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

CRIMINAL APPEAL NO.AAU 131 of 2020
[In the High Court at Lautoka Case No. HAC 124 of 2019]

BETWEEN : **LAISIASA COREREGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. J. Nasa for the Respondent**

Date of Hearing : **11 October 2023**

Date of Ruling : **12 October 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva on three sexual assault charges, two rape charges and one indecent assault charge. The victim, aged 12, RK was the appellant's step-daughter. The charges are as follows.

'***COUNT ONE***
Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

LAISIASA COREREGA, *on the 17th of July, 2019 at Lautoka in the Western Division unlawfully and indecently assaulted "**RK**", by licking her vagina.*

COUNT TWO
Statement of Offence

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

Particulars of Offence

LAISIASA COREREGA, *on the 17th of July, 2019 at Lautoka in the Western Division penetrated the vagina of "**RK**", a child under the age of 13 with his finger.*

<u>COUNT THREE</u>
Statement of Offence

<u>SEXUAL ASSAULT</u>*: Contrary to section 210 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

LAISIASA COREREGA, *on the 17th of July, 2019 at Lautoka in the Western Division on an occasion other than in Count One, unlawfully and indecently assaulted "**RK**", by licking her vagina.*

<u>COUNT FOUR</u>
Statement of Offence

<u>RAPE</u>*: Contrary to section 207 (1), (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

LAISIASA COREREGA, *on the 17th of July, 2019 at Lautoka in the Western Division penetrated the vagina of "**RK**", a child under the age of 13 with his finger.*

<u>COUNT FIVE</u>
Statement of Offence

<u>SEXUAL ASSAULT</u>*: Contrary to section 210 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

LAISIASA COREREGA, *on the 17th of July, 2019 at Lautoka in the Western Division unlawfully and indecently assaulted "**RK**", by touching her breast.*

<u>COUNT SIX</u>
Statement of Offence

<u>INDECENT ASSAULT</u>*: Contrary to section 212 (1) of the Crimes Act, 2009.*

Particulars of Offence

LAISIASA COREREGA*, on the 17th of July, 2019 at Lautoka in the Western Division unlawfully and indecently assaulted "ST", by pulling down her panty.*

[2] The appellant had pleaded guilty to all counts and admitted the summary of facts. The trial judge had convicted the appellant accordingly and sentenced him on 30 June 2020 to an aggregate sentence of 13 years' and 01 month with a non-parole period of 11 years.

[3] The appellant had lodged in person an untimely appeal against conviction and sentence. However, since the delay is less than 03 months and the appeal had been lodged in person, this court would excuse the delay and consider his appeal as timely.

[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 to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The trial judge had summarized the facts in the sentencing order as follows.

'3. The brief summary of facts was as follows:

On 17th July, 2019 the victim "RK" who was 12 years of age was sleeping at her home with her sister when the accused who was her step father entered the bedroom.

4. *In the bedroom the accused removed the victim's clothes, spread her legs and licked her vagina (count 1). After licking the victim's vagina for a few minutes the accused poked one his fingers into the vagina of the victim (count 2).*

5. *The victim felt pain since the accused pushed his finger back and forth in her vagina, thereafter the accused carried the victim from the bedroom into the sitting room after leaving the victim on the mattress he went into the bedroom.*

6. *After a while the accused came out of the bedroom and laid beside the victim and began touching her left breast (count 5) he then turned the victim around removed her clothes, spread her legs and licked the victim's vagina again (count 3). At this point the accused poked one of his fingers into the vagina of the victim (count 4). The victim felt pain.*

7. *The matter was reported to the police the next day (18 July, 2019), later the accused was caution interviewed and charged.*

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

Conviction:

Ground 1

THAT the learned sentencing Judge erred in law and fact in his tendering of the sentence (exercising sentence discretion) mistaking the facts, due to a prejudiced, incompetent defence counsel provided by the Legal Aid Commission where the learned sentencing Judge accepted his mistaken facts to be correct without said counsel objecting to correct the learned sentencing Judge in which the end result was a substantial miscarriage of justice has occurred, and the said counsel had material evidence to admit in favour of the defence and aid the administration of justice but neglected to .

Ground 2

THAT the learned sentencing Judge erred in law and fact in his tendering of the sentence (exercising sentence discretion) making the fact that count 5 (Sexual Assault) is inconsistent to the particulars of the offence highlighted to reveal indecent assault therefore a substantial miscarriage of justice has occurred.

Ground 3

THAT the learned sentencing Judge erred in law and fact in his tender of the sentencing (exercising sentence discretion) whereby count 2 and 4 should have been charges of sexual assault and not rape having regarded the evidence and

particulars of offence complained of where by a substantial miscarriage of justice has occurred.

Sentence.

Ground 4

THAT the learned sentence Judge erred in law and fact exercising his sentence discretion neglecting to consider the appellants personal mitigation factors and therefore a substantial miscarriage of justice has occurred.

Ground 5

THAT the learned sentencing Judge erred in law and fact exercising sentencing discretion neglecting/failing to give 1/3 discount for early guilty pleas whereby a substantial miscarriage of justice has occurred.

Ground 6

THAT the learned sentencing Judge erred in law and fact exercise his sentence discretion when he set the non-parole to close to the head sentence therefore a substantial miscarriage of justice has occurred.

Ground 1

[8] The gist of the appellant's complaint rests on possible 'equivocal plea' and 'incompetence of trial counsel'.

[9] The trial judge had stated as follows in the sentencing order.

> '8. *After considering the summary of facts read by the State Counsel which was admitted by the accused and upon reading his caution interview and the charge statement this court is satisfied that the accused has entered an equivocal plea of guilty on his own freewill.*
>
> 9. *This court is also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offences the accused is charged with.*
>
> 10. *In view of the above, this court finds the accused guilty and he is convicted for counts one to five being two counts of rape and three counts of sexual assault.*

[10] The appellant was represented by counsel and he pleaded guilty on 17 February 2020 and the summary of facts were admitted only on 15 June 2020. The appellant was sentenced on 30 June 2020. Thus, there had been ample time for the appellant to change his mind if he so wished during the period of 4 ½ months until the court

sentenced him. In addition to the summary of facts, the trial judge appears to have perused the appellant's cautioned interview and charge statement (though not required to do so) to satisfy himself that the appellant's guilty plea was unequivocal.

[11] **Nalave v State** [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008) the Court of Appeal held:

> *'[23] It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (**Rex v Golathan** (1915) 84 L.J.K.B 758, **R v Griffiths** (1932) 23 Cr. App. R. 153, **R v. Vent** (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (**R v Murphy** [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (**Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132).'*

[12] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132);

> *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

[13] In **Tuisavusavu v State** [2009] FJCA 50; AAU0064.2004S (3 April 2009) the Court of Appeal stated:

> *'[9] The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see **Bogiwalu v State** [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (**Liberti** (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.'*

[14] I cannot see any hint of equivocation on the record as far as the appellant's guilty plea is concerned. His arguments based on equivocal plea is an afterthought.

[15] As for the allegation of flagrant incompetemce of counsel, the appellant had not followed the procedure in criticizing his trial counsel as prescribed in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) and reiterated in **Sami v The State** AAU 0025 of 2018 (26 May 2022) and therefore, he is not entitled to raise it as part of this ground of appeal. I see no evidence flagrant incompetemce on that part of the appellant's trial counsel.

Ground 2

[16] The appellant's complaint that the particulars of the fifth count of sexual assault is inconsistent with the details which reveal only an indecent assault, has no merits. The fifth count alleges that the appellant unlawfully and indecently assaulted "RK", by touching her breast and the summary of facts states that after a while the appellant came out of the bedroom and laid beside the victim and began touching her left breast (count 5). Thus, the summary of facts establish all elements of count 5.

Ground 3

[17] The appellant argues that counts 2 and 4 should have been sexual assault charges and not rape.

[18] Paragraphs 4 and 6 of the summary of facts shows that the appellant on two different occasions had inserted his finger inside the victim's vagina. Therefore, those charges had been properly framed and established by the summary of facts admitted by the appellant.

Ground 4

[19] Mitigation factors highlighted at paragraphs 12(a) to (f) pf the sentencing order are pure personal factors and as correctly held by the trial judge could account for little or no mitigation of the offending [see **Raj v The State** CAV 0003 of 2014 (20 August

2014)]. Therefore, the judge was right in not according any discount on account of those factors.

Ground 5

[20] The appellant states that the trial judge had erred in not affording 1/3 discount for the guilty plea.

[21] The sentencing order at paragraphs 22-25 has dealt with in detail as to the reduction of 03 years from the sentence given for the guilty plea. The guiding principle is that the one third discount approach may apply in less serious cases but in cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably [see **Mataunitoga –v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) & **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018)]

[22] I do not think that there is any sentencing error in allowing 03 years for the appellant's guilty plea.

Ground 6

[23] The appellant argues that the non-parole period is too close to the head sentence.

[24] The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent [vide **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20].

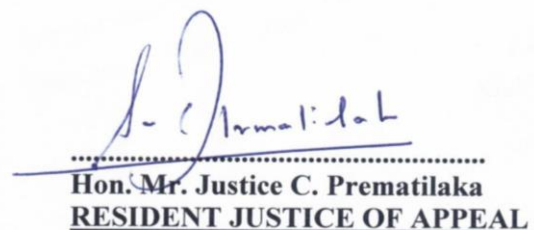
[25] I see no reason to conclude that the gap of 02 years and 01 month between the non-parole period and the head sentence violates this principle in any way. The appellant's challenge to the conviction entered upon his own guilty plea suggests that he had not been remorseful at all and he does not deserve a shorter non parole period.

[26] The trial judge had arrived at the sentence after applying sentencing tariff applicable for juvenile rape *i.e.* 11-20 years of imprisonment set in **Aicheson v State** [2018] FJSC 29; CAV0012.2018 (02 November 2018)] .

[27] If I were to adopt the approach suggested by the Supreme Court in **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)] in dealing with the sentence appeal *i.e.* 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 and whether in all the circumstances of the case the sentence is one that could reasonably be imposed, I have no doubt that given the gravity of the offending the ultimate sentence is appropriate.

Orders

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



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