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

CRIMINAL APPEAL NO. AAU 37(A) of 2022
[In the High Court at Suva Case No. HAC 269 of 2020]

BETWEEN	**:**	**SUDHIR KUMAR**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person** **Ms. S. Shameem for the Respondent**
Date of Ruling	**:**	**06 August 2024**

RULING (IN CHAMBERS)

[1] The appellant had been charged and convicted in the High Court at Suva on five representative counts of rape. Counts one and two cover a period between 01 January 2014 and 19 October 2014, when the complainant was under the age of 13 years. Counts three, four and five cover a period between 20 October 2014 and 10 August 2020. Counts one, three and four allege digital rape using finger and tongue. Counts two and five alleges sexual intercourse, that is, penetration of vagina with penis. The victim was the appellant's step-daughter.

[2] After trial, the appellant had been found guilty of all counts by the trial judge who sentenced him on 06 May 2022 to an aggregate sentence of 18 years' imprisonment with a non-parole period of 12 years and 01 month with a non-parole period of 11 years. The final sentence became 16 years and 04 months due to the discount for the remand period of 01 year and 08 months.

[3] The appellant had lodged in person a timely appeal against conviction and sentence. However, the appellant had tendered an application for abandoning the sentence appeal in Form 03 on 09 June 2023. A judge of this court on 17 October 2023 made relevant inquiries from the appellant in keeping with ***Masirewa*** guidelines (**Masirewa v State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) and allowed his application to abandon his sentence appeal and proceeded only with his conviction appeal. The court delivered the ruling on 17 October 2023 and refused leave to appeal against conviction. The appellant has then renewed his conviction appeal before the Full Court on 08 November 2023 and the CA Registry is now in the process of preparing appeal records. In the meantime, the appellant has sought to canvass his sentence appeal again by way of a letter received on 17 May 2024 addressed to the Registrar of the Court of Appeal.

[4] In terms of section 21(1)(c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against 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] The 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:

> *'[1] The victim was about five years old when her parents separated. Her father abandoned her and had not been in contact with her since then.*
>
> *[2] Soon after separation the victim's mother entered in a de-facto relationship with the accused. The victim knew the accused was her stepfather but she addressed him as her father.*
>
> *[3] The accused started to sexually abuse the victim at the age of 12 in 2014. She was in Year 7 then. She was at home after school when he touched her private parts when her mother was not around. On the same day he returned home late night and penetrated the vagina of the victim with his finger and penis (counts 1 and 2). Her mother was in a different room asleep. He subdued her using physical force. On this occasion she bled. She kept quiet. He convinced her that nobody will believe her if she complained.*
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> *[4] **Thereafter the accused carried out a campaign of rape against the victim**. **The magnitude of the abuse is not reflected in the manner in which the accused was charged in this case**. He was charged with representative counts but counts one and two reflect two types of sexual penetration carried out in the same transaction. Similarly counts three, four and five reflect three types of sexual penetration carried out in the same transaction on a specific date.*

[7] The appellant has not submitted any specific grounds of appeal against sentence in his letter submitted to the Registrar but his initial notice of appeal contains a single ground of appeal against sentence which is as follows:

Ground 1

1. The sentence is too harsh and excessive given I'm a first offender.

Ground 1

[8] The trial judge had recorded the process leading to the appellant's ultimate sentence and delivered the sentence of 18 years' imprisonment with a non-parole period of 12 years and 01 month with a non-parole period of 11 years; the final sentence became 16 years and 04 months due to the discount for the remand period of 01 year and 08 months

[9] The trial judge had by and large not followed the two-tiered system of sentencing but adopted 'instinctive synthesis' method. This court in **Koyamaibole v State** [2023] FJCA 38; AAU098.2020 (6 March 2023) said on 'instinctive synthesis' method as follows:

