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

CRIMINAL APPEAL NO.AAU 045 of 2019
[In the High Court at Suva Case No. HAC 201 of 2018]

BETWEEN	**:**	**TAIONE PETERO SENIKUTA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	**:**	**19 July 2021**
Date of Ruling	**:**	**23 July 2021**

RULING

[1] The appellant, 59 years old, had been indicted in the High Court at Suva with one count of rape of 08 year old girl contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Nadoi Village, Rewa in the Central Division on 29 April 2016.

[2] The information read as follows:

'Statement of Offence'

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

'Particulars of Offence'

> ***TAIONE PETERO SENIKUTA*** *on the 29th of April 2018 at Nadoi Village, Rewa in the Central Division penetrated the vulva of CS, who is a child under the age of 13 years old, with his finger.*

[3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of rape as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of rape and sentenced him on 21 February 2019 to a sentence of 12 years and 02 months of imprisonment with a non-parole period of 10 years and 02 months.

[4] The appellant had appealed in person against conviction and sentence in a timely manner. Thereafter, the Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence and written submission on 03 March 2021. The state had tendered its written submissions on 30 March 2021. Both parties had consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or 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] Grounds of appeal urged on behalf of the appellant are as follows:

> ***Conviction***
>
> *THAT the learned trial judge erred in law and fact in convicting the Appellant after accepting evidence of PW2 – Dr. Elvira Ongbit without considering the inconsistency in the evidence of PW2 and PW1.*
>
> ***Sentence***
>
> *THAT the learned trial judge erred in law and in fact in sentencing the Appellant to a sentence that is harsh and excessive.*

[8] The trial judge had summarized the prosecution evidence as follows at paragraph 26 in the summing-up:

> a. *She is 8 years old. She said she went to watch television at one Salote Nabou's house on 29/04/18. Her friend Katalina and Lewasau were also watching TV with her. They were in the living room. After sometime, Katalina and Lewasau went to their houses to have tea and she continued to watch TV.*
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> b. *While she was alone watching TV, the accused came and sat beside her. At that time she was lying down on her chest. She said the accused then started touching her right leg, asking her what happened to her leg. She said the accused started from her toes and then went up to her 'Pesi'. When requested by the prosecutor to show what the accused did, she came out of the witness box and moved her hand from her toes up to her groin area.*
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> c. *She said the accused then poked her 'Pesi' with his finger and that the finger went inside her 'Pesi'. She said it was painful when he did this.*

Thereafter the accused told her not to tell anyone and he left. She continued watching TV and no one joined her to watch TV thereafter. She said the incident happened on a Sunday and the following day she told her friend Katalina about the incident.

[9] Dr. Elvira Ongbit had examined the victim on 07 July 2018 and her evidence had been summarized by the trial judge at paragraph 27 as follows:

> *'b). She observed a fresh hymenal laceration at the 8 o'clock position, a bruise and redness. She said the word fresh means from the time of injury until the injury is completely healed. She said a laceration is a break in the continuity of the skin. She said the laceration was caused by the impact or force applied through the vaginal opening and that injury could have taken place within 15 days prior to the date of examination.*
>
> *c). In her opinion the injuries she noted could have been caused by a finger forced on the hymenal opening 7 days before the examination. She said force had been applied through the vulva to the vaginal opening. She said if a finger is forced to the vaginal opening it is possible to feel pain.'*

[10] The appellant had stated in his evidence that the victim called him to show a plaster on her right leg and while he was looking at the plaster and touched her foot, the other children came inside the house and the victim also then ran away with them. He had admitted that he spanked the victim twice but denied making any other physical contact with her. He had denied watching TV inside the house with the complainant as well.

[11] However, the appellant's witness Katalina, another child who was in the group on the day of the incident had confirmed that the appellant and the victim were watching TV alone inside the house after they came out. She had also seen the appellant looking at the victim's leg.

Conviction ground of appeal

[12] The counsel for the appellant submits that the evidence of Dr. Elvira Ongbit that hymenal laceration, seen upon the examination of the victim on 07 May 2018, could have happened 15 days prior to the examination would place the date of the incident

on 22 April 2018 and that would cast doubt on the truthfulness of the victim's evidence (incident had allegedly happened on 29 April 2018).

[13] However, it is clear that the doctor had placed the age of the injuries between 07 to 15 days prior to 07 May 2018. Medical evidence as to the age of an injury is more often than not only approximate. 29th April 2018 clearly falls within the time period identified by Dr. Elvira Ongbit. The trial judge had correctly adverted to this at paragraph 6 of the judgment as follows:

> *'I accept the medical opinion provided by the second prosecution witness. However, the complainant had been examined by her about one week after the date of the alleged incident. The medical opinion only confirms that the complainant's vulva had been penetrated with a foreign object within 15 days prior to the date of medical examination which is 07/05/18. The date of the alleged offence falls during this period.*

[14] In any event, even assuming that medical evidence is inconclusive or not supportive of the exact date of the incident that alone would not discredit the evidence of the victim. The duty of expert witnesses including doctors is to furnish the judge or assessors with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or assessors to form their own independent judgement by the application of these criteria to the facts proved in evidence [vide **Davie v Magistrates of Edinburgh** 1953 SLT 54; 1953 SC 34 as quoted in **Vukicanagauna v State** [2020] FJCA 230; AAU0081.2018 (19 November 2020)].

[15] In fact medical evidence has supported the penetration of a foreign object as the victim had complained. The victim's evidence had been proved to be truthful even by the appellant's witness Katalina whose evidence had discredited the appellant's denial of being alone with the victim inside the house watching TV as alleged by the victim.

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

Sentence ground of appeal

[17] The appellant complains that the sentence is harsh and excessive. The prosecution had demanded 19 years of imprisonment as the punishment. However, the trial judge had correctly rejected it by quoting **State v Kumar** [2014] FJCA 86; AAU0040.2012 (2 June 2014) where Goundar J. had said *"[s]entencing is a matter for the courts and not for the prosecutors. The prosecutors' obligations are to assist the court by providing all the relevant information that has bearing on the sentence. It is not their function to recommend a specific punishment".*

[18] At the same time, the trial judge had correctly identified the sentencing tariff for juvenile rape as 11-20 years of imprisonment guided by **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) which increased the previously existing tariff of 10-16 years set in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and confirmed in **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. He had picked the starting point at the lower end of the tariff of 11 years and added 05 years for aggravating factors and deduced 03 years on account of the only mitigating feature namely the appellant being a first offender. After discounting the period of remand of 10 months, the final sentence had been fixed at 12 years and 02 months of imprisonment. The trial judge had also fixed a non-parole period of 10 years and 02 months. Thus, the final sentence is still at the lower end of the sentencing tariff.

[19] 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). It cannot be said that the sentence is harsh or excessive. The sentence imposed on the appellant does fit the crime.

[20] Thus, the appellant has not demonstrated any sentencing error and his appeal against sentence has no reasonable prospect of success.

Orders

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

COURT OF APPEAL FIJI

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