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

CRIMINAL APPEAL NO.AAU 150 of 2020
[In the High Court at Suva Case No. HAC 174 of 2017]

BETWEEN	**:**	**LIVAI BATILOTE**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. L. Lazel for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**07 July 2023**
Date of Ruling	**:**	**10 July 2023**

RULING

[1] The appellant, aged 20 had been charged in the High Court at Suva on one count rape and one count of assault causing actual bodily harm of his 10 year old female cousin. The charges are as follows:

> *'**FIRST COUNT***
> ***Statement of Offence***
>
> ***SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***LIVAI BATILOTE** between the 1st day of January to the 31st December, 2015 at Yasawa Island, in the Western Division, unlawfully and indecently assaulted "L.R" by licking the vagina of the said "L.R".*

SECOND COUNT
Statement of Offence

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

Particulars of Offence

LIVAI BATILOTE *between the 1st day of January to the 31st day of December, 2015 at Yasawa Island in the Western Division, penetrated the vagina of "L.R", a 10 year old child with his penis.'*

[2] The appellant had been acquitted of count 01 at no case to answer stage but found guilty both by the assessors in unanimity and the trial judge after trial on count 02. Accordingly, the learned High Court judge had convicted the appellant for rape and sentenced him on 30 October 2020 to a period of 17 years' imprisonment for rape (the final and effective sentence being 16 years and 10 months) with a non-parole period of 12 years.

[3] The appellant through the law firm M. Y. Law had lodged a timely appeal against conviction and sentence. While appearing for the appellant Ms. Lazel informed court that she would rely on the grounds of appeal and submissions filed by the appellant in person as the appellant's subsequent lawyers Messrs. Niudamu Lawyers has not been able to file any amended grounds of appeal and submissions as directed by this court on 09 December 2022 and 07 February 2023.

[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] It was held in **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) that *'The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v The King** (1936) 55 CLR 499)'*. ***Bae*** was affirmed in **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013).

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

> *'2. The brief facts were as follows:*
>
> *The victim and the accused are cousins, in the year 2015 the victim was 10 years of age and a class 4 student living with the accused and his family. One day during the second term of school after the victim returned from school she was alone in the house with the accused.*
>
> *3. The accused told her to go to his bedroom and bring a torch. When the victim was in the bedroom the accused came and pushed her on the floor and made her lie on her back facing up. The accused forcefully removed the victim's panty, the victim was scared, the accused removed his ¾ pants and underwear then penetrated the vagina of the victim with his penis and had sexual intercourse with her for about 3 minutes. The accused threatened the victim not to tell anyone about what he had done to her. Later the victim told her aunt about what the accused had done to her, the matter was then reported to the police.'*

[7] Only the victim gave evidence for the prosecution. The appellant had remained silent and not called any evidence on his behalf. He was defended by a counsel at the trial. The appellant had denied the act of rape but admitted to have touched her buttocks *via* cross-examination of the victim.

[8] The grounds of appeal against conviction and sentence are as follows:

Conviction

'***Ground 1***

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to direct himself and the assessors on the weight to be attached to the opinion of the assessors in giving his judgment.

Ground 2

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to direct himself and the assessors on the law regarding inconsistencies, discrepancies, irregularities and improbabilities of evidence.

Ground 3

THAT the Learned Trial Judge may have fallen into an error of law and fact when His Lordship failed to adequately direct himself and the assessors on the inconsistent evidence of the complainant in court giving rise to a grave miscarriage of justice.

Ground 4

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship shift the burden of proof to the appellant at paragraph 21 of the judgment by stating that the defence has not been able to create any reasonable doubt in the prosecution case giving rise to a substantial miscarriage of justice.

Ground 5

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship misdirected himself and the assessors on the lesser offence of indecent assault and in doing so has confused the assessors in regards to the offence of Rape.

Ground 6

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to make independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence giving rise to a grave miscarriage of justice.

Ground 7

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship failed to direct himself and the assessors on the law regarding recent complaint and the failure of the State to call the complainant's aunt who can bolster and make the version of the complainant credible and consistent in the ….

Sentence

Ground 8

THAT the Learned Trial Judge erred in principle by double counting having considered aggravating factors that is reflected already in selecting the starting point.

Ground 1

[9] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) it was held that:

> *'[26] ……. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].'*

[10] Therefore, there is no error in the manner in which the trial judge had dealt with the assessors' opinion. The judge need not have told the assessors what weight he would attach to their opinion.

Grounds 2 and 3

[11] The inconsistency or discrepancy or improbability in the victim's evidence which the appellant complains of, appears to be her admission under cross-examination that in 2015 the appellant had only touched her buttocks. However, despite that answer she had still maintained throughout her evidence that the appellant did penetrate her vagina in 2015. According to the victim, the only reason she came up with this story

about the appellant was for her to get away from her aunt because she wanted to be sent back to the appellant's family or her family. She had also agreed that when she was taken to Labasa by her aunt she was crying and she had refused to stay in Labasa.

[12] The trial judge had placed the above evidence before the assessors at paragraphs 38, 39, 40, 45 and 50 but appears to have failed to specifically direct them how they should approach this inconsistency or discrepancy. Even if there are some omissions, contradictions and discrepancies, the entire evidence need not be discredited or disregarded because an undue importance should not be attached to omissions, contradictions and discrepancies unless they go to the heart of the matter and shake the basic version of the prosecution's witnesses [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]. The trial judge should have asked the assessors to see whether the above inconsistency or discrepancy was such that it would materially affect and render the victim's testimony un-creditworthy and if so what they may do. The said inconsistency or discrepancy appears to have persuaded the trial judge to direct the assessors on the lesser charge of indecent assault at paragraph 22 and 60.

[13] I cannot at this stage see in what context the victim had said that in 2015 the appellant had only touched her buttocks (except that it was in answer to the defence proposition to that effect) or whether it was a separate act (for which no charge had been laid) from the act of penetration of her vagina in 2015 or whether it was an act preparatory to or preceding the act of penetration. Only a perusal of the judge's notes and/or transcript would reveal that. Though, I am mindful that the trial judge had referred to this inconsistency or discrepancy at paragraphs 12 and 13 of the judgment and said at paragraph 18 and 20 that that the victim's admission that in 2015 the appellant had only touched her buttocks did not affect her overall credibility, I would be inclined to leave this mater to be further examined by the full court and decide *inter alia* whether it is a matter where the proviso to section 23(1) of the Court of Appeal would come into play, if no substantial miscarriage of justice had occurred on account of non-direction on the inconsistency or discrepancy.

Ground 4

[14] The trial judge has given textbook directions on standard and burden of proof in the summing-up and directed himself accordingly in the judgment. It would be inappropriate for a trial judge to have said *'The defence has not been able to create any reasonable doubt in the prosecution case'* in the summing-up as it is the assessors' duty and role to assess the evidence presented during the trial and determine whether the prosecution has met its burden of proof beyond a reasonable doubt and then to express an opinion as to the guilt or innocence of the accused and if a judge were to make such a statement in the summing-up, it could potentially be seen as a violation of the accused's right to a fair trial. However, after receiving the assessors' opinion and while agreeing with them in his judgment, there is nothing wrong in the trial judge stating that the defence has not been able to create any reasonable doubt in the prosecution case and it does not amount to shifting the burden of proof to the accused.

Ground 5

[15] There is no error of law in the trial judge directing the assessors to consider indecent assault (paragraph 22 and 60) instead of rape with regard to the charge of rape in the light of the victim's admission that in 2015 the appellant had only touched her buttocks.

Ground 6

[16] In ***Fraser*** it was held that:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the*

> *evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]'*

[17] The trial judge has not fallen short of his duty as stated in ***Fraser*** in agreeing with the assessors in his judgment.

Ground 7

[18] The prosecution led only the evidence of the complainant and therefore, there was question of the trial judge directing the assessors or himself on the facts and law relating to recent complaint evidence.

Ground 8 and 9

[19] The appellant complains of double counting and the sentence being harsh and excessive.

[20] In **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) Keith, J in the Supreme Court said that having identified the then tariff for the rape of a child as 10-16 years' imprisonment, the judge must have reflected some of the features which made this a serious case by taking 12 years as his starting point but the difficulty was that the Supreme Court did not know whether all or any of these aggravating factors (the age of the girl when the abuse began, the breach of trust which the abuse involved, the threats made to deter her from speaking out, and the impact which the abuse had on her) had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff and if he did, he would have fallen into the trap of double-counting. This problem has been highlighted before by the Supreme Court in **Seninolokula v The State** [2018] FJSC 5 at paras 19 and 20 and **Kumar v The State** [2018] FJSC 30 at paras 55 and 56.

[21] In **Kumar v The State** [2018] FJSC 30 it was held:

> *'57. ... First, a common complaint is that a judge has fallen into the trap of 'double-counting', i.e. reflecting one or more of the aggravating features of the case more than once in the process by which the judge arrives at the ultimate sentence. If judges choose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only then use those aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *58. Secondly, the lower [end] of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided."*

[22] However, the current tariff for juvenile rape is 11 years to 20 years [**Aitcheson v State** [2018] FJSC 29; CAV 0012.2018 (2 November 2018)]. The trial judge had started at 12 years based on objective seriousness and added 06 years for aggravating factors and reduced 01 year for the appellant being a first time offender and ended up with 17 years.

[23] There may be a suspicion that the trial judge had unwittingly considered some aggravating factors in the starting point of 12 years itself, for which 06 years were later added. However, the trial judge in fixing a generous 12 years as the non-parole period has stated as follows:

> *19. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation as a young offender. A non-parole period too close to the final sentence will not be justified for this reason.*

> *20. Considering the above, I impose 12 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 and also meet the expectations of the community which is just in the circumstances of this case.*

[24] Therefore, provided the appellant maintains a good behaviour while serving his sentence of 16 years and 10 months imprisonment in prison he is most likely to be released on completing the non-parole 12 years into his sentence though he would be completing two thirds of his sentence (one third remission of the sentence is about 5 ½ years) in about 11 years and 04 months.

[25] The amendments to section 27 of the Corrections Service Act mean that when a prisoner has a non-parole term fixed as part of his sentence the prisoner is to be released (provided that he has been of good behaviour) either after he has served two thirds of his sentence or on the expiry of the non-parole period, whichever is the later. Where the release date calculated in accordance with section 27 (3) of the Corrections Service Act is beyond the non-parole period, for example, when the head sentence is 06 years and the non-parole term is 03 years the early release date after the one third remission is 04 years which exceeds the non-parole period of 03 years. It follows that the prisoner must serve the 04 years sentence [vide **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023)]. Similarly, even if he completes two thirds of his sentence earlier than the non-parole period, the prisoner must necessarily serve the non-parole period before his release. For example, where the head sentence is 06 years and the non-parole term is 05 years, though the early release date after the one third remission is 04 years, the prisoner must serve the non-parole period of 05 years before being released.

[26] Therefore, 12 years of imprisonment the appellant has to serve is neither excessive nor harsh, though, the sentence of 16 years and 10 months imposed seems somewhat disproportionate to the gravity of the offending which, however, has been completely mitigated by the trial judge by fixing the non-parole period at 12 years. Therefore, I do not foresee any tangible and reasonable prospect of overall success of the appellant's sentence appeal.

Orders of the Court:

1. Leave to appeal against conviction is allowed on the 02nd and 03rd grounds of appeal.
2. Leave to appeal against sentence is refused.

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

Solicitors:

Lazel Lawyers for the Appellant
Office for the Director of Public Prosecutions for the Respondent