> *'[26] The 'instinctive synthesis' approach has been recognized in the sentencing process in Fiji (see **Qurai v State** ([2015] FJSC 15; CAV24.2014 (20 August 2015) and approved in **Kumar & Vakatawa v The State** AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022).*
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> *[27] The Victorian Supreme Court in **R v Williscroft** [1975] VR 292 at 300 first coined the notion of an "instinctive synthesis" approach to sentencing in 1975, a concept which has been cited and refined multiple times since [see **R v Markarian** (2005) 228 CLR 357; **Hili v R** (2010) 242 CLR 520; **R v Morton** [1986] VR 863)] and which now refers to an exercise whereby "all relevant considerations are simultaneously unified, balanced and weighed by the sentencing judge" **(see Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 Law and Contemp Probs 265 at 268)**. As a result, the instinctive synthesis approach to sentencing has been characterised as "more art than science" (see **Krasnostein and Freiberg at 269.**).*
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> *[28] To this end, a judge does not need to explicitly lay out the reasons behind the sentence he or she arrives at, because all that matters is the sentence itself (see **Grant Hammond "Sentencing: Intuitive Synthesis or Structured Discretion?" [2007] NZ Law Review 211 at 213**). It is the intuitive weight that a sentencing judge decides to place on the circumstances of the offence and the offender after the benefit of hearing all the evidence which is important **(see JUDICIAL DISCRETION IN SENTENCING: A JUSTICE SYSTEM THAT IS NO LONGER JUST? Sean J Mallett)**.*
>
> *[29] However, other judges and commentators have viewed this approach with a degree of consternation, noting a number of significant flaws. Kirby J of the Australian High Court felt that the approach lacked transparency and was a "retrograde step" (**Wong v R** (2001) 207 CLR 584 at [102] per Kirby J dissenting) because disclosure around how a particular sentence has been formulated and the reasons for that sentence should not be hidden by judicial reference to instinct or intuition, "which does little to provide any useful insight or engender public confidence in the task of sentencing" (see **Sally Traynor and Ivan Potas "Sentencing Methodology: Two-tiered or Instinctive Synthesis?" (2002) Sentencing Trends and Issues 25 at [4.2]**).*
>
> *[30] Indeed, consistency itself is not of primary importance under the instinctive synthesis approach. Because judges do not need to explicitly set out the*

weight they give to certain factors when formulating their "intuitive" decision, it becomes virtually impossible to assess whether like offenders are routinely treated in the same way. This in turn means that "sentences can be inconsistent within a (potentially vast) margin of error yet [remain] legal" (see ***Krasnostein and Freiberg at 269****.).*

*[31] A further problem around the instinctive synthesis approach is the underlying need for a clear rationale of sentencing. It is one thing to agree that judges should be left with discretion, so they may adjust the sentence to fit the particular combination of facts in the individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing to adopt in particular cases or types of case. Freedom to select from among the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts (****see Andrew Ashworth Sentencing and Criminal Justice (4th ed, Cambridge University Press, Cambridge, 2005) at [3.3.1****]). According to Ashworth, one of the major reasons for sentencing disparity are the different penal philosophies amongst judges and magistrates (At [3.3.1]). This problem would be magnified exponentially in a situation whereby sentencing judges have unlimited discretion to impose a sentence according to their subjective intuition. Intuitions will invariably differ, and can be plagued by bias, ignorance and prejudice (****see Mirko Bargaric "Sentencing: The Road to Nowhere" (1999) 21 Syd L Rev 597 at 609.****).*

[32] On the other hand when a sentence is reviewed in 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). In determining whether the sentencing discretion has miscarried the appellate courts 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; AAU48.2011 (3 December 2015). However, every sentence that lies within the accepted range may not necessarily fit the crime.*

[10] In the recent case of **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024) the Court of Appeal said:

'[149] The trial judge had used the instinctive synthesis method……. Nevertheless, I do not see any sentencing error in order to conclude that the sentencing discretion by the trial judge had miscarried. Nor can I say that there is a 'striking' or 'startling' or 'disturbing' disparity……. Neither would I say that the .....term is unreasonable or plainly unjust. I cannot also say that the …… term ..... is so disproportionate or shocking that no reasonable court could have imposed it. It is the law that an appellate Court will not

interfere with the sentence imposed by a trial Court unless it is shown to be manifestly excessive in the circumstances or wrong in principle.'

[11] Therefore, applying those principles, I refuse leave to appeal against sentence.

Order of the Court:

1. Leave to appeal against sentence s refused.

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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent