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

CRIMINAL APPEAL NO.AAU 0055 of 2019
[In the High Court at Lautoka Case No. HAC 134 of 2017]

BETWEEN	:	**SEREMAIA BATIALIVA**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Appellant in person**	
	:	**Ms. L. Latu for the Respondent**	
Date of Hearing	:	**22 March 2021**	
Date of Ruling	:	**23 March 2021**	

RULING

[1] The appellant had been indicted in the High Court of Lautoka with one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Matanagata, Vatukoula, in the Western Division on 24 June 2017. The victim was 07 years of age at the time of the incident and the granddaughter of the appellant.

[2] The information read as follows.

FIRST COUNT
Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

***SEREMAIA BATIALIVA**, on the 24th day of June, 2017 at Matanagata, Vatukoula, in the Western Division, unlawfully and indecently assaulted "**JS**".*

SECOND COUNT
Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

***SEREMAIA BATIALIVA**, on the 24th day of June, 2017 at Matanagata, Vatukoula in the Western Division, penetrated the vulva of **"JS"**, a child under the age of 13 years, with his finger.*

[3] At the end of the summing-up on 23 April 2019 the assessors had unanimously opined that the appellant was guilty of both charges levelled against him. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 24 April 2019, convicted the appellant of both charges and sentenced him on 29 April 2019 to an aggregate sentence of 17 years and 10 months with a non-parole period of 16 years.

[4] The appellant's timely notice and grounds of appeal against conviction had been filed in person on 22 May 2019. Thereafter, Kevueli Tunidau Lawyers had tendered amended grounds of appeal only against conviction on 30 May 2019 and written submissions on 18 January 2021. The state had tendered its written submissions on 23 December 2020. The appellant had tendered an application to abandon his sentence appeal in Form 3 but without a date and therefore, he was advised to file a Form 3 afresh on 22 March 2021 if he wished to abandon his sentence appeal and the appellant did so.

[5] 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** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (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 and

Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Grounds of appeal urged on behalf of the appellants are as follows.

> ***'Ground 1***
>
> *The Trial Judge erred in law and fact by holding in his voir dire ruling at paragraph 49 that the Appellant's caution interview statement "was not obtained by an improper practice". In saying so, the Trial Judge failed to consider:*
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> *1.1 That the interview statement did not expressly show that ;*
>
> *(a) The Appellant was given the opportunity and liberty to read for himself the contents of the statement before signing it; nor*
> *(b) That the record of interview was not read to the Appellant by the police interviewing officer before the Appellant signed it.*
>
> *1.2 That Question 93 of the interview was very unfair to put to the Appellant and to be answered by him when the contents of his statement was neither read by him nor read back to him by the interviewing police office.*
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> ***Ground 2***
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> *The Trial Judge erred in law and fact by failing to direct the assessors in his summing up that the Appellant's interview statement did not expressly show the Appellant had read his interview statement nor that it was read back to him by the police interviewing officer.*
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> ***Ground 3***
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> *The Trial Judge misdirected himself in his judgment by failing to consider that it was unfair for the Appellant to sign his caution interview without being given the opportunity and liberty to read it himself nor that it was read back to him by the police interviewing officer.*
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> ***Ground 4***
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> *The Trial Judge erred in law and facts by misconstruing the law on recent complaint in the light of the Supreme Court decision in Rohit Prasad v The State, Criminal Petition No. CAV 0024 of 2018.*
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> ***Ground 5***
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> *The Trial Judge erred in law and fact by misdirecting the assessors and himself on the unreliability of the evidence of the complainant and other prosecution witnesses.*

[7] The trial judge had summarized the prosecution evidence as follows in the sentence order.

