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

**CRIMINAL APPEAL NO. AAU 112 of 2022**
**[In the High Court at Lautoka Case No. HAC 30 of 2019]**

**BETWEEN** : **ISIKELI KUNAGUDRU**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

**Date of Hearing** : **07 August 2024**

**Date of Ruling** : **08 August 2024**

# RULING

[1] The appellant had been charged with six counts of rape under the Crimes Act 2009. The charges were as follows:

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

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

***Particulars of Offence***

***ISIKELI KUNAGUDRU****, on the 27th of August 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of "A.N" without her consent.*

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

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

***Particulars of Offence***

***ISIKELI KUNAGUDRU****, on the 12th of September 2019, at Keiyasi village, Navosa in the Western Division, penetrated the vagina of "A.N" with one of his fingers, without her consent.*

***THIRD COUNT***
***Statement of Offence***

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

***Particulars of Offence***

***ISIKELI KUNAGUDRU**, on the 12th of September 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of "A.N" without her consent.*

***FOURTH COUNT***
***Statement of Offence***

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

***Particulars of Offence***

***ISIKELI KUNAGUDRU**, on the 23rd of September 2019, at Keiyasi village, Navosa in the Western Division, penetrated the vagina of "A.N" with one of his fingers, without her consent.*

***FIFTH COUNT***
***Statement of Offence***

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

***Particulars of Offence***

***ISIKELI KUNAGUDRU**, on the 23rd of September 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of "A.N" without her consent.*

***SIXTH COUNT***
***Statement of Offence***

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

***Particulars of Offence***

***ISIKELI KUNAGUDRU**, on the 4th of October 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of "A.N" without her consent.'*

[2] The High Court judge found the appellant guilty of 01st, 02nd and 03rd counts for rape and of indecent assault (instead of rape) of 04th and 06th counts. He was acquitted of count 5 completely. On 17 August 2022, the appellant was sentenced to an aggregate sentence of 15 years' and 08 months' imprisonment with a non-parole period of 13 years' imprisonment.

[3] The appellant's appeal in person against conviction and sentence could be regarded as timely.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction 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 trial judge had referred to the prosecution evidence (there was no evidence led by the defense) in the sentencing order as follows:

> *'2. The brief facts were as follows:*
>
> *The victim in 2019 was 16 years of age, she is the niece of the accused who is also a church elder. Both were living at Keiyasi Village on 27th August, 2019 at about 9 am the victim after completing her household chores went to lie down on the mattress in her house to take a nap. After a while, the accused came into the house laid beside the victim and started touching her from her breast downwards. The victim told him not to do it but he did not stop.*
>
> *3. The accused got hold of some clothes and blocked her mouth. The victim was scared she wanted to sit but the accused pushed her down removed her pants, blocked her mouth and with his other hand pulled down her pants, at this time the victim was lying face up. The accused forcefully penetrated her vagina with his penis and had sexual intercourse for about 5 minutes.*
>
> *4. Thereafter in the morning of 12th September, 2019 the victim was sleeping in her house. The accused came and forcefully turned her to face up since she was lying on her side. The accused put his pants down, went on top of the victim and removed her pants.*

5. *The victim tried to turn and sit but could not since the accused was on top of her. The accused told her to lie still and not do anything. The victim was crying since she was afraid of what the accused was doing to her. The accused forcefully inserted his finger into the victim's vagina and after this had forceful sexual intercourse with her for about 4 minutes.*

6. *On 23rd September 2019 at around 9 am the victim was at home. After doing the house chores the victim was playing with her phone whilst lying on the mattress. The victim had a swollen leg she could not walk the accused came and lay beside her and forcefully started touching her from her breast downwards. The victim told the accused to go away and also told him that everyone at home was aware of what he has been doing to her. After a while the accused left.*

7. *On 4th October 2019 at 9 am the victim was alone at home she went to lie down in the living room. The accused came and sat beside her and said for them to go to the sleeping area. The victim told the accused to go away but he did not go so she stood up and sat by the door and looked outside to see if someone was around but there was no one.*

8. *After the accused left the victim went to sleep. When she woke up she found the accused lying beside her and his hand was under her dress. The victim pushed the accused hand stood up and went outside. The accused told her not to tell anything to anyone. The victim ran to a neighbour's house and locked herself.*

10. *The victim did not consent to what the accused had done to her. On all occasions the victim was alone since all her family members had left for the farm. The matter was reported to the police, the accused was arrested, caution interviewed and charged.'*

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

***<u>Conviction</u>***

***<u>Ground 1</u>***

***<u>THAT</u>*** *the Learned Judge erred by not assessing the facts of the case properly which was based on consent.*

***<u>Ground 2</u>***

***<u>THAT</u>*** *the Learned Trial Judge failed by not taking into consideration the consent credentialities on para 49, 50, 51, 52, 53 and 54 of the judgment process thus denying the applicant/appellant to the principle of impartiality to receive a fair trial.*

***Ground 3***

***THAT*** *the Learned Judge erred when he failed to take into consideration on that in para 73, 74 and 75 of the judgment was consistent with the complainant's consent to the sexual encounter.*

***Sentence***

***Ground 4***

***THAT*** *the Sentencing Judge erred in principle when he failed to sentence him on consent and when there was no gravity of culpability thus in the very sentence was harsh and excessive.*

***Ground 5***

***THAT*** *the Sentencing Judge failed to sentence the accused accordingly without applying the normal sentencing process knowing full well that there was never any parole board for the past 17 years.*

***Ground 1, 2 and 3***

[7] All three grounds of appeal are based on the issue of 'consent'. Therefore, I shall consider them together.

[8] The appellant had not given evidence at the trial and taken up 'consensual sex' as his defense. As revealed by paragraphs 44, 49 and 54 of the judgment the victim had not agreed to have sex with the appellant for him to penetrate her vagina with his penis or fingers.

[9] The trial judge had examined the defence position taken up in cross-examination at paragraphs 89-97 of the judgment. The most relevant to the issue of consent are as follows:

> *90. ……. It was the complainant who had called the accused in her house at all times. She was the one who had left the door of the house open because she knew the accused would be coming. She could have shouted or yelled or run away from the house if there was anything untoward done to her.* ***The accused in his caution interview told the truth when he told the police that he did not have sexual intercourse although she wanted to but he did not****.*
>
> *91. He felt sorry for the complainant when he was on top for her because she had a small vagina so he did not penetrate her vagina with his big penis.* ***In this regard he had penetrated her vagina with his fingers on one occasion***

***but with her consent. In respect of the two lesser offences of indecent assault the accused submits that he had touched the complainant but with her consent.***

93. ***For the first and the third counts the accused denies penetrating the vagina of the complainant at all, for the second count he had penetrated the vagina of the complainant with his fingers with her consent. In respect of the lesser offences the accused touched the complainant with her consent.***

94. *It was the complainant who would bring the mattress in the living room and lie down for the accused to lie with her.*

95. *The evidence of the doctor supports the contention of the defence that there were no injuries noted and/or seen on the complainant that would suggest any forceful penetration. This expert's evidence is worth considering in particular the fact that the evidence of the doctor does not support the evidence of the complainant.*

111. *On 27th August and 12th September the accused never had any sexual intercourse with the complainant. They were in a relationship and it was the complainant who had invited him to the house on all occasions and* ***consented for him to penetrate her vagina with his fingers on one occasion****.*

112. *The accused told the truth to the police during his caution interview which explains in detail what had happened.* ***In respect of the allegations of indecent assault the complainant had consented to the acts of touching by the accused****.*

114. *The complainant had consented which is obvious from her conduct in leaving the door of the house open, inviting the accused into the house, not shouting or yelling. It was a village setting and houses were next to each other. The complainant also did not run out of the house if there was anything done to her which she did not like. The complainant was 16 years at the time who was matured enough to understand what was being done to her hence she would have resisted in all possible ways to raise the alarm but she did not. The complainant in cross examination had admitted that she had all the opportunity to scream or shout or run away but she did not. The complainant did not do anything to ensure that she was safe in the house because there was nothing to be worried about.*

115. *The complainant also had the opportunity to push the accused away from on top of her yet she did not do so. The defence is asking this court not to believe the complainant.*

[10] On the question of appellant's apology the trial judge had said:

> *72. After his wife left the accused told the witness to tell the complainant and her grandmother not to report the matter to the police and he will give them a bullock. As soon as the complainant and her grandmother arrived the witness asked the complainant and her grandmother what was the problem for which the accused was apologizing. There was no response. According to the witness he did not know what the problem was.*
>
> *73. In front of the witness the accused asked for forgiveness from the complainant and her grandmother. The accused said "I request both of you to forgive me because of the weakness I had." There was a family meeting where the complainant told everything the accused had done to her in the presence of the accused. The accused did not say anything. It was after the meeting the matter was reported to the police.*
>
> *74. In cross examination, the witness agreed that it was also for the purpose of maintaining a good relationship with the complainant and her grandmother that the accused had apologized.*
>
> *125. Sairusi Qali was also a truthful witness as well he told the truth when he said the accused in his presence had apologized to the complainant and her grandmother for what he had done to the complainant. I do not accept that the accused had apologized for the sake of maintaining the family relationship he knew what he had done to the complainant was wrong and by his apology he wanted to stop the complainant and the grandmother from reporting the matter to the police.*

[11] The trial judge had further analyzed the issue of consent in the following paragraphs:

> *126. In the caution interview the accused gave a mixed statement. From the line of cross examination the accused completely denied doing anything sexually to the complainant on 27th August but in his caution interview at Q.33 the accused told the police:*
>
> > *"I kissed her I caressed her breast and then touched the hairy part of the vagina and then deeped my hand into her vagina and at the same time fondle the clitoris, I then lying on top of her and took my penis outside my pants but I felt sorry for her I then stood up and then get dress then went outside."*
>
> *127. Furthermore, the accused in his line of defence completely denied doing anything sexually on 12th September to the complainant. However, in answer to Q. 39 the accused told the police:*

*Ans: 39. I was about to insert my penis into her vagina but I felt sorry for her so I just slide my penis on top of the mouth of the vagina.*

128. *It is also worth noting that the accused in answer to Q. 20 had told the police "...I only had sexual intercourse with her for two times as I asked her then she agree." Based on the above, there is an obvious contradiction between what the accused stated in his caution interview and the line of defence. I do not accept that the accused did not have forceful sexual intercourse with the complainant on 27th August and 12th September. Looking at all the evidence holistically the accused did not tell the complete truth in his caution interview. He gave the answers in respect of the allegations to protect himself by saying that the complainant had consented which was far from the truth.*

129. *In my considered judgment the complainant did not consent to any acts of the accused. The definition of consent as mentioned in the early part of this judgment is crucial to resolve this issue. It is obvious to me from the conduct of the accused that he was forcefully doing what he wanted to do. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.*

130. *Furthermore, the defence contention that the complainant was not doing anything to push him away or was just lying down doing nothing hence showing consent is rejected by this court as untenable on the totality of the evidence. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent. I also accept that the complainant was scared of the accused.*

131. *The complainant had promptly told her grandmother about what the accused had done to her more particularly that the accused had sex with her adds to the credibility of the complainant. The lack of all the details of how he did it did not affect the credibility of the complainant. It is not expected that a complainant will immediately tell every detail about an unexpected sexual encounter to the first person seen. The complainant had told her grandmother about what the accused had done to her shows consistency in her evidence.*

133. *I agree with Dr. Chand that it is not necessary for injuries to be seen on a patient to suggest forceful sexual intercourse and other abuses. This court accepts the evidence of all the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence of complete denial of sexual intercourse and defence of consent in respect of digital penetration and indecent assault as untenable and implausible.'*

[12] Therefore, the trial judge had carefully considered, evaluated and analyzed all the evidence relating to the question of consent and determined that:

> *135. This court is satisfied beyond reasonable doubt that the accused on 27th August, 2019 and 12th September, 2019 had penetrated the vagina of the complainant with his penis without her consent.*
> *136. Furthermore, this court is also satisfied beyond reasonable doubt that on 12th September, 2019 the accused had penetrated the vagina of the complainant with his fingers without her consent.*
> *137. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.*
> *138. The accused is acquitted for the offence rape in counts four, five and six, however, this court is satisfied beyond reasonable doubt that the accused on 23rd September, 2019 (lesser offence in count four) and 4th October, 2019 (lesser offence in count six) unlawfully and indecently assaulted the complainant by touching her breast and had put his hand under her dress respectively.*

[13] In the end the trial judge seems to have acquitted the appellant of rape on the 05th count completely.

[14] When examining whether a verdict is unreasonable or cannot be supported by evidence , as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including defence evidence, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors ***must*** as distinct from ***might***, have entertained a reasonable doubt about the appellant's guilt. The same test could be applied *mutatis mutandis* to a trial by a Judge alone (without assessors) or a Magistrate.[1]

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[1] **Filippou v The Queen** (2015) 256 CLR 47

[15] Having read the transcript, keeping in mind the above guiding principles, I have no doubt that it was clearly open to the trial judge, being the ultimate judge of facts and law, to have arrived at a verdict of guilty against the appellant. Keith, J said in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] ……….The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[16] In **Pell v The Queen** [2020] HCA 12 it was held that in a criminal case, the prosecution is required to prove the case beyond all reasonable doubt and if there is any evidence that would raise doubt, then the accused cannot be convicted, however, the prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but only beyond reasonable doubt. I have no doubt, that the prosecution has accomplished its task to this criminal standard in this case. In coming to this conclusion, while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses[2], I have evaluated the evidence and made an independent assessment thereof[3]. I am convinced that the trial judge could have reasonably convicted the appellant on the evidence before him[4].

***Grounds 4 (sentence)***

[17] The trial judge was bound by section 18 of the Sentencing and Penalties Act to fix a non-parole period as the sentence of imprisonment was over 02 years irrespective of the existence or operation of the Parole Board or not. Section 18(1) which required a non-parole period to be fixed in every case in which the sentence was for a term of two years or more – Per Keith J in **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023) paragraph 46.

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[2] **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)

[3] **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)

[4] **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 ( 14 March 2013)

[18] The issues surrounding fixing the non-parole period had been settled by the Supreme Court in **<u>Ratu v State</u>** [2024] FJSC 10; CAV24.2022 (25 April 2024) where the court remarked:

> *'[33] ..... The fixing of a non-parole is an innovative feature of Fiji's criminal justice system. Its purpose is well-established. It is intended to be the minimum period which an offender has to serve so that the offender will not be released earlier than the court thinks appropriate by the grant of parole or the practice of remitting one-third of the sentence for "good behaviour" in prison. However, since a Parole Board has never been established in Fiji, the only route by which an offender can be released earlier than the expiration of his head sentence, but for a **non-parole period** being fixed in his case, is by the operation of the practice relating to remission of sentence: see Ilaisa <u>Bogidrau v The State</u> <u>[2016] FJSC 5</u> at para 4.'*

[19] How the remission should be calculated was decided by the Supreme Court in **<u>Kreimanis v The State</u>** <u>[2023] FJSC 19</u> at para 17 (*per* Calanchini J) in that in terms of section 27 of the Corrections Service Act 2006, the Commissioner has to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence ***or*** has completed his non-parole period, whichever is the later.

***<u>Grounds 5</u>***

[20] The appellant seems to challenge the sentencing process with regard to the trial judge deviating from two-tiered system of sentencing.

[21] In the sentencing guideline judgment on the imposition and length of the minimum term on murder convicts in **<u>Vuniwai v State</u>** [2024] FJCA 100; AAU176.2019 (30 May 2024) the Court of Appeal said:

> *'[52] However, as held in **<u>Qurai v State</u>** [2015] FJSC 15; CAV24.2014 (20 August 2015), Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as 'instinctive synthesis'. The 'instinctive synthesis' method of sentencing is where the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of*

*the case; only at the end of the process does the judge determine the sentence [see **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)].'*

[22] However, what the trial judge had adopted is not strictly 'instinctive synthesis' method of sentencing but what the Supreme Court highlighted in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), *for the judge had taken a starting point* and set out aggravating and mitigating factors without, however, assigning any numerical values to increase and decrease the starting point in arriving at the final sentence, which was explained in ***Vuniwai*** by the Court of Appeal as follows:

> *'[54] The Supreme Court in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) seems to have suggested another sentencing methodology where the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors.'*

[23] Thus, the trial judge had not committed any sentencing error. However, the Court of Appeal advised the trial judges as follows on applying 'instinctive synthesis' method which may be equally applicable to the method adopted by the trial judge.

> *'[55] However, the Supreme Court and the Court of Appeal have premised the application of the sentencing guidelines in **Tawake**[5] (aggravated robbery in the form of street mugging), **Kumar**[6] (burglary & aggravated burglary), **Seru**[7] (cultivation of cannabis sativa), **Matairavula**[8] (aggravated robbery against public service providers) and **Chand**[9] (Defilement) in such a way that not only is it advisable and preferable but may indeed be convenient for the sentencing courts to adopt the two-tiered system and not 'Instinctive synthesis' methodology in order to effectively give effect to the sentencing guidelines. **Therefore, in my view, the two-tiered methodology, at least for the time being, should be the preferred option for sentencing courts in Fiji whether there are specific guidelines or otherwise**.*

[24] The trial judge had taken 11 years as the starting point. In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court said that the tariff

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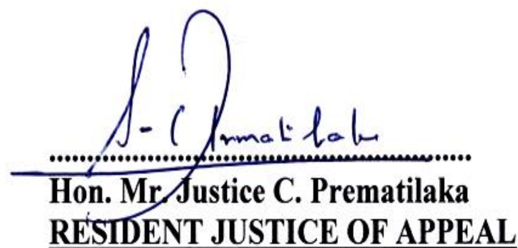
[5] **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022)
[6] **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)
[7] **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023)
[8] **Matairavula v State** [2023] FJCA 192; AAU054.2018 (28 September 2023)
[9] **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023)

previously set for juvenile rape in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years. The trial judge had started with 11 years and ended up imposing a sentence of 18 years and 08 months with a reasonable non-parole period of 13 years.

[25] 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 even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question [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)]. I do not think that the ultimate sentence irrespective of the methodology applied in the sentencing process is disproportionate, harsh or excessive.

***Orders of the Court:***

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



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

**Solicitors:**

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