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

CRIMINAL APPEAL NO.AAU 148 of 2019
[In the High Court at Suva Case No. HAC 81 of 2018]

BETWEEN : **MANASA RATULOALOA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **13 September 2021**

Date of Ruling : **17 September 2021**

RULING

[1] The appellant, 27 years old, had been indicted in the High Court at Suva with one count of rape contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009, one count of sexual assault contrary to Section 210 (1) (b) (i) and (2) of the Crimes Act No. 44 of 2009 and one count of abduction of young persons contrary to Section 285 of the Crimes Act No. 44 of 2009; all offences against a 12 year old girl committed at Lakena, Nausori, in the Central Division on 25 January 2018.

[2] The information read as follows:

'***Statement of Offence***

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

Particulars of Offence

***MR,** on the 25th day of January, 2018, in Lakena, Nausori, in the Central Division, penetrated the vulva of **AB**, a child under the age of 13 years, with his finger.*

Second Count

Statement of Offence

***<u>SEXUAL ASSAULT</u>**: Contrary to Section 210 (1) (b) (i) and (2) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***MR**, on the 25th day of January, 2018, in Lakena, Nausori, in the Central Division, unlawfully and indecently assaulted **AB**, by bringing his penis into contact with her hand.*

Third Count

Statement of Offence

***<u>ABDUCTION OF YOUNG PERSONS</u>**: Contrary to Section 285 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

***MR**, on the 25th day of January, 2018, in Lakena, Nausori, in the Central Division, unlawfully took **AB**, being under the age of 18 years, out of the possession and against the will of her grandmother.'*

[3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of all counts and sentenced him on 04 October 2019 to an aggregate imprisonment of 16 years with a non-parole period of 14 years but after deducting the period of remand the actual serving period is 14 years and 03 months with a non-parole period of 12 years and 03 months.

[4] The appellant had appealed in person against conviction and sentence in a timely manner (29 October 2019). From time to time he had tendered amended grounds of appeal. Thereafter, the Legal Aid Commission had filed amended notice of appeal against conviction and sentence along with written submission on 19 November 2020.

The state had tendered its written submissions on 19 February 2021. Both counsel participated at the hearing *via* Skype.

[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. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

(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 are as follows:

Conviction

Ground 1

The Learned Trial Judge erred in law and in facts having not directed the assessors to disregard the evidence of police officer IP Maivusa who had

testified of what the Appellant's wife had said in her police statement which is hearsay.'

<u>Sentence</u>

<u>Ground 01</u>

The learned trial judge had erred in principle having accounted for aggravating factors that is reflected in the starting point that has resulted in double counting.

[8] The evidence had revealed that the appellant had lured the victim into his car while she was waiting for the school bus in order to go to school in the morning of 25 January 2018 under the pretext of dropping the victim at her school. He had then taken her to an isolated location and locked her inside the car leaving her with no way of escaping or asking for any assistance. He had punched her thighs heavily when she tried to prevent the appellant from putting his hands between her thighs. He had then forced her to touch his penis and then penetrated her vagina with his index finger. After that the appellant had driven the car towards the victim in order to run over her but she managed to save herself and escape by jumping out of the road.

[9] The prosecution led the evidence of eight witnesses including the complainant. The appellant had opted to exercise his right to remain silent and called no witnesses.

<u>Conviction ground of appeal</u>

[10] The appellant's complaint is based on a part of the evidence of IP Maivusa where she had stated under cross-examination that the police recorded a statement from the wife of the appellant and she had told the police that he fought with her and left home in the middle of the night till the following day during which period the alleged offences took place (see paragraph 42 of the summing-up). The appellant's argument is that the prosecution had not called the appellant's wife to elicit this piece of evidence from her and therefore it is hearsay and the trial judge had failed to direct the assessors to disregard it.

[11] It is clear that witness IP Maivusa had come out, perhaps inadvertently, with the impugned statement in the course of her cross-examination by the defence counsel. Thus, it was not elicited deliberately by the prosecution. There was no burden on the prosecution to call the appellant's wife just to speak to that statement. The defence counsel had the opportunity to seek a redirection form the judge to the assessors to disregard it but he failed to do so. No reason for the failure is forthcoming and therefore the appellant should not be entitled to even raise it as an appeal point (see **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)].

[12] In any event, the impugned piece of evidence should be looked at in the context of the appellant's defence which seems to be a general denial. It was not the position of the appellant that at the time relevant to the crimes he was at home with his wife. Therefore, what IP Maivusa had stated could not materially prejudice the appellant's denial, for all what it would suggest at its best is that he was away from home during the relevant time. That does not mean that he committed the offending. Thus, though technically it was hearsay in nature IP Maivusa's impugned evidence and the failure of the trial judge to direct the assessors to disregard it could not have resulted in a miscarriage of justice particularly in the light of the very strong evidence led by the prosecution.

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

Sentence ground of appeal

[14] The appellant's argument here is that the trial judge had taken a high starting point at 14 years and still added 03 more years for aggravating factors and in the process he had committed double counting because the starting point itself reflected the aggravating factors.

[15] In **Batimudramudra v State** [2021] FJCA 96; AAU113.2015 (27 May 2021) the Court of Appeal remarked:

> *'[58] 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'. The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018)*
>
> > *[57] Two words of caution. First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *[59] In other words <u>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.</u> The ultimate sentence will then have reflected any <u>other</u> aggravating features of the case as well as the mitigating features. <u>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.</u>*
>
> *[60] 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.'*

[16] However, in this instance this court is not faced with that dilemma. It is clear what factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated. Therefore, there is no serious concern as to whether any one or more of the aggravating factors named by the trial judge had influenced the starting point of 14 years towards the higher range of the tariff of 10-16 years as per **Raj v The State** <u>[2014] FJSC 12</u> CAV0003.2014 (20th August 2014). Within a short time since the appellant's offending on 25 January 2018 the tariff for juvenile rape

was increased to 11-20 years in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (02 November 2018).

[17] The trial judge had explained what factors led him to select 14 years as the starting point:

> *9. According to the victim impact report, the complainant is going through an adverse emotional and psychological trauma due to this incident. Her life style has adversely changed after this incident. It has adversely affected her life making her a withdrawn and isolated personality. Therefore, I find the level of harm is substantially high in this offending.*
>
> *10. You abducted the complainant while she was waiting for the school bus in order to go to school in the morning of 25th of January 2018. You then took her to a secluded location and locked her inside the car. She had no prospect of escaping or asking for any assistance. You have punched on her thighs heavily when she tried to prevent you putting your hands in between her thighs. After the incident you drove your car towards the complainant in order to run over her, which she managed to escape by jumping out of the road. Accordingly, I find this is an opportunistic crime, committed on the complainant by using substantial amount of physical and emotional violence. Therefore, I find the level of culpability is substantially high in this matter.*
>
> *11. Having taken into consideration the seriousness of the offence, the purpose of the sentence, and the level of harm and culpability, I find this is an appropriate case to fix a higher starting point. I accordingly select fourteen (14) years as the starting point.*

[18] Then the trial judge had next explained as to what factors had been considered as aggravating features.

> *12. The complainant was twelve (12) years old at the time of this offence took place. You were twenty seven (27) years old at that time. Therefore, the age difference between you and the complainant is substantial high. The complainant trusted you when you offered her a lift to the school. However, you breached that trust by committing this heinous crime on her without any remorse. I find these factors as aggravating factors in this offending.*

[19] Thus, the aggravating features considered were age difference and breach of trust which were not part of the factors considered in picking the starting point. Therefore, there is no double counting here.

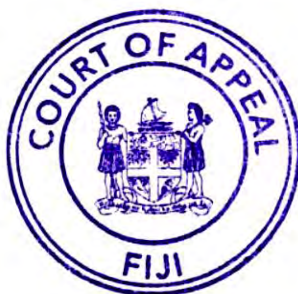
[20] In **Batimudramudra** the Court of Appeal further said:

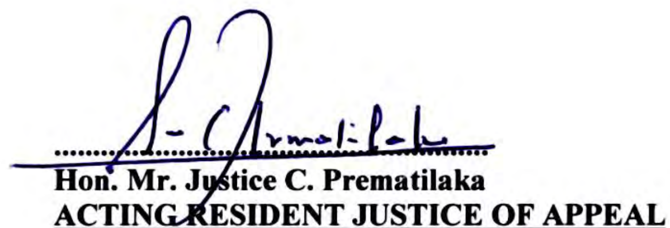
> *'[64] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate 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).'*

[21] Given all the factors considered by the trial judge and considering the protection of community particularly the unsuspecting children and juveniles for whom the appellant may pose a threat if allowed into the community to early and the necessity for deterrence for prospective offenders of this kind, I do not think that the sentence can be said to be harsh and excessive.

Orders

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





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