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

CRIMINAL APPEAL NO. AAU 70 OF 2019
In the High Court at Lautoka HAC 165 of 2015

BETWEEN	:	**ROHIT RIKASH CHAND**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Prematilaka, RJA**
		Mataitoga, JA
		Qetaki, JA

Counsel	:	**Mr Heritage S for Appellant**
		Mr Burney L.J.

Date of Hearing	:	**13 September, 2023**
Date of Judgment	:	**28 September, 2023**

JUDGMENT

Prematilaka, RJA

[1] I agree that the appeal should be dismissed.

Mataitoga, JA

[2] The appellant (Rohit Rikash Chand) was indicted in the High Court of Lautoka on one count of **Rape**: Contrary to section 207(1) (2) (b) (3) of the Crimes Act 2009. Following a trial, the Assessors unanimously found the appellant guilty as charged.

[3] The Information sets out the charge as follows:

> ***"Count One***
>
> *Statement of Offence*
>
> ***Rape:*** *Contrary to section 207(1) and (2) (b) of the Crimes Act 2009*
>
> *Particulars of Offence*
>
> ***ROHIT RIKASH CHAND*** *on the 14 day of August 2015 at Nadi in the Western Division, penetrated the vagina of DG, with his finger, a child under the age of 13 years."*

[4] The trial judge accepted the opinion of the assessors and convicted the appellant on 6 May 2019. After hearing sentence submission from the appellant and respondent, trial judge sentence him to 17 years 5 months and 16 days with a non-parole period of 16 years.

[5] The appellant was given 30 days to appeal the conviction and sentence.

The Appeal

[6] The appellant through his counsel (Mr. Iqbal Khan) filed a timely notice of appeal and an application to appeal against conviction and sentence on 21 June 2019. The appellant submitted his appeal pursuant to section 21 of the Court of Appeal Act.

[7] The appellant filed submission on 9 September 2019 and the respondent filed its submission on 14 October 2020.

Leave to Appeal Hearing Fixed – the case of the missing Judges Notes

[8] The Leave to Appeal hearing was fixed for 12 January 2020. At the Leave to Appeal hearing date, Mr. Iqbal Khan counsel for the appellant, requested an adjournment of 14 days to allow him to supplement his grounds of appeal already filed with what he may obtain from the Judges Notes. There was no Judges Notes in the Court Record. This request was strongly objected to by Mr. Burney for the respondent. The trial judge and both counsels made their observation regarding the practice with regard to the use of judges notes at this stage and whether there is any prejudice to the appellant if the Notes are later used at the full court hearing.

[9] There were 5 grounds of appeal against conviction and 2 grounds against sentence.

[10] Under section 21(1)(b)(c) of the Court of Appeal Act an appeal against conviction and sentence is permitted with leave of the Court. The test for leave to Appeal is to demonstrate that the grounds submitted have 'reasonable prospect of success.'

[11] In **Caucau v State** [2018] FJCA 171, the Court adopted the following statement of the South African Supreme Court:

> *'**S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa enunciated the correct approach as to whether leave to appeal by the high court should have been granted or not as follows:*
>
> > *'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.(emphasis added)*
>
> *[11] In my view the test of 'reasonable prospect of success' could be employed to differentiate arguable grounds from non-arguable grounds at*

the stage of leave to appeal. I shall proceed to consider the Appellant's appeal accordingly.'

[12] The 5 grounds of appeal submitted on behalf of the appellant are set out in page 6-7 of the Court Ruling for the Leave to Appeal hearing before the single Judge. It is not necessary to set them out here.

[13] The grounds of appeal and supporting submissions were strongly objected to by the Counsel for the State because they fail to show the grounds of appeal in any meaningful manner and with no regard to the case-specific particulars of the summing-up, judgment and the sentence order complained.

[14] The Single Judge considered the grounds of appeal against conviction and ruled that no one has any prospect of succeeding on appeal given the haphazard and confusing manner in which the grounds were drafted. They were all dismissed.

[15] Both grounds of appeal against sentence were reviewed and dismissed as having no merit.

Full Court

[16] The appellant through his counsel and acting pursuant to section 35(3) of the Court of Appeal Act submitted 4 grounds of appeal against sentence before the Court. These are:

(i) the learned trial judge erred in law and fact in not taking into consideration that apart from the evidence of the complainant, there was no other credible evidence to support the complainant evidence against the appellant.

(ii) the learned trial judge erred in law and fact in relying on inadmissible evidence which was prejudicial in finding the appellant guilty

(iii) the learned trial judge erred in law and fact in not fully and adequately analysing the evidence before the court and hence there was substantial miscarriage of justice.

(iv) the learned trial judge erred in law and fact in not adequately directing/misdirecting himself on the previous inconsistent

statements made by the complainant, and as such there has been substantial miscarriage of justice

[17] It is pertinent that the court reminds counsel before it, of their duty in drafting grounds of appeal, to be precise as to question of law complained and the support submissions must refer to case-specific parts of the summing-up, judgment or sentence order where the alleged error occurred. Failure and flippancy with regard to this warning will move the court to dispose grounds falling foul of it as frivolous and/or vexatious under section 35(2) of the Court of Appeal Act and dismiss it.

[18] In **Daya Prasad v State** [2020] FJCA 178, the Court of Appeal stated that:

> *'21. It is the duty of the counsel in drafting and arguing grounds of appeal to act responsibly and not make sweeping and unjustified attacks on the summing up of the trial judge, unless such attacks are justified [vide Morson v R (1976) Cr App R 236]. Counsel should not settle or sign grounds of appeal unless they are reasonable, and real prospect of success and are such that he is prepared to argue before the court.*
>
> At paragraph 30, the court sounded the following warning:
>
> *'I should for the record mention that in future a notice of appeal for leave to appeal (or an application for extension of time or bail pending appeal application) containing grounds of appeal which do not substantially meet the above requirements or are filed in negligence or careless disregard of them may run the risk of the single judge of the court dismissing the appeal on the basis that it is vexatious or frivolous under section 35(2) of the Court of Appeal Act.'*

[19] All the 4 grounds urged by the appellant suffer from a misunderstanding of what the legal principles applicable to issues raised as evidence in a trial and whether corroboration evidence in required as a matter of law. In addition the drafting of the grounds of appeal by the appellant counsel, is poor and confusing. The court is placed in great difficulty in trying to make sense of what exactly is the nature of the complaint and how is it an error of law.

[20] To illustrate the point the Court raises in paragraph 16 above, a review of ground 1 would demonstrate the weaknesses in the grounds of appeal and submissions. Ground 1 alleges that 'the learned trial judge erred in law and in fact in not taking into consideration that apart from the evidence of the complainant, there was no other

credible evidence to support the complainant evidence against the appellant.' This grounds is claiming that the error of the trial judge is that apart from the complainant evidence there are no other credible evidence to support the complainant's evidence against the appellant. This is not an error of law, it is the law.

[21] In Fiji the complainant's evidence in sexual offence cases do not need support evidence [corroboration] from other witnesses: section 129 of the Criminal Procedure Act 2009. In **Bijendra v State** [2014] FJCA 180; 26/11/2014 the Court of Appeal stated the law as follows:

> *'7. Ground 1 is based on the fact that the learned trial Judge in his summing up at paragraph 12 and 13 had mentioned about the complainant's Aunt who was not called in as a witness in the case.*
>
> *8. The complainant gave evidence regarding the offence committed on her. The Appellant is seeking to argue that there was no corroboration of the evidence of the Complainant and that mentioning the complainant's Aunt in the summing up amounted to using hearsay evidence.*
>
> *9. In paragraphs 12 and 13 the learned trial Judge had summed up the evidence given by the complainant during the trial. In her evidence the complainant had narrated the sequence of events that led to commission of the offence. She had given evidence regarding the commission of rape by the Appellant.*
>
> *10. It was argued on behalf of the Appellant that the evidence of the complainant should have been corroborated by leading the evidence of the Aunt.*
>
> *11. Under section 129 of the Criminal Procedure Decree of 2009 corroboration is no longer required in cases involving sexual offences and there is no requirement of a warning to be given by the trial Judge to the Assessors regarding corroboration. Therefore there was no requirement for the complainant's evidence to be corroborated by calling the Aunt of the complainant as a witness to corroborate the evidence of the complainant, nor was there any requirement of a warning to be given to the Assessors regarding corroboration. The Assessors could act on the evidence of the complainant alone.'*

[22] Similar defects apply to ground 2, 3 and 4 in not identifying the specific error of law complained and providing the supporting case-specific records of evidence from the

court record of the trial that would assist the Court to make its assessment of the grounds.

[23] In light of the above, the grounds of appeal against conviction are assessed as having no merit and are dismissed.

Appeal Against Sentence

[24] At the Leave to Appeal Hearing before the Resident Justice of Appeal there were 2 grounds advanced against sentence. Both were broad claims that the sentence was harsh and excessive. Counsel for the appellants did not elaborate the basis of this claim during the hearing.

[25] The appellant was sentenced on 21 May 2019 and the trial judge had correctly followed the new tariff set in **Aitcheson v State** [2018] FJSC 29; CAV 0012/2018 (2 November 2018) in the case of the appellant. He had picked 12 years towards the lower end of the tariff as the starting point based on 'objective seriousness' of the crime. Having considered aggravating features he had added 6 years and reduced 6 months for mitigation. The appellant did not receive any discount for being a first offender due to his three previous convictions on abduction, defilement and indecent assault. After deducting the remand period the final sentence became 17 years, 5 months and 16 days. The final sentence is still within the tariff of the offence for which the appellant was convicted in the High Court.

[26] The appellant's counsel has not demonstrated why the ultimate sentence is said to be harsh and excessive.

[27] However, the respondent has pointed out in its written submissions and the counsel for the state made oral submissions as well that there may be an error of double counting in the enhancement of the sentence by 6 years for aggravating factors on the premise that the fact that the victim was unsuspecting and naïve as an aggravating factor may be subsumed in the sentence tariff for child rape itself and when the trial judge took that along with three other aggravating features he may have inadvertently double counted in the aggravation.

[28] The Court is mindful that it is the ultimate sentence that is important, rather the reasoning process that leading to it.

[29] Leave was granted to appeal and for the full court to decide on the appropriate sentence.

[30] Despite Leave for Appeal, being granted for the full court to review the sentence, the appellant did not submit any grounds of appeal against sentence. In fact in both submissions made after the Ruling of the Singles Judge on 31 January 2021 the grounds submitted were against conviction only. The first set of submission on behalf of the appellant was filed on 1 March 2022 and the second set was filed on 8 September 2023. It did not cover appeal against sentence.

[31] Can the full court proceed to deal with the sentence appeal when the appellant has not made any submission on the issue? The issue whether there has been double counting in computing the final sentence was raised in the submission of the respondent at the Leave to Appeal hearing. It is not from the submission of the appellant.

[32] The power of the Court to a vary sentence on appeal is in Section 23(3) of the Court of Appeal Act which states:

> *'On an appeal against sentence, the Court of Appeal shall, if they think, that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such order as they think just.'*

[33] Before the full court there was no appeal grounds against sentence submitted by the appellant. Section 23(3) of the Court of Appeal Act that requires 'on an appeal against sentence, the Court of Appeal shall, if they think, a different sentence should have been passed...' With no submission at all made on the sentence appeal by the appellant before the full court, have the requirement of Section 23(3) being satisfied.

[34] But this hurdle is bridged by the fact that since this appeal is pursuant to section 35(3) of the Court of Appeal Act, the grounds submitted before the Judge Alone for the Leave to Appeal Hearing is renewed in the full court and the appellant may add more grounds

if they wish. On that basis the Court may review the sentence on the submission of the appellant at Leave to Appeal hearing before the single judge.

[35] In reviewing the sentence I have considered the trial judge statement on how he arrived at the sentence he imposed on the appellant: **State v Rohit Rikash Chand** [2019] FJHC 467.

> *16. After assessing the objective seriousness of the offence committed I take 12 year imprisonment (lower range of the scale) as the starting point of the sentence. I add 6 years for the aggravating factors. The interim sentence is now 18 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. It is noted that the accused has three previous convictions for abduction, defilement and indecent assault. The accused does not receive any discount for good character. The sentence is reduced by 6 months for the mitigation presented. The sentence now stands at 17 years and 6 months imprisonment.*
>
> *17. The accused has been remanded for 11 days, I deduct 14 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The sentence now is 17 years 5 months and 16 days imprisonment.*
>
> *18. Mr. Chand you have committed a serious offence against the victim. She was unsuspecting and naive you cannot be forgiven for what you have done to this victim.*
>
> *19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence 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 was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.*
>
> *20. Under section 18 (1) of the Sentencing and Penalties Act, I impose 16 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.*
>
> *21. In summary I pass a sentence of 17 years and 5 months and 16 days imprisonment with a non-parole period of 16 years to be served before the accused is eligible for parole.'*

[36] I have reviewed and I accept the assessment of the relevant factors in computing sentence of the trial judge because he observed first hand the impact of such horrendous violence perpetrated on a young girl who is further traumatized by the court procedures and processes. The choice of the starting point of 12 years is on the lower range of tariff of 11 to 18 years rape of young girls adopted by the Supreme Court in **Gordon Aitcheson v State** (supra). I assess that this on the lower side of the tariff.

[37] I am unable to agree that the 6 years added for the aggravating factors is necessarily due to double counting. That is always the assumption made, but this is one case that may not be covered by this generalized wisdom. The aggravating factors taken into consideration were itemized by the trial judge. They were relevant but it does not take into account additional financial costs of the professional support services the victim will need for rehabilitation and the severe sense of loss of her sexuality personally and a sense of shame in her community.

[38] The maximum sentence for the offence in question here is life imprisonment. It underscored by the duty of the court to protect children from sexual exploitation of any kind.

[39] In totality the sentence passed against the appellant is within the tariff and is not contrary to any principles of sentencing. I do not think that the sentencing discretion exercised by the trial judge was miscarried. I find not merit in the appeal against sentence.

[40] In conclusion, both appeal against conviction and sentence have no merit and are dismissed.

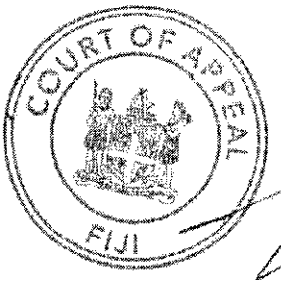
Qetaki, JA

[41] I agree with the judgment, the reasoning and the orders.

ORDERS:

1. *Appeal against Conviction Dismissed*
2. *Appeal against Sentence is dismissed*
3. *Conviction and sentence passed by the High Court at Lautoka in this case is affirmed.*

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



The Hon. Mr. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

The Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

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