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

CRIMINAL APPEAL NO. AAU 011 of 2019
[In the High Court at Suva Case No. HAC 064 of 2017]

BETWEEN	:	**ISOA RAINIMA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Mataitoga, JA** **Qetaki, JA**
Counsel	:	**Appellant in person**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**14 September 2023**
Date of Ruling	:	**28 September 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Suva on one count of assault with intent to rape contrary to section 209 of the Crimes Act, 2009, seven counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009, one count of sexual assault contrary to section 210(1)(a) and (2) of the Crimes Act, 2009, one count of criminal intimidation contrary to section 375(1)(a)(iv) of the Crimes Act, 2009 and robbery contrary to section 310(1)(a) of the Crimes Act, 2009 committed at Suva in the Central Division on 30 day of December 2016.

[2] The information read as follows.

*'**FIRST COUNT***

REPRESENTATIVE COUNT

Statement of Offence

***ASSAULT WITH INTENT TO COMMIT RAPE**: Contrary to section 209 of the Crimes Act 2009.*

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division assaulted one **M.S.** with the intention to rape her.*

SECOND COUNT

Statement of Offence

***RAPE:** Contrary to section 207(1) and (2)(a) of the Crimes Act 2009*

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division **had** carnal knowledge of **M.S.** without her consent.*

THIRD COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division penetrated the vagina of **M.S**. with his fingers without her consent.*

FOURTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

***ISOA RAINIMA** on the 30th day of December 2016 at Suva in the Central Division penetrated the vagina of **M.S.** with a stick without her consent.*

FIFTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the vagina of* ***M.S.*** *with his tongue without her consent.*

SIXTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the anus of* ***M.S.*** *with his fingers without her consent.*

SEVENTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the anus of* ***M.S****. with a stick without her consent.*

EIGHTH COUNT

Statement of Offence

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

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division penetrated the mouth of* ***M.S****. with his penis without her consent.*

NINTH COUNT

REPRESENTATIVE COUNT

Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210(1)(a) and (2) of the Crimes Act 2009.*

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division unlawfully and indecently assaulted the complainant* ***M.S.*** *by licking her vagina.*

TENTH COUNT

Statement of Offence

CRIMINAL INTIMIDATION*: Contrary to section 375(1)(a)(IV) of the Crimes Act 2009.*

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division criminal intimidated* ***M.S.*** *by threatening to kill her.*

ELEVENTH COUNT

Statement of Offence

ROBBERY: *Contrary to section 310(1)(a) of the Crimes Act 2009.*

Particulars of Offence

ISOA RAINIMA *on the 30th day of December 2016 at Suva in the Central Division robbed* ***M.S.*** *of 1 mobile phone, 1 gold plated wrist hand watch, I hand bag, 1 pencil case, pens, 1 pair of flip flops, charger, USP ID cards, clothes and $40.00 cash monies and at the time of such robbery did use personal violence on the said M.S.*

[3] The crucial issue at the trial had been the identity of the assailant and to establish the identity of the rapist, the prosecution had relied on the complainant's identification of the appellant at the material time. The appellant had remained silent but called his girlfriend (DW1) to testify that the appellant was with her on the day in question at Tamavua from 6.30 a.m. till next morning *i.e.* throughout the time relevant to the allegation of sexual abuses of the complainant.

Facts in brief

[4] On 30 December 2016, the complainant – MS (PW1), a university student aged 23, was walking along Holland Street towards Knolly Street in a bright sunny morning around 10.05 am. The appellant is alleged to have suddenly come from behind and shoulder tackled her. He had then thrown her over the metal railings. She had fallen

02 meters down the slope. The appellant had then jumped in after her and landed beside her and thrown several heavy punches to her face and head. She had cried out loud to raise the alarm, but it was to no avail. Her left eye had got swollen, and she had got a cut also below the left eye. The appellant had sworn at her, and threatened her not to 'misbehave'. The appellant had then forced her down the slope, and taken her through a tunnel below Holland Street. He had forced her to the other side, facing Wainibukalou Creek. He had stripped her naked.

[5] The appellant then allegedly forced her to a flat surface and licked her vagina (count no. 9) and later inserted his tongue into her vagina (count no. 5). Then the appellant had forcefully marched her downstream. On the way, he had forced her to a number of flat surfaces, and repeatedly raped her, as alleged in counts 2, 3, 4, 5, 6, 7 and 8 and severely dominated, subdued and threatened MS into submission. He had also sexually assaulted her (count no. 9), repeatedly intimidated her (count no. 10), and stolen her properties (count no. 11). All the acts of the offending had been committed without MS's consent and in the course of them he had forced her to suck his penis, inserted a finger and small stick into her anus, inserted 05 fingers and penis and thrust a big stick into her vagina and later strangled her with some nearby bush vines and stomped her head. He finally whacked her head three times with a big stick, and left her for dead exhibiting extreme cruelty. He also took close photographs of her vagina and anus in between at different angles and at one stage wanted to insert a pipe into her vagina. Her cries for help went unanswered and pleas for mercy was met with more abuse, contempt and brutality by the appellant. She came close to death on more than one occasion during the ordeal that lasted for an hour. Medical evidence showed the extreme trauma MS had undergone. There was distress evidence coming from MS observed by the doctor. MS was determined to remember her attacker's face to bring him to justice in case she survived. She identified him at two photographic identifications and at a formal ID parade where she struggled to hide her emotions.

[6] The assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment, convicted the appellant on all counts and sentenced him on 25 October 2018 to 23 years of imprisonment with a non-parole period of 20 years.

[7] A Judge of this court had refused the appellant's application for enlargement of time to appeal against conviction and sentence and the appellant had renewed his application before the Full Court but with several new grounds of appeal.

[8] The appellant's grounds of appeal before the Full Court are follows:

> ***'Conviction:***
>
> ***Ground 1***
>
> *THAT the investigation by police was procedurally flawed and was prejudicial to the appellant's right and interest to attain justice.*
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> ***Ground 2***
>
> *THAT the Judge erred in law and fact when he failed to properly sufficiently warn himself and the assessors on the issues of lies by prosecution witnesses Sgt. Salote Vuniwaqa and PW Sakiusa Masitoqi in relation to their original statements given to police, a failure that occasioned a miscarriage of justice.*
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> ***Ground 3***
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> *THAT the trial Judge erred in law and fact when he admitted propensity and evidence of bad character of prosecution witnesses and convicted where there was no credible evidence either direct or indirect proving the involvement of the appellant in the rape of robbery of the victim occasioning a miscarriage of justice.*
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> ***Ground 4***
>
> *THAT the Judge as judge of facts had failed to investigate and acquaint himself well in a far manner with the circumstances of the rape and evidence in totality where no material evidence support the charges and where witness conspired to pervert or defeat justice, a failure or neglect that was prejudicial to the interest of justice for the appellant*
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> ***Ground 5***
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> *THAT the conviction is not supported by the totality of the evidence in that there is a serious doubt to the identification of the appellant and that the appellant raped and intimidated and robbed the victim.*
>
> ***Ground 6***
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> *THAT the direction of the judge to the assessors during the summing up did not effectively canvas the defence thereby encumbering the appellant's right to a fair trial.*
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> ***Ground 7***
>
> *THAT the guilty verdict of the trial court was perverse and wrong in law.*

Additional Grounds

Ground 8

THAT the trial Judge had erred in law and fact for interfering the counsel's cross-examination and examination in chief during the trial which was unfair to the appellant's right to a fair trial.

Ground 9

THAT the processes of the audio transcript at the beginning of the trial was unfair to the appellant

Ground 10

THAT the trial Judge had failed to assess adequately or sufficiently the evidence of the prosecution witnesses and had also failed to give a clear or sufficient direction to the assessors regarding the witnesses evidence.

Ground 11

THAT the prosecution did not fairly conduct their case in a fair manner.

Sentence

Ground 1

THAT the learned Judge had erred in law and fact when he double counted the aggravating features of rape with other offences.

Ground 2

THAT the learned Judge erred in law when he imposed a sentence outside of the accepted tariff.

Ground 3

THAT the starting point was at the higher end of the tariff.

Ground 4

THAT the learned Judge had erred in law and fact when he subsumed the remand period as a mitigating factor.

01st ground of appeal

[9] The appellant argues that the police investigation had been flawed because he was originally arrested for theft and burglary in his neighborhood but kept in custody while the investigation into rape was being carried out which was not informed to him at the time of the arrest. He also complains that surveillance officers had not given

statements as to when the arrest took place and the police kept him in custody for more than 48 hours *i.e.* from 09 February 2017 to 15 February 2017.

[10] Cpl. 1297 Rusiate Vulaona (PW8) had arrested the appellant on 24 January 2017 for unrelated matters and he appears to have been released later. The prosecution had not led evidence as to the circumstances or date of the appellant's arrest for offending against MS. Nor had the defense counsel cross-examined any of the police witnesses to elicit these details. The appellant had remained silent and not disclosed the circumstances and the alleged date of his arrest. According to his then girlfriend and witness, Liku Paoni (DW1), they were at Tamavua for a week from 30 December 2016 and later went to Nanuku, Vatuwaqa. After two days the police had come and taken the appellant to Totogo Police Station (TPS). Thus, even DW1 had not disclosed the date of his arrest.

[11] There is no evidence to show that the appellant had been arrested on 09 February 2017 but the Magistrates court, Suva record shows that he had been produced there on 15 February 2017. Neither is there any evidence that he had not been informed of the reason for his arrest. I do not find at least suggestions to that effect in evidence. Therefore, at this stage without any evidential basis, this court cannot speculate on the date of arrest and the allegation that the appellant had not been informed of the reason for the arrest. On the other hand, if the appellant was already in custody, as he claims to have been, on suspicion of theft and burglary in his neighborhood, it is possible that he had been arrested for those offences on 09 February 2017.

[12] The evidence of MS shows that woman Sgt. Salote Vuniwaqa (PW2) showed her two sets of photographs and she identified the appellant's photograph as her attacker in both sets. PW2's evidence on the photographic identification was that she conducted it on 09 and 10 February 2017 and MS did identify the appellant from among 12 different photographs. Aside this inconsistency about the date, the evidence of MS and PW2 confirms that when the photographic identifications were carried out, if one were to believe the appellant's account, he was in police custody in connection with different offences. SP Sami Surend and WPC 3498 Vishah Reddy had testified that a police identification parade took place on 13 February 2017 where MS unmistakably identified the appellant as her attacker. These items of evidence taken together

demonstrate that the police had absolutely satisfied themselves that it was the appellant who was involved in the horrific crimes against MS on 30 January 2017, before he was brought before the Magistrates court on 15 February 2017 with definite allegations against him.

[13] Therefore, given the circumstances, I think it may not have been reasonably possible for the police to bring the appellant to court in respect of the offending on MS with definite allegations before 15 February 2017 which was clearly within 48 hours of the police identification parade. Once the police became sure of the appellant's involvement in crimes against MS, I see no reason why they did not inform him of the allegations against him. When produced before the Magistrate on 15 February 2017, the appellant's counsel had complained that the police had assaulted the appellant at the time of his arrest but not raised any complaint that he was kept beyond 48 hours or he had not been informed of the allegation of rape after he was unequivocally implicated crimes against MS.

[13] In any event, the right to be brought before a court within 48 hours of one's arrest is not an absolute one. If it is not reasonably possible to do so, he may be brought before a court as soon as possible thereafter [**Maya v State** CAV009 of 2015: 23 October 2015 [2015] FJSC 30]. What is important is whether the alleged extended custody had affected the fairness of the trial [**Murti v State** CAV0016 of 2008S:12 February 2009 [2009] FJSC 5] and resulted in a substantial miscarriage of justice. I see no evidence of either in this case even assuming that there may be a grain of truth to the appellant's complaint.

[14] The appellant also contends that at the time of his arrest he did not have a gold tooth; nor stopper or studs on his earlobes; nor visible scars of the stud. He however admits that he had the tattoo marks on his right hand but they did not resemble the description alleged by MS, though at the leave stage his position was that he did not have tattoo marks.

Gold tooth

[15] PW10 Sakiusa Masitoqi had known the appellant before and seen him having a gold tooth on his upper right teeth on 30 December 2016 but he was not to be seen where he was around 10.00 am (her second house) until she saw him again at 3.00 pm with DW1. PW10's evidence has destroyed DW1's alibi evidence. Cpl. 1297 Rusiate Vulaona (PW8) had seen the appellant spotting a gold tooth on his left upper set of the teeth at the time of his arrest at about 6.00 am on 24 January 2017. According to MS, she had noticed a gold tooth on her assailant's left side on 30 January 2017. A dentist for 32 years, Jone Domoni (PW9) had examined the appellant's teeth on 13 February 2017 and confirmed in his evidence that there had been a gold or silver tooth in the appellant's upper left canine tooth which had been later removed.

Tattoos

[16] I cannot see any prosecution witnesses at the trial having spoken to the appellant wearing stoppers or studs on his earlobes or scars of the stud. However, MS had seen tattoos on assailant's right arm but could not make out what it was. PW2 also had confirmed that the appellant had a tattoo on his right hand. PW10 also had seen tattoos on the appellant's hand. Even DW1 had said that the appellant had tattoos on his right hand. Thus, all prosecution witnesses and even the sole defense witness confirm that the appellant had tattoos on his right hand.

DNA evidence

[17] The appellant submits that the samples obtained from some items recovered from the crime scene did not match that of the appellant. The DNA report had been marked as PE5. Two witnesses namely PW6 and PW7 had spoken to PE5. The gist of the appellant's complaint at the leave stage was that his trial counsel (02) had not contested the prosecution evidence. He particularly criticized the trial counsel for not having contested the DNA report despite the fact that it had failed to connect him with the crime or the crime scene.

[18] The prosecuting counsel had in the course of leading the evidence of PW6 at one stage informed the trial judge that he was not relying on DNA evidence for the reason

that the lab was unable to match the swab sample provided by the appellant (*i.e.* the appellant's DNA) with samples of DNA from any object taken from the crime scene, the reason being that the DNA samples taken from the crime scene (known as touched DNA) had little amount of DNA in them. In other words, the report marked PE5 did not implicate the appellant. However, according to both witnesses PE5 cannot tell whether the appellant was at the crime scene or not. In other words, PE5 cannot rule out the appellant's presence any more than it cannot confirm his presence.

[19] I do not see any logical reason for the prosecutor to have led the evidence of PW6 and PW7 and mark the DNA report as PE2, for it did not advance the prosecution case at all.

[20] In cross-examinations and re-examination of PW6 it was revealed that an unknown DNA profile had been obtained from the stick (as per 3.17 of PE). The same unknown male profile had been found on the side of handbag and the shorts allegedly worn by MS but given to her by a person at the gas station. The appellant attempts to argue that this evidence points to the possibility of other unknown person being present at the crime scene. However, it is clear that in the course of collecting the stick, handbag and the shorts from the crime scene, another male including police officers would have come into contact with them as they were all touched DNAs. That does not establish at all or even cast a doubt of the presence of an unknown person at the crime scene during the commission of the crime or that someone else was the assailant. The only conclusion to be derived from PE5 is that DNA test did not connect the appellant with the crime scene but it did not in any way rule out his presence at the crime scene.

02nd and 03rd grounds of appeal

[21] The main thrust of the appellant's contention is based on the photographic identification conducted by PW2 who said in evidence that she did one photographic identification on 09 February 2017 at Totoga Police Station (PE3A) and the second one at Naqali police post (PE3B) on 10 February 2017. The appellant argues that she had stated in her police statement that both photographic identifications were conducted on 10 February 2017. However, it had not been shown in cross-examination that PW2 had indeed said so in her police statement.

[22] This court would only look at the trial proceedings and not the disclosures at this stage unless they had been in one way or the other brought to the main body of the trial. Parties are not allowed to raise appeal grounds and make submissions on matters never raised at the trial stage, for witnesses should be confronted with and given a chance to explain, if possible before being discredited. This is the only way a fair trial could be achieved in an accusatorial system such as ours.

[23] On the other hand, even if the appellant's submission is credible, he has not shown how that inconsistency affect the credibility of the photographic identification made by MS according to whom she twice identified the appellant among different photographs (the only photograph featuring in both sets was that of the appellant) shown to her by PW2 on 10 February 2017. It appears that PW2 had made an error as to when the photographic identifications exactly took place.

[24] The appellant also complains that when the investigating officer (PW2) Woman Sergeant 2952 Ms. Salote Vuniwaqa had shown two sets of photos (exhibits 3A and 3B) to the complainant where she had identified the appellant in both sets, he was already in police custody on 10 February 2017 and therefore, photographic identification should not have been carried out.

[25] The leave to appeal ruling has quoted the relevant paragraphs in Fiji Police Force Manual (FPM).

> *'[17] ……..paragraphs 7 and 8 of the 'Identification By Photographs' available at Fiji Police Force Manual (FPM) which is appendix 'A' (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85.*
>
> *[18] Paragraph 7 of FPM of states:*
>
> *'Identification Parades by photograph will be carried out only when the identity of the offender is unknown and there is no other way of establishing his identity; or if it is suspected that there is no chance of arresting him in the near future. A photographic identity parade of a person already in custody shall not be held.'*
>
> *[19] Paragraph 8 of FPM sets out in detail the procedure or the manner in which an identification parade by photograph should be conducted.'*

[26] In is very clear that the appellant was in custody for an unconnected offending when photographic identification was conducted and the police by that time did not have any clue as to who the perpetrator was except the descriptions given by MS as to the identity of the assailant. Thus, it is not correct to say that the appellant was in custody for the offending against MS when photographic identifications were carried out.

[27] The rationale behind the Fiji Police Force Standing Orders is to make sure that if an accused suspected to be connected with an offence is already in police custody, the police should ordinarily hold a police identification parade unless the accused declines to participate in which event the police would be justified in carrying out a photographic identification. Therefore, though technically the appellant was in custody, he was on his own accord not in custody in connection with the offending against MS and the police had not breached Fiji Police Force Standing Orders by having photographic identifications in this instance.

[28] In any event, the Fiji Police Force Standing Orders will have the same effect as 'judges' rules' and it is well recognized that they do not have the force of law and hence their noncompliance *ipso facto* would not render a particular act or conduct illegal or incapable of being acted upon. Nevertheless, it is important to bear in mind that compliance with them is most desirable since they play a crucial role in determining fairness and breaches of them are generally not condoned [**Temo v State** [2022] FJCA 63; AAU117.2016 (26 May 2022) & **Kumar v State** [2023] FJCA 125; AAU132.2018 (27 July 2023)].

[29] The appellant also seems to challenge the ability of MS to identify him because her one eye was swollen. Her evidence was that her left eye started swelling up and was numb and vision became limited, not imparted but clear after 8-10 hard punches by the appellant on her head and face but she could see with her right eye clearly. She also said that she spent about an hour looking at the attacker and she kept telling herself that when she escapes that was the face that she was going to bring to justice.

[30] The appellant also refers to MS's evidence and submits that though she had seen another iTaukei male peeping into the tunnel but could not identify him as her vision was impaired. However, MS had explained in evidence that the person peeping at

them from the top of the tunnel was about 10-12 footsteps away and the appellant kept throwing stones at him. The lighting inside the tunnel was dark but outside it was bright. She further clarified in cross-examination that she could not see that person's face clearly because he was right at the back where the water outlet was. Thus, MS could not identify the other iTaukei male not due to any impairment of her vision but due to surrounding circumstances.

04th ground of appeal

[31] The appellant's complaints seem to refer to alleged inadequate consideration of the trial judge of the improbability of MS's identification in view of the punches she alleged received at the hands of the attacker on her face.

[32] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [**Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[33] 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 (vide ***Fraser***)

[34] The trial judge had addressed the assessors on all the aspects complained of by the appellant at paragraphs 23-27 and analyzed them at paragraphs 37-43 of the summing-up. The trial judge had particularly brought to the notice of the assessors the crucial issue in the case namely the identification of the appellant as the assailant at paragraph 39 and directed them on Turnbull principles on identification at paragraph 40.

[35] In the judgment, the trial judge had directed himself according to the summing-up and particularly concerned himself with the identification of the appellant as the perpetrator at paragraphs 7 and 8 and determined that MS had correctly identified the appellant as her assailant.

[36] Coming back to the appellant's specific complaints as to the improbability of MS having identified her attacker, she had explained that the punches delivered by her attacker only limited her vision in the left eye but did not impair it. On the other hand, the vision of her right eye was not affected at all. The blood flowing down from the cut below her left eye had no impact on the left eye. This was not a case of a fleeting glance but where MS had spent an hour with her assailant and during that time she had ample opportunity to allow her mind to register his face from more than one angle and observed other features such as his gold tooth and tattoos. Against all odds, she was determined to remember his face in order to bring him to justice if she escaped. Having evaluated and analyzed MS's evidence from the trial transcripts, I see no merit in the appellant's complaint in identification.

05th ground of appeal

[37] The appellant once again challenges MS's identification at the police ID parade on the basis that she had been coached by police officers prior to the parade that one of the persons at the parade could be her attacker and she was not in a proper state of mind to make a proper identification.

[38] I have perused MS's evidence under oath and do not find any evidence where she had said that police officers had told her prior to the parade that one of the persons at the parade could be her attacker. Whatever MS had stated in her police statement is not

evidence and even does not form part of the trial proceedings on which a submission on inconsistency could be made out. There is not even a suggestion made to that effect to MS at the trial.

[39] As for her mental state at the time of the police ID parade, her evidence is that she took a couple of minutes to compose herself and entered the room where the ID parade had been arranged on 13 February 2017. She moved from the first person to the eighth in the line and then looked at the person standing at number 09 and identified him. He had looked back at her and lowered his head. Under cross-examination, MS specifically said that she suffered a shock after the shoulder-tackle but thereafter during the ordeal she was determined to survive. Her evidence shows that even under extreme trying circumstances and sexual abuse, she had acted tactfully to save her life from her attacker. She further added that the persons at the ID parade (except of course the appellant) were different to those in the two sets of photographs shown to her earlier.

06th ground of appeal

[40] The appellant complains that the trial judge failed to put the defense theory fairly to the assessors.

[41] The defense theory consisted of a suggestion that due to the events on that day including a shoulder-tackle, MS had mistakenly identified the appellant as her attacker coupled with his denial of any involvement in the offending and his alibi. As already pointed out, the trial judge had addressed the assessors on the issue of identity in adequate measure in the summing-up and the judgment. Similarly, the trial judge had put to the assessors the appellant's case and the alibi evidence of DW1 for consideration at paragraphs 28-30 & 44-45 of the summing-up. The fact that the judge had not mentioned in the summing-up about DW1's evidence that the appellant did not have a gold tooth which came only under cross-examination (as a result of an imprudent question by the prosecutor) could not result in a different opinion and verdict, for if the assessors and the judge did not believe her evidence as to the alibi they would not have obviously believed her when she said that the appellant did not have a gold tooth. PW10's evidence shows that DW1's alibi evidence was incredible.

07th ground of appeal

[42] The appellant argues that the guilty verdict was perverse. The trial judge had specifically held in the judgment that the assessors' opinion was not perverse. The appellant in effect seems to suggest that the verdict was unreasonable and cannot be supported by evidence.

[43] In **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021), the Court of Appeal stated the law as follows with regard to a situation where it is alleged that the verdict is unreasonable and cannot be supported by evidence [see **Pell v The Queen** [2020] HCA 12 (07 April 2020), **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) as well].

> *'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.*
>
> *[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.*

[44] This court took the same view in **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021). In and **Lal v State** [2022] FJCA 27; AAU047.2016 (3 March 2022) it was held

> *'[7] At a trial by jury with a judge where the jury had returned a verdict of guilty, the High Court of Australia in **Weiss v The Queen** [2005] HCA 81 delving into section 568(1) of the Crimes Act 1958 (Vic) [which is verbatim of section 23(1)(a) read with the proviso of the Court of Appeal Act in Fiji] held that an appellate court must review the whole of the record of the trial, make its own independent assessment of the evidence and determine whether, making due allowance for natural limitations that exist in the case of an appellate court proceedings wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty.'*

[45] I have examined the record of the trial and considered the alleged inconsistencies, discrepancies, omissions, improbabilities or other perceived inadequacies of the prosecution evidence including that of the complainant and the evidence of DW1 and in my view upon the whole of the evidence it was quite open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt. I myself have no reasonable doubt of the appellant's guilt.

08th ground of appeal

[46] The appellant complains that the interference by the trial judge has miscarried the trial and deprived him of a fair trial. His submission seeks to invoke what is known as 'the Hamilton grounds' after Lord Parker CJ's statement of principle in **R v Hamilton** (unreported, 9 June 1969) on judicial interventions during the course of trial which is as follows.

> *'……..But the interventions which give rise to a quashing of a conviction Page 6 are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury . . . . The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."*

[47] However, in **Peter Michel v The Queen** [2009] UKPC 41(Privy Council Appeal No 0075 of 2008) Lord Brown said that there is, however, a wider principle in play in

these cases merely than the safety, in terms of the correctness, of the conviction and perhaps its clearest enunciation is to be found in the opinion of Lord Bingham of Cornhill speaking for the Board in **Randall v R** [2002] 2 Crim App R, 267, 284 where, after remarking that "it is not every departure from good practice which renders a trial unfair" and that public confidence in the administration of criminal justice would be undermined "if a standard of perfection were imposed that was incapable of attainment in practice," Lord Bingham continued:

> *"But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."*

[48] In ***Lal*** the Court of Appeal in Fiji also analyzed the law relating to a similar complaint as follows.

> *'[27] A judge has not only the right but also the duty to put questions to a witness in order to clarify an answer or to resolve possible misunderstanding of any question by a witness put to him by counsel and even to remedy an omission of counsel by putting questions which the judge thinks ought to have been asked in order to bring out or explain relevant matters. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put he can intervene to see that deficiency is made good. It is generally more convenient to do this when counsel has finished his questions or is passing to a new subject. The nature and extent of a judge's participation in the examination of a witness is a matter within his discretion which must be exercised judicially. The judge should keep the scales of justice in even balance between the State and the accused. See **R.v. Darlyn** (1946) 88 C.C.C. 269; **Yuill v Yuill** [1945] 1 ALL E.R.183 (C.A.). However, it is wrong for a judge to descend into the arena and give the impression of acting as advocate (vide **R v. Flulusi** (1973) 58 Crim. App R378, 382).*
>
> *[28] However, though the trial judge has a right and often a duty, if justice is in fact to be done, to question witnesses, interrupt them and if necessary to call them in order he must do so within certain limits and in such a way that justice is seen to be done. When the trial judge goes beyond the limits and by his conduct gives the impression of assisting counsel for the prosecution and raised some doubt as to his impartiality only a new trial can erase such doubts (vide **Browilland v The Queen** [1988] I R.C.S. 39).*

*[29] In my view, the trial judge has gone beyond the limits permitted in taking over the cross-examination of the appellant. The High Court of Australia on the application of section 6(1) of the Criminal Appeal Act 1912 (NSW) which is similar to the proviso to section 23(1) of the Court of Appeal Act in Fiji held in **Wilde v The Queen** [1988] HCA 6; (1988) 164 CLR 365 that the proviso has no application where an irregularity has occurred which is such a departure from essential requirements of the law that it goes to the root of the proceedings where it can be said that without considering the effect of it on the verdict that the accused has not had a proper trial and there has been a substantial miscarriage of justice. Nevertheless, there is no rigid formula to determine what constitutes such a radical or fundamental error and in the end no mechanical approach can be adopted and each case must be determined its own circumstances.*

*[30] The Fiji Court of Appeal in **Hussein v State** [2019] FJCA 108; AAU034.2015 (6 June 2019) where it examined similar complaints of the trial judge having continuously intervened and interfered with the trial process depriving the appellant from having a fair trial, set aside the conviction and ordered a new trial.*

[49] A linchpin of the criminal justice system is the ability of defense counsel to represent a client effectively. The trial judge's conduct can hamper defense counsel's performance either by remarks that denigrate or threaten counsel, rulings that undermine effective representation, or other conduct that communicates to the jury the judge's disposition either to favor the prosecution or to disfavor the defense. The judge's behavior, in the various contexts described earlier, has the potential to seriously impair defense counsel's ability to represent the client effectively, and thereby prejudice the defendant's right to a fair trial[1]. Trial judges have extremely broad discretion to administer the trial, but must do so impartially and with deference to a defendant's right to the competent assistance of his attorney. When a judge makes rulings that undermine counsel's effectiveness and his ability to be the guiding hand to his client that the Sixth Amendment contemplates, where there is no clear justification for the judge's intervention, and when the defendant suffers prejudice from the judge's interference, then a reviewing court usually will reverse the

[1] Judicial Interference with Effective Advocacy by the Defense Bennett L. Gershman, Elisabeth Haub School of Law at Pace University (1997) - https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1938&context=lawfaculty

conviction, concluding that the judge abused his discretion and infringed on the defendant's right to a fair trial and the effective assistance of his counsel.[2]

[50] **Galea v Galea** (1990) 19 NSWLR 263 summarizes previous authorities regarding judicial interference:

> *"Had his Honour remained silent despite his developing opinions, the appellant might have had a legitimate cause to complain that he was not given an opportunity of correcting these opinions. He might then have been afforded no opportunity to meet the judge's developing view that the appellant was temporising, unduly technical and presenting a demeanour destructive of the acceptance of his credibility… Some of the judge's comments and questions were blunt and even robust. Whilst politeness in court is a virtue, departure from that standard will not necessarily require appellate correction"*

[51] **R v Esposito** (1998) 45 NSWLR 442

> *"The line that a trial judge walks when asking questions of a witness is a narrow one. There is nothing wrong with questions designed to clear up answers that may be equivocal or uncertain, or, within reason, to identify matters that may be of concern to himself. However, once the judge resorts to extensive questioning, particularly of the kind that amounts to cross-examination in a criminal trial before a jury, then he is treading on thin ice. The thinness of that ice will depend upon the identity of the witness being examined (here the person on trial), and on whether the questions appear to be directed towards elucidating an area of evidence that has been overlooked or left in an uncertain or equivocal state, or directed towards establishing a point that is favourable or adverse to the interests of one or other of the parties"*

[52] **R v Coe** [2002] NSWCCA 385

> *"In considering a ground of appeal such as this, it is necessary to read the passage objected to as part of the flow of the evidence as a whole to determine whether the overall effect of the judge's questions was to clarify the evidence of the witness or directed to establishing a point which is favourable or adverse to one or other of the parties"*

[53] **FB v Regina; Regina v FB** [2011] NSWCCA 217

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[2] Bennett L. Gershman, Judicial Interference With Effective Assistance of Counsel, 31 Pace L. Rev. 560 (2011), http://digitalcommons.pace.edu/lawfaculty/752/.

"It is obvious that, in the course of clarifying the evidence, and throwing a clearer light on the issues at trial, a judge may, without taking sides one way or the other, involuntarily or inevitably, assist either the prosecution or the defence. For my part, I cannot accept that this unintended consequence, if that is what happened, makes such an intervention inappropriate. I cannot accept that there is any principle that suggests a trial judge (whose task it is to determine the facts) should sit mute, especially in a situation where the lack of clarification and precision will hinder the ultimate fact finding process."

[54] **R v WE** (No.16) [2020] NSWSC 325

"Although difficulties will arise where the trial judge resorts to extensive questioning, particularly questioning of a kind that amounts to cross-examination, it is open to a trial judge to ask questions which are designed to clear up answers that may be equivocal, ambiguous or uncertain, or which may, within reason, be designed to identify matters that may be of a concern to the judge himself or herself."

[55] Lord Browne concluded in **Peter Michel v The Queen** (supra)

32. The need for the judge to steer clear of advocacy is more acute still in criminal cases. It is imperative that a party to litigation, above all a convicted defendant, will leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it.

33. None of this, of course, is to say that judges presiding over criminal trials by jury cannot attempt to assist the jury to arrive at the truth. On the contrary, they should. That is part of their task. Judges exist to see that justice is done and justice requires that the guilty be convicted as well as that the innocent go free….'

[56] Within the above broad framework, I have examined all specific instances relating to the appellant's complaints of the trial judge's alleged interference in the course of the trial set out in his written submission and though some of those instances could have been advisedly avoided, none of them were such as to deprive the appellant of a fair trial or demonstrated that the trial judge was biased in one way or the other.

09th ground of appeal

[57] The appellant submits that for a while since the commencement of the trial audio transcript was not available and it was unfair to the appellant.

[58] It appears from the record that for the first to third day of the trial, the audio recording had been either not clear or inaudible but from the fourth day it was available. This was the same for both parties. However, the trial judge had made detailed notes of all proceedings on the first three days. Entire cross-examination of MS, PW2 and other important prosecution witnesses had taken place on or after the 04th day of the trial and their evidence had been audio recorded in addition to judge's notes.

10th ground of appeal

[59] The appellant seems to suggest that the summing-up was not fair, balanced and objective by pointing out to several aspects of the evidence of MS and PW2 and stating that those instances affecting the credibility had not been highlighted in the summing-up.

[60] One aspect of his complaint relates to the photo identification conducted by PW2 as to who assembled the photos. Contrary to the appellant's assertion, PW2 had said under examination-in-chief and cross-examination that it was by another member of her police team who had done it. The appellant quarries why the appellant's photo was the only common one in both sets of the photos and that should have been clarified at the trial and put to the assessors. It is possible that when MS identified the appellant among the photographs in the first set, the police would have wanted to test the accuracy of her identification by putting his photograph among a different set of photos in the second set. The defense counsel had not sought to probe this matter in any detail as a trial issue.

[61] The appellant attempts to discredit MS's ability to identify her attacker as he was behind her 'most of the time' but the instances when he was right in front of her face were many and long lasting in the course of the ordeal. The appellant questions her evidence as to the height of the tunnel in comparison with that of the investigating officer. Obviously, MS's estimate was based on her common sense and not an exact measurement in the midst of a terrible experience. He also seems to question why MS had not suffered injuries on her hands if she attempted to cover herself with hands against his attack with a stick. However, medical evidence had revealed tenderness on

the left shoulder, superficial tear (laceration & abrasion) on the upper back of the head which amply corroborates her evidence on the third attack with the stick.

[62] The appellant complains that the trial judge had not addressed the assessors on the above matters. A trial judge is not expected to repeat every item of evidence taken in the presence of the assessors. The assessors had also listened to the addresses of the counsel for the state and the defense. The trial judge's duty is to present the important aspects of the evidence in a fair, objective and balanced manner. I am convinced that the trial judge's summing-up measures up to the required standard in those respects.

11th ground of appeal

[63] The appellant argues that the prosecution had not conducted the trial in a fair manner by not calling several witnesses who had given statements to the police.

[64] Calling witnesses is the prerogative of the prosecution. As long as it had disclosed all relevant disclosures to the defense without deliberately suppressing material witnesses and documents, the prosecution has the freedom to choose its witnesses to call at the trial. Had the appellant's counsel felt that there were other witnesses disclosed by the prosecution who could have shed more light on the identity of the 'real' attacker or cast a reasonable doubt of the appellant as the attacker, he could have called them as defense witnesses. For obvious reasons, the defense only called the appellant's then girlfriend (DW1).

12th ground of appeal (sentence)

[65] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows.

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he*

allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).'

[66] ***Bae*** was adopted by the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499.

[67] The appellant complains of double counting in that the trial judge had allegedly taken into consideration the other charged offences such as assault with intent to rape and criminal intimidation as aggravating factors in arriving at the sentence for rape. He also submits that the trial judge had used elements of 04th and 07th rape counts as aggravating factors.

[68] I find the following statements in the sentencing order in paragraph 9(i) and (ii).

'....you shoulder tackled the complainant and threw her over the metal railings on 30 December 2016…'

'…….You began by shoulder-tackling her on Holland Street. You then threw her over the metal railings. You followed her and threw several hard punches on her face and head. Your forced her down a slope. You repeatedly swore at her and threatened to kill her if she did not follow your commands….'

'…….You stuck sticks into her vagina and anus….'

[69] I think there is merit in the appellant's submission that the trial judge had considered facts relating to two of the other charged acts namely assault with intent to rape and criminal intimidation in the sentencing process for rape and those offences themselves. Further, those facts were also constituent factual elements of assault with intent to rape and criminal intimidation. Since, the trial judge had made sentences for assault with intent to rape and criminal intimidation run consecutively to rape, he may have fallen into the error of double counting as far as rape is concerned as the trial judge was not imposing an aggregate sentence. There is also merit in the appellant's submission that the very particulars of the elements 04th and 07th rape counts had been considered as aggravating factors.

13th ground of appeal

[70] The appellant challenges the sentence imposed on rape as outside the tariff for adult rape. The tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. Thus, the appellant's sentence is outside the tariff.

[71] In **Zhang v R** [2019] NZCA 507 the Court of Appeal of New Zealand stated:

> *[48] Consistency is not of course an absolute and in the guideline judgments, this Court has been careful to emphasise that sentencing is still an evaluative exercise.* ***The guideline judgments are just that, "guidelines", and must not be applied in a mechanistic way****. The bands themselves typically allow a significant overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified.'*

[72] Sentencing is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise[3].

[73] In **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023) the Court of Appeal remarked

> *'[46] Sentencing guidelines are designed to find the correct equilibrium between giving a sentencing magistrates or judges sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases. Justice O'Regan in* ***R v Taueki*** *[2005] 3 NZLR 372 (CA) went to significant lengths to highlight the need to avoid a 'rigid or mathematical approach'.*

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3 Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 Law and Contemp Probs 265 at 265.

[74] I am inclined to adopt the approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)] in dealing with the sentence appeal *i.e.* 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 and whether in all the circumstances of the case the sentence is one that could reasonably be imposed.

[75] In **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015) the Supreme Court said

> *'[51] In my considered view, it is precisely because of the complexity of the sentencing process and the variability of the circumstances of each case that judges are given by the Sentencing and Penalties Decree a broad discretion to determine sentence. In most instances there is no single correct penalty but a range within which a sentence may be regarded as appropriate, hence mathematical precision is not insisted upon. But this does not mean that proportionality, a mathematical concept, has no role to play in determining an appropriate sentence. The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process…'*

[76] One of the issues is whether the trial judge had breached the default position of concurrency in sentencing the appellant as three sentences for separate offences committed in the same transaction had been made consecutive contrary to on 'one-transaction rule' which simply is that where two or more offences are committed in the course of a 'single transaction', all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive (see **Wong Kam Hong v State** [2003] FJSC 13; CAV0002.2003S (23 October 2003

[77] Section 22(2)(c) of the Sentencing and Penalties Act allows a judge to depart from the default position of concurrency of every term of imprisonment and thus, 'one transaction rule' by directing otherwise and justifying the consecutive sentences. The trial judge had said that due the level of violence and cruelty the appellant had shown to MS and considering how he had damaged her physically and psychologically, he had decided to make the three sentences consecutive. Thus, no blame could be attached to this departure from the default position of concurrency in this instance.

[78] The next question is whether there has been any breach of totality principle & proportionality principle.

[79] The totality principle and the proportionality principle are related concepts in criminal sentencing, but they are not the same. They both pertain to the idea of ensuring that the punishment imposed on a convicted individual is fair and just, but they approach this goal from slightly different perspectives

[80] In **Mill v R** [1988] HCA 70; (1988) 166 CLR 59 (8 December 1988) the High Court of Australia said of the totality principle as follows.

> *8. The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, Principles of Sentencing, 2nd ed. (1979), pp 56-57 as follows (omitting references):*
>
> *"The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'*

[81] The totality principle is primarily concerned with the overall sentence an individual receives when they have been convicted of multiple offenses in a single criminal case or during a specific period. It suggests that when a person is convicted of multiple offenses, the sentencing judge should consider the cumulative impact of all the sentences to ensure that the total punishment is not excessive or disproportionate to the overall criminal conduct. In essence, it encourages judges to take into account the full range of offenses committed by the defendant and the combined impact of the sentences to avoid overly harsh punishments that do not fit the overall criminal behaviour. Totality principle is particularly important when sentences are made consecutive rather than concurrent.

[82] The proportionality principle, on the other hand, is a broader concept that applies to individual sentences for single offenses. It emphasizes that the punishment for a particular crime should be proportionate to the seriousness of that specific offense. In other words, the punishment should fit the crime. This principle ensures that sentences

are not unduly harsh or lenient, and it aims to strike a balance between the severity of the crime and the punishment imposed.

[83] In summary, while both the totality principle and the proportionality principle seek to achieve fairness in criminal sentencing, the former focuses on the combined impact of multiple sentences in cases of multiple offenses, while the latter addresses the appropriate punishment for each individual offense. Both principles are important in ensuring that the criminal justice system administers just and equitable sentences.

[84] On the question of proportionality of the sentence of 16 years for rape, the trial judge had particularly highlighted the aggravation of the offending in the sentencing order as follows.

> *'9. The aggravating factors in this case were as follows:*
>
> *(i)* ***Pre-planning of the offences.*** *Looking at the total evidence provided in the case, it showed that you had obviously pre-planned these offending. You knew the Holland Street well. You knew the tunnel and the surrounding environment very well. You knew that the public does not often come to the area. You knew it would be an ideal place to offend against the complainant. You knew the privacy in the area. You knew that even if the complainant raised the alarm, it would be difficult for others to hear her. With the above knowledge in hand, you shoulder tackled the complainant and threw her over the metal railings on 30 December 2016, and later proceeded to offend against her. You were like a predator, waiting to pounce on unsuspecting innocent girls, who were going about their own business on Holland Street. You were cunning and deceitful. You must accept that your type of behaviour will not be tolerated by society. You must also accept that predators like you, will have to serve a long prison sentence, to protect innocent young girls, like the complainant.*
>
> *(ii)* ***The level and extent of the violence accompanying the offending.*** *Technically, from a legal perspective, you raped the complainant numerous times on 30 December 2016, thus the counts in the information. However the level of violence you unleashed on the complainant during her one hour ordeal was the worst I've seen in the 24 years I have sat on the bench. You began by shoulder-tackling her on Holland Street. You then threw her over the metal railings. You followed her and threw several hard punches on her face and head. Your forced her down a slope. You repeatedly swore at her and threatened to kill her if she did not follow your commands. Then you continually subdued and dominated her. You stripped her naked and repeatedly offended against her. You stuck sticks into her vagina and anus. You continually threatened her with violence. You later tried to strangle her by tying her neck to a vine. Later you hit her head three times with a stick and*

knocked her unconscious. You left her for dead and fled the crime scene. You must realise these type of behaviour cannot be tolerated in our society, and you will have to be punished for the cruelty you unnecessarily unleashed on this girl on 30 December 2016. I therefore ask you not to complain about the long prison sentence I am about to give you.

(iii) ***Physical and Psychological Injuries to the Complainant****. After your offending, the complainant was medically examined at CWM hospital. A medical report showed the extensive injuries she suffered. This report was tendered in court as prosecution exhibit no. 6. She suffered injuries to her face and head. She also suffered injuries to her private parts. These were the results of your offending. During the trial, it was evident that she was finding it difficult to relive her ordeal in the courtroom when giving evidence. She fainted in the courtroom. The above are the physical and psychological damage you have caused the above individual, and you must not complain when you are punished for it.*

(iv) Through your offending, you had shown no regard to the complainant's right not to be harmed, no regard to her right as a human being and no regard to her right to live a happy and peaceful life.'

[85] In fact, the absolute horrific experience MS faced on this eventful day for about an hour is much more than the sentencing judge had managed to put down in writing under aggravating factors. Perhaps, one could picture the ordeal only by reading the full transcript of MS's evidence. It shocks the conscience of any human being, for her attacker's conduct and behavior was sub-human and beastly which the trial judge described as the worst that he had seen in his 24 years on the Bench. According to the doctor, this was one of the worst cases of rape that had come before her and MS was one of the most traumatised patients she had ever seen. Worst, according to MS all the time the attacker was sober. Her evidence suggests that he acted rationally and carefully calculated all his moves.

[86] MS came close to death on more than one occasion when forced by the assailant to do various acts. One wonders how she managed to keep calm and acted in such a way to avoid death. For that she had to pay a heavy price in suffering sexual abuse on every conceivable way. It is almost a miracle that she survived to tell her tale of woe. To me, MS comes across as a young women of steel who refused to die but determined to live to fight another day to bring her perpetrator to justice under extremely dangerous, painful and humiliating circumstances.

[87] Therefore, 16 years of imprisonment for rape in this instance was not disproportionate to the gravity of multiple acts of rape of all forms. It does not violate the proportionality principle.

[88] As for the trial judge making three sentences to run concurrently so that the appellant has to serve a total of 23 years, I am of the view that it does not offend the totality principle either. In my view, the appellant deserves every year, month, week, day and minute of his sentence. I am not surprised that the trial judge decided to keep a sexual predator such as the appellant out of the reach of the community for 23 years.

14th ground of appeal

[89] The appellant complains of the trial judge having selected 13 years as the starting point. By itself, the starting point is close to the higher end of sentencing tariff for adult rape.

[90] However, 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)]. The approach taken by the appellate court in an appeal against sentence 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)]. The appellant's sentence is outside the tariff for adult rape but does not violate one transaction rule, totality or proportionality principles. It fits the extreme gravity of the crime.

15th ground of appeal

[91] The appellant submits that it was wrong for the trial judge to have taken pre-trial remand period as a migrating factor. The only mitigating factor identified by the trial judge was the appellant's remand period. Thus, after picking 13 years as the starting point and adding 04 years for aggravating factors, the only thing left for the judge was to consider mitigating factors. There were none and the trial judge had deducted 12

months remand period as a mitigating factor from 17 years and arrived at 16 years. There is no sentencing error of principle.

Mataitoga, JA

[92] I concur with the draft judgment.

Qetaki, JA

[93] I have read the judgment in draft, and I agree entirely with it, the reasoning and the orders.

Order of court

1. Enlargement of time to appeal against conviction is refused.
2. Appeal against conviction is dismissed.
3. Enlargement of time to appeal against sentence is refused.
4. Appeal against sentence is dismissed.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

.....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL