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

CRIMINAL APPEAL NO.AAU 014 of 2016
[In the High Court at Suva Case No. HAC 257 of 2015]

BETWEEN	**:**	**ILAITIA NALAWA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
	:	**Bandara, JA**
	:	**Perera, JA**
Counsel	**:**	**Mr. T. Lee for the Appellant**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	**:**	**03 May 2021**
Date of Judgment	**:**	**25 June 2021**

JUDGMENT

Prematilaka, ARJA

[1] The appellant had been indicted in the High Court at Suva with one count of burglary contrary to section 312(1) and (2)(a) of the Crimes Act, 2009, one count of theft contrary to section 291(1) of the Crimes Act, 2009, one count of assault with intent to commit rape contrary to section 209 of the Crimes Act, 2009 and rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed at Saula Road, Nakasi, Nasinu in the Central Division on 07 July 2015.

[2] At the end of the summing-up, the majority of assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the majority opinion of the assessors in his judgment, convicted the appellant as charged

and sentenced him on 08 February 2016 to imprisonments of 02 years for burglary, 09 months for theft, 03 years for assault with intent to commit rape and 18 years for rape (all sentences to run concurrently) with a non-parole period of 17 years.

[3] The appellant's appeal against conviction and sentence had been timely. The following amended grounds of appeal had been canvased against conviction and sentence by the Legal Aid Commission (LAC) at the leave to appeal stage. The single Judge had allowed leave to appeal on 01 June 2018 to enable the full court to examine all grounds of appeal with the benefit of the appeal record. The appeal grounds urged at the leave stage were as follows:

> *'**Conviction***
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> ***Ground 1:***
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> *THAT the Learned Trial Judge erred in law in relying on the confession made by the appellant in the Caution Interview Statement yet not adequately and properly directing the assessors on convicting the assessors on any other evidence apart from the confession.*
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> ***Ground 2:***
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> *THAT the Learned Trial Judge erred in law in not properly and adequately directing the assessors on the principle of Turnbull since the identification of the perpetrator was disputed.*
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> ***Ground 3:***
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> *THAT the Learned Trial Judge caused the trial to miscarry when the summing up lacked fairness and balance.*
>
> ***Sentence***
>
> ***Ground 1:***
>
> *THAT the Learned Trial Judge erred in law to sentence the appellant on duplicity charges for Assault with Intent to Commit Rape and Rape.*
>
> ***Ground 2:***
>
> *THAT the Learned Sentencing Judge in law in considering 15 years as the appropriate starting point.*

*'**Ground 3:***

THAT the Learned Sentencing Judge erred in law to consider the injuries to the complainant's vagina as an aggravating features and labelling it as the "level of violence appellant did on the complainant."

Ground 4:

THAT the Learned Sentencing Judge erred in law in the appellant's non-remorsefulness during the proceedings as an aggravating features.

Ground 5:

THAT the Learned Sentencing Judge erred in law in choosing a non-parole period that is close to the head sentence.'

[4] After the leave to appeal stage, apart from the above grounds of appeal, the counsel for the LAC has raised two fresh grounds of appeal against conviction before the full court on the issue of identity of the appellant which will be considered in the light of ***Nasila*** guidelines (see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)] for enlargement of time:

'THAT the Learned Trial Judge may have fallen into an error in law and fact thereby causing a real and substantial miscarriage of justice in totally disregarding the facts and evidence regarding identification.'

'THAT the Learned Trial Judge may have fallen into an error in law and fact to convict the appellant when the conviction was unreasonable and cannot be supported by the totality of the evidence therefore causing a real substantial miscarriage of justice.'

Prosecution case in brief

[5] In the early hours on 07 July 2015, Raijieli Tuisorisori's (PW7) dwelling house at Salua Road, Nakasi had been broken into and the properties mentioned in count no. 2 of the information had been stolen. She had identified all the missing items including a pompom recovered upon the appellant's confession. According to the witness, the pompom belonged to her son and had cutting of eyes and nose but it was not in that condition when it was kept at home. She had not identified the burglar.

[6] On 07 July 2015, the 09 year old female victim (PW9) was living in a house in Nakasi with her parents. She was a Class 4 student. Every morning her father used to drop her off at school in a van. At about 3pm, the school would finish and she would normally walk home with her friends. On 07 July 2015, she was dropped off at school by her father. At about 03pm, she took a short cut and was walking past bushes on that road leading towards her home when one i-Taukei male wearing a black pompom (mask) jumped out of the bush grabbed her and dragged her into the bushes. He closed her mouth with his hand to prevent her raising the alarm.

[7] He then assaulted the victim by hitting her twice on the left and right side of her face. He then forcefully took off her clothes and undergarment. He then forced himself on her by parting her legs and forcefully inserted his penis into her vagina. The girl cried in pain and agony and struggled as a result of the pain she felt in her vagina. She fainted once as a result of the physical ordeal. She had fainted once again after the penetration of her vagina by the assailant and could not remember what happened thereafter. After a while, she regained consciousness and was on her way home when she met her mother on the way around 4.05 p.m. She told the mother as to what happened. The mother had observed blood in the victim's eyes, black spot underneath her eye and seen blood was coming out through her legs. The victim had not been able to identify the rapist as his face was covered.

[8] After the victim had been treated at the emergency department, Dr. Reapi Mataika had examined her after 16 hours since the incident on 08 July 2015. According the doctor, the victim was bleeding from face and her genitalia and the doctors had attempted to stop bleeding. The doctor had found the victim distressed, fearful, her hair in disarray, bruises in her face, swelling over the face and eyes and on the left side of her face. The victim had bleeding in her eye called as subconjunctival haemorrhage. Bruises had been observed on the victim's neck area consistent with something tied around her neck. Victim's vaginal examination had revealed serious internal vaginal injuries. The victim had been hospitalised for 03 days after the incident.

[9] The appellant had been initially arrested on 08 July 2015 but had been released as he had given a wrong name to police. The prosecution had relied on the appellant's cautioned statement and charge statement to establish the identity of the appellant as both Raijieli Tuisorisori's and the child victim had not identified the assailant. On 18 December, 2015, the trial judge had admitted both the cautioned statement and the charge statement after the *voir dire* inquiry after determining that the appellant had given his cautioned interview and charge statement voluntarily and out of his own free will.

Defence case in brief

[10] The appellant (DW1) was aged 31 years old and had studied up to Class 8 by the time of his arrest. He was residing at Mataiasi's (DW2) house at Salua Road at the time of the incident. Mataiasi was his uncle who was farming in the area. It appears that the appellant was assisting Mataiasi in his vocation. Also assisting Mataiasi in the farm on 07 July 2015 were said to be Apenisa Vuniivi (DW3), Livai Navudi (DW4) and Semisi Salusalu (DW5). It appears that DW1, DW2, DW3, DW4 and DW5 were related and well-known to each other.

[11] At the end of the prosecution's case, the appellant had given sworn evidence and called four witnesses (DW2, DW3, DW4 and DW5) in his defence. On oath, the appellant denied all the allegations against him and relied on his *alibi* defence. He had stated that the police forced the confessions out of him by assaulting him and swearing at him. DW3, DW4 and DW5 had stated in their evidence that the appellant was with them at the material time, and therefore he could not have committed the alleged offences.

01st ground of appeal

[12] The appellant's counsel admits that the trial judge's direction at paragraph 45 of the summing-up is adequate in so far as the cautioned statement is concerned. However, he argues that the trial judge had erred in not directing the assessors to consider

whether the cautioned statement taken at its best did prove the elements of rape against the appellant.

[13] The counsel has developed his argument on the initial police statement of the 09 years old victim made on 10 July 2015 where she had stated that the assailant had a black mole above the finger nail of his right small finger and a green tattoo which looked a bird design with long legs and beak on the back of his leg. This argument is not about the elements of the offence of rape. What the counsel seems to contend is that this may cast a doubt on the truthfulness of the cautioned statement regarding the identity of the appellant. However, there is no evidence on record to ascertain whether the appellant did or did not have such body marks at the time of his arrest or thereafter.

[14] However, the appellant's trial counsel should have sought redirections in respect of the complaints now being made on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). Any deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility. Nevertheless, in the interest of justice this court would proceed to consider them fully.

[15] There are three matters to be considered here. Firstly, the prosecution quite understandably did not depend on the victim's evidence at all to prove the identity of the appellant. She admittedly did not identify the assailant. Therefore, a discrepancy, if any, in her description of the assailant does not affect the proof of the appellant's identity *via* his cautioned statement and charge statement. The confession made by the appellant of his involvement in rape and other crimes is independent of the victim's evidence as to any marks that she thought she had seen in her rapist.

[16] Secondly, given her tender age of 09 years and extreme physical and mental trauma she was subjected to by the rapist it is very unlikely that the victim was able to see those marks on his body including a mole above the finger nail of his right small finger leave aside memorizing them reeling under such a brutal attack. She obviously, would have been disoriented and confused and had admittedly fainted twice. This is

further aggravated by the injuries she had suffered in her eye. In my view, little reliability could have been attached to such descriptions. The respondent has submitted that the victim in fact had trouble in recalling at the trial her ordeal as to how she was raped and simply answered 'yes' under cross-examination to leading questions on those marks as appearing in her police statement.

[17] It is neither wise nor fair to judge the evidence of a child victim using the same yardsticks employed for adults. In **R. v. W. (R.)** [1992] 2 SCR 122 the Supreme Court of Canada examined this aspect of the evidence of children and held as follows:

> *'In determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, a court of appeal must re-examine and to some extent reweigh and consider the effect of the evidence. This applies to verdicts based on findings of credibility. The test is whether a jury or judge properly instructed and acting reasonably could have convicted. In applying this test the appeal court should show great deference to findings of credibility made at trial. While the Court of Appeal thus did not err in this case in re-examining and reweighing the evidence, it did err in setting aside the convictions. The law concerning the evidence of children has undergone two major changes in recent years. **First**, the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution has been eliminated. Thus various provisions requiring that a child's evidence be corroborated have been repealed. **Second**, there is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case. The Court of Appeal went too far in this case in finding lacunae in the evidence which did not exist and in applying a stringent, critical approach to the evidence. It appears to have been influenced by the old stereotypes relating to the inherent unreliability of children's evidence and the "normal" behaviour of victims of sexual abuse and to have placed insufficient weight on the trial judge's findings of credibility. The verdicts in this case were ones which a properly instructed jury (or judge), acting judicially, could reasonably have rendered. (Emphasis added)'*

[18] The Supreme Court of Canada went on to deal with this aspect further as follows:

> *'The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests*

for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in R. v. B. (G.), [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that:

> *... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.*

As Wilson J. emphasized in B. (G.), these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create a new stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this.

In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying. (Emphasis added)'

[19] The Court of Appeal in Fiji in **Lulu v State** [2016] FJCA 154; AAU0043.2011 (29 November 2016) quoted from **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280) the following passage regarding matters that should be borne in mind in evaluating the evidence of a rape victim in general which are even more applicable to a child rape victim:

'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another; (4) It is unrealistic to expect a witness to be a human tape recorder;(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time sense' of individuals which varies from person to person. (6) ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on; (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts; get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defense mechanism activated on the on the spur of the moment.'

[20] Therefore, I do not think that undue weight should be attached to the victim having described the assailant having a black mole above the finger nail of his right small finger and a green tattoo which looked a bird design with long legs and beak on his leg.

[21] Thirdly, there is no evidence on record that the appellant did not have any of the marks described by the victim. Even if the appellant had such marks at the time of the attack on the victim whether they remained on his body thereafter and even during the period of the trial cannot be ascertained. Whether such marks were temporary or permanent also cannot be ascertained. The counsel for the appellant had submitted in his written submissions that the appellant removed his shirt and showed to court if he had any such body marks. However, no such event is borne out by the appeal record. If in fact the appellant had demonstrated that he had no such body marks the assessors would certainly have taken that into account in arriving at their opinions. Obviously, the majority of them and the trial judge had entertained no reasonable doubt on the identity of the appellant on account of his alleged demonstration in court.

[22] As submitted by the appellant the trial judge had not specifically directed the assessors on this aspect of the victim's evidence in the summing-up. However, that does not mean that the assessors were debarred from considering this item of evidence of the victim in their deliberations. Moreover, if the appellant had demonstrated to the assessors that he had no body marks as referred to by the rape victim, trial judge's failure to refer the assessors to this aspect would have had little impact on their deliberations. The assessors may well have considered it but not attached to it a great deal of significance as to doubt the victim's testimony given the fact that the appellant in his cautioned interview and the charge statement had admitted that it was he who committed all the offences alleged against him. Nor had the majority of them and the trial judge entertained a reasonable doubt as to the truthfulness of the appellant's cautioned statement and the charge statement on account of some body marks the victim had purportedly seen on her assailant which the appellant allegedly did not have.

[23] Considering the appellant's cautioned interview where he had admitted all the elements of the offence of rape (and other offences) as opposed to the appellant's submission, in my view, any reasonable assessors having been directed on the above item of evidence could and would still have found the appellant guilty on his cautioned statement alone. In addition, the appellant had admitted his culpability in the charge statement too.

[24] Unlike in **Chand v State** [2016] FJCA 61; AAU0015 of 2012 (27 May 2016) relied on by the appellant where the cautioned interview taken at its best did not prove the elements of the offence the accused was charged with, in the case of the appellant it is clear that all elements of the offences had been established by his own confessional statements in the cautioned interview (see questions and answers 51-73, 81-100, 102, 103, 105-110, 132-148, 152 to 160 and 184 of the cautioned statement).

[25] If the appellant has any grievance on insufficiency of evidence to bring home the conviction, it is clear that once the assessors and the trial judge accepted and relied upon the cautioned interview and the charge statement there was sufficient evidence to establish all elements of the offence the appellant was charged with beyond reasonable doubt. It is well settled in Fiji that an accused may be properly convicted on evidence consisting of an uncorroborated confession alone (vide **Kean v State** [2013] FJCA 117; AAU 95.2008 (13 November 2013) and **Kean v The State** [2015] FJSC 27; CAV 7 of 2015 (23 October 2015)].

[26] Therefore, I conclude that the first ground of appeal has no merits and cannot succeed.

02nd ground of appeal

[27] The appellant's counsel argues that the trial judge should have directed the assessors on Turnbull directions on the basis that the complainant (it is not clear whether the counsel refers to Raijieli Tuisorisori or the child victim) had identified the appellant. In any event, I think this ground of appeal is misconceived.

[28] Neither Raijieli Tuisorisori nor the child victim had claimed to have identified the appellant at the crime scene. The identity of the appellant was sought to be established through his own admissions in the cautioned interview and charge statement. In the circumstances there was no need for the trial judge to have administered Turnbull directions to the assessors.

[29] The counsel had made the same submission arising from the child victim's reference to some body marks on the assailant in connection with this ground of appeal as well. In addition, he had referred to the cautioned statement where an identification parade had been mentioned. The prosecution had not led evidence of any identification parade held and in fact there would have been no purpose in holding an identification parade as neither Raijieli Tuisorisori nor the child victim had identified the appellant. The trial judge had correctly referred to this fact at paragraph 43 of the summing-up. An identification parade was not required to be held just for the child victim to see the body marks in her assailant that she had apparently described in her police statement.

[30] Anyway the appellant had not probed the issue of a police identification parade at the trial and therefore, it was not a trial issue. Therefore, the trial judge was not required to discuss with the assessors the issue of identity of the appellant more than he has done in the summing-up.

[31] Therefore, I conclude that the second ground of appeal has no merits and cannot succeed.

03rd ground of appeal

[32] The counsel for the appellant has submitted that he was making the same submissions under this ground of appeal that he made in respect of the previous appeal grounds on identification. Therefore, my determinations on the first and second grounds of appeal would apply to the third ground of appeal as well. Accordingly, I see no merits in the third ground of appeal. Although, the trial judge had not referred to the victim's evidence on the alleged body marks of her rapist in his summing-up, taken as a whole the summing-up cannot be labelled as unfair and unbalanced as extensively discussed

by the Court of Appeal in **Chand v State** [2017] FJCA 139**;** AAU112 of 2013 (30 November 2017). The trial judge had addressed the assessors at paragraphs 4, 5, 44-49 and 51 the defense case satisfactorily.

New grounds of appeal

[33] The new appeal grounds had not been urged before the single Judge of this court. Given that the appellant had been sentenced on 08 February 2016 and the new grounds had been taken up for the first time in the appellant's written submissions dated 27 February 2020, the delay is over 04 years. Notwithstanding very pertinent observations by the Supreme Court in **Tuwai v State** [2016] FJSC 35; CAV0013 of 2015 (26 August 2016) against litigants trying to argue their appeals on a piecemeal basis, in utmost fairness to the appellant this court would now follow ***Nasila*** guidelines regarding those two new grounds of appeal and see whether enlargement of time should be granted to urge them before this Court.

[34] In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) faced with a similar situation the Court of Appeal stated:

> *'[14] Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned.'*
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> *'[15] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17.'*

[35] Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[36] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained (vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100).

[37] It is clear that the delay is very substantial and appellant has not explained the delay. As far as the prejudice is concerned, there will be undue hardship on the child victim to relive her story again in court if there is to be fresh proceedings. Nevertheless, if there is a real prospect of success in the belated grounds of appeal in terms of merits this court would be inclined to grant extension of time (vide ***Nasila).*** The DPP had not averred any prejudice that would be caused by an enlargement of time to the state.

01st new appeal ground

[38] The counsel for the appellant argues that there has been a substantial miscarriage of justice by the trial judge having violated the rules of cross-examination by the defense about the body marks apparently seen by the child victim by making it difficult for the defense counsel. However, it appears that the defense had elicited under cross-examination that the victim had told the police that she saw a black mole above the finger nail of the right small finger and a green tattoo which looked a bird design with long legs and beak in the assailant which is the bedrock of the appellant's all grounds of appeal though put in different ways and under separate headings. The counsel had not submitted any other matter concerning the identity of the appellant that the defense was not able to elicit from the victim as a result of the alleged interference of

the trial judge in cross-examination, for she had not made any other identification of the assailant.

[39] As pointed out earlier, once the cautioned interview and the charge statement were accepted by the assessors any description in the evidence of the child victim as to her assailant's body marks inconsistent with those of the appellant would not make a significant dent in the matter of identity of the appellant. Rather than harping on the victim's evidence on this issue, the appellant's counsel had not been able to demonstrate as to how even a description of body marks not tallying with those of the appellant, made obviously on the spur of the moment and in extremely trying circumstances by the victim, should cast a reasonable doubt on the appellant's own admissions of him being the perpetrator in the cautioned statement and the charge statement. As already discussed, a cloud of uncertainty was hovering over the question whether the appellant in fact did or did not have those body marks but such an eventuality in the negative could not be ruled out. But, in the light of the cautioned interview and the charge statement it did not matter in the end.

[40] Therefore, in the circumstances the trial judge cannot be legitimately criticized for his view that the contested evidence of the victim's description of body marks in the assailant would be irrelevant in determining the question of identity of the appellant as the latter had admitted to be the person who had physically and sexually assaulted the victim in his cautioned statement and charge statement.

[41] Therefore, there is no real prospect of success in this ground of appeal and applying ***Nasila*** guidelines enlargement of time is accordingly refused.

02nd new appeal ground

[42] The appellant argues that the conviction is unreasonable and cannot be supported by the totality of evidence causing a substantial miscarriage of justice.

[43] The counsel submits two reasons for the above contention. Firstly, he argues that the appellant 'proved' in court that he did not have a black mole above the finger nail of

the right small finger and a green tattoo which looked a bird design with long legs and beak on his leg or any part of the body. I have already dealt with this aspect earlier and would only reiterate the same. Secondly, the counsel argues that the appellant's *alibi* witnesses confirmed his whereabouts at the time of the offending.

[44] The trial judge had addressed the assessors on the defense evidence and in particular the appellant's *alibi* at paragraphs 47-49 of the summing-up. He had specifically directed the assessors that:

> *'[47] ...There is no obligation on the accused to prove his innocence. He is entitled to put in evidence to create a reasonable doubt on the prosecution's case, and if you are thrown into a reasonable doubt as a result, you must find the accused not guilty as charged.*
>
> *[48] .....If you accept the accused's above evidence, you must find him not guilty as charged on the rape charge (count no. 4). If you accept his sworn denials, you must find him not guilty on all counts.*
>
> *[49] However, if you reject the accused's alibi evidence, you will still have to consider the prosecution's case. You will still have to look at the whole of the prosecution's case to decide whether or not they had made you sure of the accused's guilt. If they had made you sure of the accused's guilt on all counts, you must find the accused guilty as charged on all counts. If it's otherwise, you must find the accused not guilty as charged on all counts.'*

[45] When an accused relies on *alibi* as his defense, in addition to the general direction of the burden of proof, the assessors should be directed that the prosecution must disprove the *alibi* and that even if they conclude that the *alibi* was false, that does not by itself entitle them to convict the accused [vide **Bese v State** [2013] FJCA 76; AAU0067.2011 (10 July 2013) and **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015)].

[46] The above directions by the trial judge substantially conform to the prescribed guidance given in ***Bese*** and ***Ram***.

[47] Having considered the evidence and the trial judge's directions the assessors obviously rejected the appellant's *alibi*. So did the trial judge. Once the appellant's

cautioned statement and the charge statement were accepted it was only logical that the assessors and the trial judge thought that the prosecution had disproved the *alibi*.

[48] The counsel for the appellant also has criticized alleged shortcomings in the investigation conducted particularly with regard to the victim's evidence of the body marks on the assailant. These are trial issues that should have been canvased and tested at the trial and not in appeal.

[49] As for the totality of evidence against the appellant it becomes clear upon a reading of his detailed cautioned interview that the sequence of events commencing with burglary at Raijieli Tuisorisori's house and ending up with sexual abuse of the child victim described by the appellant are quite consistent with the testimonies of the two witnesses. As stated by the Supreme Court in **Tuilaselase v State** [2019] FJSC 2; CAV0025.2018 (25 April 2019) *' …the weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue…'*. The appellant's position was that the police forced the above alleged confessions out of him by assaulting him and swearing at him which had been correctly rejected at the *voie dire* ruling by the trial judge and by the assessors and the judge at the trial.

[50] In addition to the cautioned interview, the recovery of stolen items upon the appellant's cautioned interview and finding a pompom among the stolen items similar to the face mask worn by the assailant when he sexually attacked the child victim were other circumstantial evidence which go to the truthfulness of the cautioned statement.

[51] Therefore, there is no real prospect of success in this ground of appeal and applying ***Nasila*** guidelines enlargement of time is accordingly refused:

> ***'The appellant's complaints of the convictions being unreasonable and cannot be supported by evidence and there has been a substantial miscarriage of justice.'***

[52] While not purporting to make an exhaustive statement of when there will be a substantial miscarriage of justice, the High Court in Australia has identified three situations in **Baini v R** (2012) 246 CLR 469; [2012] HCA 59):

- *Where the jury's verdict cannot be supported by the evidence (i.e. where section 276(1)(a) is directed);*
- *Where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome;*
- *Where there has been a serious departure from the proper processes of the trial.*

[53] The test to determine a *'verdict which is unreasonable or which cannot be unsupported by evidence'* was laid down recently, the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) as follows:

> *'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence 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 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 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. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.*
>
> *[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009,*

> *0016, 0018, 0019.2016 (26 August 2016]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.'*

[54] Having examined the record and in applying the above test, I would conclude that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of guilt of the appellant beyond reasonable doubt. I cannot say the assessors and the trial judge must have entertained a reasonable doubt about the appellant's guilt or it was 'not reasonably open' to the assessors to be satisfied beyond reasonable doubt of the commission of the offences by the appellant (see also **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992). The trial judge also could have reasonably convicted the appellant on the evidence before him which is the test when a verdict is challenged on the basis that it is unreasonable (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[55] This court is also mindful of the benefit the assessors and the trial judge had in seeing the witnesses giving evidence at the trial as succinctly put in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992):

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere……'*

[56] Consequently, I hold that the verdict of guilty of the appellant cannot be set aside on the basis that it is unreasonable or cannot be supported having regard to the evidence. As a result pursuant to section 23(1) of the Court of Appeal Act the appellant's appeal against conviction should be dismissed.

[57] As to the complaint of substantial miscarriage of justice the test is the inevitability of the conviction. **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 at [33] set down the test of inevitability as follows:

'....Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal.'

[58] Put it another way, if the Court comes to the conclusion that, on the whole of the facts, a reasonable assessors, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso to section 23(1) of the Court of Appeal Act has occurred (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[59] On a perusal and from my review of the appeal record, despite the shortcomings alleged by the appellant's counsel and discussed above, I am satisfied that the conviction of the appellant was inevitable and that on the whole of the evidence a reasonable assessors, after being properly directed, would without doubt have convicted. Therefore, I conclude that there has not been a substantial miscarriage of justice.

Sentence appeal

[60] The guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The aforesaid guidelines are as follows:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

01st ground of appeal

[61] The appellant's counsel argues that the trial judge had erred in law in sentencing the appellant on duplicity charges which he identifies as assault with intent to commit rape and rape *i.e.* third and fourth counts.

[62] The rule against *'duplicity'* relates to the charging of an accused with committing more than one offence in a single charge. In ***Director of Public Prosecutions v Dunn*** [2001] 1 Cr App R 352 Bell J, with whom Pill LJ concurred, stated at page 357:

> '[In *Director of Public Prosecutions v Merriman* (1972) 56 CrAppR 766; [1973] AC 584 Lord Morris or Borth – y – Gest at pages 775 and 793 and Lord Diplock at pages 796 and 607] make it clear that the rule against duplicity, that only one offence should be charged in any one count, information or summons, has always been applied in a practical rather than a strictly analytical way for the purpose of determining what constituted one offence.
>
> > *The question of whether someone has committed one offence or more than one offence is best answered by applying common sense in deciding what is fair in the circumstances. It will often by legitimate to bring a single charge in respect of what may be called one activity, even though it may involve more than one act*.' (emphasis added) [words in brackets added]'

[63] In **R v T** [1993] 1 QdR 454 the Court of Criminal Appeal had to consider whether a number of acts committed on a complainant constituted more than one offence. Thomas J stated at page 455:

> 'Useful guidance is afforded by Lord Morris's remarks in *R v Merriman* [1973] AC 584, 593:
>
> > "The question arises – what is an offence? If A attacks B, and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. *In my view, such questions when they arise are best answered by applying common sense and by*

> *deciding what is fair in the circumstances*. No precise formula can usefully be laid down but that clear and helpful guidance given by Lord Widgery in a case where it was considered whether an information was bad for duplicity: see *Jemmison v Priddle* [1972] 1 QB 489, 495. I agree respectfully with Lord Widgery CJ that it will often be called one activity even though that activity may involve more than one act. *It must, of course, depend upon the circumstances.*"

[64] In **R v Morrow and Flynn** [CA 120 and 122 of 1990 CCA unreported 30th August 1990] Connolly J observed:

> *'It is obvious that a knifing attack by one man who delivers a number of blows may properly be charged as a series of woundings, but one must ask oneself whether this would be an application of common sense in terms of Lord Morris's speech.'(emphasis added)'*

[65] A charge that alleges separate offences on different days is bad for '*duplicity*', irrespective whether the offences alleged are the same (see **R v Robertson** (1936) 25 CrAppR 208 & **R v Thompson** (1914) 9 CrAppR 252; [1914] 2 KB 99).

[66] In **R v Calos Galofia** (Unrep. Criminal Review Case No. 1293 of 1991) Muria J stated at page 1:

> *'I refer to my Review Judgments in Criminal Case No. 1245/91 given on 10 January 1992 and Criminal Case No. 1167/91 given on 13 January 1992 in which I said that a count alleging that the accused "broke and entered ..... with intent to steal and did steal therein ....." is bad for duplicity. It is clear that the charge against the accused is bad for duplicity.'*

Such a charge is bad for 'duplicity' because it alleges two separate offences, i.e., 'break and enter with intent' under section 299(a) of the Penal Code (Ch. 26) and 'break and enter and commit' under section 300(a) of the Penal Code (Ch. 26).

[67] In **DPP v Meeriman** [1973] AC 584, Lord Diplock stated that:

> "*A count will not be bad of duplicity where it alleges a continuous offence. Moreover with more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission."*

[68] In the light of above principles, the counsel's submission is misconceived. I do not think that the third and fourth counts constitute duplicity of charges. In any event, the trial judge had imposed 03 years for the third count and 18 years for the fourth count and directed that both sentences should run concurrently. Thus, no prejudice had been caused to the appellant at all by separate sentences imposed on the two counts.

02nd ground of appeal

[69] The counsel for the appellant argues that the trial judge had erred in law in selecting 15 years as the starting point and wrongly submits that the sentencing tariff for juvenile rape is between 07-15 years and the trial judge had picked as the starting point at the highest point of the range. It is the tariff for adult rape that is between 07 and 15 years of imprisonment [see **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018)]. This patently erroneous submission must be due to either chronic carelessness or total ignorance of the law on the part of the appellant's counsel.

[70] The sentencing tariff for juvenile rape when the appellant was sentenced was 10-16 years of imprisonment as set out in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and confirmed in **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. The trial judge had started with the sentence of 15 years imprisonment and added 04 years for aggravating factors making a total of 19 years imprisonment. He had made a deduction of 01 year for the time already served by the appellant while in custody pending trial ending up with the final sentence of 18 years.

[71] The trial judge had still picked 15 years as the starting point towards the high end of the tariff and added 04 more years for the aggravating factors and in the process the trial judge appears to have, inadvertently though, committed double counting by considering the aggravating factors twice in the matter of the final sentencing. This aspect of sentencing was discussed in detail by the Court of Appeal in **Naua v State** AAU0056 of 2015 (29 April 2021) having referred to the sentiments expressed by the Supreme Court, particularly in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019).

[72] The Supreme Court in **Nadan v State** (supra) stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[73] This court is faced with exactly the same dilemma in this appeal. It is not clear what factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated. The concern is whether any one or more of the aggravating factors named by the trial judge had influenced the starting point of 12 years towards the high end of the tariff. If so, 04 year increase on account of the same factors may have caused double counting.

[74] However, 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, 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). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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).

[75] The final sentence of 18 years is beyond the usual sentencing range for juvenile rape. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range [vide **Koroivuki v State** [2013] FJCA 15; AAU0018.2010 (5 March 2013)].

[76] The trial judge in handing down the sentence of 18 years had stated as follows:

> *'7. This case was one of the worst type of child rape cases to ever come before the courts..'*
>
> *11. (i)……This type of offence is becoming prevalent in our community. Despite the severe prison sentence the courts are dishing out against child rapist, our courts are still filling up with alleged child rapists. The courts had repeatedly said before, and will say again, it will not stand by and let this menace pervade our society. Children are the future of this country and it is only right that the courts stand with them to protect the future of this country. They are the most vulnerable and deserve the most protection by the State. A deterrent sentence is therefore called for and the accused must not complain when he gets the same.'*

[77] When the sheer brutality involved in the rape of the 09 year old victim is considered one cannot agree more with the trial judge's above sentiments. When the aspects of deterrence and protection of community are considered, as permitted by the Sentencing and Penalties Act, the ultimate sentence though outside the sentencing tariff cannot be termed as harsh and excessive. Even a harsher sentence would have been justified given the degree of cruelty involved in the crimes committed by the appellant on the child victim. The appellant has demonstrated himself to be a potential threat to the children and the juveniles, if not kept away from the community. In the circumstances, I see no reason to interfere with the length of the sentence.

03rd ground of appeal

[78] The appellant's counsel contends that it was wrong for the trial judge to have considered the level of violence perpetrated on the child victim by the appellant as an aggravating feature. It is clear that the trial judge had considered the injuries caused to

the victim's body and vagina as proved by medical evidence in relation to the charge of rape and not to the count of assault with intent to rape.

[79] The Supreme Court in **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) set out a non-exhaustive list of aggravating factors in rape cases (and sexual abuse cases in general) such as whether the crime had been planned, or whether it was incidental or opportunistic, whether there had been a breach of trust, whether committed alone, whether alcohol or drugs had been used to condition the victim, whether the victim was disabled, mentally or physically, or was especially vulnerable as a child, whether the impact on the victim had been severe, traumatic, or continuing, whether actual violence had been inflicted, whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections, whether the method of penetration was dangerous or especially abhorrent, whether there had been a forced entry to a residence where the victim was present, whether the incident was sustained over a long period such as several hours, whether the incident had been especially degrading or humiliating, whether a plea of guilty was tendered, how early had it been given with no discount for plea after victim had to go into the witness box and be cross-examined and little discount, if at start of trial, time spent in custody on remand, extent of remorse and an evaluation of its genuineness and if other counts or if serving another sentence, totality of appropriate sentence (see para [26] of ***Ram***).

[80] Thus, level of violence and physical and mental trauma caused by the appellant on the victim was well within the above list of aggravating circumstances and the trial judge made no error in taking them into account as an aggravating feature.

04th ground of appeal

[81] This ground of appeal seems to be based on the following paragraph in the sentencing order relating to aggravating factors:

> *'Despite his right to defend himself in a criminal court, the accused showed no remorse during the proceeding. The child complainant had to be called to relive her ordeal in the courtroom, by giving evidence.'*

[82] It appears that the trial judge had considered the absence of remorse by making the child victim give evidence and relive her ordeal in court, on the part of the appellant as an aggravating feature. I think the trial judge had erred in this instance as I doubt whether lack of remorse and forcing the victim relive her experience in court could have been taken as aggravating features as the appellant had a constitutional right to go through the trial though demonstration of remorse signified *inter alia* by a guilty plea may warrant a discount as a mitigating feature. The appellant's lack of remorse would certainly deprive him of any discount for 'genuine remorse' but it could not have been treated as an aggravating factor to enhance the sentence (vide paragraph [54] in **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018).

[83] However, as I have already indicated what matters is the ultimate sentence and I have no doubt that the sentence imposed on the appellant fits the gravity of the crimes he was convicted of.

05th ground of appeal

[84] The appellant's counsel has also argued that the non-parole period is too close to the head sentence and may affect his rehabilitation.

[85] The Supreme Court in **Tora v State** [2015] FJSC 23; CAV11 of 2015 (22 October 2015) had quoted from **Raogo v The State** CAV 003 of 2010 (19 August 2010) on the legislative intention behind a court having to fix a non-parole period as follows:

> *"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[86] In **Natini v State** [2015] FJCA 154; AAU102 of 2010 (3 December 2015) the Court of Appeal said on the operation of the non-parole period as follows:

"*While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case***."

'*.... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[87] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal at [114] stated (see also **Chirk King Yam v State** [2015] FJCA 23; AAU0095 of 2011 (27 February 2015) and **Kumova v The Queen** [2012] VSCA 212):

> *'[114] The Court of Appeal guidelines in* ***Tora*** *and* ***Raogo*** *affirmed in* ***Boqidrau*** *by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[88] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 17 years (when the head sentence was 18 years) fixed by the trial judge is in compliance with section 18(4). Therefore, the gap of 01 year between the final sentence and the non-parole period cannot be said to violate any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period. In the case of the appellant the need to protect the community and deterrence must be prime considerations and rehabilitation of the appellant should play a secondary role. Therefore, the gap of 01 year between the final sentence and the non-parole period is fully justified.

Corrections Service (Amendment) Act 2019 (22 November 2019)

[89] Corrections Service (Amendment) Act 2019 (22 November 2019) amended section 27 of the Corrections Service Act 2006 and Sentencing and Penalties Act 2009 significantly affecting some aspects of section 18 of the Sentencing and Penalties Act 2009, as follows:

> *Section 27 amended*
>
> **2.** Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—
>
> > *"(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009,* ***for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.***
> >
> > *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.*
> >
> > *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.".*
>
> *Consequential amendment*
>
> **3.** The Sentencing and Penalties Act 2009 is amended by—
>
> > *(a)* in section 18—
> >
> > > (i) in subsection (1), deleting "Subject to subsection (2), when" and substituting "When"; and
> > > (ii) deleting subsection (2); and
> >
> > *(b)* deleting section 20(3).

[90] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019 (22 November 2019), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court ***must*** fix a period during which the offender is not eligible to be released on parole (*i.e.* the non-parole period) and irrespective of the remission that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner ***must*** serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the final/head sentence not taking into account or with no consideration to the non-parole period. Therefore, when there is a non-parole period included in a sentence, the earliest date of release of the prisoner for all practical purposes would be the date of completion of the non-parole period notwithstanding or even if he/she may be entitled to be released early upon remission of the sentence.

[91] Therefore, with the above statutory changes the time gap between the head sentence and the non-parole period does not affect the calculation of remission of one-third of the sentence either.

[92] Therefore, none of the grounds of appeal against sentence would succeed and the appeal against sentence should be dismissed.

Bandara, JA

[93] I have read the draft judgement of Prematilaka ARJA and agree with his reasoning and conclusions.

Perera, JA

[94] I have had the opportunity of perusing in draft the judgment of Prematilaka ARJA and I agree with his reasoning and conclusions. The appeals against the conviction and the sentence should be dismissed accordingly.

[95] I take the liberty to make one observation. The term of imprisonment of 18 years imposed for the offence of rape which stands as the final sentence in this case is indeed beyond the applicable sentencing range for child rape at the relevant point in time. It is pertinent to note that the learned trial judge has in the sentencing remarks observed that the case at hand '*was one of the worst type of child rape cases to ever come before the courts*'. The question is whether a term of 18 years imprisonment adequately reflect the denunciation of this abhorrent and horrendous crime of rape committed against a 9 year old child who was returning from school and would it serve as a deterrence especially in view of the fact that the maximum penalty prescribed by law for the offence of rape is life imprisonment? My view is it is not. The learned State Counsel expressed a similar view during the hearing. However, for the reason that there is no appeal preferred by the State before this court against the sentence and because the appellant has not been given the relevant warning in accordance with the decision in **Kumar and Skipper v Reginam** (Criminal Appeal No.70 of 1978: 29 March 1979 [1979] FJCA 6), expounding on this point would not be worthwhile as it would only amount to an academic exercise.

Orders

1. Appeal against conviction dismissed.
2. Appeal against sentence dismissed

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Hon. Mr. Justice Chandana Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL

.....

Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL