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

**CRIMINAL APPEAL NO.AAU 0120 of 2018**
**[In the High Court at Lautoka Case No. HAC 41 of 2015]**

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| **BETWEEN** | : | **PETERO MASALA** | |
| | | | ***Appellant*** |
| **AND** | : | **STATE** | |
| | | | ***Respondent*** |
| **Coram** | : | **Prematilaka, JA** | |
| **Counsel** | : | **Mr. M. Fesaitu for the Appellant** | |
| | : | **Mr. M. Vosawale for the Respondent** | |
| **Date of Hearing** | : | **14 January 2021** | |
| **Date of Ruling** | : | **15 January 2021** | |

# RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009, one count of rape 207(1) and (2) (a) of the Crimes Act, 2009 and one count of indecent assault contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

[2] The information read as follows.

*'COUNT ONE*

***Statement of Offence***

***SEXUAL ASSAULT****: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.*

***Particulars of Offence***

***PETERO MASALA*** *aka* ***PETE MASALA*** *sometimes between the 16th day of May, 2012 and 19th day of August, 2012 at Yalalevu, Ba in the Western*

*Division, unlawfully and indecently touched the vagina of* ***"EB"*** *with his finger, without the said* ***"EB's"*** *consent.*

***COUNT TWO***

***Statement of Offence***

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

***Particulars of Offence***

***PETERO MASALA*** *aka* ***PETE MASALA*** *sometimes between the 16th day of May, 2012 and 19th day of August, 2012 at Yalalevu, Ba in the Western Division, had carnal knowledge (penile sex) of* ***"EB"*** *without the said* ***"EB's"*** *consent.*

***COUNT THREE***

***Statement of Offence***

***INDECENT ASSAULT****: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.*

***Particulars of Offence***

***PETERO MASALA*** *aka* ***PETE MASALA*** *sometimes between the 29th day of July, 2013 and 3rd day of August, 2013 at Raiwai, Suva in the Central Division, unlawfully and indecently touched the breasts, neck, and private parts of* ***"EB"*** *on top of her clothes, without the said* ***"EB's"*** *consent.*

[3] The brief facts as could be gathered from the sentencing order are as follows.

*2. 'The brief facts were as follows:*

*he victim "EB" in 2012 was 15 years of age a Form 3 student. On one of the days during the second term of school she was at the house of her uncle the accused, her aunty had gone to work. The victim did not go to school because she was having stomach ache.*

*The accused offered to massage the victim's stomach, the victim was alone with the accused.*

*3. She was wearing a shorts and a top, in the sitting room the accused started to massage the stomach of the victim, as he continued he started to massage the victim's vagina and was playing around by touching it.*

*4. Thereafter the accused removed the victim's shorts and underwear and went on top of her and penetrated her vagina with his penis. When the accused penetrated her for the second time the victim pushed the accused away because it was painful for her, her legs were shaking she felt weak and emotionally broken.*

*5. The victim did not consent to what the accused had done to her. After two days the victim told her friend Faustina about what the accused had done to her. Faustina wanted to tell her mother but the victim stopped her since she felt nobody would believe her and that she was scared.*

*6. The matter was reported to the police after the victim couldn't continue to live with it any longer she informed her distant relative Laisiana Tukana.*

*7. Between 29 July, 2013 and 3 August, 2013 the victim went to Suva, she stayed at the house of an aunt. The accused also resided there.*

*8. One night when she was sleeping she felt a light being shown on her face she opened her eyes and saw the accused shining a torch at her face and at the same time touching the victim's neck, breasts and private part on top of her clothes. The victim was scared and did not know what to do. The accused touched her for about an hour she did not consent to the touching by the accused.*

*9. The victim later told her relatives and the matter was reported to police. The accused was arrested and charged.*

[4] At the conclusion of the summing-up on 16 October 2018 the assessors had unanimously opined that the appellant was guilty of count 01 but not guilty of count 02. The appellant had pleaded guilty to count 03 earlier on 13 November 2015. The learned trial judge had agreed with the assessors on count 01 and disagreed on count 02 in his judgment delivered on 17 October 2018, convicted the appellant on all counts and sentenced him on 02 November 2018 on all three counts to an aggregate sentence of 14 years and 11 months of imprisonment with a non-parole period of 12 years.

[5] The appellant's timely notice of leave to appeal against conviction and sentence had been filed on 29 November 2018. The Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence along with written submissions on 23 September 2020. The state had tendered its written submissions on 05 November 2020.

[6] 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.

[7] 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.*

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

***Conviction***

1. *That the learned trial judge erred in law and in fact in not providing cogent reasons when overturning the unanimous opinion of the assessors that the Appellant is not guilty for the charge of rape.*

2. *That the learned trial judge erred in law and in fact in not adequately assessing the delay in the complaint made.*

***Sentence***

3. *The learned trial judge erred in principle by double counting having considered aggravating factors that is reflected already in selecting a starting point.'*

***01st ground of appeal***

[9] The appellant relies on **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) where the Supreme Court examined the trial judge's duty in disagreeing with the assessors in support of this ground of appeal.

> *'[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have **"cogent reasons"** for differing from their opinion. The reasons must be founded on the **weight of the evidence** and must reflect the judge's views as to **the credibility of witnesses**; **Ram Bali** v **Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali** v **The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad** v **Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano** v **The State** [1991] FJA 3 at 5, the reasons of a trial judge:*
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> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[10] The appellant also cites **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) where the Court of Appeal remarked

> *'[42] The learned Trial Judge in his judgment had correctly cited the cases of **Joseph v The King** [1948] AC 215, **Ram Dulare & others v R** [1955] 5 FLR and **Sakiusa Rokonabete v The State**, Criminal appeal No. AAU 0048/05 and stated, in Fiji the responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with Assessors is that of the trial*

*Judge, who is the sole Judge of facts and that the Assessors duty is to offer opinions which might help the trial Judge and does carry great weight, but he is not bound to follow their opinion. Section 237 of the Criminal Procedure Act states that the Judge in giving judgment "shall not be bound to conform to the opinion of the assessors".*

*[43] The learned Trial Judge had again correctly made reference to the provisions of section 237(4) of the Criminal Procedure Act which states: "When the Judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be - (a) written down; and (b) pronounced in open court." He has cited the cases of **Ram Bali v Regina** (1960) 7 FLR 80 at 83, **Ram Bali v The Queen Privy Council** Appeal No 18 of 1961, **Shiu Prasad v Regina** (1972) 18 FLR 70 at 73, and **Setevano v State** [1991] FJA 3 at 5 and stated the reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*

[11] I had the occasion to analyze several previous decisions of the Supreme Court and the Court of Appeal on the duty of a trial judge in **Waininima v State** [2020] FJCA 159; AAU0142.2017 (10 September 2020) and concluded as follows.

*'[18] What could be ascertained as common ground 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 a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.*

*[19] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors.*

*[20] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment*

*in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard given to the assessors by the trial judge.*

*[21] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judges of facts. The judge is the sole judge of facts 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).*

[12] The appellant complains that the trial judge had not lived up to the expectation of the obligation cast on him by the above decisions when he disagreed with the assessors on their opinion on the count of rape.

[13] I do not agree. An examination of the judgment clearly demonstrates that the trial judge had in deed considered and analyzed the evidence in addition to directing himself on his own summing-up to the assessors on the prosecution evidence and the appellant's stance of denial on the charge of rape and sexual assault. The appellant had only admitted to have touched different parts of her body of the appellant including her vagina as described in count 03.

[14] The trial judge had dealt with the evidence on count 01 and 02 which had happened on the same day one after the other at paragraphs 8-27 of the judgment and the defense position at paragraphs 28. The appellant had not given evidence; not had he called other witnesses. Therefore, his stance had been presumably ascertained from the cross-examination of the prosecution witnesses.

[15] He had alleged that the false allegations of sexual assault and rape had been fabricated due to the animosity the complainant's family had towards him as he had married her mother's sister and they did not want him as part of their family. However, it is the complainant's mother who had asked her to say with her sister and the appellant at their house during the times relevant to the allegations as their house was close to her table tennis training facility and school. The trial judge at paragraph 35 of the

judgment had noted that the appellant and the complainant even had breakfast together on the very day of the incidents relating to the first and second counts and therefore, concluded that the relationship should have been good between the two.

[16] The trial judge had also referred to the positive demeanor of the prosecution witnesses and the apparent honesty under cross-examination at paragraph 37 of the judgment and stated that the defense had not been able to cast any reasonable doubt in the prosecution case. He had concluded that the prosecution had proven its case beyond reasonable doubt in respect of the charge of rape as well.

[17] It would appear that there was no rational basis for the assessors to have acted upon the evidence of the complainant in so far as the charge of sexual assault was concerned and not believed her on the rape charge as both were inseparable and part and parcel of the same transaction.

[18] Therefore, there is no reasonable prospect of success in the first ground of appeal.

***02nd ground of appeal***

[19] The appellant argues that the trial judge had not adequately assessed the delay in reporting the incidents of sexual abuse. He relies on **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) as to how to deal with a delayed complaint in support of his contention.

> *'[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*
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> > *'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.'*
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> *[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In*

*the case of* ***Thulia Kali v State of Tamil Naidu****: 1973 AIR.501; 1972 SCR (3) 622:*

> *"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."*

[20] The trial judge cannot be faulted for not referring to **State v Serelevu** (supra) in the judgment as the Court of Appeal decision had been delivered less than two weeks prior to the trial judge's judgment. ***Serelevu*** may not have been available to the trial judge by then. However, the trial judge had really focused on the issue of delay in the complaint at paragraphs 30 of the judgment after setting out the evidence of the complainant and other witnesses.

[21] It appears that the complainant had in deed complained to her friend Faustina Kavoa (PW2) two days after the incidents relating to the first and second counts but had told her not to reveal it to PW2's mother for fear of being disbelieved. The complainant had been scared and could not talk properly. Thereafter, in 2004 after a Sunday mass the complainant had started crying with her head bowed. She had been taken home and then to hospital where she had divulged the sexual abuse by the appellant to her distant relative PW3 Laisiana. The trial judge had summarized the issue of delay at paragraph 30 of the judgment as follows.

> *"The matter was reported to the police two years after the alleged incident, however, it was due to the fact that from 2012 to 2014 the complainant had kept the incident to herself after telling her friend Faustina, but could not*

*continue to live with it any longer. It was too much for her particularly when she used to see the accused at family gatherings and he was one of the Eucharistic Ministers in the church. The complainant broke down in church which led to her telling the third prosecution witness Laisiana at the hospital what the accused had done to her. Considering the circumstance of the complainant the late reporting to police does not affect her credibility she was scared, confused and did not know what to do. I accept that the complainant tried to keep the incident to herself and not let anyone know but she could not.'*

[22] Therefore, I am satisfied that the trial judge had adequately considered the explanation for the belated complaint to police and accepted it. In the totality of circumstances the complainant's explanation for the delay was acceptable. The trial judge's analysis of the delay had satisfied ***Serelevu*** test.

[23] Therefore, there is no reasonable prospect of success of the second ground of appeal.

***03rd ground of appeal (sentence)***

[24] The appellant's complaint is that the trial judge had considered breach of trust at paragraph 19 of the sentencing order in selecting the starting point of 12 years and the judge had once again considered it as an aggravating feature at paragraph 13 (a) to enhance the sentence by 05 years committing the error of double counting.

[25] The trial judge had taken the sentencing tariff in **Raj v State** [2014] FJSC 12: CAV0003.2014 (20 August 2014) for juvenile rape *i.e.* between 10-16 years of imprisonment in sentencing the appellant though in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) delivered on the date of sentencing, tariff for juvenile rape was enhanced to 11 to 20 years.

[26] It cannot be said with absolute certainty whether breach of trust had been counted twice in the matter of sentence. In any event, 05 years of enhancement was for three aggravating factors including breach of trust. However, there could be a reasonable suspicion whether breach of trust had crept into the consideration as part of 'objective seriousness' of the offence which led to the starting point of 12 years in the aggregate sentence. If so, when it was considered as an aggravating factor once again the error of double counting had occurred. If not, it is not clear what other factors had gone into

picking the starting point at 12 years, for there is no indication to that effect in the sentencing order.

[27] 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.

[28] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that 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.

[29] 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.

[30] 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.

[31] 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).

[32] Nevertheless, whether the ultimate sentence of 14 years and 11 months imposed on the appellant is justified should be decided by the full court in view of the possible sentencing error of double counting. If so, the full court would decide what the ultimate sentence should be exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act after a full hearing.

[33] Therefore, I am inclined to allow the appellant leave to appeal against sentence on this possible sentencing error of double counting which may have resulted in the current sentence. The appropriate sentence is a matter for the full court to decide [Also see **Salayavi v State** AAU0038 of 2017 (03 August 2020) and **Kuboutawa v State** AAU0047.2017 (27 August 2020) for detailed discussions].

**Order**

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

COURT OF APPEAL FIJI

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**Hon. Mr. Justice C. Prematilaka**
**JUSTICE OF APPEAL**