> *'2. The brief facts were as follows:*
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> *On 24th June, 2017 the victim who was 7 years of age and a class 3 student in the morning was sitting on the settee and reading at her home when the accused her Tatai meaning her grandfather came and sat beside her. The accused touched her thighs and then put his right hand inside her shorts and touched her private part meaning her vagina with his finger.*
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> *3. As a result of what the accused had done the victim felt pain in her private part. After the accused left the victim told her mother everything the accused had done to her she had waited for the accused to leave because she was scared of him.*
>
> *4. The mother of the victim Siteri Nabite reported the matter to the police the victim was medically examined. The doctor confirmed the victim had sustained injuries in her vulva. Upon investigations the accused was arrested and charged.*
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> *5. Both counsel filed written sentence submissions the prosecution also filed the victim impact statement of the victim for which this court is grateful.*
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> *6. Counsel for the accused presented the following personal details and mitigation on behalf of the accused.*

01st, 02nd and 03rd grounds of appeal.

[8] It is convenient to consider the all three grounds of appeal together as they arise from the same complaint. The appellant's argument is that the trial judge should have ruled out his cautioned interview at the *voir dire* inquiry as the cautioned interview did not show that he had the liberty and the opportunity to read its contents for himself or that it was read over to him by the interviewing officer before he signed it.

[9] Upon a reading of the *voir dire* ruling dated 24 August 2018 it appears that the trial judge had correctly approached his task by reminding himself of the relevant law laid down in **Ganga Ram and Shiu Charan vs. R** Criminal Appeal No. AAU 46 of 1983 where the following two tier test for the exclusion of confessions had been set down as follows:

> *"First, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats or prejudice or inducement by offer of some advantage which has been picturesquely described as "the flattery of hope or the tranny of fear" Ibrahim v R (1914) AC, 599; DPP v Ping Lin (1976) AC 574.*
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> *Secondly, even if such voluntariness is established there is also a need to consider whether the more general ground of unfairness exists in the way in which police behaved, perhaps by breach of the Judge's Rules falling short of overbearing the will, by trickery or by unfair treatment. R v Sang (1980) AC 402; 436 at C-E. This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account."*

[10] According to the *voir dire* ruling the appellant had objected to the admissibility of the caution interview on the following grounds:

> *"a) The accused was assaulted on the mouth by one iTaukei officer and the same officer also threw a lemon which hit his head during the caution interview at Vatukoula Police Station; and*
>
> *(b) The accused felt intimidated and harassed in a manner that made him to confess to the said charges."*

[11] Therefore, it is clear that the appellant had challenged his confessional statement based on the first limb of **Ganga Ram** (supra). He had not challenged it at all based on any ground coming under the second limb **Ganga Ram** (supra) at the stage of *voir dire* though he had given evidence under oath. PC 5260 Nemani Lutumailagi who was the investigating officer as well as the interviewing officer had stated that after each question was answered by the accused he read it back to the accused to confirm the same. He had also confirmed that he read back the caution interview to the accused. The witnessing officer had been present throughout the interview. The appellant had signed all the pages of the interview together with PC 5260 and the witnessing officer WPC Makelesi Ranadi.

[12] The appellant also complains that question 93 was very unfair to be put to him to be answered in the light of his complaint that the cautioned interview was neither read by him nor read over to him by the police. Question 93 is *'Is this your true statement?'* and the appellant had answered in the affirmative. As I have already held, the

appellant's complaint that the cautioned interview was neither read by him nor read over to him by the police is devoid of any merit. Therefore, his complaint based on question 93 too is baseless.

[13] In the circumstances, I hold that the 01st ground of appeal has no prospect of success in appeal. It is vexatious and should be dismissed in terms of section 35(2) of the Court of Appeal Act.

[14] The appellant alleges under the second ground of appeal that the trial judge erred in law and fact by failing to direct the assessors in his summing up that the appellant's cautioned interview statement did not expressly show that appellant had read his interview statement nor that it was read back to him by the interviewing officer.

[15] I have examined the summing-up and the judgment and find that the appellant had not given evidence at the trial proper but cross-examined the police witnesses regarding voluntariness of the cautioned statement. There had not been even a suggestion on the grounds of the appellant having not read his interview statement or that it was not read back to him by the interviewing officer. Therefore, in those circumstances there was no reason at all for the trial judge to have directed the assessors on the lines suggested by the appellant.

[16] Therefore, the 02nd ground of appeal has no prospect of success in appeal. It is vexatious and should be dismissed in terms of section 35(2) of the Court of Appeal Act.

[17] Under the third ground of appeal the appellant argues that the trial judge had misdirected himself in his judgment by failing to consider that it was unfair for the appellant to sign his caution interview without being given the opportunity and liberty to read it himself or for the police interviewing officer to read it back to him.

[18] As I have already held, the appellant had only contested the cautioned interview based on the first limb of **Ganga Ram** (supra) even at the trial proper. Therefore, there was no factual basis for the trial judge to give his mind to the question whether appellant

had to sign his caution interview without being given the opportunity and liberty to read it himself or for the police interviewing officer to read it back to him.

[19] Therefore, the 03rd ground of appeal has no prospect of success in appeal. It is vexatious and should be dismissed in terms of section 35(2) of the Court of Appeal Act.

04th ground of appeal

[20] The appellant has not elaborated at all in written submissions this ground of appeal that the trial judge had erred in law and facts by misconstruing the law on recent complaint in the light of the Supreme Court decision in **Rohit Prasad v The State**, Criminal Petition No. CAV 0024 of 2018 where it was held:

> *12. As one would expect, the law does not regard this as corroboration. In Anand Abhay Raj v **The State** [2014] FJSC 12, Gates P said at para 33:*
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> > *"...evidence of recent complaint was never capable of corroborating the complainant's account: R v Whitehead [1929] 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: Basant Singh & Others v **The State** Crim App 12 of 1989; Jones v The Queen [1997] HCA 12; Vasu v **The State** Crim App AAU0011/2006S."*

[21] The trial judge had dealt with recent complaint evidence at paragraph 44 of the summing-up.

> *'44. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.'*

[22] Thus, it is clear that the trial judge had not misconstrued the law relating to recent complaint evidence. He was even more elaborate in the judgment.

26. The complainant promptly told her mother about what the accused had done to her as soon as the accused left their house since she was afraid of the accused.

27. Although the complainant did not tell her mother all the details of what the accused had done to her, however, she did disclose material and relevant information about the unlawful sexual conduct on the part of the accused. The complainant told her mother the accused had put his fingers inside her panty.

28. The evidence of the complainant's mother was relevant to the question of consistency or inconsistency of the complainant's conduct and as such going to the complainant's credibility and reliability as a witness (see Anand Abhay Raj vs. The State, CAV 0003 of 2014 (20 August, 2014).

[23] Therefore, the 04th ground of appeal has no prospect of success in appeal. It is vexatious and should be dismissed in terms of section 35(2) of the Court of Appeal Act.

[24] In any event the appellant's counsel should have sought redirections in respect of the complaints now being made under the above grounds of appeal 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). The deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

05th ground of appeal

[25] The appellant contends that trial judge had erred in law and fact by misdirecting the assessors and himself on the unreliability of the evidence of the complainant and other prosecution witnesses. The counsel for the appellant had not elaborated or made any submission on this ground of appeal to substantiate the allegation of error of law and fact by the trial judge. This to me is grossly unprofessional and unethical. A trial judge should not be subjected to totally unwarranted and unsubstantiated criticism unless backed up by material facts and substantial argument. This sort of conduct may border on conduct unbecoming of a lawyer.

[26] I had the occasion to remark in **Vunisea v Fiji Independent Commission Against Corruption** - Ruling [2020] FJCA 169; AAU98.2018 (16 September 2020) and **Vunisea v Fiji Independent Commission Against Corruption** [2020] FJCA 170; AAU98.2018 (16 September 2020) on a similar situation as follows.

> *'[10] It is clear that the appellant's grounds of appeal have been framed in very general terms. The written submissions also render very little help in that regard as they lack elaboration and sufficient details. In **Rauqe v State** [2020] FJCA 43; AAU61.2016 (21 April 2020) the Court of Appeal remarked as follows [see also **Kishore v State** [2020] FJCA 70; AAU121.2017 (5 June 2020)] on framing of appeal grounds.*
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> > *'[14] It is clear that the sole ground of appeal is so broadly formulated that neither the respondent nor the court would have been in a position to understand what the real complaint of the appellant was. The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said*
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> > *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*
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> *[11] Similar observations were earlier made in the case of **Rokodreu v State** [2016] FJCA 102; AAU0139.2014 (5 August 2016) by Goundar J. as follows.*
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> > *'[4] I have read the appellant's written submissions. In his submission, apart from reciting case law, counsel for the appellant made no submissions on the grounds of appeal. The grounds of appeal are vague and lack details of the alleged errors. The Notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.*
> >
> > *[5] In the present case, the State was not able to effectively respond to the grounds because they were vague and lack details. It appears that the alleged errors concern directions in the summing up. A copy of the summing up, the judgment and the sentencing remarks were made available to the appellant after the conclusion of the trial. In these circumstances, the appellant cannot be excused for not providing*

better particulars of the alleged complaints in the summing up. Without reasonable details of the alleged errors, this Court cannot assess whether this appeal is arguable.'

[27] In any event, I find that the appellant's cautioned interview was only one item of evidence against him. The prosecution relied on the direct evidence of the victim, recent complaint evidences of her mother and the supportive medical evidence to prove its case beyond reasonable doubt. Thus, even if the entire confessional statement is excluded there is sufficient to evidence to sustain the conviction.

[28] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is reasonable or can be supported by evidence under section 23(1)(a) of the Court of Appeal Act (which were echoed in **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98).

> *'.....Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based.....*

[29] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[30] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[31] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaiyum**.

[32] Therefore, I dismiss the appellant's appeal against conviction in terms of section 35(2) of the Court of Appeal Act on the basis of being vexatious.

[33] Although the appellant had filed an application to abandon his sentence appeal in Form 3 which has to be considered by the Court of Appeal in due course, upon a perusal of the sentencing order in view of the sentence of 17 years and 10 months, I began to have some reservations of the propriety of the sentence in the larger context whether the sentence fits the gravity of the crime and in keeping with current sentences in similar cases. Uniformity is an important aspect of the sentencing exercise.

[34] The evidence shows that both sexual assault and digital rape had occurred in the same transaction and the hymen of the child victim had been intact (with no discharge or bleeding from the vagina) and only an abrasion (excoriation) on the left labia (which is outer part of vagina) on the lower side had been seen with no bruise. The said excoriation had been described similar to a friction related injuries caused by any blunt force applied across the skin surface.

[35] The trial judge had correctly identified the sentencing tariff as 11-20 years of imprisonment as set in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). He had cited **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)] too and picked 13 years as the starting point and added 06 years for aggravating factors to make it 19 years. One year had been deducted for the appellant being a first offender and 02 months for the period of remand.

[36] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[37] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will

not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[38] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) (supra) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[39] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and 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.

[40] This court is faced with exactly the same dilemma in this appeal. It is not clear what other factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated.

[41] On the other hand, the facts in the instant case cannot be compared equally to those shocking aggravating circumstances in ***Aicheson*** and ***Raj.*** Similarly, the sentence of 17 years and 10 months would seem excessive compared to the sentences meted out to accused with more aggravating features in child rape cases.

[42] 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).

[43] The fact that the ultimate sentence is within the tariff does not necessarily make it appropriate to the gravity of the crime. Therefore, I think that it is in the best interest of justice to leave it to the full court to look at the propriety of the sentence. In the circumstances, I am inclined to grant leave to appeal on the ground of appeal raised by the appellant in person in his initial appeal as to whether the sentence is harsh and excessive. The state is free to make fresh submission to the full court regarding the sentence.

[44] In **Chand v State** [2021] FJCA 5; AAU0070.2019 (13 January 2021), another case of child digital rape, the state submitted that there could have been an error in the ultimate sentence of 17 years, 05 months and 16 days in more or less similar facts and circumstances to this case. Since I have dealt with this issue in detail at paragraphs 38-63 in ***Chand***, I do not wish to repeat the same here but the state is advised to consider its own stand in ***Chand*** in relation to this appeal which also persuaded me to grant leave to appeal against sentence in this appeal.

Order

1. Appeal against conviction is dismissed in terms of section 35(2) of the Court of Appeal Act.

2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL