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

CRIMINAL APPEAL NO. AAU 024 of 2016
[In the High Court at Suva Case No. HAC 90 of 2014]

BETWEEN	:	**AVITESH RAM**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, ARJA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	:	**Mr. M. Yunus for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**07 May 2021**
Date of Judgment	:	**02 July 2021**

JUDGMENT

Prematilaka, ARJA

[1] The appellant had been indicted in the High Court at Suva with one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2)(b) of the Crimes Act, 2009 committed at Suva in the Central Division on 15 March 2013.

[2] At the end of the summing-up, the majority of assessors had unanimously opined that the appellant was guilty of the 01st count and not guilty of the 02nd count. The learned trial judge in his judgment had agreed with the opinion of the assessors on the 01st count and disagreed with their opinion on the 02nd count, convicted the appellant on

both counts as charged and sentenced him on 08 March 2016 to imprisonments of 18 months for the 01st count and 10 years and 01 month for the 02nd count (all sentences to run concurrently) with a non-parole period of 07 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 at the leave to appeal stage. The single Judge had refused leave to appeal on 24 January 2017. The appeal grounds urged at the leave stage were as follows:

> ***'Conviction***
>
> *'**Ground 1** - The Learned Trial Judge erred in law and in fact by convicting the Appellant for second count of Rape, in the absence of any medical evidence, contravening his right to a fair trial enshrined in the Constitution.*
>
> ***Ground 2** – The Learned Trial Judge erred in law and in fact when he did not properly direct the assessors on how to approach the previous inconsistent statements of some witnesses.*
>
> ***Ground 3** – The Learned Trial Judge erred in law by failing to order a second psychiatric report to determine the mental status of the Appellant at the time of the trial.*
>
> ***Ground 4** – The Learned Trial Judge erred in law by overturning the unanimous verdict of the assessors in respect of the second count (Rape).*
>
> ***Ground 5** – The Learned Trial Judge erred in law and in fact when he overturned the verdict of the assessors in respect of the second count (Rape) without giving cogent reasons for the decision.*
>
> ***Ground 6** – The sentence is harsh and excessive in all the circumstances of the matter.'*

[4] After the leave to appeal stage, apart from the above grounds of appeal, the counsel for the appellant had raised one more fresh ground of appeal (06th appeal ground) against conviction before the full court but in his written submissions he had sought to abandon it. Similarly the appellant's counsel had decided not to pursue the 04th ground of appeal against conviction before the full court.

Evidence in the case in brief

[5] The alleged incident had occurred on 15 March 2013 at the appellant's residence. The residence belonged to his mother. The appellant who was 27 years old was residing

with his mother. The complainant was 16 years old at the time. At trial, it was an agreed fact that the complainant was residing at the appellant's residence when the allegation arose.

[6] The complainant's evidence was that she was sleeping in her bedroom when the appellant entered the room drunk around 01-02 am and sexually assaulted her by touching her breasts, genitals and raped her poking his fingers into her vagina while lying on top of her. She resisted and screamed for help. At one point, the appellant's mother came, swore at the complainant and pushed the appellant back on to the complainant. After about 20 minutes the complainant managed to free herself, get out of the bed room and sit in the sitting room. The next morning, the complainant reported the assault to her grandmother living next door. The grandmother informed the mother of the incident but the mother could not immediately approach the complainant due to a DVRO taken against her by the complainant earlier. On 25 March 2013, the matter was reported to the police.

[7] The appellant gave evidence. He denied the allegations and alleged that the complainant's mother had framed him for the offending. He further said that he was not at home at the material time. He also called his mother and sister to give evidence on his behalf.

01st ground of appeal

[8] The appellant's counsel argues that the trial judge had erred in law and fact by convicting the appellant on count 02 for rape in the absence of or due to the suppression of medical evidence infringing his right to a fair trial. He argues that the penetration of the vagina with fingers must be proved beyond reasonable doubts and that could only be done with the help of medical evidence or a medical report.

[9] The prosecution had not relied on medical evidence as part of its case. The case against the appellant in respect of both counts was based primarily on the evidence of the complainant, her mother and the husband of the appellant's sister. The decision not lead medical evidence was part of the prosecutorial right. However, the

complainant's medical report had been part of the disclosures available to the defense and there does not appear to have been any suppression of it by the prosecution.

[10] The appellant's trial counsel had not made any attempt to produce the medical report at the trial or challenge the complainant's testimony based on her medical report. In other words non-production of the medical report had not been a trial issue at all. Therefore, there is no evidential basis for the appellant's counsel to raise this as a ground of appeal.

[11] Secondly, there was ample evidence coming from the complainant that the appellant indeed penetrated her vagina with his fingers. She, of course, had used the word 'poking' in describing the penetration of her vagina by the appellant with his fingers but also said that she had felt his fingers in the act of poking her vagina.

[12] In **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) the 14 year old victim had said that the accused had poked her vagina and this court pronounced on the question of penetration as follows:

> *'[13] Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.*
>
> *[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be*

sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ…..'

[13] In **Reddy v State** [2018] FJCA 10; AAU06.2014 (8 March 2018) once again the Court of Appeal had to tackle a situation where the evidence of the 15 years old victim was that the accused had inserted his penis inside her halfway but not inside the vagina. The Court upheld the conviction and remarked:

[19] Before proceeding to consider the grounds of appeal, I feel it pertinent to make some observations on the applicable legal provisions relevant to this appeal. Carnal knowledge is complete on penetration to any extent [vide section 206 (4) of the Crimes Act]. It is clear that for the purpose of section 206 (4) carnal knowledge means sexual intercourse involving penetration of vulva, vagina or anus by the penis. Carnal knowledge includes sodomy [vide section 206(5)]. A person rapes another if the former has carnal knowledge with or of the other person without the latter's consent [vide section 207(2) (a) of the Crimes Act] and carnal knowledge, in so far as section 207 (2) (a) is concerned, therefore, should mean penetration to any extent of the vulva, vagina or anus of the victim by the penis of the accused.

'[21] The Court of Appeal in Volau v State Criminal Appeal No AAU0011 of 2013: 26 May 2017 [2017 FJCA 51] having referred to medical literature, made it clear that the medical distinction between vulva and vagina is immaterial under section 207 (2) (b) of the Crimes Act 2009 as far as the offence of rape is concerned as it includes both vulva and vagina and in my view, the same position applies to section 207(2) (a) of the Crimes Act 2009 as well. The following observations of the Court of Appeal in Volau dealing with a count under section 207 (2) (b) of the Crimes Act, are applicable to the facts of this case as well where the Complainant is 15 years of age and it is clear that she had difficulties in explaining the exact act and the extent of penetration by the penis that had taken place:

> *'It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(2)(b) of the Crimes Act 2009 as far as the offence of rape is concerned.'*

[14] Compared to **Volau** and **Reddy** there was clear evidence in this case of penetration of the complainant's vagina with the appellant's fingers. The use of the word 'poking' would not make any material difference.

[15] As for the argument that medical evidence is a *sina quo non* to prove penetration the single Judge in his ruling has correctly pointed out that the counsel had not cited any authority to buttress his argument and in fact there is no obligation on the part of the prosecution to lead medical evidence to prove penetration. However, if there is medical evidence supportive of penetration it would certainly strengthen the prosecution case but lack of it would not necessarily weaken it. Availability of physical evidence of penetration that can be medically ascertained depends on so many factors which vary from case to case. If believed, the evidence of a victim of rape alone is sufficient to prove the element of penetration.

[16] On the other hand, the appellant's counsel had made detailed written submissions based on the medical report which was never produced at the trial by either party. Ironically, according to his submissions the medical report had revealed that the vaginal examination did show some injuries and the complainant had claimed that an Indian male had inserted his two fingers inside her vagina. Though, the counsel's attempt is to show that the complainant had not given the name of the appellant in the history to the doctor but his submissions on lack of proof of penetration falls flat in the face of what she had purportedly stated in the history.

[17] Be that as it may, the appellant's counsel could not have made submissions under this ground of appeal based on the medical report in the absence of it as part of the evidence led at the trial by either side. The trial counsel for the appellant for good reasons may have refrained from leading the medical report as part of the defense case, for it perhaps may have been adverse than favorable to the appellant.

[18] The appellant's counsel by comparing the medical report and the complainant's police statement submits that the complainant had been medically examined and her police statement had been recorded at the same time and she could not have been at two places simultaneously. These are also not matters elicited at the trial. Neither the medical report nor the police statement is part of the trial proceedings.

