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

CRIMINAL APPEAL NO.AAU 0058 of 2019
[In the High Court at Suva Case No. HAC 93 of 2016]

BETWEEN	:	**KAMELI DIANI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. S. Kiran for the Respondent**
Date of Hearing	:	**01 April 2021**
Date of Ruling	:	**07 April 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka with three counts of rape contrary to section 207 (1), (2) (b) and (3) of the Crimes Act, 2009 committed at Colo-I-Suva, in the Central Division between the 01 January 2014 and the 17 April 2014. The victim was 09 years and the appellant was 23 years of ages respectively at the time of the incidents. The appellant is an uncle of the complainant. His father is the complainant's grandfather.

[2] The information read as follows:

*'**COUNT 1**'*

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, *at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at Colo-I-Suva, in the Central Division, penetrated the anus of* ***TV****, a child under the age of 13 years, with his penis.*

*'****COUNT 2****'*

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI *, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at a separate incident from Count 1, at Colo-I-Suva, in the Central Division, penetrated the anus of* ***TV****, a child under the age of 13 years, with his penis.*

*'****COUNT 3****'*

Statement of Offence (a)

RAPE*: Contrary to Section 207 (1), 2(c) and 3 of the Crimes Act 2009.*

Particulars of Offence (b)

KAMELI DIANI *, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at Colo-I-Suva, in the Central Division, penetrated the mouth of* ***TV****, a child under the age of 13 years, with his penis.*

[3] At the end of the summing-up on 28 January 2019 the assessors had unanimously opined that the appellant was guilty of all charges levelled against him. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 30 January 2019, convicted the appellant of both charges and sentenced him on 05 February 2019 to sentences of 19 years on each count (18 ½ years after the remand period was deducted) to run concurrently with a non-parole period of 15 ½ years.

[4] The appellant's application for leave to appeal against conviction and sentence had been filed in person nearly 01 month and 02 weeks out of time on 16 April 2019. However, the respondent agreed to treat it as a timely appeal on 13 July 2020. Thereafter, The Legal Aid Commission had tendered amended grounds of appeal

against conviction and sentence and written submission on 26 August 2020. The state had tendered its written submissions on 04 January 2021.

[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] Grounds of appeal urged on behalf of the appellants are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *The Learned Trial Judge erred in law and in fact by not directing the assessors to consider the inconsistencies of what is being relayed, when considering recent complaint evidence.*
>
> ***Ground 2***
>
> *The Learned Trial Judge erred in law and in fact by not directing the assessors and himself in assessing the delay in the complaint.*
>
> ***Sentence***
>
> *The Learned Trial Judge erred in principle in accounting for extraneous factors in some of the aggravating factors itemized, thereby enhancing the Appellant's sentence.*

[7] The trial judge had summarized the prosecution evidence as follows in the sentence order:

> ***'[4]*** *It was proved during the trial that, between 1 January 2014 and the 17 April 2014, at Colo-I-Suva, you penetrated the anus of TV, with your penis, and at the time TV was a child under 13 years of age.*

[5] *It was also proved during the trial that, between 1 January 2014 and the 17 April 2014, but on a separate occasion to count 1, at Colo-I-Suva, you penetrated the anus of TV, with your penis, and at the time TV was a child under 13 years of age.*

[6] *It was further proved during the trial that, between 1 January 2014 and the 17 April 2014, at Colo-I-Suva, you penetrated the mouth of TV, with your penis, and at the time TV was a child under 13 years of age.*

[7] *You are an uncle of the complainant. Your father, Tu Cebu Kuruvaki, is the complainant's grandfather. Tu Cebu Kuruvaki testified that the complainant had been residing with him at Colo-i-Suva since 2007. It is admitted that the complainant was residing with you and other family members at Naisoqo Settlement, Colo-I-Suva, in the year 2014.*

[8] *As per his birth certificate tendered to Court as Prosecution Exhibit PE1, the complainant's date of birth is 10 April 2004. Therefore, at the time of the alleged incidents as set out in the Amended Information, which was said to be between the 1 January 2014 and the 17 April 2014, the complainant would have been 9 years old (turning 10), and as such, he was a juvenile. At the time he testified in Court the complainant said that he is 14 years of age.*

[9] *The complainant said that he goes to the Suva Special School and he is a senior. Prior to that he had attended Nausori Special School. However, he does not remember when he attended Nausori Special School nor when he started at Suva Special School.*

[10] *The complainant described as to how on one occasion you had taken off your pants and put your penis into the complainant's anus. He said that this incident happened during the day time and during this time he had been attending Nausori Special School.*

[11] *The complainant testified to another similar incident which took place when his grandfather had gone to Krest Chicken to sell food. During this time too he had been attending Nausori Special School.*

[12] *The complainant also testified to an incident which happened in the night, when he was sleeping. He said that you had opened his mouth and put your penis into the complainant's mouth. Even at the time this incident took place the complainant said that he had been attending Nausori Special School.'*

[8] The prosecution relied on the evidence of the complainant, his grandfather (Tu Cebu Kuruvaki) and his uncle (Inia Rasaku) to prove its case. The accused opted to remain silent and did not call any evidence.

01st ground of appeal.

[9] The appellant argues that the trial judge had not directed on the inconsistency between the complainant's evidence and what he had told his uncle (Inia Rasaku) in analysing recent complaint evidence and had those inconsistencies been brought to the notice of the assessors they would have affected the credibility of the complainant. The trial judge's directions on recent complaint evidence are at paragraphs 17-19 of the summing-up:

> *'**[17]** You heard in this case the evidence of Inia Rasaku, an uncle of the complainant. He said that TV is like a nephew to him. He testified that on 14 April 2014, the complainant had told him about the alleged incidents. When asked to explain as to what exactly the complainant had told him, the witness said "That **Kameli Diani** used to pull down his pants, put out his male private part and used to harass him". "He said that he used to lay him down and lie on top of him". "To insert it. He used to hold his male private part and insert on his back (backside)". You should consider whether this could be regarded as a complaint made by the complainant of the alleged incidents, **at least in relation to counts 1 and 2**. If so you should also consider whether he made that complaint without delay and whether he sufficiently complained of the offences the accused is charged with.*
>
> ***[18]** The complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that his credibility is strengthened in view of that recent complaint.*
>
> ***[19]** It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with his evidence given at the trial. It goes to support and enhance the credibility of the complainant.'*

[10] The only inconsistency that I could see is the omission on the part of the complainant to tell his uncle of oral sex performed by the appellant which related to count 03. The trial judge had brought it to the notice of the assessors at paragraph 17. His directions on recent complaint evidence are in line with **Rohit Prasad v The State**, Criminal Petition No. CAV 0024 of 2018 where it was held:

*12. As one would expect, the law does not regard this as corroboration. In Anand Abhay Raj v **The State** [2014] FJSC 12, Gates P said at para 33:*

> *"...evidence of recent complaint was never capable of corroborating the complainant's account: R v Whitehead [1929] 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: Basant Singh & Others v **The State** Crim App 12 of 1989; Jones v The Queen [1997] HCA 12; Vasu v **The State** Crim App AAU0011/2006S."*

[11] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court had earlier said apart from what was quoted in ***Rohit Prasad*** as follows:

> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
>
> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'*

[12] Therefore, the assessors had obviously relied on the complainant's evidence on the third count of oral penetration even without the recent evidence of his uncle. The trial judge had agreed with their decision.

[13] In any event the appellant's counsel should have sought redirections in respect of the complaint now being made under the first ground of appeal on the summing-up as held in **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). The deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

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

02nd ground of appeal

[15] The appellant's complaint is that the trial judge had not directed the assessors in assessing the delay in the complainant. He has proceeded on the premise that the offences had allegedly taken place between 01 January 2014 and 17 April 2014 and the complainant had complained to his uncle of what the appellant had done to him on 14 April 2014. However, he argues that from the High Court number 93 of 2016 it appears that the matter had been reported to law enforcement authorities in 2016. Thus, he argues that the delay of two years raises doubts on the credibility and veracity of the allegations made against the appellant. He relies on **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

[16] There is no indication that the defence counsel had raised the issue of delay at all during the trial. It was not a trial issue; nor was it a live issue at the trial. The defence had not even suggested to the complainant or his uncle that there had been undue delay in the complaint being reported to the police. The reason is clear. According to paragraph 77(viii) of the summing-up the matter had been reported to the police on the same day the complainant had told the incidents to his uncle:

> '*(vii) The witness testified that the complainant told this to him on 14 April 2014. The complainant had told him this when they met between the witness's house and the house where the complainant was residing.*
>
> *(viii) The witness said that he had taken the complainant to the Police on the same day to report the matter.'*

[17] Therefore, the basis of the appellant's ground of appeal is misconceived. The mater had been reported promptly to the police once the complainant's uncle got to know it. Given that the complainant is a mentally challenged child, it is not difficult to understand the time taken by him to bring the appellant's criminal acts to the notice of his uncle. If the matter had not been brought to court promptly by the law enforcement authorities that delay cannot be attributed to the appellant or his uncle. Nor can it affect the complainant's credibility. **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) has no application to the facts of this case.

[18] Thus, the 02nd ground of appeal has no reasonable prospect of success.

[19] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act (which were echoed in **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98):

> *'……..**Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based**…*….

[20] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[21] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[22] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaiyum**.

01st ground of appeal (sentence)

[23] 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.*

[24] The appellant argues that the enhancement of the sentence by 07 years for aggravating factors had been based on some extraneous matters thus making the sentence to go as high as 19 years and is higher in comparison to similar cases such as **Bulago v State** [2020] FJCA 94; AAU084 of 2016 (02 July 2020) where acts of sexual abuse represented by six counts of rape and another sexual assault count had been performed over a period of 04 years on a child and the accused had been sentenced to 13 ½ years and 25 days of imprisonment.

[25] The appellant in effect challenges the propriety of the sentence in the larger context whether the sentence fits the gravity of the crime and in keeping with current sentences in similar cases. Uniformity is an important aspect of the sentencing exercise.

[26] The trial judge had correctly identified the sentencing tariff as 11-20 years of imprisonment as set in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). He had cited **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)] too and picked 12 years as the starting point and added 07 years for aggravating factors to make it 19 years. 06 months had been deducted for the appellant's remand period.

[27] In paragraph 13 and 14 of the sentencing order the trial judge had stated the special condition of the complainant:

> *'**[13]** A Psychiatrist Assessment had been conducted on the complainant on 29 October 2018. The said assessment had been carried out by Dr. Daryn Reicherter, M.D.; Clinical Professor and Director of the Human Rights in Trauma Mental Health Programme, Department of Psychiatry and Behavioural Sciences, School of Medicine, Stanford University.*

[14] *As per the assessment, it is stated that the complainant has a long history of low Intelligence Quotient (IQ) and carries a diagnosis of Intellectual Disability (ID) and Attention Deficit Hyperactivity Disorder (ADHD). He has struggled with learning disabilities since a very early age and is considered a "special boy" because of intellectual disability. These long standing issues have been tendered via special education in school. Having ID is a vulnerability that increases the risk for sexual victimization.*

[28] After picking the starting point at 12 years considering the objective seriousness the trial judge had laid down the aggravating factors as follows:

*'**[31]** The aggravating factors are as follows:*

(i) The victim was extremely vulnerable by reason of his age and other circumstances in the case. As noted earlier, the victim has a long history of low Intelligence Quotient (IQ) and carries a diagnosis of Intellectual Disability (ID) and Attention Deficit Hyperactivity Disorder (ADHD). He has struggled with learning disabilities since a very early age and is considered a "special boy" because of intellectual disability.

(ii) The impact of the crimes on the victim was traumatic and is said to be continuing.

(iii) You were the uncle of the complainant. Being so, you should have protected him. Instead you have breached the trust expected from you and the breach was gross.

(iv) There was a large disparity in age between you and the complainant. The complainant was 9 years of age at the time you committed these offences on him. At the time you were 23 years of age. Therefore, there was a difference in age of 14 years.

(v) Court is of the view that there was some degree of pre-planning on your part to commit these offences.

(vi)You took advantage of the complainant's vulnerability, helplessness and naivety.

(vii) You have exposed the innocent mind of a child to sexual activity at such a tender age.

(viii) You are now convicted of multiple offending.

[29] I do not think that the trial judge had taken extraneous matters into account as aggravating factors. However, I feel that the trial judge may have considered the

special mental condition of the victim being a mentally challenged child as a factor in picking 12 years as the starting point. I think considering that fact the judge could have picked even a higher starting point. However, in that event he could not have considered the same as part of aggravating features, for it may amount to double counting. Had the trial judge started with the lower end of the tariff *i.e.* 11 years he could have considered the child's mentally vulnerable condition as an aggravating feature warranting a substantial increase in the sentence. This case undoubtedly warrants a harsh and deterrent sentence (given the appellant's propensities – paragraph 33 of the sentencing order) but whether 19 years of imprisonment fits the crimes he had committed is open to debate and it appears to be somewhat on the higher side.

[30] 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 stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[31] 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.

[32] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) (supra) 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.

[33] 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.

[34] This court is faced with exactly the same dilemma in this appeal. It is not clear what other factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated.

[35] On the other hand, the facts in the instant case cannot be compared equally to those shocking aggravating circumstances in ***Aicheson*** and ***Raj.*** Considering all the above matters, the sentence of 19 years would seem somewhat excessive compared to the sentences meted out to accused with even more aggravating features in child rape cases. The tail end of the sentencing tariff set in ***Aicheson*** or incarceration outside the higher end of that range should, in my view, be reserved for the most extreme cases of child abuse.

[36] 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).

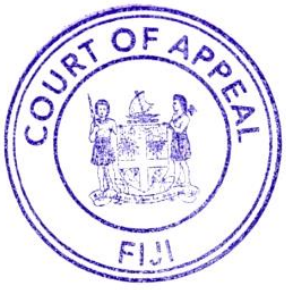
[37] The fact that the ultimate sentence is within the tariff does not necessarily make it appropriate to the gravity of the crime. Therefore, I think that it is in the best interest of justice to leave it to the full court to look at the propriety of the sentence. In the circumstances, I am inclined to grant leave to appeal on the ground of appeal raised

by the appellant as to whether the possible double counting had made the sentence harsh and excessive.

[38] In **Chand v State** [2021] FJCA 5; AAU0070.2019 (13 January 2021), another case of child digital rape, the state submitted that there could have been an error in the ultimate sentence of 17 years, 05 months and 16 days. Since I have dealt with this issue in detail at paragraphs 38-63 in ***Chand***, I do not wish to repeat the same here but the state is advised to consider its stand in ***Chand*** in relation to this appeal which also persuaded me to grant leave to appeal against sentence in this appeal.

Order

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



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL