made over a few months at a Youth Club.*
> *II. The girl was just one month short of her 13th birthday.*
> *III. There is no evidence of psychological damage to the young lady. I saw her give evidence and now she appears to be very controlled, unemotional and looking forward to continuing her family life in Canada where her husband is now employed.*
> *IV. Even at the time of the offence, she subsequently allowed the young man back into her home when she was again alone and they spent an afternoon playing computer games on her bed before Mother found them. The offence seems to be the result of friendship ruined by lust.*
> *V. The young man himself is now married with a young child and keen to pursue his married life whilst at the same time supporting his very sickly parents. He is reasonably young at 25 years old and has never before offended.*
> *VI. As Mr. Singh submits, he is not the typical picture of a predator preying on an underage girl.*
> *VII. The accused has had the case hanging over him for over 5 years now and he has suffered the stress of two trials being aborted through no fault of his own.*
>
> ***[10.] Sentence***
>
> *I. Despite this overwhelming mitigatory background, the legislature and the public at large would expect the forcible defiling of*

a 12 year old to be punished, but not to the extent of the usual 11-20 year sentencing band.

II. I take a starting point for this offence of 6 years imprisonment. There are no aggravating features apart from the crime itself and for the mitigation outlined above, (including his clear record and the time he has spent in remand custody) I deduct a period of 3 years meaning that the sentence he will serve is a term of imprisonment of three years.

III. In the circumstances, the Court declines to fix a minimum term he should serve before he is eligible for parole.

[12] Clearly the trial judge has not followed the methodology commonly followed by judges in Fiji called two-tiered approach which involves a more structured approach incorporating a two-tiered process highlighted in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008), further elaborated in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) and supplemented in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013). Having stated that the range of sentence for child rape was 11-20 years, the trial judge had picked 06 years as the starting point when he should have picked the starting point within the tariff. There is no specific reason attributed to discarding the applicable tariff in the sentencing order. Having given a further discount of 03 years the final sentence had been settled at 03 years of imprisonment.

[13] The trial judge does not seem to have adopted even the alternative methodology of sentencing highlighted in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) where the judge identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors. For this method to work there should be a fixed starting point for a particular offence and for juvenile rape there is no fixed starting point but only a range of sentence. The trial judge had at least not started with the lower end of the tariff.

[14] 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]**.** The purpose of tariff in sentencing is to maintain uniformity in sentences which is a

reflection of equality before the law. Offenders committing similar offences should know that punishments are even-handedly given in similar cases. The trial judge has seemingly breached this fundamental obligation in the appellant's sentence.

[15] It was said in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) that quantum can rarely be a ground for the intervention by an appellate court. However, when there is such a conspicuous and alarming disparity between the sentences imposed on similar offenders and the sentence imposed on the respondent, there arises a need for scrutiny by the appellate court.

[16] Sentencing is neither a science nor a mere exercise in creative mathematics. Sentencing is an art (vide **R v Simson** (2001) 126 A Crim R 525 at 544[101] (2) (NSWCCA) per Sully J. The sole criterion relevant to a determination of an upper limit of an appropriate sentence is that, the punishment fits the crime and apart from mitigating factors, it is the circumstances of the offence alone that must be determinant of the appropriate sentence [vide **Baumer v The Queen** (1988) 35 A Crim R 340]. In **Webb v O'sullivan** (1952) SASR page 65 Napier CJ said *'we ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.'* In **DB v the Queen** (2007) 167 A Crim R 393 (NSW CCA) Adams J said (396-397 [101]), *'it is also fundamental that the minimum sentence that reflects the objective and subjective features of a case and satisfies the purpose of sentencing (such as protection of the public) . . . should be that which is imposed. This has been called the principle of parsimony . . .'*. Dwyer CJ in **Reynolds v Wilkinson** (1948) 5 WALR 17 said (at 18)**,** *'crimes bearing the same general description have not equally evil content or characteristics, and offenders also differ in themselves.'*

[17] 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).

[18] Therefore, there is a sentencing error as stated in the first ground of appeal which has a reasonable prospect of success, committed by the trial judge, but the ultimate sentence is a matter for the full court to decide. Therefore, leave to appeal is granted on this ground of appeal.

02nd ground of appeal

[19] The appellant complains that it was wrong for the trial judge to have said that there were no aggravating features. The state cites (i) praying on the vulnerable and defenseless victim who was alone at her home (ii) threatening the victim after raping and (iii) emotional trauma caused to the victim from the rape as such aggravating factors. However, the trial judge specifically excluded (iii) by stating *'There is no evidence of psychological damage to the young lady'* in paragraph 9(iii) of the sentencing order.

[20] However, this complaint could be addressed by the full court under the first ground of appeal in deciding what the appropriate ultimate sentence should be.

03rd ground of appeal

[21] The state argues that not-fixing a non-parole period has made the sentence manifestly lenient.

[22] Prior to the promulgation of Corrections Service (Amendment) Act 2019 on 22 November 2019 in the matter of sentence the court had an discretion to decline to fix a non-parole period as articulated in paragraph [26] of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22) in terms of section 18(2) of the Sentencing and Penalties Act. 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.

[23] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

> *"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[24] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> "*While leaving the discretion to decide on the **non-parole period** when sentencing to the sentencing Judge it would be necessary to state that **the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case***."
>
> '*.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[25] The trial judge had not stated in the sentencing order why he was not fixing a non-parole period under section 18(2) of the Sentencing and Penalties Act where the judge had the discretion to decline to fix a non-parole period on a consideration of the nature of the offence or the past history of the offender or both. Otherwise, the trial judge had to fix a non-parole period under section 18(1) of the Sentencing and Penalties Act as the sentence was 03 years of imprisonment. This, in my view, constitutes a sentencing error.

[26] Therefore, leave to appeal is granted on the third ground of appeal. However, whether to fix or not to fix a non-parole period too would be decided by the full court as part of the final sentence that would be imposed on the appellant.

Order

1. Leave to appeal against sentence is allowed.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL