IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0071 of 2016

[In the High Court at Suva Case No. HAC 149 of 2014]

BETWEEN	:	**NITENDRA PRASAD BILASH**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Almeida Guneratne, JA**
		Gamalath, JA
		Dayaratne, JA
Counsel	:	**Mr. G. O'Driscoll for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**11 May 2022**
Date of Ruling	:	**26 May 2022**

JUDGMENT

Almeida Guneratne, JA

[1] Having read Justice Dayaratne's proposed judgment, reasoning and orders contained therein, I agree with them *in toto*.

Gamalath, JA

[2] I have the privilege of reading in draft the judgment and its conclusion of Dayaratne, JA and I agree with his reasoning's and the conclusion.

Dayaratne, JA

Application before this court

[3] The appellant is before this court consequent to the judgment of the Supreme Court dated 31 October 2019, wherein his application for special leave to appeal to the Supreme Court had been allowed and the application against his conviction of 30 May 2016 has been remitted to the Court of Appeal to be heard before a bench differently constituted to that which considered his application previously.

[4] When the appellant's renewed application for leave to appeal against the conviction and sentence was taken up before the full court on 15 February 2019, the appellant had moved to abandon both applications and the court had allowed such application by way of its judgment dated 7 March 2019. He sought special leave to appeal against that judgment from the Supreme Court and the judgment of that court was in consequence thereof.

[5] The appellant was charged in the High Court with one count of rape contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009. The learned trial judge found the appellant guilty and convicted him on the count of rape having disagreed with the unanimous opinion of not guilty of the assessors. He was later sentenced to 9 years, 11 months and 14 days imprisonment with a non-parole period of 7 years, 11 months and 14 days.

[6] His application for leave to appeal against the conviction and sentence was refused by the single judge by his ruling dated 22 March 2017. Twenty four (24) grounds had been urged in respect of the conviction whilst five (5) grounds had been urged against the sentence.

[7] His renewed application for leave to appeal against the conviction and sentence has been filed on 28 March 2017. I have noted that this application is identical to the application filed previously before the single judge but pages 5, 6, 10 and 11 are missing.

Hearing before this court

[8] Only the State had filed written submissions in this court. Considering the large number of grounds of appeal which are incoherent and repetitive in nature and considering the confusion that arises in view of the missing pages in the renewal application, this court inquired from the learned counsel for the appellant whether he was pursuing all grounds of appeal and if so what the total number was since that was not clear. In response, learned counsel for the appellant indicated to court that he had received the brief only the day before and hence is not in a position to offer any clarification but that he would rely on the grounds of appeal contained in the leave to appeal hearing before the single judge.

[9] He further informed court that he is not in a position to make any fresh submissions but would rely on the written submissions that had been filed at the hearing before the single judge. We have thereafter on 19 May 2022, received written submissions on behalf of the appellant in response to the written submissions filed by the respondent and they too have been taken into consideration by me.

[10] Considering the above, in this judgment, I will consider the twenty four (24) grounds of appeal in respect of the conviction and five (5) grounds of appeal in respect of the sentence that have been spelt out in the appellant's leave application before the single judge.

Evidence led at the High Court trial

[11] At the trial, the prosecution has led the evidence of the complainant, her mother, the doctor who had examined the complainant and two police officers. The

appellant gave evidence and also called two other witnesses to testify on his behalf.

[12] The offence has been committed on 22 July 2013 and the complainant was 16 years old. The appellant was 40 years old at the time. According to the complainant, her parents used to occasionally attend to household chores at the appellant's house. On the day in question the complainant had been dropped off at the appellant's house by her mother to baby sit the appellant's daughter.

[13] The appellant had returned home after work in the evening. His daughter had gone to have a shower and the complainant had been watching TV seated on a settee. The appellant had come and sat beside her and had pulled her pants down and had 'poked' two fingers inside her vagina. Her attempts to resist initially had been futile. She later managed to push him aside and he had then gone away. She had not raised cries out of fear. The appellant's daughter had come back after the shower and they had been in her room until the complainant's mother came and took her home. After they got home she had noticed blood on her panty and had told her mother of what had happened. A complaint had been made to the police that evening and she had been examined by a doctor the next day.

[14] The mother of the complainant has testified that she picked up the daughter that evening from the appellant's house. She looked worried and hence had inquired from her as to what was wrong. The complainant had remained silent but having gone home she had informed her that there was blood on her panty and had thereafter related to her what had happened. She had taken the daughter to the police station where both had made statements and gone to the doctor the following day, since it had been late in the night when they left the police station.

