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

**CRIMINAL APPEAL NO.AAU 16 of 2021**
**[In the High Court at Lautoka Case No. HAC 205 of 2018]**

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| **BETWEEN** | : | **SEMI NAIKAU** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, RJA** |
| **Counsel** | : | **Appellant in person** |
| | : | **Ms. S. Naibe and Mr. T. Tuenuku for the Respondent** |
| **Date of Hearing** | : | **16 August 2023** |
| **Date of Ruling** | : | **17 August 2023** |

# RULING

[1] The appellant had been charged in the High Court at Lautoka on the following counts of indecent assault.

*'**FIRST COUNT***
***Statement of Offence***

***INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Act 2009.*

***Particulars of Offence***

***SEMI NAIKAU,** on the 17th day of October, 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted "SN" by touching her breast.*

***SECOND COUNT***
***Statement of Offence***

***INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.*

***Particulars of Offence***

> ***SEMI NAIKAU,*** *on the 17th day of October, 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted "SN" by touching her vagina.*

[2] The assessors had opined that the appellant was guilty of both counts of indecent assault and rape. Having agreed with the assessors, the trial judge had convicted the appellant accordingly and sentenced him on 20 January 2021 to an aggregate sentence of 15 years and 09 months imprisonment with a non-parole period of 13 years.

[3] The appellant had lodged a timely appeal against conviction and sentence.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] Further guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999), **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499). For a ground of appeal timely preferred against sentence to be considered

arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[6] The sentencing order has summarised the evidence as follows.

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

*The first accused is the victim's maternal uncle, on 16th October, 2017 the victim who was 16 years of age after finishing her Fiji Junior Examination went to the house of the first accused to spend her school holidays.*

3. *The next day the first accused asked the victim whether she had sexual intercourse. The victim responded she had not, at this time the first accused came close and touched the top portion of the victim's breast and her vagina from on top of her clothes.*

4. *The victim was afraid because her uncle wasn't supposed to do what he had done. She did not consent to what the first accused had done to her.*

5. *On the 18th the second accused the grandfather of the victim (from her mother's side) came to the house of the first accused. During the night the first accused told the second accused to lie down beside the victim, when the light was switched off the first accused said whatever he was going to do to his wife, the victim and the second accused will have to do as well.*

6. *The second accused did everything the first accused told the second accused to do to the victim. The second accused removed the victim's clothes and started sucking her breast and licking her vagina. Thereafter the second accused forcefully inserted his penis into the victim's vagina and had sexual intercourse with the victim for about 4 to 5 minutes. The first accused aided and abetted in the rape of the victim by the second accused.*

7. *The victim did not consent to what both the accused persons had done to her. The matter was reported to the police after the victim told her mother about what had happened to her.'*

[7] The grounds of appeal urged by the appellant are as follows:

***Conviction:***

***Ground 1***

*THAT the judge had failed to adequately and sufficiently warn, and, or, direct the assessors on the inconsistencies and contradictory evidence of the complainant which was material and significantly undermined her credibility as a witness and misdirection that is fatal in law.*

***Ground 2***

*THAT the quality of evidence upon which the court convicted the appellant was flawed inadequate and not sufficient for the trial court to "safely convict".*

***Ground 3***

*THAT the Judge erred in law and in fact when he convicted the appellant on the "adding and abetting" after the fact that the complainant gave direct evidence that the appellant did not have sex with her at any point in time causing justice to miscarry regardless of the mistaken belief that "the three main elements of rape" were attributable to the appellants advantage*

***Ground 4***

*THAT the Judge erred in law and in principle where he considered that the substantive charges against the appellant corroborating the complaint's statement to exceed to the charge of rape occasioning justice to miscarry.*

***Ground 5***

*THAT the Judge allowed extraneous or irrelevant matter to guide or affect him.*

***Ground 6***

*THAT the guilty verdict of the assessor was perverse and wrong in law.*

***Ground 7***

*THAT the Judge failed to take into account some relevant considerations.*

***Ground 8***

*THAT His Lordship erred in law and in fact when he misdirected the assessors on the evidence of Isikeli Nasaku which later found that the appellant was an active participant in the joint enterprise that led to the alleged aggravated incident.*

***Ground 9***

*THAT the learned trial judge misdirected the assessors and also himself in that the impression of the evidence adduced during the trial spelt the difference which reinforced the material of the alleged incident causing material misdirection.*

***Ground 10***

*THAT the learned trial judge failed in principle to avoid the tainted evidence of the alleged accomplice which caused justice to miscarry.*

***Sentence:***

***Ground 11***

*That sentence imposed by the learned trial judge was manifestly exclusive having regards to all the circumstances of the matter mendacious in its allegiance to the adjudication of the case.*

***Ground 1***

[8] Contrary to the appellant's assertion, the trial judge had directed the assessors how to evaluate inconsistencies at paragraphs 95-97 of the summing-up and then highlighted those inconsistencies at paragraphs 98-106. In addition, the trial judge himself had considered the same at paragraphs 50-54 of the judgment.

[9] An undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses and therefore the broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. Mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [14] & [15].

***Ground 2***

[10] There was certainly enough evidence to substantiate the charges of indecent assault where the appellant had touched the complainant's vagina and her breasts over her cloths (see paragraphs 54 to 56 of the summing-up and 11-13 of the judgment).

***Grounds 3, 4 & 6***

[11] The appellant challenges his conviction and the verdict for rape. There was no evidence at all that the appellant had committed rape within the definition of rape under section 207 of the Crimes Act, 2009. He was convicted for rape based on his acts of 'aiding and abetting' the co-accused to commit rape (see paragraphs 56, 63 & 70 of the judgment and 32-39 & 41 of the summing-up). The trial judge had acted under section 45 of the Crimes Act in convicting the appellant for rape which states that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

[12] There is an important legal question whether the person aiding and abetting another to commit rape could be convicted for rape despite the former having not committed the physical element of rape.

[13] Hypothetically, another incidental issue here is whether a person who committed rape by penetrating the complainant and another person who merely aided him in doing so but did not himself penetrate, can be charged with rape in the same count in the same charge sheet. Are all the parties coming under section 45 of the Crimes Act including aiders and abettors, principal offenders who may be jointly charged with the commission of the offence and as such may be charged in the same count? Or are the aiders and abettors under section 45 different from the principal offender and cannot be charged jointly with the principal offender with the result that they cannot be charged in the same count. Section 45(5) seems to suggest or draw a distinction between the principal offender and aiders and abettors.

[14] In this case the appellant was not charged at all for rape but was convicted for rape based on section 45 of the Crimes Act, 2009.

[15] Should or could the prosecution have charged the appellant for the offence of incitement under section 48 of the Crimes Act, 2009? If the full court were to quash the conviction for rape, should or could it not consider entering a conviction for the offence of incitement?

***Ground 5***

[16] This ground is too vague for any consideration at this stage, for the appellant had not described the alleged extraneous and irrelevant factors.

***Ground 6***

[17] Depending on the answer to the question of law above highlighted, the assessors' opinion that the appellant was guilty of rape may or may not be perverse. As for indecent assault charges, their opinion was not perverse at all.

***Ground 7***

[18] This ground is too vague for any consideration at this stage, for the appellant had not described the alleged relevant factors the trial judge had failed to take into account.

***Grounds 8, 9 and 10***

[19] These grounds of appeal question the consideration of his co-accused's evidence implicating the appellant by triers of fact.

[20] The trial judge had given sufficient warnings as to how the assessors should treat the evidence of the co-accused against the appellant as he was considered an accomplice at paragraphs 143-149 of the summing-up.

[21] Nevertheless, it is clear that even without the evidence of the co-accused, the evidence of the complainant was enough to implicate the appellant in rape charge provided he could have been lawfully convicted for rape based on section 45 of the Crimes Act, 2009.

***Ground 11 (sentence)***

[22] The sentence of 15 years and 09 months had been imposed in view of the conviction of the appellant for rape. If the rape conviction is lawful there is no merit in the challenge to the sentence. According to **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff for juvenile rape is between 11 to 20 years' imprisonment. The complainant was 16 years of age at the time of the incident and a juvenile.

[23] In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. 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)]. The approach taken by the

appellate court in an appeal against sentence 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)].

[24] Subject to the legality of rape conviction, there is no sentencing error for rape. If the conviction for rape is set aside by the full court, the current sentence will automatically be vitiated and a new sentence will be imposed by the full court if it chooses to convict the appellant for incitement under section 48 of the Crimes Act, 2009.

**Orders**

1. Leave to appeal against conviction is allowed on grounds of appeal 3, 4 & 6.
2. Leave to appeal against sentence is allowed subject to the decision by the full court on the conviction for rape.


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