

**IN THE COURT OF APPEAL, FIJI**  
**Appellate Jurisdiction**

**CRIMINAL APPEAL NO. AAU 109 OF 2022**  
**(High Court Criminal No. HAC 273 OF 2022)**

**BETWEEN:**            **KAUSHIK KAUSHAL SINGH**

*Appellant*

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

*Respondent*

**Coram:**                **Mataitoga, RJA**

**Counsel:**            **In Person for Appellant**  
**Nasa J. for the Respondent**

**Date of Hearing:**    **16 July 2024**

**Date of Ruling:**    **19 August 2024**

**RULING**

1. The appellant was charged with one count of Sexual Assault, contrary to section 210(1)(a) of the Crimes Act 2009 and two counts of Rape, contrary to section 207(1)(2)(a)(b) of the Crimes Act 2009. The particulars of the offences are:

**COUNT 1**

*Statement of Offence*

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

*Particulars of Offence*

**KAUSHIK KOSHAL SIGNH** *between the 1<sup>st</sup> day of January 2020 and the 31<sup>st</sup> day of December 2020, at Tacirua, in the Eastern Division, unlawfully and indecently assaulted AS by touching her breasts and her vaginal area, over her clothing.*

**COUNT 2**

*Statement of Offence*

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

*Particulars of Offence*

**KAUSHIK KOSHAL SINGH** *between the 1<sup>st</sup> day of January 2021 and the 15<sup>th</sup> day of May 2021, at Tacirua, in the Eastern Division, had carnal knowledge of AS a child under the age of 13 years.*

**COUNT 3**

*Statement of Offence*

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

*Particulars of Offence*

**KAUSHIK KOSHAL SINGH** *between the 16<sup>th</sup> day of November 2021, at Tacirua, in the Eastern Division, had carnal knowledge of AS a child under the age of 13 years.*

2. The appellant pleaded not guilty to these counts; hence, the matter proceeded to the hearing. The hearing commenced on the 3rd of October, 2022 and concluded on the same day. The Prosecution presented the evidence of the Complainant. At the end of the Prosecution's case, the learned Counsel for Defence made an application under Section 231 (1) of the Criminal Procedure Act, stating there was no evidence to establish the third Count as charged in the Information. The learned Counsel for the Prosecution conceded to this Application. I accordingly found no evidence to establish the third Count of Rape as charged and dismissed the said Count while acquitting the Accused of the same. The

trial then proceeded with one Count of Sexual Assault and one Count of Rape. The Accused opted to exercise his right to remain silent. However, he called his mother to give evidence for the Defence.

3. Subsequently, the Court heard the closing submissions of the parties. In addition to their oral submissions, both Counsel filed their respective written submissions. Having carefully considered the evidence adduced during the hearing and the respective oral and written submissions of the Prosecution and the Defence, the trial judge found the appellant guilty of Sexual Assault and 1 count of Rape in Count 2.

### **The Appeal**

4. The appellant not being satisfied with the High Court Judgement filed a Notice of Appeal against conviction and sentence on 19 October 2022, which was received in the Court Registry on 2 November 2022. This appeal is therefore timely. There were two generic grounds submitted against conviction and sentence.
5. The grounds submitted by the appellant against conviction is the that the verdict was unreasonable and not supported by the totality of the evidence. The ground against sentence was that the sentence was harsh and excessive. There were no submissions in support to clarify to the court what exactly were being alleged as the error of law and fact by the trial judge.
6. In a submission dated 5 March 2024, the appellant four grounds of appeal against conviction and one ground against sentence.

### **Grounds of Appeal**

7. The grounds of appeal were as follows:

#### *Against Conviction*

- (i) The trial judge erred in law and facts when he failed to direct himself on the effect of the contradiction in the prosecution witness testimony and what weight to be given to it;
- (ii) The trial judge erred in law and facts when he failed to direct himself on the contradiction in the prosecution evidence and what weight to be pleaded on it;

- (iii) That the conviction was unsafe and unsatisfactory having regard to the entire sum of the evidence at the trial in particular the complainant in her evidence .. the appellant touched her breasts and vagina during the evidence in chief and say in re-examination from the State counsel that she saw the appellant touched her breast and vagina.;
- (iv) That the trial judge erred in law when he failed to direct himself that there was no medical expert positive verification on any of the sexual assault had been found on the complainant nor any ingredient verification to rectify and morally support the Rape allegation from the complainant.

Against Sentence

- (v) The trial judge failed in principle and erred in law where he mistook the facts and sentenced the appellant to an aggravated 15 years imprisonment 9 months imprisonment with a non-parole period of 13 years and 9 months to serve which was harsh and excessive considering that there has never been a Parole Board in prison for almost 17 years.

**Relevant Principles of law for Assessing Grounds Appeal**

- 8. Pursuant to Section 21(1) (b) of the Court of Appeal Act 2009, leave application may be heard if the grounds of appeal advanced by the appellant allege error of law and fact as in this case.
- 9. For a timely appeal, the test for leave to appeal against conviction is 'reasonable prospect of success': **Caucu v State**<sup>1</sup>, **Navuki v State**<sup>2</sup> and **Sadrugu v The State**<sup>3</sup>.
- 10. The principles when an appellate court may interfere with a sentence on appeal was outlined by the Court of Appeal in **Kim Nam Bae v State**<sup>4</sup>. In that case the Court stated:

*"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*

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<sup>1</sup> [2018] FJCA 171 (AAU 029 of 2016)

<sup>2</sup> [2018] FJCA 172 (AAU

<sup>3</sup> [2019] FJCA 87 (AAU 057 of 2015)

<sup>4</sup> [1999] FJCA 21

*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)."*

### **Assessment of the Grounds of Appeal**

#### *Against conviction*

11. Grounds 1, 2 and 3 set out in paragraph 7 (i), (ii) and (iii) above, are the same and it alleges that inconsistent statements/contradictions in the prosecution witness evidence, especially from the complainant and it was not properly evaluated by the trial judge and given proper weight.
12. The alleged contradictory evaluation of the evidence claimed by the appellant is in reference to the trial judge's assessment of the reliability of the complainant's set out in paragraphs 14, 21, 22 and 29 of the judgement. However, before that the trial judge stated clearly how he is going to evaluate the evidence at the trial.
13. At paragraph 18, the trial judge stated:

*18 "In evaluating the evidence, the Court needs to first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant<sup>5</sup>.*

*19. The Prosecution's main witness was eleven years old when the first offence occurred in 2020 and twelve years old in 2021. Hence, her evidence must be evaluated by referencing factors appropriate to her strengths and weaknesses related to her age, mental development, understanding, and communication ability. Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021).*

*20. I shall first draw my attention to the issue of probability. Regarding the first Count, the Complainant testified that it occurred while she was sleeping with her younger sister and the Accused on the mattress. They were lying side by side, where the Accused was next to their younger sister, and the Complainant was after the younger sister. However, when the Complainant woke up, after feeling someone was touching her breasts and vaginal area, she found the*

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<sup>5</sup> Matasavui v State [2016] FJCA 118

*Accused had moved closer to her legs and lying there. When she asked him to go out until their mother returned home, he initially refused but later walked out after she shouted at him.*

21. I observed that the Complainant did not specifically explain whether she saw the Accused touch her breasts and vagina during the evidence-in-chief. However, during the cross-examination, the learned Counsel for the Defence suggested that she did not see who touched her breasts and vagina. The Complainant denied that proposition and explained further in the re-examination, affirming that she saw the Accused touch her breasts and vagina. Considering the reasons discussed above, I find it possible for the Accused to touch the Complainant's breasts and vagina while they were sleeping on the mattress, as explained by the Complainant."

14. From paragraphs 22 to 25 of the judgement the trial judge explains how and what the supporting evidence were at the trial that led him to concluded that it was possible that the appellant could touched the complainant's breast and vagina while she was sleeping on the mattress.
15. The trial judge's evaluation of the evidence and the conclusion he reached is correct and there is no fault in it. These grounds have no merit.
16. Ground 4 set out in paragraph 7(iv) above is misconceived. The medical evidence is not needed in sexual offences, as corroboration is not required under section 129 CPA. This ground has no merit.

#### Against Sentence

17. The sentence in this case is permissible given that the sentencing tariff for the rape of a child by the Supreme Court in **Aitchison v State**<sup>6</sup> is 11 to 20 years imprisonment. A starting point of 14 years imprisonment in the computation of the sentence in the context of this case, is not against principle; refer to paragraphs 8-12 of the Sentence Ruling.
18. The totality of the sentence in the context of the specific facts of the case is important and in this case the final sentence is justifiable.

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<sup>6</sup> [1918] FJSC 29

19. In light of the above evaluation of the grounds of appeal submitted by the appellant against conviction and sentence, none of the grounds have reasonable prospect of success on appeal.

**ORDER:**

1. Appellant's application for Leave to appeal against conviction and sentence is refused.



*[Handwritten Signature]*  
Isikeli U. Maitaitoga  
**RESIDENT JUSTICE OF APPEAL**