[15] The doctor who had examined the complainant was the next witness for the prosecution and has submitted the medical report. He had explained that he observed a tear of the hymen at 7 o'clock position and a blood clot. There had been no active bleeding at the time. The surrounding area had erythema which meant redness. In addition, there had been a small bruise 2 ½ cm in size noted above the nipple of her left breast.

[16] The doctor had expressed the opinion that *'if two fingers were inserted in a vigorous manner of a girl who has had no sexual intercourse, the injuries I have noted can occur'.* The injuries had been quite close to the entrance of the vagina. Considering the presence of the blood clot and redness, he had opined that the injuries were recent having occurred within 24 to 48 hours. He has also noted that the medical examination was consistent with the history given by the victim.

[17] The police officer who had recorded the appellant's statement and the police officer who had been the charging officer also gave evidence.

[18] The Appellant took the stand and denied the accusation. He stated that after he returned home his daughter was with the complainant right throughout and that his daughter never left the sitting room to have a shower as alleged by the complainant.

[19] The appellant's daughter also gave evidence and her position was that she was with the complainant even after the father had returned from work and that she did not leave the sitting room to have a shower whilst the complainant was at their house.

[20] The other witness who testified on behalf of the appellant was one of his tenants. She testified that she had met the complainant and her mother about two weeks after the incident and that they informed her of their willingness to drop the allegation against the appellant if he gave them $10,000. She did not inform the appellant of this until just a week prior to her giving evidence in court.

The grounds of appeal in respect of the conviction

[21] There are 24 grounds of appeal advanced in respect of the conviction. I am compelled to emphasize at the very outset that all grounds of appeal are replete with bare statements and are bereft of any legal foundation. They smack of

prolixity. Nevertheless, I will consider each one of those grounds, taking some of them together depending on the commonality of the matters contained therein.

Grounds 1, 2, 3, 14 and 16

[22] I will first deal with grounds 1, 2, 3, 14 and 16. They respectively are as follows;

> ***THAT*** *the Learned trial Judge erred in law and fact by failing to consider the medical evidence which stated that the injury appeared to have occurred within 24 to 48 hours and the doctor further defining in his evidence under oath that he should have stated that the injury has occurred within the last 48 hours from the time of the examination, thereby implying that the injury was possibly 2 days old.*
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> ***THAT*** *the Learned trial Judge erred in law and fact by failing to consider the doctor's evidence which confirmed that there were 3 possibilities through which the injuries alleged to have suffered by the complainant appears to have occurred, therefore, there was a reasonable doubt as to whether the injuries alleged to be suffered by the Complainant were caused by penetration by 2 fingers and one that was caused by the Appellant.*
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> ***THAT*** *the Learned trial Judge erred in law and fact in not accepting that the injuries sustained could be self-inflicted, therefore there was a reasonable doubt as to whether it was the Appellant who had caused the injuries to the Complainant.*
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> ***THAT*** *the Learned Trial Judge did not direct himself and take into consideration the evidence of the Medical Practitioner that there could be possibility that the complainant did not suffer any injuries as during the complainant's examination no injuries were found and as such there is a possibility that no injury was caused to her.*
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> ***THAT*** *the Learned Trial Judge erred in law and in fact in not directing himself when finding the Appellant guilty that when the Appellant was called at the Police Station he was not interviewed on the same day. The Police Officers told*

the Appellant that he would be interviewed later and despite the fact the Appellant requested that it was getting late night and he requested the Police Officers to take the Complainant for medical examination same night because he was concerned that the Complainant will go and do something to herself and thereafter blame the appellant by not doing so there was a substantial miscarriage of justice as it created serious doubts of self-inflicted injuries by the Complainant.

[23] Taken as a whole, they relate to the medical evidence. The position taken up by the appellant is that the injuries could have been self-inflicted and that the Learned trial Judge had failed to direct himself properly on that aspect.

[24] It must be noted that the medical evidence was very clear. At paragraph 15 and 16 hereof, I have referred to the testimony of the doctor. He had examined the complainant the day after the incident. He has stated during his examination-in-chief that the injuries were recent and that they would have been caused during the last 24 to 48 hours. When he was asked in cross-examination whether this meant that the injuries could not have been caused *'no sooner than 24 hours and no later than 48 hours'* his answer was *'actually it means within the last 24 to 48 hours. I should have just written within 48 hours but I gave a range'* (at page 145 of the High Court proceedings). The doctor has said that there is always a possibility that this type of injury could be self inflicted but if so would be very painful. He has clearly explained that he did not find evidence of an old tear of the hymen. In explaining the manner in which the injuries to the vagina may have been caused, he has said *'apart from sexual intercourse, anything that pierces or penetrates the vagina if it is done vigorously can cause a tear, be it a penis, fingers or a foreign object'*. He has expressed a clear opinion that the injuries could have been caused if two fingers were inserted to the vagina of a girl who has not had prior sexual intercourse.

[25] The learned High Court Judge at paragraphs 38 and 39 of his summing and paragraph 10 of his judgment has accurately summarized the evidence of the doctor and at paragraph 63 of the summing up, has dealt with the effect of medical evidence and how such evidence should be applied.

[26] The Supreme Court of India in the case of **State of Punjab v Gurmeet Singh** (1996) 2 SCC 384, forcefully expressed the view that *"The Court must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases, amounts to adding insult to injury'.*

[27] Section 129 of the Criminal Procedure Act 2009, has stipulated that corroboration of the evidence of a complainant is not required in order to secure a conviction in a case pertaining to a sexual offence. It must be borne in mind that the probative value of medical evidence is merely that of a corroborative nature. Hence, it is not mandatory on the part of the prosecution to lead medical evidence to corroborate the evidence of a complainant. Whilst the availability of medical evidence would be an advantage, its absence would not be detrimental to the prosecution's case.

[28] The learned counsel for the appellant has submitted in his recent written submissions that the appellant's position that the injuries of the complainant have been self-inflicted should not be seen as a far-fetched argument since body piercing and tattooing is a hobby that is practiced not withstanding its resultant pain. I do not find this to be an appropriate analogy.

[29] It is inconceivable that it would even be suggested that the complainant had inflicted the injuries upon herself. The opinion of the doctor that there was always a possibility that this type of injury could be self-inflicted (but if so would be very painful) should not be construed to mean that the medical evidence supported the appellant's suggestion that the injuries found on the complainant have been self-inflicted. He was expressing a general opinion and one must be mindful that there always is a possibility that injuries found on victims of violence could be self-inflicted. That does not mean that testimony of a witness should be viewed with suspicion and be rejected simply on account of such probability, unless there is some compelling reason to suspect such conduct. Probabilities may be endless. The task of the prosecution is to prove a case beyond reasonable doubt and not

beyond all doubt. Would a girl of such age and background resort to such conduct in order to falsely implicate a person? I do not think so and the learned trial judge certainly did not think so having regard to the evidence placed before him.

[30] As an expert witness the doctor has expressed his opinion based on his examination of the complainant and that opinion is consonant with the testimony of the complainant. The judge as the final arbiter of facts and law had properly directed himself on this aspect. The complainant has clearly denied that the injuries were self-inflicted.

[31] Importantly, in the case of **State of Tamil Nadu v Raju Nehru** (2006) 10 SCC 534, it was observed that *'Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether rape has occurred or not is a legal conclusion, not a medical one'.*

[32] There is no conflict between the description given by the complainant and the opinion expressed by the doctor pertaining to the manner in which the injuries have been caused. There was no basis whatsoever to suggest that the injuries were self-inflicted. The learned High Court judge has properly evaluated the evidence and directed himself correctly in arriving at his decision. There is no merit in these grounds of appeal and they must necessarily fail.

Ground 4

[33] Ground 4 advanced by the appellant is as follows;

THAT *the Learned trial Judge erred in law and fact in not considering that had the Appellant intended to commit the offence, he could have chosen the more probable venues, which were the 3 bedrooms in the house rather than choosing the sitting room, which was open and allowed any act done in the sitting room to be fully exposed to the Appellant's 10 year old daughter and an uninterrupted access to the daughter at any time.*

[34] This is a mere proposition and cannot form the basis of a ground of appeal. As to whether it would have been more probable that the appellant would have chosen a bedroom instead of the sitting room to commit the sexual assault is wholly speculative and has no consequence. Since it has been suggested in cross-examination, the learned trial judge nevertheless has given due consideration to this proposition at paragraph 56 of his summing up. This ground is totally baseless and does not merit any further consideration.

Grounds 5, 9, 11 and 15

[35] Grounds of appeal 5, 9, 11 and 15 respectively, are as follows;

> ***THAT*** *the Learned trial Judge misdirected himself and contradicted himself in accordance with the directions given in his summing up at (paragraph 8) when assessing the testimony of a witness.*
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> ***THAT*** *the Learned trial Judge erred in law and fact in holding that the evidence given by the 2nd Defence witness, Nishka Neha Bilash was not credible and that the demeanor at the time she gave evidence was not acceptable and failing to consider the age of the witness at the time of giving evidence, the position in which the witness was made to sit at the time of giving evidence, in that she was clearly facing the Trial Judge, all the counsels, the assessors and the Appellant throughout the entire time that she gave evidence, hence eye contact with the Appellant could not be avoided at the material time, and further that she gave clear answers to the questions asked and also, that similar type of demeanor was portrayed by the Doctor when he gave evidence in that there were long pauses before he answered the questions and, he took longer time to give his answers despite being a professional and deemed to have sufficient knowledge of the injuries in question and who looked down most of the time at the time of answering questions.*
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> ***THAT*** *the Learned trial Judge erred in law and fact in holding that the offence was committed by the Appellant when the Appellant's daughter was having her*

bath, without any cogent proof of evidence and not accepting the daughter's evidence when she said that she never went for a bath whilst the Complainant was at their home between 4.00pm to 5.00pm.

THAT *the Learned trial Judge erred in law an fact in holding that Neha Nishika Bilash's evidence was inconsistent and unreliable when Neha stated that she did not see her father put the bag on the dining table and taking out food, and also when she said he father was still eating when the Complainant's mother came whereas the Appellant's version was that he had already eaten before the Complainant's mother came, and failing to consider that whatever happened in the kitchen was irrelevant and that the main issue was as to whether the incident as alleged by the Complainant occurred in the sitting room during that time. The Learned Trial Judge misdirected and contradicted himself in his summing up paragraphs 9, 10 and 11.*

THAT *the Learned Trial Judge did not consider/analyze the Defence case adequately/or in detail in particular the evidence of the Accused's daughter who was present in the room with the victim but did not see the Appellant committing the offence as charged. In the circumstances there was a substantial miscarriage of justice.*

[36] These grounds have been advanced on the premise that the learned trial judge had failed to properly evaluate the evidence of the appellant's daughter and that he has misdirected himself when he concluded that he cannot accept her account of the events that happened on the day in question. Whilst the complainant has deposed in her evidence that the sexual assault took place when this witness had left the sitting room in order to take a shower, this witness as well as the appellant had maintained that she never left the sitting room in order to take a shower.

[37] Paragraphs 47, 48 and 49 of the summing up and paragraphs 12, 13, 22, 23 and 24 of the judgment bear testimony to the fact that the learned High Court Judge has not only evaluated her evidence carefully but had closely observed her demeanor when she was giving evidence. Her behaviour in the witness box has been specifically noted at page 158 of the High Court proceedings and the observation

made by the learned High Court Judge has been referred to, at paragraph 22 of his judgment.

[38] This witness was ten years old at the time of the incident and was thirteen at the time she gave evidence and the learned trial judge has been mindful of this since he has referred to her age. He has at paragraphs 22 and 23 of his judgment referred to the important part of her evidence and explained as to why her evidence is incapable of being accepted. Accordingly, he has concluded that; *'Considering all the evidence led in this case and the demeanour and deportment of witness Neha when she gave evidence, I cannot accept her account of what happened from the time the accused came home on that day in question till the complainant left with his mother'.* The learned trial judge has given reasons as to why he came to that ultimate conclusion regarding this witness. He was in the best position to come to such conclusion and it is not desirable for this court to subscribe to a different view in the absence of a valid reason.

[39] Considering the above, I find these grounds to be without merit and I reject them.

Grounds 6, 7, 8 and 13

[40] Grounds 6, 7, 8 and 13 respectively are as follows;

> ***THAT*** *the Learned trial Judge erred in law and fact in not directing himself when finding that the evidence of the Complainant was credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave to police and that she gave to the medical doctor. Failure to direct himself on previous inconsistent statement in law of the complainant caused substantial miscarriage of justice.*
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> ***THAT*** *the Learned trial Judge erred in law and fact in accepting the evidence of the Complainant when she said in re-examination that the reason she did not tell the police about the appellant kissing her breast was because she was scared and ashamed when it ought to hold that such an*

explanation was least probable in light of the fact that she was without any hesitation able to tell the police about the alleged penetration in her vagina by the Appellant, and therefore the Complainant's version of the whole situation ought not to be believed.

THAT *the Learned trial Judge erred in law and fact in holding the Complainant as a credible witness and not taking into account that on one hand the Complainant gave evidence that the Appellant had forced her pants down and held her tight and committed the offence whilst she was sitting down, whilst on the other hand she admitted that her clothes buttons were not broken, her clothes were still in good condition when her mother came to take her at 5.00pm, she did not have any bruises or marks over her hands or waist area, and she did not shout even to raise alarm for Neha Bilash to hear who was right inside the house or to the neighbors, whose houses were just 2 to 3 meters away.*

THAT *the Learned Trial Judge erred in law and in fact in misdirecting himself when he stated that "I observed the demeanor of the complainant when she gave evidence. I did not note any attempt by her to exaggerate. In my view, she gave honest answers" relying only on the demeanor of the Complainant and not whole evidence as a whole caused a substantial miscarriage of justice.*

[41] The above grounds refer to the inconsistencies in the evidence of the complainant and her demeanor. The main amongst the inconsistencies highlighted is that in her statement to the police she has not mentioned that the appellant had kissed her breast and that she had also failed to mention about the bruise on her breast. Under cross-examination she has admitted that she did not give all details to the police. She has explained that she did not inform the police about the bruise on her breast and that the appellant had kissed her breast because she was scared and shameful (page 137 and 138 of the High Court proceedings). The explanation given by the complainant is understandable. It is not realistic to expect a girl of sixteen years to narrate explicit details of a sordid encounter she has experienced to total strangers

such as the police. It is not unusual for her to have been in a state of shock and shame and omissions such as these no doubt are inevitable.

[42] The learned High Court Judge in his summing up has referred to the evidence of the complainant in great detail and has carefully evaluated her evidence. In doing so he has specifically referred to the inconsistencies. The specific contradictions and omissions have been taken in to account and he has commented on their impact in ultimately determining her credibility and the weight that can be attached to her testimony. These have been adverted to in the judgment as well (para 5, 6, 7, 15, 16, 17, 32 & 33 of the judgment and para 31, 32, 33, 34, 55, 56, 57 & 58 of the summing up).

[43] The following directions are important; *'Was the complainant a truthful witness and can you rely on her evidence? You saw the way the complainant gave evidence before this court. You should decide whether she was a credible witness and whether you can rely on her evidence. You should decide whether there are inconsistencies in her evidence as stated by the defence and assess the evidence of the complainant according to the directions I have given you on dealing with inconsistencies. If it is shown that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some others for example by a police officer in recording the statement where the witness is alleged to have given that version'* (para 57).

Further, at paragraph 58, he has said *'You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points it would not make a witness a liar. You must consider the overall evidence of the witness, the demeanour, the way he/she faced the questions inside this court, in deciding on a witness' credibility'.*

[44] After this detailed analysis he expressed the following view; *'I observed the demeanor of the complainant when she gave evidence. I did not note any attempt*

by her to exaggerate. In my view, she gave honest answers' (para 17 of the judgment). Although it is alleged in ground 13 that the judge has relied only on her demeanour and not on the entirety of her evidence, it is not so. It should not be construed that he has only been satisfied with her demeanour, since he has separately commented on her evidence having taken cognizance of the inconsistencies. He has not placed undue reliance on her demeanour.

[45] She reported the incident to her mother soon after the incident and the mother has made a statement to the police of this fact and has testified at the trial. Her recent complaint evidence no doubt added weight to the consistency of the complainant. Per **Kory White v The Queen** [1999] 1 AC 210 and **Anand Abhay Raj v The State**, [2014] FJSC 12, CAV0003 of 2014 (20 August 2014).

[46] I consider the following observation in **Gurmeet Singh** (supra) to be apt under the circumstances. Court said *'In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are of a fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable'.*

[47] The forceful observations of a similar nature expressed in the cases of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (1983) SCC 217, **Koroitamana v The State** [2018] FJCA 89; AAU0119.2013 (5 June 2008), **Swadesh Kumar Singh v The State** [2006] FJSC 15, **Praveen Ram v The State** [2012] FJSC 12; CAV0001.2011 (09 May 2012), **Mohammed Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Krishna v The State** [2021] FJCA 51; AAU0028.2017(18 February 2021) would certainly have echoed

in the mind of the learned trial judge when he arrived at the decision to accept the testimony of the complainant.

[48] The inconsistencies have been duly brought to the attention of the assessors and the learned High Court Judge has adverted to them in his judgment. He has taken the view that they are not significant so as to diminish the credibility of the complainant. He has believed her testimony and decided to base his decision on the totality of the evidence led at the trial. Upon an appraisal of the record, I have no reason to disagree with that conclusion. These grounds of appeal must fail.

Ground 10

[49] Ground 10 is as follows;

> ***THAT*** *the Learned trial Judge erred in law and in fact in not accepting the evidence given by the Appellant without any cogent reasoning.*

[50] The learned trial judge has given due consideration to what the appellant has stated in his evidence. He has examined and evaluated his evidence and also adverted to the fact that the appellant had no burden to prove his innocence or to disprove the evidence of the prosecution. His evidence has been discussed in paragraphs 43, 44, 45, 46, 66 and 67 of the summing up as well as paragraphs 11, 20 and 21 of the judgment. He has said further, that he has observed the demeanor and deportment of the appellant when he testified in court and having taken into account the totality of the evidence led at the trial, he is not able to accept the evidence of the appellant (para 20 of the judgment). Therefore, I do not find any basis to agree with this ground of appeal.

Ground 12 and 17 to 23

[51] Ground 12 and grounds 17 to 23 respectively are as follows;

THAT *the Learned trial Judge erred in law and fact in overturning the unanimous decisions of the Assessors of Not Guilty and failing to consider that the facts of the case and the evidence given by each of the witnesses clearly indicated that the Complainant was highly likely to be falsely made.*

THAT *the Learned Trial Judge erred in law and in fact in overruling the unanimous verdict of the Assessors of Not Guilty did not give cogent reasons as to why he overruled the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.*

THAT *the Learned Trial Judge erred in law and in fact in not adequately directing himself that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.*

THAT *the Learned Trial Judge erred in law an in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it.*

THAT *the Learned Trial Judge erred in law and in fact in not directing himself to refer any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

THAT *the Learned Trial Judge erred in law and in fact in not adequately/ sufficiently/ referring/ directing/ putting/ considering the Appellant's case to the Prosecution and Defence evidence.*

THAT *the Learned Trial Judge while correctly directing the assessors in paragraph 5 of his summing up that "You must not speculate about what evidence there might have been" misdirected himself and erred in law and in fact in speculating when he stated in his Judgment Paragraph 26 that "The defence counsel attempted to paint the picture that the complainant*

was poor, she wears short and tight fittings and she made this complaint in order to claim money from the accused. The unanimous opinion of the assessors that the accused is not guilty shows the defence counsel has in fact been successful in painting that picture in the minds of the assessors. In my view that picture had prejudiced the assessors mind against the complainant and the assessors failed to comprehend that those factors are not relevant in deciding whether the accused is guilty or not guilty of the offence charged."

THAT *the Learned Trial Judge erred in law and in fact by finding the Appellant guilty of the offence charged contradicted himself in his summing up at paragraph 67 when he gave inter alia 3 options:-*

i. *You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.*

ii. *Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.*

iii. *The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.*

That despite the above directions the 3 assessors found the appellant not guilty and the Learned Trial Judge by overturning their unanimous opinion of not guilty and without giving cogent reasons had caused a substantial miscarriage of justice.

[52] The complaint contained in these grounds is that the learned High Court Judge has misdirected himself in not properly taking into consideration the defence put forward by the appellant and that he has failed to give cogent reasons for having disagreed with the unanimous opinion of the assessors and deciding to convict the appellant.

[53] It is important to bear in mind that the role of assessors is different to that of jurors. Whilst the jury would be the ultimate judges of fact the assessors are not. Whereas the judge presiding over a trial with a jury is bound to accept the verdict of the jury, the opinion of the assessors is not binding on the judge who presides over a trial with assessors. Although the opinion of the assessors will have much persuasive value, the judge is entitled to disagree with the opinion of the assessors provided there is good reason to do so. His reasons to disagree ought to be cogent and has to be based on the weight of the entirety of the evidence that has been placed before court and he is expected to make a critical analysis of the evidence and the credibility of the witnesses. The reasons adduced by him for differing from the opinion of the assessors must have a direct link to the evidence that has unfolded before him. In situations where the accused himself has testified in court, it would be incumbent on the trial judge to carefully evaluate his evidence and give reasons as to why he has chosen to disregard his evidence. The judgment will have to reflect such position. Such pronouncements have been made in a series of decisions of the superior courts and I would like to, amongst others, cite the cases of **Ram Bali v Regina** (1960) 7 FLR 80, **Shiu Prasad v R** (1972) 18 F.L.R 68, **Ram v State** [2012]FJSC 12;CAV0001.2011 (9 May 2012), **Lautabui v State** [2009] FJSC 7;CAVoo24.2008 (2 February), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), and **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019).

[54] In order to determine as to whether the learned trial judge has conformed to such requirements, I will now make reference to his summing up and judgment. I must acknowledge that the learned trial judge has taken great pains in his summing up to set out and evaluate the evidence of each witness of the prosecution, the evidence of the appellant and the two witnesses who testified on behalf of the appellant. The applicable statutory provisions and legal principles, the

presumption of innocence, burden of proof, ingredients of the offence, the inferences to be drawn and not to be drawn, importance of the consistency and demeanor of witnesses, relevance of medical evidence and how such evidence has to be applied, impact of inconsistencies in testimony etc, have all been comprehensively and meticulously addressed.

[55] The learned trial judge has in his judgment indicated that he was directing himself in accordance with the summing up and has proceeded to set out the prosecution and defence cases respectively. He has briefly set out once again the evidence of all witnesses including that of the appellant. Thereafter, having analyzed the evidence of each witness, he has come up with a conclusion regarding each one of them. In dealing with grounds of appeal 5 to 11, 13 and 15, I have referred in detail to the manner in which the learned trial judge has dealt with the evidence of the complainant, the doctor, the appellant and the appellant's daughter. Therefore I will not repeat them here and will only examine the manner in which he has considered the evidence of the other two witnesses. The trial judge has dealt with the evidence of the complainant's mother in his summing up (para 35, 36, 37) as well as in his judgment and has concluded that *'I accept the evidence of the second prosecution witness, Reena Prasad that the complainant did complain to her about the alleged offence on 22/07/2013. I find that complaint was a prompt complaint'* (para 18 of the judgment).

[56] He has also dealt in detail with the evidence of defence witness Lata, both in his summing up (para 50, 51, 52 and 58) and judgment (para 25 – 30). At paragraph 25 of the judgment, the learned trial judge has pointed out the matters regarding which she testified, in the following manner;

'The third witness for the defence, witness Lata, mainly testified on the following three matters;

a) the complainant and her mother told her that they are willing to withdraw the complaint if the accused pays $ 10,000. This happened two weeks after the incident and this was the last time she met them.

b) The way the complainant dress is not good as she always wear "small clothes, tight fitting, tights'

c) The complainant is seen on the road, at the bus stop and shops. She said "they are there to borrow money, groceries, plenty of times they came to me' (para 25).

[57] The learned trial judge has devoted six more paragraphs in his judgment to analyze the evidence of this witness (para 26 – 31). It is clear that the trial judge believed that the evidence of this witness has portrayed the complainant in poor light in the minds of the assessors. In his judgment, the learned high Court Judge expresses the view that *'The unanimous opinion of the assessors that the accused is not guilty, shows that the defence counsel has infact been successful in painting that picture in the minds of assessors. In my view that picture had prejudiced the assessors' minds against the complainant and the assessors failed to comprehend that those factors are not relevant in deciding whether the accused is guilty or not guilty of the offence charged'*.

[58] Through his deep analysis of her evidence, focusing on the three points on which she testified, the learned trial judge has demonstrated why her testimony cannot be relied upon as well as why her evidence is irrelevant to the determination of the guilt or otherwise of the appellant. He has also explained why the testimony of this witness had no bearing on the credibility of the complainant or the weight of her evidence. Having done so he has concluded that; *'Therefore I hold that the three matters outlined in paragraph 25 above are not relevant to this case' (para 31 of the judgment)*. He has engaged in this analysis in order to explain why he was inclined to disagree with the opinion of the assessors.

[59] His ultimate conclusion is that *'Considering all the evidence led in this case, I find that the complainant was a credible witness. Her account of what happened to her on 22/07/2013 at the accused's house is reliable. I hold that the complainant's credibility is strengthened in view of the recent complaint she made to her mother, the second prosecution witness'* (para 32 of the judgment).

[60] Learned counsel for the State has relied on the case of **Bavesi v The State** [2022] FJCA 2; AAU044.2015 (3 March 2022) in discussing the legal position as to when a trial judge would be entitled to disagree with the opinion of assessors and what

reasons he should adduce if he decides to do. He has quoted extensively from this judgment of Gamalath J. Having traced the history of trials with assessors and the long line of judicial pronouncements pertaining to this aspect, he opines that *'Assessors are not required to give reasons for their opinion whereas the judge is bound by law to substantiate his position with good, sound reasons. Trial judges with their legally trained minds may perceive evidence in a manner which is not necessarily compatible with layman's view that is the opinion of the assessors. The system as I understand does not demand the treatment of the assessors' opinion as more realistic than that of a judge's, solely because of the fact that their understanding of the social dynamics are autochthonous. There can possibly be many nuances, subtleties, facets and dimensions relating to a set of evidence through which unequivocal, inevitable inferences could be drawn and the possibility for such subtleties to escape the laymen's eye is not an impossibility'*.

[61] Gamalath J has also pointed out that; *'The decided line of cases discuss the extent to which an appellate court would be inclined to interfere with the final decision of the judge, who disagreed with the majority opinion of the assessors. In my view this approach should be a holistic approach, in the sense, the nature of the evidence, the summing up and the contents of the judgment should all be considered together, in determining the accuracy of the trial judge's final determination'*.

[62] The learned trial judge has demonstrated that he had good reasons to differ from the opinion of the assessors. He has given due consideration to the totality of the evidence led at the trial and I have no reason to dispute or disagree with his conclusion that the prosecution has proved the case beyond reasonable doubt. In my view, the reasons alluded to by him in his judgment as well as his well conceived summing up satisfies the 'cogent reasons' test as postulated by the superior courts.

There is no reason therefore for this court to disturb his decision to find the appellant guilty as charged and convict him. Leave to appeal is refused. I affirm the conviction and dismiss the appeal.

Appeal against sentence

[63] I will now deal with the leave application regarding the sentence.

[64] The grounds of appeal are as follows;

THAT *the Appellant relies on Grounds 1 to 23 stated hereinabove.*

THAT *the Learned trial Judge erred in law and fact in ordering a sentence of 9 years 11 months and 14 days with parole of 7 years 11 months and 14 days, which is manifestly excessive and failed to consider that the facts of the case were not so grave as to amount to a harsh and severe penalty.*

THAT *the Learned trial Judge erred in law and fact in considering that the Police Officer had co-operated with the Appellant in allowing him more time during the investigation process when it ought to have considered that it was the Appellant who has cooperated with police for some 10 months, that was since the date of the complaint, until the time the Appellant was charged by Police, and therefore this factor ought to be considered as a ground for mitigation whilst passing the sentence.*

THAT *the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.*

THAT *the Learned Trial Judge erred in law and in fact in not taking into account consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.*

[65] In the case of **Simeli Bili Naisua v. The State,** Crim. App. No. CAV 0010 of 2003, the Supreme Court, following the cases of **House v The King** [1936] HCA 40; (1936) 55 CLR 499 and **Kim Nam Bae v The State** Criminal Appeal No. AAU0015 at 2 has specifically stated that the Court of Appeal will interfere with the sentence imposed by a trial court only if certain errors are established. They were identified as;

'(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'.

[66] The Court of Appeal has thereafter, applied these criteria in determining appeals against sentences imposed by the trial courts. Therefore, it is necessary for me to consider as to whether the grounds of appeal set out by the appellant in this case would fall under any of the above criteria.

[67] It has been stated in the written submissions of the appellant that the sentence was excessive and that the trial judge did not adequately consider the provisions of the Sentencing and Penalties Decree and that he has not taken into consideration the serious flaws in the evidence of the complainant and further, that the trial judge has not exercised his discretion judicially when deciding on the sentence. There is no further elaboration other than these bare statements and it is clear that none of these fall in to the criteria identified in the case referred to by me and that these grounds have no justification whatsoever.

[68] The trial judge has correctly referred to Section 207(1) of the Crimes Decree 2009 and Section 3(4) of the Sentencing and Penalties Decree 2009 and identified the sentencing tariff applicable to the offence committed. He has then applied the sentencing tariff for rape of a child victim as a term of imprisonment between 10 to 16 years. He has taken 10 years as the starting point for the sentence. There can be no criticism regarding the starting point he has selected. It is within the tariff.

[69] He has then taken the facts and circumstances of the case into consideration and has set out the following as aggravating factors:

"(a) breach of trust (since the parents of the victim had sent her to the Appellant's house to look after his daughter),

(b) the appellant had authority over the victim who was vulnerable at the material time and

(a) the age gap of 22 years between the appellant and the victim."

[70] Thereafter he has taken into consideration the mitigating factors that had been urged. They are as follows;

(a) the appellant had no previous convictions,
(b) he had an unblemished service of 13 years to the public,
(c) he was looking after his 63 year old mother and
(d) he was 41 years old and married with one daughter.

[71] He has added 4 years to the starting point on account of the aggravating factors and deducted 4 years on account of the mitigating factors. Accordingly, the sentence of 10 years imprisonment has been arrived at. The non parole period has been set at 8 years. I find that the learned trial judge has been quite generous in considering the above grounds as mitigating grounds, except of course the fact that he is a first time offender. Since the appellant has been in remand for a period of 16 days prior to his release on bail, the learned trial judge had decided to reduce 16 days from the sentence of 10 years.

[72] The Supreme Court in the case of **Koroicakau v The State** [2006] FJSC 5; CA V0006U.2005S (4 May 2006) has opined that what is important is the ultimate sentence and not each step in the process of reasoning that leads to the determination of the sentence.

[73] Accordingly, I see no reason to interfere with the sentence imposed by the High Court. The appeal in respect of the sentence is dismissed and the sentence imposed by the High Court is affirmed.

<u>The Orders of the Court:</u>

1. Leave to appeal refused.

2. Appeal dismissed.

3. Conviction and sentence affirmed.

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Hon. Justice Almeida Guneratne
<u>JUSTICE OF APPEAL</u>

COURT OF APPEAL FIJI

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Hon. Justice S. Gamalath
<u>JUSTICE OF APPEAL</u>

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Hon. Justice V. Dayaratne
<u>JUSTICE OF APPEAL</u>