

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

CRIMINAL APPEAL NO. AAU 70 of 2021
[In the High Court at Lautoka Case No. HAC 203 of 2018]

BETWEEN : **EPELI BALEIWASAWASA**

AND : **THE STATE**

Appellant

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. L. Ratidara for the Appellant**
: **Mr. L. Latu for the Respondent**

Date of Hearing : **18 October 2023**

Date of Ruling : **19 October 2023**

RULING

- [1] The appellant had been charged and convicted in the High Court at Lautoka on one count of sexual assault and one count of digital rape of an 11 year-old female child ('RV').
- [2] Upon his conviction, the trial judge had sentenced him on 07 October 2021 to an aggregate sentence of 15 years and 03 month of imprisonment with a non-parole period of 13 years after the remand period was discounted (from the original sentence of 16 years).
- [3] The appellant had lodged in person a timely appeal against conviction and sentence. However, since then he had filed an application to abandon his sentence appeal by filing a Form 3 dated 22 September 2022 under Rule 39 of the Court of Appeal Rules.

[4] In terms of section 21(1)(b) 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 and 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 Waqasaga 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 summarized the facts in the sentencing order as follows:

2. *The brief facts were as follows:*

On 11th November 2018, the 11 year old victim was sleeping at her home with her younger sister. At about 5am, Jone a family friend of the victim’s parents and the accused went into the house of the victim to sleep since both had to go to work the same day. The victim’s parents were at work at the time.

3. *In the house the accused went and sat in the sofa in front of the bedroom where the victim and her sister were sleeping. Jone called the accused to sleep with him in the sitting room but the accused did not listen.*
4. *After Jone went to sleep in the sitting room the accused went into the bedroom where the victim was sleeping. He removed her blanket, and then put his hands inside the pants of the victim and started massaging her vagina. While doing this, the accused poked his two fingers inside the victim’s vagina, when she screamed the accused ran out of the house.*
5. *The matter was reported to the police the same day and the victim was medically examined at the Nadi hospital. The medical report of the victim showed injuries to the vaginal opening, the accused was arrested and charged.’*

- [6] The sole ground of appeal urged by the appellant is as follows:

Conviction:

Ground 1:

THAT the Learned Trial Judge erred in law and facts by not directing himself to consider the Turnbull principles when convicting the appellant.

Ground 1


- [7] The gist of the appellant's complaint is that the trial judge had failed to direct himself on Turnbull guidelines with regard to the evidence of the victim, RV. Turnbull guidelines have no relevance or application to the evidence of Jone.
- [8] RV's evidence had revealed that she recognised the voice of Jone coming into the house but not that of the other person. But, she was sure of the presence of another with Jone, for she heard Jone calling the other person by the name 'Epeli'. Though, she had seen the other person sitting on her parents' bed she could not recognise him. She only heard Jone calling him to come out of the parents' bedroom and to sleep with him in the sitting room. RV was sleeping with her sister on her parents' mattress in the parents' room. The unknown person had left the parents' bed room. RV heard Jone snoring and the unknown person had returned to their room and allegedly committed the acts of sexual abuse. When RV started screaming he had run away.
- [9] RV had immediately woken up Jone and told him that the guy wearing ¾ pants had touched her and Jone had taken her to the neighbour's house and called her mother. RV had told the mother that Epeli had come to their bedroom and harassed her.
- [10] The appellant had tendered an alibi notice but not called any of those alibi witnesses. He had given evidence and taken up an alibi and denied that he accompanied Jone to RV's home. Jone had been steadfast that he and the appellant came together to RV's home in that night. The trial judge had disbelieved the appellant's alibi and his evidence.

- [11] Both counsel admitted at the hearing that RV had not identified the appellant at all. There was not even a first time dock identification by RV. It was Jone who identified the appellant in the dock. Thus, the prosecution had not relied on RV's evidence to establish the identity of the offender which was established primarily through circumstantial evidence of RV and Jone.
- [12] There was no fleeting glance or a disputed recognition by RV of the appellant. Therefore, no Turnbull direction was required as far as her evidence was concerned [see **Saukelea v State** [2018] FJCA 204; AAU0076 of 2015 (29 November 2018); **Savu v State** [2014] FJCA 208; AAU 0090 of 2012 (05 December 2014) and **Mateni v State** [2020] FJCA 5; AAU 061 of 2014 (27 February 2020)].
- [13] The appellant's counsel also submitted that the circumstantial evidence was not conclusive enough to establish the appellant's identity as the perpetrator in as much there was a reference by Jone to another person by the name of Mato whose metres was found but not him inside the house in that night. She also submitted that the evidence showed that the back door of the house too had been left open and there was a possibility of another unknown person being the wrongdoer. However, the appellant's sole ground of appeal was not framed along these lines (which seem to suggest that the verdict was unreasonable or could not be supported having regard to the evidence).
- [14] The sole ground of appeal has no reasonable prospect of success.

Order of the Court:

1. Leave to appeal against conviction is refused.




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