IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 105 OF 2016
(High Court No. HAC 37 of 2013L)

BETWEEN : **SAMISONI BAUKARI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Dayaratne, JA

Counsel : **Mr S. Waqainabete for the Appellant**
Ms E. Rice for the Respondent

Date of Hearing : **06 May, 2022**

Date of Judgment : **26 May, 2022**

JUDGMENT

Gamalath, JA

[1] The appellant was indicted in the High Court at Lautoka on a charge of Rape, contrary to Sections 207(1) and (2)(a) of the Crimes Act No.44 (Decree) of 2009 and according to the particulars of the offence, between 14 February 2013 and 15 February 2013 at Lautoka he had allegedly raped Kinisimere Vakayavu.

[2] At the conclusion of the trial, the assessors were unanimous that the appellant was not guilty. The learned trial Judge disagreed. In his judgment he reasoned out why he was not in agreement with the opinion of the assessors. Having convicted the appellant, he sentenced him to a period of 8 years and 6 months with a parole period of 7 years.

[3] Being aggrieved by the conviction and the sentence the appellant is seeking to assail both the conviction and the sentence on the following grounds for which the leave was granted by the Single Judge on 20 August 2018.

> *(1) The learned trial Judge erred in law and caused the trial to miscarry in convicting the appellant on insufficiency of evidence led by the prosecution (sic).*
>
> *(2) The learned trial Judge caused the trial to miscarry to convict the appellant on the unreliable and incredible evidence of the complaint.*
>
> *(3) The learned trial Judge erred in law in considering 10 years as the appropriate starting point.*

[4] The first two grounds have a close affinity, for both are primarily concerning the nature of the evidence upon which the learned trial Judge arrived at the conclusion to find the appellant guilty as charged. As such the first two grounds can be considered together and it is also the wish of the counsel for the appellant.

Evidence in brief

[5] The victim Kinisimere Vakayavu was a 31 years old person when she testified at the trial. Around 14 February 2013, she was residing at a house that belonged to her husband's aunt, and the appellant her husband's uncle was also living with them in the same house. On 14

February 2013, her husband Senitiki started his work at a place called Mike's Shop, a bakery and since he was doing the night shift, he had left for work at around 6.00p.m. After her husband left for work, the victim and the appellant had gone to a nearby neighbor's house, one Jone's, to watch the T.V. While the victim was watching the movies at Jone's, the appellant had gone to another house to drink kava. Around 1.00a.m. both the victim and the appellant returned home, and the victim had gone to sleep in her room, the door to which had been kept open. The victim was lying in the mattress and dozing off when she felt someone's embrace. The person who embraced her has said "please forgive me and please don't tell Senitiki", and the voice was recognized to be of the appellant's. The victim found the appellant lying on top of her; he tied her hands over her head; punched her legs so that she could not move due to weakness; he had felt her body; removed her clothes and inserted his penis into her vagina. In order to escape from him, the victim had told the appellant she wanted to use the toilet and when she went to the toilet the appellant had followed her and stood by the door. After about 10 minutes, the victim returned to her bedroom and whilst lying in the mattress, the appellant had once again approached her and embraced her. The time then was around 3.25 a.m. according to the reading on the mobile phone.

The victim, in order to escape from the appellant's clutches, walked out of the house, followed by the appellant. He was inquiring her as to where she was going and whilst this conversation was in progress the victim had run away through the sugar cane field , back to the house of Jone, where she found the door to the entrance to the house was still open. Inmates were asleep. Jone said in evidence that around 3 in the morning he had noticed her presence in the house and wanted him to take her back home. Whilst walking back to her house the victim had told Jone about the incident with the appellant. She had told him that the appellant raped her. The victim after returning home went back into her room, closing the door from behind to prevent the appellant from entering. Her evidence was that the appellant was in the house when she returned and had told her that the house was theirs' from then onwards. In the morning when she woke up to let her husband in after work the appellant was not at home. She had never seen the appellant again. She complained to her husband about the incident. After the husband went to sleep, she went to her uncle's place and later around 9.00 or 10.00 in the morning when the husband came in search of her,

they reported the matter to the police. At the time of the incident the victim was 28 years old. She was categorical that she did not give consent to have sex with the appellant.

The line of cross-examination of the victim shows that the appellant was suggesting that the sexual intercourse was consensual. A close examination of the evidence in cross-examination of the victim would make it clear that there had been no contradictions or omissions worthy of considering to discredit her evidence. She had been consistent that she did not indulge in having sexual intercourse with the appellant willingly.

[6] The evidence of Jone Nawaqa at whose house the victim was watching the TV along with the appellant testifying stated that around 3.00a.m. when he woke up, the victim was found sitting in the living room. She had wanted him to accompany her to get back to her house. While they were walking towards her house, the victim had related to him the incident with the appellant. She had told him that the appellant raped her. The evidence of the witness has not been controverted. The prosecution called the evidence of the husband of the victim who in his evidence narrated what his wife told him on his return from the work in the morning.

The appellant neither gave evidence nor did he call any witness on his behalf.

[7] I find the learned trial judge had given a balanced and an accurate summing up. He disagreed with the assessors opinion with good reasons as set out in the judgement considered together with the reasons adduced in the summing up. I am unable to find any material on the record in support of the first two grounds of appeal and must say there is nothing with strength in a legal sense in the appellant's submission that there was "a miscarry in finding the appellant guilty", whatever it may mean. The two grounds are based on vague and insufficient material and as such they cannot succeed in appeal.

<u>The Third Ground of Appeal</u>

[8] This concerns the perceived error in law in considering 10 years as the starting point of the sentence, which the learned counsel urged is an inappropriate selection. In other words the contentious issue is about the 10 years starting point as chosen by the learned trial Judge,

who in his sentencing order had laid down the prime considerations upon which he relied in arriving at the sentence;

The prime considerations as stated by the learned High Court Judge

[9] (1) Since this involves an "acquaintance rape", where a family member had been involved, it should therefore be considered as one of the "worst forms of sexual offence". (page 158; sentencing decision).

(2) It had been inimical to the victim's emotional and physical wellbeing.

(3) There is an exponential rise of similar offences and its invasive nature is detrimental to the social stability.

(4) "Committing offences (of this nature) has posed a perilous risk to the smooth functioning of society" (page 158 Sentencing decision)

Having stated as above, and having referred to Section 4 of the Sentencing and Penalties Act (Decree) 2009(CAP0178), the learned Judge was persuaded by the need to convey the message of deterrence as his prime object in deciding on the sentence of imprisonment. Thus, the learned Judge stated that "in sentencing, it is the responsibility of the court to demonstrate the gravity and seriousness of the offences in the similar nature as this; the public should be made aware of the matter." (page 158).

[10] In selecting the tariff, that ranges from 7 to 15 years, the learned Judge relied on the guidance as set out in **The State v. Marawa** [2004] FJHC 38; HAC 0016T.2003S (23 April 2004); **The State v. Navauniani Koroi** (unreported) Crim. App. Case No. HAA 0050.2002S; **The State v. Samu Seru** (unreported) Suva Crim. Case No. HAC 0021.2002S; **The State v. Oteti Sivonatoto** Crim. Case No. 207 of 2011.

[11] In paragraph 10 the learned Judge, having reiterated the facts relating to the offence, selected 10 years as the starting point.

[12] This is wrong in principle of law, the counsel for the appellant urged. Instead of 10 years, the appropriate starting point should have been 7 years, he urged. He relied on **Mohammed Kasim v. The State** (unreported); Fiji Court of Appeal Cr. Case No. 14 of 1993; 27 May1994; in which the Court of Appeal observed:

> *"We consider that any rape case without aggravating or mitigating features, the starting point for the sentencing for an adult should be a term of imprisonment of seven years. It must be recognized by the Court that the crime of rape has become altogether too frequent and that the sentences imposed by the Court for that crime must reflect the understandable public outrage. We must stress, however that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point."* (emphasis added).

[13] As can be seen the decision in that case was handed down in 1994; the Court seemed to have been empathizing with the prevailing social abhorrence towards the large number of reported rape cases at the time and accordingly decided to place the starting point at 7 years, as stipulated in the above case. As what has been emphasized above would demonstrate, the above decision recognizes the need to be flexible in the selection of a starting point that would commensurate to the gravity of each case and as such depending on the attendant circumstances of a case involving rape, the decision making process on the starting point by a sentencing judge has been left in a rather flexible premise.

[14] Nearly 22 years later, on 11th July 2014, the learned trial Judge in the case of the instant appeal seemed to have been moved by the same social factors when he decided on the impugned starting point of 10 years. He was persuaded by the exponential growth of the cases of rape, particularly in view of the fact that the appellant being a family member, who took advantage of the situation in the night of a vulnerable woman while her husband, his own nephew, was away from home, doing his night shift at a bakery. Based on the attendant circumstances and having described the act as "an acquaintance rape," the learned Trial Judge was inclined to treat it with a severe sentence that reflects the deterrence.

[15] Making a personal note I must state that although between 1994 and 2016, a period of little over two decades has passed, there seems to be a perceivable slowness in the change that

has been aspired to be achieved in combatting violence directed against women in the form of sexual offences. If the pervading somewhat of an abysmal situation persists with no improvement, should the starting point of 7 years as per **Mohammed Kasim** (supra) that was laid down 22 years ago remain a constant figure, I wonder. Suffice it to state that as I have observed , a very great percentage of cases that come up for hearing before this Court are based on sexual violence perpetrated against women and to say the least it is an alarming factor that cannot be considered with any degree of insignificance.

[16] The State relies on **Naikelekelevesi v State** [2008] FJCA 11; AAU 0061.2007 (27 June 2008) to discuss about the exercise involved in the selection of the starting point of the sentence.

> *"22. In Fiji sentencing now involves a more structured approach incorporating a two tier process. The first involves the articulation of a starting point based on guideline appellate judgments, the aggravating features of the offence [not the offender]; the seriousness of the penalty as set out in the act of parliament and relevant community considerations. The second involves the application of the aggravating features of the offender which will increase the starting point, then balancing the mitigating factors which will decrease the sentence, leading to a sentence end point. Where there is a guilty plea, this should be discounted for separately from the mitigating factor in a case.*
>
> *23. In determining the starting point for a sentence the sentencing court must consider the nature and characteristic of the criminal enterprise that has been proven before it following a trial or as in this instance the facts that were outlined to the appellant after his guilty was entered and he was convicted, to which he voluntarily admitted. In doing this the court is taking cognizance of the aggravating features of the offence."*

[17] In order to be specific on the matter the State relies on **Koroivuki v. State** [2013] FJCA 15; AAU0018.2010 (5 March 2013) in which it was decided that (in paragraph 27);

> "*In selecting a starting point, the Court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at the stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting the mitigating and aggravating factors, the final term should fall within the tariff."* (emphasis added)

[18] Having stated thus, the State submitted that "the sentencing judge appeared to have referred to some aggravating factors of the case when fixing the starting point'. Although the submission is to that effect, it is bereft of any specific reference to such factors, which in the view of the State may have operated wrongly in arriving at the starting point of 10 years. In the absence of any material to enumerate the specific instances of the wrongful counting of aggravating factors in deciding the 10 years period of the starting point, the overtly generous approach does not seem to be holding water.

[19] Having said, in relation to the issue of selecting an appropriate starting point, I wish to take a view from a different perspective in which the use of the judicial discretion should be given the pride of place. In my opinion the sentencing judges should be able to exercise a greater discretionary power in selecting a starting point within the basic parameters as laid down statutorily or otherwise. It is to be remembered that not every case that comes up for consideration would necessarily fit into the mould as laid down by different *dicta* or listed catalog of items that is to be followed assiduously as in a situation that requires the "ticking the boxes" approach to ensure the strict adherence. That I think is a regimental approach that would operate contrary to the use of judicial discretion in sentencing. Operating within the basic norms of law and without falling in to the error of making overtly arbitrary decisions based on subjective criterion, a sentencing judge should be able to exercise his discretion in deciding on a starting point which is possible to be justified having regard to the factual matrix, assessed within the applicable law.

However then the inevitable question that comes up for consideration is whether this exercise would go contrary to the need for parity and conformity, which are secondary considerations in sentencing. In relation to this the basic structure introduced by the appellate courts or by a statutory provision in prescribing a starting point should remain as a guiding norm of law for the general consideration on sentencing of cases which would be clustered into a particular category. Deviations can be based on *sui generis* instances where the use of the judicial discretion can be justified based on objective criteria with which the complaint of falling into the error of arbitrariness could be negated.

Based on the facts of the case and the attendant circumstances a Judge should be able to justify the reason for the deviation and the reasons should be based on some cogent material. Easy to be discerned through the proceedings of a particular case.

[20] In dealing with the issue of selecting the accurate starting point in the case of **Parranto et al. v. the Queen**, 2021 SCC 46 , Supreme Court 39227, 12 Nov, 2021, (a case involving in dealing with a dangerous drug)the Supreme Court of Canada held in that ;

> *"……. There is no need to disavow the starting-point approach to sentencing. Sentencing ranges and starting points are simply different tools that assist sentencing judges in reaching a proportionate sentence. It is not for the Court to dictate which of these tools can or cannot be used. Provincial appellate courts should be afforded the respect and latitude to provide their own forms of guidance to sentencing judges, as long as that guidance comports with the principles and objectives of sentencing and with the proper appellate standard of review. However, starting points must be properly treated as non-binding guidance by both sentencing and appellate courts and appellate courts must adhere to the deferential standard of review in sentencing appeals and to the Court's clear direction on how to account for starting points when reviewing sentences for errors in principle and demonstrable unfitness."*

> *"Sentencing is one of the most delicate stages of the Criminal Justice Process. It requires judges to consider and balance a multiplicity of factors and it remains a discretionary exercise. The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching the goal, and parity and individualization are secondary principles. Individualization is central to the proportionality assessment. Each offence is committed in unique circumstances by an offender with a unique profile. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and unique circumstances of each case. Sentencing courts are best-positioned to craft a fit sentence for the offenders before them. As for the appellate courts, they play two roles; consider the fitness of sentence appealed against and promoting stability in the development of the law while providing guidance to lower courts to ensure the law is applied consistently. Appellate courts are well-positioned to provide such guidance because of their appreciation of overall sentencing practices, patterns and problems in their jurisdictions."*
> *"Appellate guidance may take the form of quantitative tools such as sentencing ranges and starting points, non-quantitative guidance*

explaining the harms entailed by certain offences, or a mix of both. Quantitative appellate guidance, generally starting points or sentencing ranges, operate to ensure sentences reflect the sentencing principles prescribed in the Criminal Code*. Neither relieves the sentencing judge from conducting an individualized analysis. Sentencing ranges generally represent a summary of the case law that reflects past minimum and maximum sentences imposed by trial judges. Starting points are an alternative to ranges. The starting-point methodology has three stages: defining the category of an offence to which the starting point applies; setting a starting point; and individualization of the sentence by the sentencing court. Both reflect judicial consensus on the gravity of the offence. Irrespective of the preferred sentencing methodology, the purpose of the modality is to assist the sentencing judge in achieving the objectives and principles of sentencing, primarily proportionality. Ranges and starting points are simply different paths to the same destination: a proportionate sentence. Courts of appeal have discretion to choose which form of guidance they find most useful; however, because starting points are not binding precedents, parties seeking to challenge them need not have resort to a reconsideration application procedure".*

"Sentencing decisions are entitled to a high level of deference on appeal. Deviation from a range or starting point does not in itself justify appellate intervention. Unless a sentence is demonstrably unfit or the sentencing judge made an error in principle that impacted the sentence, an appellate court must not vary the sentence. Ranges and starting points cannot be binding in theory or practice and appellate courts cannot apply the standard of review to enforce them. Directions in R. v. Arcand, 2010 ABCA 363, relating to the binding nature of starting points do not reflect the required standard of appellate review. It is not the role of appellate courts to enforce a uniform approach to sentencing through the application of the standard of review; rather, appellate courts must guard against undue scrutiny of the sentencing judge's discretionary choice of method. There is no longer space to interpret starting points or ranges as binding in any sense. Departing from a range or starting point is appropriate where required to achieve proportionality and exceptional circumstances are not required when departing from a range or starting point to achieve proportionality".

"Starting points do not relieve the sentencing judge from considering all relevant sentencing principles. Sentencing judges have discretion over which objectives to prioritize and may choose to weigh rehabilitation and other objectives more heavily than "built-in" objectives like denunciation and deterrence. Appellate sentencing guidance ought not to purport to pre-weigh or build in any mitigating factors and starting points should not be viewed as incorporating principles such as restraint or rehabilitation.

Sentencing judges are not precluded from considering any factor that is built in to a starting point as mitigating in the individual circumstances and retain the discretion to weigh all relevant factors in their global assessment of a fit sanction. When setting starting points and ranges, inclusion of characteristics of an archetypal offender could impede individualization of sentences. Sentencing ranges and starting points are applicable only inasmuch as they solely speak to the gravity of the offence. By restricting starting points and ranges to strictly offence-based considerations, they will continue to be useful without fettering discretion or impeding individualization in a way that could produce clustering of sentences. Any risk of clustering is properly addressed by ensuring sentencing judges consider all factors relevant to each individual offender and by clarifying the proper standard of review on appeal."

[21] Referring to the issue of the 'Starting point' approach Supreme Court of Canada further held in **<u>Parranto</u>** (*supra*) that;

"The starting point approach seeks to reduce arbitrariness, disparity and idiosyncratic decisions-making in order to maintain public confidence in the administration of justice. Jail becomes the norm, starting point becomes hardened into fixed sentences, and factors leading to systematic discrimination are ignored or inadequately dealt with.

The application of starting points by trial judge is another area in which the starting point approach is inconsistent with the principle of sentencing. Sentencing judges have less discretion to fully consider all relevant circumstances and are less likely to arrive at individualized and proportionate sentences. <u>Starting points overemphasize deterrence and denunciation</u>. They are defined solely in relation to the gravity of the offence. Moral blameworthiness and personal characteristics are secondary considerations. <u>This is a methodological problem because the gravity of the offence and moral blameworthiness must be considered in an integrated manner to achieve proportionate sentences</u>; sentencing judges using a presumptive sentence do not follow a frailly individualized process. <u>Building some factors to the starting point effectively</u> prescribes the weight to be given to factors, displacing the sentencing judges discretion to determine their weight. Under the starting point approach, categorization is pivotal, and this improperly shifts the main focus from whether a sentence is just and appropriate to which judicially-created category applies. The starting point approach also balances sentences around a mediation. This clustering effect is unethical to individualization. Starting points are often established to emphasize deterrence and denunciation and to ensure more retributive punishment. This runs contrary to the objectives of reducing prison as a sanction and expanding use of restorative justice. As well, starting points make it more difficult for judges to give adequate weight to restorative justice principles because they are designed to move up and hard

to move down. They explicitly or implicitly foreclose reliance on multiple mitigating factors, which risks overlooking lower, appropriate sentences."

[22] As can be seen in **Parrento** the Supreme Court of Canada, while recognizing the rigidity in sentencing that comes along the wake of already fixed starting point approach on sentencing, expressed the concerns that that approach could possibly operate as a fetter in using the well measured discretionary power that a sentencing judge is expected to use by taking a holistic view having regard to multifarious factors of any given case. Further, in **Parrento** the exercise of applying the starting-point approach as a mechanism to foster deterrence as a promoter of retributive justice as opposed to rehabilitation and restoration has been discussed. Individualization, which is a vital consideration in determining the appropriate sentence is to a certain degree comes under restriction by the rigid application of the starting point approach and it indeed can have a negative impact on the exercise of discretion in sentencing.

[23] It is a degree of discretion being exercised by the sentencing judges, that has universal recognition in deciding on the appropriate sentences. As Lord Chief Justice (ex) of England and Wales Tom Bingham stated in his seminal text "*The Rule Of Law" p. 53, Chapter* 4, "*Law not Discretion*" that "It is widely (and rightfully) regarded as important that judges should enjoy a measure of discretion when passing sentence on convicted criminals, since if they are unable to take account of the difference between one offence and another and between one offender and another." "The rule of law does not require that official or judicial decision makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."(*p*.54)

[24] Applying the above conceptual matrix to the impugned sentence imposed by the learned trial Judge in this case, what is clearly discernible from the reasons given in selecting the 10 years period as the starting point, the learned trial Judge had been persuaded by the fact that the exponential growth in the violence through sexual aggression directed towards women should be treated with a sense of harshness that would have a resounding impact of deterrence, a retributive impact, so that the society in general and women in particular will

be ensconced in an atmosphere of protection in the environment to which they belong. Having considered the use of discretion by adopting a holistic view of the facts relating to the instant case I am unable to hold that the sentencing Judge erred in not conforming to the 7 years starting point.

[25] As already stated the counsel for the appellant's complaint against the impugned sentence is primarily based on the excessiveness on account of disproportionality and as such the counsel urges that the error can be attributed to the fact that the learned trial Judge had failed to take into account the commission of the offence was against an adult (as against an underage person; I suppose); there had been minimum violence inflicted on the victim; the absence of medical evidence to substantiate the sexual aggression or other related matters. As such the counsel contends that an injustice had occasioned.

[26] With that submission, I am unable to agree. Having regard to the evidence it is to be recalled that the victim in order to escape from the appellant had to run through a sugar cane farm in the dead of night, for almost 2 kilometers, (as found in the summing up) and sought refuge under the roof of Joan, who has to bring her back home and posited her in the house ensuring safety from the appellant's aggressions. The acts of the appellant had thus exposed the victim to a grave vulnerability which is not to be treated lightly. In my view no woman should be exposed to such a predicament on account of the unrestrained temptation of an aggressor.

[27] Due to the reasons set out above I do not find any merit to the third ground of appeal against the sentence. As such this ground also cannot succeed.

<u>Prematilaka, JA</u>

[28] Having had the benefit of reading the draft judgment of Gamalath, JA, I am agreement with the proposed outcome namely that the appeal against conviction and sentence should be dismissed. However, in addition to what has been discussed by my brother Gamalath, JA on the sentence appeal, I would like to add a few of my own observations.

[29] The contention of the appellant's counsel seems to be that the trial judge may have erred in taking the starting point as 10 years and also he may have been guilty of double counting the aggravating features by enhancing the sentence by 02 more years for aggravating factors.

[30] In **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) the Court of Appeal decided that *'in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years.'* However, in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) Gates, CJ on behalf of the Supreme Court having considered ***Kasim*** and **State v. Marawa** [2004] FJHC 338 declared that *'…….the tariff for rape of an adult has been set between 7 and 15 years imprisonment.* Thus, the Supreme Court seems to have departed from the starting point based approach in ***Kasim*** in adult rape cases to a tariff based approach in ***Rokolaba***. Since then, sentencing magistrates and judges in Fiji have by and large followed the sentencing tariff of 07-15 years in respect of adult rape cases.

[31] In heralding a new approach, the Supreme Court in **State v Tawake [2022] FJSC 22; CAV0025.2019 (28 April 2022)** has favoured a sentencing regime of having a starting point and a sentencing range for aggravated robberies in the form of 'street mugging' where the sentencer having identified the initial starting point for sentence, must then decide where within the sentencing range the sentence should be, adjusting the starting point upwards for aggravating factors and downwards for mitigating ones. The Supreme Court has said that identifying where in the sentencing range the judge should start when the higher courts have only identified the appropriate sentencing range for offences, has caused difficulties to the sentencers as highlighted by the Supreme Court on a number of occasions, for example **Seninolokula v The State** [2018] FJSC 5 at paras 19 and 20 and **Kumar v The State** [2018] FJSC 30 at paras 55-58. The Court has further stated that the proposed methodology which is new to Fiji, if used, that problem is avoided and expressed the view that there is no reason why this methodology should be limited to "street muggings" and recommended that it be considered for sentencing for other offences.

[32] The High Court judge has picked 10 years as the starting point, added 02 years for aggravated factors, reduced 03 years for mitigating factors and 06 months of further discount for the period of remand to end up with a final sentence of 08 years and 06 months.

[33] Having perused paragraph 6 of the sentencing order I think in selecting 10 years to start with the High Court judge had considered objective seriousness of the crime and added 02 years for subjective aggravated factors identified at paragraph 7, thus reasonably keeping with the sentencing practice prescribed in **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008). Therefore, in my view there is no serious error in the process or double counting. Whether, 10 years was the right starting point for objective seriousness of the crime could be a point of contention and arguable but not the enhancement of 02 years for subjective aggravating features.

[34] 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. 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 (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[35] No party urged this court to adopt the new methodology of sentencing to the current case. Holistically looking at it, I have no doubt at all that the ultimate sentence of 08 years and 06 months is not harsh or excessive given all the circumstances of the case and well within the range of 07-15 years. If am to somewhat surmise, even if the new methodology suggested by the Supreme Court was adopted taking 07 years as the starting point there would not have been a significant difference to the final sentence. In fact, the ultimate sentence could have been even higher.

Dayaratne, JA

[29] I have read the judgment in draft of Gamalath J and agree with his reasons and conclusions.

Order of the Court

Appeal against the conviction and sentence cannot succeed.

The appeal is dismissed.

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice V. Dayaratne
JUSTICE OF APPEAL