[19] The counsel prosecuting appeals in the appellate courts should not get into the habit of canvasing trial issues in appeal without them being adequately ventilated at the trial and without creating a proper evidential basis for such matters to be taken up in appeal. Therefore, this calls for an observation by this court that any appeal counsel should not fall into the error of raising grounds of appeal which have no factual or legal foundation referable to the proceedings in the original court. It would be unprofessional and unethical for any appeal counsel to do so.

[20] Therefore, there is no merit in the first ground of appeal.

02nd ground of appeal

[21] The appellant's counsel argues that the trial judge's directions at paragraph 55 on how to approach previous inconsistent statements is inadequate in the light of guidelines given in **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012) which confirmed **Singh v The State** [2006] FJSC 15] CAV0007U.05S (19 October 2006). It has be held that it is a paramount duty of the trial judge to direct and guide the assessors on how to act on the inconsistencies or contradictions or omissions (*vide* **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017).

[22] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal considered both **Singh** and **Ram** and sets down the law on inconsistencies as follows:

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).'*

[23] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

> *'[35].....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. ..... It is unrealistic to expect a witness to be a human tape recorder;"*

[24] The Court of Appeal followed the above decisions in **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019).

[25] The problem with this ground of appeal is that the appellant's counsel had not shown what previous inconsistent statements of the prosecution witnesses the trial judge had failed to direct the assessors on. I find that in paragraph 55 of the summing-up the trial judge had indeed referred to some inconsistencies of witness Kushbu with her police statement. Kushbu is the sister of the appellant who gave evidence for the appellant at the trial.

[26] I find that under the first and fifth ground of appeal the counsel had highlighted the fact that the complainant had stated in evidence that the appellant poked his finger as well as fingers into her vagina. It does not really matter as far as the act of penetration is concerned whether it was done with one finger or fingers. This is not an inconsistency that could shake the foundation of the complainant's evidence.

[27] Other than that, the counsel has not been able to substantiate the merits of the ground of appeal with reference to the evidence of the complainant. He has pointed out no material discrepancies, inconsistencies or omissions in the complainant's evidence in the written submissions or oral submissions which the trial judge should have pointed

out to the assessors. Citing legal authorities alone would not help an appellant to sustain an appeal ground and such an exercise is of little help to the appellate court. This court should not be expected to go on a voyage of discovery in search of merits or demerits of an appeal ground particularly when the appellant is represented by counsel.

[28] Therefore, the second ground of appeal has no merits.

03rd ground of appeal

[29] The appellant's counsel complains that the trial judge had not called for a second psychiatric report to determine the mental status of the appellant at the time the trial commenced but admits that such a report dated 26 November 2015 had been obtained at the pre-trial stage which had revealed that the appellant was fit to plead in court and not under the influence of mental illness at the time of the alleged offence. The counsel submits that the trial judge should have called for another psychiatric report when the trial commenced on 22 February 2016 because the appellant had behaved in an unruly manner at the commencement of the trial or even subsequently during the trial as he had given some weird answers in his testimony. He further submits that the trial judge should have directed the assessors to consider the defense of mental impairment though the appellant had not pleaded the same as a defense.

[30] I cannot agree more with the single Judge at paragraph 6 of his ruling when he said as follows regarding this ground of appeal:

> *'Before the trial commenced, the trial judge had obtained a psychiatric assessment report on the appellant. The report stated that the appellant was not suffering from any mental illness at the time of the alleged offences. Mr Yunus's contention is that the trial judge should have obtained a further psychiatric assessment report when the appellant behaved in an abnormal manner when giving evidence at the trial. Whether or not to obtain a psychiatric assessment report on an accused is a matter of discretion for the trial judge. The trial judge may obtain a psychiatric assessment report if he or she has reason to believe that the accused may be of unsound mind. In the present case, the appellant may have behaved in an abnormal manner when giving evidence, but there was no reason for the trial judge to believe that the appellant was of unsound mind. The appellant gave rational evidence and*

even his trial counsel made no complaint to the trial judge that the appellant was incapable of giving evidence due to unsound mind. This ground is unarguable.'

[31] Thus, the psychiatric report dated 26 November 2015 had effectively ruled out any mental impairment of the appellant at the time of the alleged offence and therefore, no directions to the assessors were required on any mental impairment of the appellant.

[32] His unruly behavior at the commencement of the trial and his alleged weird answers during his evidence had not convinced his own trial counsel to seek a fresh psychiatric examination or report on the appellant. There was nothing to indicate from the trial proceedings, summing-up or the judgment that the trial judge had felt any need to call for another psychiatric report on the appellant.

[33] Once again the appellant's counsel had failed to demonstrate concrete material which should have compelled the trial judge to have called for a fresh psychiatric report on the appellant or directed the assessors to consider mental impairment of the appellant on the defense of mental impairment. The appellant's state of mind was not a trial issue at all and the appellate counsel has attempted to create a mountain out of a molehill.

[34] The counsel has cited a leading English case involving a deaf and dumb accused *i.e.* **Rex v Pritchard** ([1836] EWHC KB 1 & (1836) 7 CAR. & P. 304), in support of his argument on assessing an accused's fitness to plead. ***Pritchard*** was followed in **R v Berry** 1876, 1 Q B D 447 and considered in **R. v Harris** 1897, 61 J. P. 792 and **R v Governor of Stafford Prison, ex parte Emery** [1909] 2 KB 81.

[35] I am afraid that ***Pritchard*** would be of little help to buttress the counsel's argument, for the England and Wales High Court (King's Bench Division) held that:

'The question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge. A similar case, that of Rex v Dyson, occurred before Mr. Justice James Parke, on the Northern Circuit, and he adopted the course which I shall now follow. There are three points to be inquired into:

- *First, whether the prisoner is mute of malice or not;*
- *secondly, whether he can plead to the indictment or not;*
- *thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence- to know that he might challenge any of you to whom he may object- and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation'*

[36] The first consideration does not apply to the appellant as he is not deaf and dumb. The second and third considerations have to be answered against the counsel's argument on the material available on record. The appellant had no difficulty in pleading to the indictment and comprehending the course of proceedings on the trial so as to make a proper defense against the evidence led by the prosecution.

[37] Therefore, this ground of appeal is devoid of any merits.

05th ground of appeal

[38] The appellant's counsel contends the trial judge's overturning of the assessors' opinion on the second count of rape on the basis that he had not given cogent reasons in doing so.

[39] The Court of Appeal embarked on a detailed discussion *inter alia* on the duty of the trial judge when he disagrees with the assessors in **Fraser v State** AAU 128 of 2014 (05 May 2021) and held:

> *'[24] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*

[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

*[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge 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)].'*

[40] Having examined the judgment in conjunction with the summing-up and the evidence led in the case, I have no reason to disagree with the decision of the trial judge to overturn the assessors' opinion and convict the appellant on count 02.

[41] Contrary to the counsel's submission, the trial judge after a brief narration of the evidence had analyzed the evidence with respect to the second count. He had found the complaint to be consistent and truthful. The trial judge had particularly found that the complainant had no reason to falsely implicate the appellant as she was staying with his mother and him in the same house and they were on good terms before the incident. The appellant's mother Shabnam had confirmed as much in her evidence.

[42] On the other hand, the trial judge had found the appellant to have lied under oath when he took up the position that the complainant was not at their house contrary to the agreed fact that she was living in that house at the material time. Further, the appellant's sister Kusbhu whose evidence was that she took away the appellant to her place and he was with her at the material time, had admitted that she told the police

that her mother Shabnam wanted her to make the false statement that the appellant was with her. She had then stated that she said so to the police because her husband Vinay Kumar had forced her. Appellant's mother Shabnam also had said that the appellant left their house and went to Kusbhu's house and that he was not at home at time material to the alleged offending.

[43] However, Kusbhu's husband Vinay Kumar for the prosecution had said in evidence that the appellant's mother Shabnam had asked them to give false statements to the police that the appellant was with them at the time he allegedly committed the offending but he had refused to do so.

[44] The trial judge had also highlighted the fact that the complainant as a 16 year old could not leave Shabnam's house in the night when her mother was away who was unable to come to her help due to the DVRO against her. It had appeared that it was Shabnam who had earlier assisted the complainant to make a complaint against her mother. The trial judge had correctly noted that the complainant in the following morning promptly complained to her grandmother and the mother of what had happened. Her mother Seshli had confirmed this in her evidence. In the circumstances the trial judge was right in his conclusion that the delay in complaining to the police against the appellant was justified and I think the trial judge's conclusion was right in the context of 'the totality of circumstances test' regarding how to assess complaint of delay suggested in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

[45] In ***Serelevu*** some guidelines were set down on how to deal with an allegedly delayed complaint. It was held:

> **'***[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in* ***Tuyford*** *186, N.W. 2d at 548 it was decided that:-*
>
> > *'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be*

> *taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is* ***whether the complaint was made at the first suitable opportunity within a reasonable time*** *or* ***whether there was an explanation for the delay.'***

[46] In **Tulshidas Kanolkar vs The State of Goa** Appeal (crl.) 298 of 2003 (27/10/2003) the Supreme Court of India said as follows on the effect of delay in reporting:

> *'In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case.'*

[47] If I am to comment on another relevant point at this stage, the question whether the complaint was made at the first available or suitable opportunity within a reasonable time or whether there was an explanation for the delay should have been canvassed as a live issue at the trial. If the appellant has not made it a contested issue thus preventing the complainant from affording an explanation, if any, for the delay, in my view, he cannot simply wait to raise it as an appeal point on the basis that there was an unwanted delay with no explanation or that the trial judge failed to direct the assessors on belated reporting. However, I may also add that it would be prudent for the prosecution to elicit an explanation, if available, from the complainant for any unreasonable delay as part of its case.

[48] Therefore, the trial judge having traversed all relevant issues affecting the credibility had concluded that he would not believe defense witnesses but believe the complainant and accept her to be truthful when she said that the appellant poked her fingers into her vagina. In short, in my view, the trial judge's reasons are cogent and they are founded on the weight of the evidence reflecting his views as to the

credibility of witnesses for differing from the opinion of the assessors on count 02 and those reasons are capable of withstanding critical examination in the light of the whole of the evidence.

[49] Therefore, I conclude that the 05th ground of appeal cannot succeed.

[50] In any event, the appellant's trial counsel had not sought redirections in respect of the complaints now being made on the summing-up as strongly commented upon 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). Thus, 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 did consider all of them fully.

[51] Since the single Judge had refused leave to appeal this court first has to consider the question of leave at this stage as in terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA; 171AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to 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.

[52] In the light of my consideration of all grounds of appeal I hold that none of them has a reasonable prospect of success and therefore I refuse leave to appeal.

Sentence

[53] The appellant's counsel's contention is that the sentence is harsh and excessive.

[54] 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.*

[55] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the sentencing tariff for child rape was set between 10-16 years of imprisonment:

> *"[66] The learned sentencing judge was correct in his approach. The Court of Appeal in its judgment at paragraph 18 said:*
>
> *'Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years. There can be no fault in the sentencing approach of the learned Judge referred to above (in para 13), save as to say we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve.'*
>
> *We indorse those remarks."*

[56] The counsel's argument is that the trial judge was wrong to have taken the sentencing tariff of 10-16 years for juvenile rape as the appellant had committed the offence on 15 March 2013 before the sentencing tariff was set by the Court of Appeal in **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and confirmed by the Supreme Court in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[57] The counsel's argument can be considered in the light of the principle of retrospectivity and Article 14(2)(n) of the Constitution.

[58] The Court of Appeal in **Narayan v State** AAU107 of 2016: 29 November 2018 [2018] FJCA 200 discussed this matter in great detail with reference to Article 14(2)(n) of the Constitution and retrospective operation of sentencing tariff:

> *"[39] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he did it. Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'."*
>
> *'[40] ..... that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. ..... Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation. Therefore, the new tariff that was set out in **Gordon Aitcheson** (supra) could be retrospectively applied to the instant case. The punishment for the substantive offence of rape in terms of Section 207 (1) (2) of the Crimes Act 2009 is life imprisonment which remains the same before and after **Gordon Aitcheson.'***

[59] The Court of Appeal once again dealt with a similar argument in **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) where principle of retrospectivity and Article 14(2)(n) of the Constitution were considered extensively and the Court concluded:

> *'[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable.'*

[60] Therefore, in the light of the above decisions the counsel's argument cannot succeed.

[61] In any event, 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 the appellate court 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).

[62] The ultimate sentence of 10 years and 01 month for the 02nd count is at the lower end of the tariff for juvenile rape applicable at the time of sentencing and therefore it is not harsh and excessive. The trial judge had committed no sentencing error.

[63] Therefore, the appellant cannot succeed in his sentence appeal as well.

Bandara, JA

[64] I have read the draft judgment of Prematilaka, ARJA and agree with his reasoning and conclusions.

Rajasinghe, JA

[65] I agree with the reasons and conclusion in the draft judgment of Prematilaka, ARJA.

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

.....

Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL

.....

Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL