IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 140 of 2018

[High Court Civil Case No. HBC 181 of 2015L]

BETWEEN : **SAULA VASU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Morgan, JA

Counsel : **In Person for the Appellant**
R. Kumar for the Respondent

Date of Hearing : **11 July 2023**

Date of Judgment : **27 July 2023**

JUDGMENT

Mataitoga JA

[1] I have read the judgment in draft. I support it and the conclusion.

Qetaki JA

[2] I have considered the judgment in draft and I agree with it the reasoning and conclusion.

Morgan JA

[3] This is an appeal from the decision of the High Court at Lautoka on 12 November 2018 against the Appellant's conviction of two counts of rape for which he was sentenced to 9 years, 10 months and 15 days imprisonment with a non-parole period of 8 years.

[4] The Appellant filed a Notice of Appeal for Leave to appeal against conviction and sentence in person within time as required by Section 21(1)(b) of the Court of Appeal Act on 20 December 2018. An amended Notice of Appeal against conviction and sentence was filed by the Legal Aid Commission on behalf of the Appellant on 28 April 2020.

[5] Leave to appeal against conviction and sentence was refused by Prematilaka RJA on 23 October 2020.

[6] Not being satisfied with the above ruling of the single justice of appeal, the Appellant renewed his application for leave to appeal against his conviction and sentence to the full court on 23 October 2020.

[7] The appellant had been indicted in the High Court at Lautoka on two counts of rape contrary to Section 207(1) and (2)(a) respectively of the Crimes Act, 2009 committed on 2 November 2015 at Nadi, in the Western Division.

[8] The information read as follows:

FIRST COUNT

Statement of Offence

RAPE*: Contrary to section 207(1) AND (2) of the Crimes Act 2009*

SAULA VASU*, on the 2nd day of November, 2015 at Nadi, in the Western Division, penetrated the vagina of* ***TALEI SENIROSI*** *with his penis, without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SAULA VASU*, on the 2nd day of November, 2015 at Nadi, in the Western Division, penetrated the anus of* ***TALEI SENIROSI*** *with his penis, without her consent.*

Brief Facts

[9] The facts were summarised by the trial judge as follows:-

> *"2. In the morning 2nd November, 2015 the victim was drinking beer in room No. 3 at the Martintar Hotel. The room door was open. After a while she saw the accused going past the room.*
>
> *3. The victim called out and asked the accused to join her, as the drinking continued the victim started to feel drunk. After a while the accused told the victim that he wanted her. The victim refused. The accused punched the victim, she stood up and went outside the room. The accused came and pulled her neck from behind and forcefully took her to his room no.4.*
>
> *4. The victim did not want to go into the room so she pushed him but the accused managed to pull her into his room. In the room the accused pushed the victim on the bed and pushed her down. The accused pulled up the victim's dress, she was screaming for help and pushing the accused he then locked the door of the room.*

5. *After pulling down her under wear the accused forcefully had sexually intercourse with the victim. The victim did not consent to what the accused had done to her. According to the victim she was turning, twisting and screaming for help and pushing the accused at the same time.*

6. *The accused held the victim's throat with one hand and with the other blocked her mouth. As the victim was trying to free herself the accused turned her around, pulled her bra and then inserted his penis into her anus. The victim was crying and calling for help. She did not consent to what the accused had done to her.*

7. *The accused took the victim to the bathroom where she was able to free herself and run out of the room. The accused also ran after her. At the hotel reception the police came and arrested the accused."*

Grounds of Appeal

[10] At the application for leave stage before this Court the Legal Aid Commission on behalf of the Appellant lodged two grounds of appeal namely:-

Against Conviction

Ground 1 *– The verdict on both counts of rape cannot be supported having regard to the totality of the evidence.*

Against Sentence

Ground 2 *– The trial Judge erred in principle by enhancing the Appellant's sentence with the aggravating factors accounted for in as much as;*

(i) Irrelevant or extraneous factors in aggravating factor (a); and
(ii) Aggravating factor (b) makes up part of the offending.

[11] In his renewed application for leave before this full court the Appellant has in person filed another 4 grounds of appeal. These are vague and repetitive which is understandable in that the Appellant filed these grounds in person. In essence however these grounds are covered by the very broad ground against conviction filed by the Legal Aid Commission on behalf

of the Appellant. I have however read and taken into account the Appellant's said further grounds and submissions filed by the Appellant in support thereof in considering this appeal.

[12] The Appellant did not file any further grounds of appeal against sentence nor make any submissions thereon beyond what was filed at the leave stage other than to state that he considered the sentence to be harsh and excessive in the circumstances of the case. The Appellant did state however in his renewal of leave application that he wished to appeal against conviction and sentence.

[13] Prematilaka JA in this court (single Judge) when considering the leave application also noted the following:-

> *"[9] The medical evidence had been that the complainant had sustained vaginal tears on the vaginal opening i.e. the introitus and the doctor had seen anal tears as well. The medical opinion had been that there was evidence of forceful vaginal and anal penetration.*
>
> *[10] The appellant had remained silent and called one witness by the name of Taraivosa Baleisuva. The appellant's defense had been one of consent at the trial as revealed in the cross-examination of the complainant. The trial judge had summarized the appellant's position in the summing up as follows.*
>
> > *'80. <u>According to the line of cross examination the accused takes up the position that the accused had penetrated the complainant's vagina and anus with his penis with her consent.</u> The complainant had invited him to join her for drinks after a while she wanted to have sex with him since her uncle's friend was asleep on the bed they went into the bathroom. Thereafter the accused realised his phone was missing the complainant had hidden the phone inside her bra. There was a struggle between the two resulting in the bra of the complainant being damaged."*

[14] At the trial the prosecution called 3 witnesses to prove the charges namely; the complainant, a police constable who was passing the scene of the offence shortly after, saw

a commotion and went to investigate and the Doctor who examined the complainant on the same day the offences were committed.

[15] The accused chose to remain silent but called one witness who had accompanied the accused to Nadi and was staying at the hotel where the offences were committed.

[16] At the conclusion of the trial the three assessors returned a unanimous opinion that the accused was guilty of both counts of rape.

[17] The trial judge agreed with the unanimous opinion of the assessors of guilty on both counts of rape and found the accused guilty as charged and convicted him accordingly.

[18] The Appellant was sentenced to 9 years, 10 months and 15 days imprisonment for the two offences of rape with a non-parole period of 8 years.

[19] I will now deal with the grounds of appeal.

Ground 1: Conviction

[20] That the conviction cannot be supported having regard to the totality of the evidence.

[21] The Appellant submitted in respect of this ground that the complainant had not stated that both acts of sexual intercourse had been committed on her by force, threats, intimidation or fear of bodily injury therefore there is insufficient evidence of lack of consent.

[22] The term *'consent'* in the context of sexual offences is defined in Section 206 (1) and (2) of the Crimes Act, 2009 as follows:-

*"**206**. In this Part-*

(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained-

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm;
(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner"

[23] Prematilaka, JA noted in his ruling on the application for leave in this matter as follows:

"[12] This argument presupposes that in a rape case the victim should necessarily and expressly depose to any one or more of the matters set out in section 206(2) of the Crimes Act, 2009. The law does not require a victim of a rape to make a declaration, loud and clear, that her consent was not freely and voluntarily given because it was obtained under any of the circumstances given in section 206(2) of the Crimes Act, 2009. All what is necessary is that the assessors and the trial judge, being fact finders, should be able to be satisfied beyond reasonable doubt from the totality of the evidence that the victim had not consented to the act of sexual intercourse. In some cases the victim will testify to want of consent directly and in others lack of consent has to be and could be inferred. What is meant by 'consent' becoming not free and voluntary. In other words section 206(1) describes *'what is consent'* and section 206 (2) as to *'what is not 'consent'*

[24] Prematilaka JA also referred to the following passage in the case of **Nawaitabu v The State** (2020) FJCA 53; AAU 007.2019:

> "*[13] In **Nawaitabu v State** [2020] FJCA 53; AAU 007.2019 (15 May 2020) I considered the term 'without consent' in section 207 (2) (a) of the Crimes Act in the backdrop of a similar argument as follows.*
>
> *'[10] Under the first ground of appeal the appellant argues that the prosecution had not adduced evidence from GN and MN that the appellant had committed the acts complained of by force, threats, intimidation or bodily harm to cause fear in them. In other words according to the appellant there was no evidence to say that the consent was not given freely and voluntarily due to the absence of the factors outlined in section 206(2) of the Crimes Act.*
>
> *[11] This argument presupposes that there is a burden on the prosecution to prove the absence of all factors set out under section 206(2) to prove lack of consent or to negate the element of consent required in the offence of rape. In my view, this is a wrong construction of the law. All what the prosecution has to prove is absence of consent on the part of the victim. This is denoted by the phrase 'without the other person's consent' in section 207 (2) (a) of the Crimes Act.*
>
> *'[12] Section 2016 states that*
>
> *In this Part-*
>
> *(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.*
>
> *(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained-*
>
> *(a)……..*
>
> *[13] Thus 'without consent' could be either patent lack of consent or consent (even if present outwardly) not given freely and voluntarily by a person, with the necessary mental capacity to give the consent. The prosecution may prove either of them or both. For example there can be initial physical resistance and subsequent submission in the same transaction due to any of the reasons set out in section 206(2) or some other reason inconsistent with the consent.*

> *[14] However, the prosecution does not have to rule out one or more or all instances outlined under section 206(2) to prove the element of 'without consent' in a charge of rape. Sub-section (2) only elaborates without limiting sub-section (1) instances where consent is not regarded as freely and voluntarily given. Neither does sub-section (2) override sub-section (1). This is the same with submission without physical resistance which alone would not amount to consent."*

[25] I accept and indorse this interpretation of the term *"consent"* in section 206 (1) and (2) of the Crimes Act 2009.

[26] The evidence of the complainant at the trial is clear and uncontroversial on the question of consent.

[27] The complainant in both her examination in chief and cross-examination at the trial stated in clear terms that she did not consent to sexual intercourse with the Appellant. She also describes vividly how she was resisting while the accused was penetrating her vagina and anus with his penis.

[28] This led the Trial Judge to hold at paragraph 36 of his Judgement as follows:-

> *"36. I am satisfied beyond reasonable doubt that on the 2nd day of November 2015 the accused penetrated the vagina and the anus of the complainant with his penis without her consent."*

[29] For the reasons stated above, I find that there is no merit in this ground of appeal.

Ground 2: Sentence

[30] That the learned trial judge erred in principle by enhancing the Appellant's sentence with the aggravating factors accounted for in as much as;

(i) Irrelevant or extraneous factors in aggravating factor a); and

(ii) Aggravating factor (b) makes up part of the offending.

[31] The drafting of this ground is vague however it can be summarised as follows:

> *" that the Trial Judge erred in law by increasing the Appellant's sentence for the aggravating factors of breach of trust and use of violence when the former was not applicable to the facts of the case and the latter was already part of the offence."*

[32] The Trial Judge recorded the aggravating factors in this case at paragraph 11 of his sentence ruling as follows:-

> *"The aggravating features are:*
>
> ***(a) <u>Breach of Trust</u>***
>
> *The victim trusted the accused so she invited him to join her for drinks. The accused breached her trust by his actions. The victim was alone and vulnerable the accused took advantage of this as well.*
>
> ***(b) <u>Use of Violence</u>***
>
> *The accused punched the victim when she refused to have sex with him and then grabbed her by the neck and then took her to his room. The victim was 20 years of age and the accused was 28 years of age. The age difference is substantial."*

[33] The Trial Judge dealt with the sentence imposed in his Sentence Ruling as follows:-

> *"12. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under the most serious category of offences. The accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.*
>
> *16. It is the duty of the court to protect women from sexual violations of any kind that is the reason why the law makers have imposed life imprisonment for the offence of rape as the maximum penalty.*
>
> *17. Bearing in mind the seriousness of the offences committed I take 9 years imprisonment as the starting point of your aggregate sentence. I add 3 years for the aggravating factors, bringing an interim total of 12 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value. I therefore reduce the sentence to 2 years. The sentence now is 10 years imprisonment.*

18. *I note the accused has been in remand for about 1 month and 3 days. I exercise my discretion to further reduce the sentence for the remand period by 1 month and 15 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served.*

19. *Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for the two offences of rape is 9 years and 10 months and 15 days imprisonment.*

20. *Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature."*

[34] The Appellant submitted that the aggravating factor of breach of trust was not applicable In this case because firstly there was no evidence of any fiduciary or personal relationship between the appellant and the complainant and secondly there was no evidence that they were known to each other.

[35] The Trial Judge's reference to breach of trust was not predicated on a fiduciary or personal relationships. The Trial Judge's use of the term *"breach of trust"* was used in the context of the Respondent trusting the Appellant by inviting the Appellant to join her for drinks whereby the Appellant breached that trust by raping the Respondent. This is an aggravating factor.

[36] The Appellants contention that force should not have been regarded as an aggravating factor as it is part of the offence of rape is fallacious. You can commit the offence of rape under Section 206 of the Crimes Act 2009 without using violence. The use of violence as in this case is clearly an aggravating factor.

[37] In essence, the Appellants contentions in this regard are that the trial judge erred by making the mistake of double counting by taking into account the aggravating factors outlined in his submissions.

[38] In **Saqanaivalu v State** (2015) FJCA 168; AAU0093.2010 Gounder JA stated:

> *"Of course, what is not permissible is the double counting of the same factors. For instance, if a certain factor is used to justify a high starting point, then the same factor should not be used as an aggravating factor to enhance the sentence. The use of the same factor twice to increase sentence amounts to double punishment (**Laisiasa Koroivuki v The State** unreported Cri App. No. AAU0018 of 2010; 5 March 2010 at [31])"*

[39] The trial judge was required to have referred to the nature and gravity of the particular offence under section 4 (2) (c) of the Sentencing and Penalties Act 2009. He did this in paragraph 17 of his Sentence Ruling in ascertaining the starting point of the sentence. He then increased the sentence by the aggravating factors which he was required to do under section 43 (2) (j) of the Sentencing and Penalties Act.

[40] I do not consider that there was any double counting and cannot find fault with the trial judge's Sentence Ruling.

[41] The Appellant did not file any submissions regarding sentencing either at the hearing of the application for leave or at this hearing other than what is contended in the ground of appeal.

[42] The Respondent in its submissions at the leave stage and at this hearing contended that the Appellants sentence is well within the tariff and certainly on the lower side. The Respondent further contends that the sentence is neither harsh nor excessive given the proven gravity of the offending and that the Appellant's sentence in no offends the proper exercise of the sentencing discretion.

[43] I agree with these contentions.

[44] Prematilaka RJA stated the following in respect of the sentencing in this matter when considering the application for leave to appeal.

"[21] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is ultimate sentence rather that each step in the reasoning process that must be considered [vide ***Koroicakau v The State*** *[2006] FJSC 5; CAV0006U.2005S (4 May 2006) and* ***May v State*** *[2017] FJCA 110; AAU0085.2013 (14 September 2017)]. In determining whether the sentencing discretion has miscarried the appellate court 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; AAU 48.2011 (3 December 2015).*

[22] Supreme Court in ***Rokolaba v State*** *[2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment following* ***State v Marawa*** *[2004] FJHC 338. The ultimate sentence imposed on the appellant is well within the sentencing tariff."*

[45] I agree with and endorse Prematilaka RJA's views expressed above:-

[46] I consider that in all the circumstances of this case the sentence is one that could reasonably be imposed by the sentencing judge and that the sentence imposed is within the permissible range.

[47] I do not consider that the sentence is harsh in all the circumstances of the case as contended by the Appellant.

[48] For the reasons stated above I find that there is no merit in this ground of appeal.

[49] I order as follows:

1. *Appeal is dismissed*
2. *No order as to costs.*

.....
Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

.....
Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

.....
Hon. Justice Walton Morgan
JUSTICE OF APPEAL

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