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

CRIMINAL APPEAL NO. AAU 15 of 2022
[In the High Court at Suva Case No. HAC 143 of 2020]

BETWEEN	:	**SOLOMONE VUETIKOROVATU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. E. Moce for the Appellant**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**06 March 2024**
Date of Ruling	:	**07 March 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva on one count of rape contrary to section 207(1) and (2)(b) of the Crimes Act. The charge alleged that he on 22 March 2020 at Suva penetrated the vulva of the complainant, with his tongue, without her consent.

[2] The High Court judge convicted the appellant and on 10 February 2022 sentenced him to a period of 08 years imprisonment with a non-parole period of 05 years.

[3] The appellant's appeal against conviction and sentence is 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 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:

> *'[2] The incident occurred on 22 March 2020 at the Accused's residence. At the time, the victim was staying with the Accused's family and studying at USP. The victim is from Qamea, Cakaudrove.*
>
> *[3] On the night of the incident, the Accused after drinking kava with his relatives, went inside his bedroom. By that time everyone else in the house had gone to sleep. He sent numerous messages to the victim through his Facebook account for her to bring a bottle of oil to his room. He complained to her that he was having stomach pains. At first she was reluctant to go to his room but when he called her twice on her mobile she went to his room with a bottle of oil out of concern for him.*
>
> *[4] When she arrived at his room, he pulled her inside and pushed her on the mattress on the floor. He came on top of her. She resisted. Her wraparound sulu was undone and her pants was pulled down to her knees. She felt her panty was pulled to a side and his tongue penetrate her vulva for a second. She managed to push him to the side and leave the room. She immediately messaged her female cousin that the Accused had forced himself on her. Later that morning she complained to another female relative that the Accused had done something to her.*

[5] There was some attempt made by the Accused's family to resolve the matter internally, but after the victim received professional counselling she reported the incident to police.'

[7] The prosecution led evidence from the complainant and two other witnesses and the appellant gave evidence on his behalf. The appellant's evidence was that he did message the complainant to bring a bottle of oil to his bedroom using his Facebook account. He also admitted that he sent several messages and called her twice to bring the oil to his bedroom because he was having stomach pains. He said that when the complainant entered his room he was lying down on the floor on a mattress. When he asked her to massage his abdomen, she locked the door and closed the curtains. She took off her sulu and sat on his lap. She massaged his belly. She tried to kiss him and then they both kissed. Apart from kissing her, he said that he did not do any other sexual acts. He denied pulling her panty to one side and penetrating her vagina with his tongue.

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

Conviction:

Ground 1

THAT the Learned Trial Judge erred in law and fact when he failed to properly consider the absence of evidence satisfying the requirement of penetration as required by law, the law, the failure of which led to a judgment that was unsafe and unsatisfactory and amounts to a miscarriage of justice.

Ground 2

THAT the Learned Trial Judge erred in fact and law when he failed to properly address the evidence of rape such as consent, in particular, the failure to consider and give weight to the evidence of the appellant on it, the failure of which resulted in a judgment which was perverse and amounts to a miscarriage of justice.

Ground 3

THAT the Learned Trial Judge erred in fact and law in not properly addressing the inconsistent evidence led at trial by the complainant, which is absent in the judgment and such absence resulted in an unsafe judgment.

Sentence

Ground 4

THAT the sentence is manifestly excessive.

Ground 1

[9] The gist of the appellant's argument is that the element of penetration had not been established.

[10] According to the complainant, she felt her panty was pulled to a side and she could feel the appellant's tongue penetrate her vagina for a second. As correctly observed by the trial judge the prosecution must prove that the appellant penetrated the vulva of the complainant with his tongue but slightest penetration is sufficient. If the appellant's tongue had penetrated her vagina even briefly, it had obviously penetrated her vulva, for one has to necessarily enter the vulva before penetrating the vagina (see **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017). Thus, with the complainant's evidence of her vagina being penetrated by the appellant's tongue, the element of penetration is satisfied as alleged in the information.

[11] The submissions based on the medical report is misconceived in as much as it was not used or relied on by the prosecution or the defence at the trial.

Ground 2

[12] Contrary to the appellant's submissions, the trial judge had indeed evaluated and analysed the evidence relating to the charge at paragraphs 5, 6, 9 and 15-20 of the judgment.

[13] The appellant's defence was not one of consensual act but a denial of penetration at all. What according to him was consensual, was the act of kissing and not penetration. There was clear evidence by the complainant that she did not consent to the act of tongue-penetration by the appellant or for that matter any of his sexual advances. Her

subsequent conduct in promptly complaining to PW2 and PW3 goes to show that she had indeed not consented to any sexual act by the appellant.

Ground 3

[14] The trial judge had not found any material inconsistencies or omissions in the complainant's evidence in the judgment. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) & **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)]. The appellant has not demonstrated any such inconsistencies or omissions in the complainant's evidence.

Ground 4

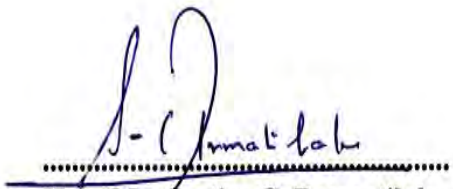
[15] The sentencing tariff for adult rape is between 07 and 15 years of imprisonment - Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338.

[16] The trial judge has clearly taken into account the fact that the appellant was 26 years old and a first time offender; at the time of the offence, he was 24; he was the youngest of three siblings; he was a student at FNU, studying Diploma in Civil Engineering, as mitigating factors and given a discount of 02 years after enhancing the initial point of 07 years by 03 years for the aggravating factors which included an act of deception by the appellant on the unsuspecting complainant who was lured into his room in the early hours of the day. I see no sentencing error at all. I agree that in approaching the question of sentencing no distinction should be made because of the category of rape and one form can be more offensive than another to the victim (**Regina v Abokar Ahmed Ismail** [2005] EWCA Crim 397 [No. 2005/00216/A5, Court of Appeal Criminal Division (15 February 2005); [2005] Times, March 7th 205, 205, per Lord Woolf CJ).

[17] However, 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 [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)]. 08 years of imprisonment with a non-parole period of 05 years is well within the tariff.

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:

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