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

CRIMINAL APPEAL NO. AAU 146 of 2019
High Court No. HAC 152 of 2016 Lautoka

BETWEEN	:	**SEMI MALAI**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Mataitoga, AP** **Qetaki, JA** **Andrews, JA**
Counsel	:	**Appellant in person (on Conviction)** **Ms.Ratidara. L . & Mr T. Varinava (on Sentence)** **Mr Kumar R for the Respondent**
Dates of Hearing	:	**3 and 9 May 2024**
Date of Judgment	:	**30 May 2024**

JUDGMENT OF THE COURT

[1] Semi Malai is the appellant in this appeal. He was indicted at the High Court, Lautoka for one count of Rape contrary to section 207(1) and (2) (c) and (3) of the Crimes Act, 2009 and two counts of indecent assault contrary to section 212 (1) of the Crimes Act, 2009 committed at Sigatoka in the Western Division on 23 July 2016 against a 7-year-old female child.

[2] The information read as follows:

'COUNT ONE

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

SEMI MALAI on the 23rd day of July, 2016, at Sigatoka, in the Western Division, inserted his penis into mouth of VH.

COUNT TWO

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

SEMI MALAI on 23rd day of July, 2016 at Sigatoka, in the Western Division, unlawfully and indecently assaulted VH by touching her vagina.

COUNT THREE

INDECENT ASSAULT: Contrary to s to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

***SEMI MALAI** on 23 July 2016 at Sigatoka in the Western Division unlawfully and indecently assaulted VH by touching her breasts.*

[3] The assessors had opined unanimously that the appellant was guilty of all counts. The trial judge agreed with the assessor's opinion, convicted the appellant and sentenced him on 11 June 2019 to an aggregate sentence of 18 years, 4 months and 15 days of imprisonment with a non- parole period of 16 years.

[4] The brief facts adopted for the sentencing purpose in the High Court are as follows:

> *"On 23rd July, 2016 the victim who was 7 years of age went to the beach near her house to look for her mother who had gone fishing with some women from the village. At this time the accused came and held the hair of the victim and took her into the nearby bush. The accused was the uncle of the victim both lived in the same village.*

In the bush the accused told the victim to suck his penis when she refused the accused forced her to suck his penis by pulling her head towards him. The accused and the victim were standing at this time. The accused also touched the victim's body by putting his hand inside her t-shirt from her breast down to her private part. The accused had touched her private part by putting his hand inside her panty.

On this day the victim was wearing a t-shirt and a skirt. She wanted to run away, but the accused grabbed her hand and then gave her a $2 coin and told to go. The victim wanted to call out to her grandmother, but the accused blocked her mouth with his hand. After a while the victim's mother came and the victim told her mother what the accused had done to her.

Upon hearing this, the victim's mother started to cry and the matter was reported to the police."

Leave Hearing

[5] The appellant's appeal against conviction and sentence was out of time by 3 months. Following the waiver by the respondent of the requirement for enlargement of time, the Legal Aid Commission tendered amended grounds of appeal against conviction and sentence on 4 March 2021. The respondent filed written submission on 30 November 2021.

[6] After due consideration of the grounds of appeal and the submissions provided in support thereof by both parties, the Justice of Appeal in a Ruling delivered on 2 December 2021, refused leave against conviction but allowed leave against sentence.

[7] Following the leave to appeal ruling, the appellant through Legal Aid Commission Counsel, renewed his appeal, to the court of appeal and submitted the following grounds of appeal against conviction and sentence.

Renewed Grounds of Appeal

[8] Under section 35(3) of the Court of Appeal Act, an appellant may renew his appeal for determination by the court of appeal, where a Justice of Appeal have refused to exercise the powers in subsection (1) in the appellant's favour. This right to renew appeal cannot be used to raise new grounds of appeal after leave to appeal ruling, which were not placed before the court at the Leave to Appeal hearing. The Court of Appeal in **Rokodreu v State** [2018] FJCA 209

"[13] Be that as it may, under this situation where the appellant is seeking the indulgence of this Court to permit him to rely on a completely new set of grounds

of appeal, it behoves the Court to examine whether there is any procedure at the disposal of the Court to be adopted in allowing such a course, for the operational sphere of this Court is governed by the provisions contained within the pale of the Court of Appeal Act &Rules (Cap 12). This Court, insofar as its appellate powers over criminal appeals are concerned, does not exercise any inherent powers. Its procedural matrix is well defined and governed by the provisions contained in the Court of Appeal Act &Rules (Cap 12).

[14] The counsel for the appellant submitted to Court that he is relying on Rule 37 of the Court of Appeal Rules to pursue the appeal based on his new grounds. As can be understood with ease that that provision deals with the procedure relating to making "Amendment of appeal", which is not the case in this matter. In the circumstances, that section has no relevance or application to the situation posed by this appeal. As such, the question remained unanswered as to which provision or provisions of law would enable this Court to entertain an appeal that is based primarily on completely new grounds of appeal that were never vetted in the backdrop of the relevant provisions of the procedural laws contained in the Court of Appeal Act &Rules (Cap 12)."

[9] By a letter dated 13 January 2022 signed by the appellant, Additional Grounds of Appeal were submitted which was filed in the Court of Appeal Registry, on 1 July 2022. There were 4 grounds of appeal in this filing and 3 are totally new and were not raised at all during the Leave Hearing before the Justice of Appeal.

[10] On the basis of the **Rokodreu** (supra) principle referenced in paragraph 8 above, 3 of the 4 grounds are dismissed.

[11] The one ground of appeal against conviction that is for review in this appeal hearing is:

"The trial judge erred in law and fact in not directing the assessors to evaluate for themselves the discrepancy that was communicated between the complainant and her mother in regards to the evidence of recent complaint that may affect the credibility of the complainant."

[12] At the hearing of the Appeal, the appellant in person argued the 1 grounds of appeal against sentence and the counsels from the Legal Aid Commission argued the appeal against sentence.

[13] The appellant complains that the trial judge erred in law and fact in not directing the assessors to evaluate for themselves the discrepancy that was communicated between the complainant and her mother, that may affect the credibility of the complainant. At the appeal hearing the court asked the appellant why such re-directions were not brough to the attention of the trial judge, when he specifically asked both counsels in paragraph

68 of the summing up, if there is anything they might wish to add or alter in the summing up just delivered. Counsel for the appellant did not raise the issues now raised as the appeal ground in this appeal.

[14] In **Tuwai v State** [2016] FJSC 35 (CAV 013/2015), the Supreme Court warned that the appellate courts will take stringent steps to stop this trend; the court stated:

> *"100. Before I go any further I must say that the trial judge had asked the parties if they needed any re-directions in the matter. The parties did not seek any re-directions on the grounds they allege that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate courts approach must be stringent.*
>
> *101. Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point."*

[15] On that basis alone, this ground of appeal may be dismissed.

[16] In the interest of justice, the court will review the 1 ground of appeal submitted by the appellant against conviction. The appellant's case at the trial was that he did not commit the offences for which was charged. He claims that the allegation by the complainant was made up by the complainant's mother, after she was told by some villagers that they had seen the complainant with an unidentified boy near the bush, and it was due to her suspicion that she had told the complainant to make up the story to implicate the appellant.

[17] The appellant submits that the summing up of the trial judge, on the directions dealing with recent complaint is set out in paragraph 46 to 48 is fine, but there were no directions to the assessors on how to evaluate for themselves the discrepancy as to what PW1 (complainant) relayed to PW2 (complainant's mother). The discrepancy highlighted is that according to PW1's evidence she only told PW2 that the appellant had touched her private part but not that he had got her to suck his penis whereas PW2 said in evidence that her daughter told her that the appellant had got her to suck his penis and he also touched her private part.

[18] The directions at paragraphs 46-48 of the trial judge's summing-up are consistent with guidance provided in **Raj v State** [2014] FJSC 12 (CAV 003/2014). However, any perceived inadequacy or omission in directions on this point should have been addressed by way of redirections as held in **Tuwai** (supra) and the failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[19] In the light of the discussion above, the appeal against conviction is dismissed.

Appeal against sentence

[20] The sole ground of appeal against sentence submitted on behalf of the appellant is:

> *"The trial judge erred in principle by double counting having considered aggravating factors that is reflected already in selecting the starting point of the sentence."*

[21] The respondent conceded that there may been an error in the trial judge's sentencing of the appellant, in that it was likely that in choosing the starting point of the sentence as 13 years imprisonment it would have taken into consideration some aggravating factors.

[22] It is not clear what matters the sentencing judge considered under '**objective seriousness**' in selecting the starting point at 13years. What is obvious is, that the sentencing judge had taken into account the same or similar aggravating factors, which were later counted again as aggravating factors, to enhance the sentence by 6 years. In that case, there has been double counting which has contributed to the final sentence.

[23] The Supreme Court in **Nadan v State** [2019] FJSC 29, (CAV 007 of 2019) addressed the difficulty faced, in sentencing using a tariff for sentence and selecting where to start within the range warned as follows:

> *"[38] The challenge to the sentence is that the judge unwittingly double-counted some of the aggravating features. The argument runs like this. Having identified the 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. That is because he said that one of the factors which had caused him to choose that starting point was "the seriousness surrounded with the circumstances of the offence". He then set out the aggravating factors which caused him to increase the length to 15 years. They were the age of the girl when the abuse began, the breach of trust which the abuse involved, the threats Nadan made to deter her from speaking out, and the impact which the abuse had on her. These were unquestionably all aggravating factors, but the difficulty is*

that we do not know whether all or any of these aggravating factors had already been taken into account when the judge selected as his starting point a term towards the middle of the tariff. If he did, he would have fallen into the trap of double-counting."

[24] The Supreme Court said in **Kumar v. State** [2018] FJSC 30 (CAV 0017 of 2017), at paras 57 and 58 in this context, as relevant to the present case:

> *"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.*
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> *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."*

[25] From the above analysis and guidance of the Supreme Court cases cited, the sentence in this case must be quashed and a new sentence passed on the appellant. Under section 23(3) of the Court of Appeal Act, the court may pass a new sentence in substitution of the one quashed. The new sentence is as follows: Taking 11 years as the starting point within the tariff range set out by the Supreme Court in **Aitcheson v. State** [2018] FJSC 29 (CAV 0012 of 2018), the Court add 3 years for the aggravating factors referred to in the sentencing ruling in the High Court, making the sentence 14 years, with 2 years to be deducted for mitigation and with rehabilitation in mind. The nature of the criminal acts in this case is far less severe than the facts of **Aitcheson** (supra). The sentence is now 12 years imprisonment.

[26] Section 24 of the Sentencing & Penalties Act provides that any period in which an offender was held in custody prior to trial, must be deducted as period of sentence already served. The appellant was in custody for 1 month 15 days, which is deducted from the aggregate sentence and the sentence is 11 years 11 months 15 days. This compares favourably with the sentences passed by the High Court in similar cases of child rape recently set out in the table of cases below.

CASE	FACTS	SENTENCE
State v Masilevu [2022] FJHC 433 (HAC 68/2021)	Victim 11 years old 3 Counts of Rape 40 years old Accused	8 years 1 month imprisonment 5 years 1 month Non Parole
State v Corivuka [2023] FJHC 5 (HAC 146/2022)	Victim 10 years old Accused 44 years	16 years 6 months imprisonment 15 years Non Parole
State v Masilevu [2023] FJHC 106 (HAC 68/2011)	3 Counts of Rape of 11 year old	13½ years imprisonment 10 years Non Parole
State v Raj [2024] FJHC 44 (HAC 249/2020)	2 Counts of Rape 1 Count of Sexual Assault	9 years 9 months imprisonment 9 years 3 months Non Parole
State v Josefa Vunibaka [2022] FJHC 149	Victim 4 years 2 months 1 Count of Rape	11 years 6 months imprisonment Non Parole
State v Bala [2022] FJHC 127 (HAC 101/2020)	Victim 10 years old 1 Count of Rape and 1 Count of Sexual Assault	14 years imprisonment 12 years Non Parole
State v Kishore [2017] FJHC 563 (HAC 70/2015)	Victim 8 years old. 1 count of Rape & 1 count of sexual assault. Accused 58 year old at time of offence	11 years 9 imprisonment 12 years Non Parole
State v Ali [2023] FJHC 61 (HAC 12/2019)	Victim 13 years old 1 Count of Rape and 1 Count of Sexual Assault Accused 38 years old at time of offence	13 years imprisonment 10 years Non Parole

[27] Having determined that the sentence appealed against must be quashed, it is now necessary that a new sentence is passed. The Supreme Court on **Koroicakau v State** [2006] FJSC 5 (CAV 006/2005) observed that:

> *"It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, against the ultimate sentence rather than each step in the reasoning process that must be considered."*

[28] The court now imposes a new and final sentence of 11 years 11 months 15 days with a non-parole of period 9 years imprisonment, on the appellant in substitution of the sentence of 18 years 4 months 15 days imprisonment with a non-parole period of 16 years, passed by the trial judge in the High Court on 11 June 2019. This sentence is effective from 11 June 2019.

ORDERS

1. The appeal against conviction is dismissed.

2. The appeal against sentence succeeds, resulting in the quashing of the sentence passed in the High Court on 11 June 2019.

3. A new sentence of 11 years, 11 months 15 days imprisonment with a non-parole period of 9 years imprisonment is substituted effective from 11 June 2019.

Hon. Justice I. Mataitoga
ACTING PRESIDENT, COURT OF APPEAL and
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice A. Qetaki
JUSTICE OF APPEAL

Hon. Justice P. Andrews
JUSTICE OF APPEAL