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

CRIMINAL APPEAL NO. AAU 084 of 2016
[In the High Court at Suva Case No. HAC 015 of 2015]

BETWEEN	:	**TOMASI BULAGO**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Bandara, JA** **Kulatunga, JA**
Counsel	:	**Appellant in person** **Mr. S. Babitu & Ms. R. Uce for the Respondent**
Date of Hearing	:	**01 February 2023**
Date of Judgment	:	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read the draft judgment of Kulatunga, JA and agree with his reasons and conclusions.

Bandara, JA

[2] I have read the judgment of Kulatunga, JA in draft and agree with his reasons and proposed orders.

Kulatunga, JA

[3] The Appellant was charged with 6 counts of rape and a count of sexual assault. After trial he was found guilty and convicted of Counts 1, 3 of rape and count 7 of sexual assault and acquitted from all the other counts of rape. He was sentenced to 13 years, 6 months and 25 days imprisonment with a non-parole period of 11years 6 months and 25 days. He being dissatisfied has preferred this timely appeal against the conviction as well as the sentence.

[4] At the conclusion of the trial the assessor unanimously of the first count and by majority of the seventh count opined that the appellant was guilty. They were unanimous that the appellant was not guilty of the fourth and fifth counts and the majority opinion of the assessors was that the appellant was not guilty of the sixth count. The trial judge agreed with the said opinions. The assessors were directed not to consider the second count and the trial judge found him not guilty of that count at the conclusion of the prosecution case. The assessors were of the unanimous opinion that the appellant was not guilty of the third count but the trial judge disagreed and proceeded to convict him on the said count.

[5] The Legal Aid Commission filed amended grounds of appeal against conviction and sentence on 21 March 2019 along with written submissions.

[6] Grounds of appeal urged before the Single Judge on behalf of the appellant are as follows;

Appeal against Conviction

1. *THAT the conviction was unreasonable and cannot be supported by the totality of the evidence, giving rise to a grave miscarriage of justice, in particular, to the following:*
   (a) The guilty verdict regarding Count 7 was unreasonable or inconsistent; and
   (b) The guilty verdict regarding Count 1; Count 3 and Count 7 was unreasonable or inconsistent; and
   (c) Failing to give cogent reasons as per the "totality of circumstances test" regarding the issue of the delay in making a complaint.

Appeal against Sentence

2. *The Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*
   (a) "double counting" an aggravated feature to enhance the sentence; and
   (b) Not properly considering the mitigating factors to adequately decrease the sentence.

[7] Granting of leave was considered by a single Judge who upon considering the aforesaid grounds of appeal by ruling dated 02nd July, 2020 refused to grant leave both in respect of the appeal against the conviction and the sentence. The Appellant preferred an application with three fresh grounds of appeal which he filed on 15th July, 2020.

[8] Upon this matter being set for argument the Respondent filed their written submissions on the 30th January, 2023. The Appellant filed his final submission on the 16th January 2023 on the perusal of the said submission the Appellant appears to have preferred further grounds of appeal.

Consideration of the Grounds of Appeal

[9] In effect there are three sets of grounds of appeal tendered to this court separately as stated above. There is a degree of repetition and overlapping and I would consolidate the grounds of appeal and list them in sequence for convenience and clarity as follows;

Grounds of appeal urged at the leave stage;
Appeal against Conviction

1. *THAT the conviction was unreasonable and cannot be supported by the totality of the evidence, giving rise to a grave miscarriage of justice, in particular, to the following:*
   (a) The guilty verdict regarding Count 7 was unreasonable or inconsistent; and
   (b) The guilty verdict regarding Count 1; Count 3 and Count 7 was unreasonable or inconsistent; and
   (c) Failing to give cogent reasons as per the "totality of circumstances test" regarding the issue of the delay in making a complaint.

Appeal against Sentence

2. *The Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*
   (a) "double counting" an aggravated feature to enhance the sentence; and
   (b) Not properly considering the mitigating factors to adequately decrease the sentence.

Other fresh grounds of appeal;

3. *The Justice of Appeal Judge erred in Law and in fact in considering the elements of Count 1, Count 3 and Count 7 which the Count 2, Count 4, Count 6 are acquitted arises from the same events.*
4. *The Learned Trial Judge erred in fact in Law is not considering the appellants unreadiness for the trial proper due to the only period of time in which he ever spent with this legal aid counsel, which causes unfair trial.*
5. *That the Learned Trial Judge erred in Law and in fact failing to considering the Appellant alibi witness.*

Further grounds of appeal identified and elicited from the final submission*;*

6. *The Learned Trial Judge erred in Law and in fact when he convicted the Appellant without adequately considering the evidence in totality and thereby (causing a miscarriage of justice).*
7. *In the sum-up the Learned Trial Judge directed to find the Accused not guilty in respect of Counts 2, 4, 5 and 6 and left the decision in respect of Counts 1, 3, and 7 to the assessors to decide. This prejudice the minds of the assessors and induced them to follow the judge's directions and to convict the accused in respect of the said charges. Therefore, the trial was unfair and unreasonable.*
8. *The Learned Trial Judge erred in failing to consider the victim's evidence of denying consent on one occasion and admitted that she consented on other occasions.*
9. *The Trial Judge erred in calling upon the assessors to consider the evidence and Counts 2, 4, 5 and 6 and leaving it for the assessors to decide without determining that there was no case to answer, had caused prejudice to the Appellant.*

[10] The Respondent in their written submissions as well as in argument objected to this court considering the fresh grounds of appeal on the basis that they are not supported by an affidavit explaining the reasons for not filing the said grounds within time. Accordingly, it was submitted that the enlargement of time be refused.

[11] As a matter of practice and prudence the preliminary issue on the enlargement of time as well as the substantive appeal were taken up together. The Appellant was heard in person.

[12] The grounds of appeal have been raised at various times and they do overlap and to an extent are repetitive. As such the grounds of appeal will be considered as follows. Grounds of appeal 1(a), 1(b), 6 and 8 will be considered together as they are based on the evaluation of evidence and the alleged failure to consider the totality of evidence and the resulting unreasonableness of the verdicts and convictions. Grounds 7 and 9 will be considered together as they are based on the alleged prejudice caused to the minds of the assessors. Grounds 2(a) and 2(b) in respect of the sentence will be considered together and the other Grounds will be considered separately. Ground No. 3 requires no consideration.

Facts and the offending

[13] Prior to considering the grounds of appeal as a prelude it is necessary to summarise the facts of this matter. All the counts were representative counts. Counts 1 to 6 are of Rape and the 7th is of Sexual Assault. Count 1 was digital rape, count 2 penile penetration of the mouth, counts 3, 4, 5 and 6 were based on carnal knowledge (virginal penetration). The date of offending of counts 1, 2 and 3 are between the 01st February, 2010 and 27th August, 2010 when the victim was less than 13 years of age (born on the 27th August, 1998).

[14] During the period 01st February, 2010 and 27th August, 2010 the complainant lived with her mother and step-father. The Appellant is her step-father's younger brother. One night when the complainant's parents were not at home as her mother was admitted to hospital, the complainant was alone at home when the Appellant has gone into her room and touched her breast and penetrated her vagina with his fingers. This was the first act of abuse between February and August, 2010(count 1). Then between the 01st January, 2011 and 27th August, 2011 when she was alone at home the Appellant has come to her house and penetrated her vagina with his penis (count 3). On the first occasion and thereafter her breasts have been touched by the Appellant

(count 7). Counts 1, 3, and 7 of which the Appellant was found guilty are based on these events. Counts 4, 5 and 6 of which the Appellant was acquitted are rape counts alleged to have been committed when the complainant was above 13 years.

[15] At the close of the prosecution case the Appellant was acquitted of count 2 due to lack of evidence of the alleged act.

Grounds of appeal No. 1(a), 1(b), 3, 6 and 8

[16] The sum total of these grounds of appeal is that the verdict of guilty and convictions of counts 1, 3 and 7 are unreasonable and cannot be supported by the totality of the evidence; the trial judge failed to consider the evidence in its totality; and the trial judge failed to consider the denial of consent on some occasions and consenting on other occasions.

[17] Further, that the convictions and findings of guilt in respect counts 1, 3 and 7 cannot stand in view of the evidence of consent in respect of counts 4, 5 and 6. The challenge is based on the premise that the victim has admitted and denied consent at various times and the trial judge had failed to appreciate the effect of these different positions as to its effect on the credibility and proof of counts 1, 3 and 7.

[18] The trial judge at paragraph 15 of his judgment has evaluated and considered the evidence in respect of counts 4, 5 and 6. The trial judge has clearly concluded that the evidence of the complainant with regard to 4th, 5th and 6th counts was vague. These acts are alleged to have been committed between 2012 and 2014. The vagueness is attributed to the confusion due to numerous unpleasant events during a prolonged period and also a certain degree of confusion due to the manner in which prosecutor led evidence. It is a fact that the victim has stated that '*she did consent at certain times and did not at other times'*. The trial judge has not disbelieved nor doubted her testimonial trustworthiness.

[19] The trial judge concludes thus; "*However, the fact remains that the evidence the complainant gave with regard to the alleged incidents in 2012, 2013, and 2014 was not convincing. By saying that I am not implying that the complainant was an incredible witness. I find the state of mind of the complainant after what she had experienced and the manner in which the prosecution decided to present its case as the reasons for the evidence that was led regarding the aforementioned incidents, to be unconvincing.*"

[20] Firstly, the trial judge as well as the Assessors have accepted the evidence of the victim as being credible and reliable. That's why the Appellant was found guilty of counts 1, 3 and 7. Secondly, it is apparent that the uncertainty as to the element of consent in conjunction with the complainant being over 13 years is the operative reason for the trial judge to agree with not guilty opinions of the Assessors of counts 4, 5 and 6. The crux of the Appellants argument is that both these positions cannot mutually subsist as such the not guilty findings of counts 4, 5 and 6 on the said premise necessarily impact directly on the evidence of the victim on counts 1, 3 and 7.

[21] To that end it is necessary to determine if the complainant is truthful when she says, that she *gives her consent only sometimes in those times because she wanted to and that she did not at other times.* When a victim is been subjected to abuse by a known elder it is probable and natural for her to not consent but to succumb and not physically resist at the initial stages. However, when a minor child of 11 or 12 years is subjected to sexual abuse though she may not consent at the inception she may well gradually with time give in and succumb and may tacitly consent. Especially, when a young adolescent child is introduced to sexual pleasure she may even subconsciously go along and become a willing victim to experience the novelty of sensual pleasure.

[22] The acts of intercourse on which counts 4, 5 and 6 were based have taken place after the lapse of about 2 years towards the later part of this prolonged abuse. In these circumstances '*consenting sometimes'* is probable and the complainant's testimony that she *consented sometimes and did so because she wanted to and that she did not at other times* is highly probable and, in all probabilities, true. That being so as the complainant was over 13 years and there being a possibility that she may have

consented the acquittal from counts 4, 5 and 6 is in accordance with the evidence. In the same vein, the guilty verdicts and convictions of counts 1, 3 and 7 are not unreasonable or inconsistent and can be reached on the same evidence as consent is not an issue as she was less than 13 years at that time.

[23] The test to be applied by the appellate court was stated in simple form in the case of **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] as follows;

> *'[23] ……..To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a Judge or Magistrate without assessors.'*

[24] Therefore, findings of guilt of counts 1, 3 and 7 can be sustained and supported and can stand together with the verdicts on counts 2, 4, 5 and 6 on the evidence of the Complainant. These verdicts are not obnoxious or repugnant to the principles as set out in ***Balemaira v State* [2013] FJSCA; CAV0008 of 2013 (6 November 2013).**

Ground of appeal No. 5- *Failure to Consider the Alibi*

[25] The submission is that the trial judge failed to consider the alibi and the evidence thereof. The trial judge has considered the defence case from paragraphs 52 to 72 of the summing-up. Having summarised the evidence of all defence witnesses, the defence position of denial and the alibi are analysed at paragraphs 74 to 79 of the summing up. The submission is that the trial judge failed to consider the alibi witnesses. The Appellant himself has given evidence and he summoned his wife as a witness to establish that he was in Denarau during the time the alleged first incident of digital rape was alleged to have been committed on the night of the 9th of July 2010. Appellant's wife testified that the victim's mother was admitted to hospital on the 9th of July, 2010 and she left for Kadavu on the 13th July, 2010. However, the Appellant

in evidence says that, "*When I left home, as mentioned, my brother and wife was sick and already admitted at hospital*."

[26] Further, the trial judge has very correctly and a fair manner placed before the Assessors the evidence of these defence witnesses without any comment. The submission that the alibi and the defence evidence was not been considered is thus not correct. Now let me consider the veracity of the alibi evidence. In cross examination of the complainant the defence position as suggested was that the Applicant left for Denarau *two days before the victim's mother was admitted to the hospital* [page 177 of the brief]. However, the Appellant in his evidence says that he left for Denarau on the 9th of July and when he left home his brother's wife was sick and was already admitted to the hospital. The evidence of the Appellant is contrary to the position suggested. If he left two days before he could not have been present on the 9th, the day on which the Complainant's mother was admitted to hospital.

[27] This is not a mere contradiction or an insignificant inconsistency. It is a stark change of position and an inconsistency of the evidence of alibi. Can this be due to a mere mistake or lapse of memory? To my mind it cannot be. If he left two days before as suggested he could not have been there on the day the complainant's mother was admitted to hospital as testified. Thus, the evidence of the appellant in all probabilities is untrue and false. That being so, the defence does not have to prove an alibi but sufficient if they succeed in creating a doubt.

[28] In **Raisele v State** [2020] FJCA 49; AAU088.2018 (1 May 2020) Prematilaka JA, cited with approval the following exposition on the burden of proof and the nature of the defence of alibi as an appropriate direction on *alibi.*

> *"It seems to me that in every case where that situation is met, there are three possibilities, all three of which should be explained to the jury." "One is that they accept the alibi in which event they would be obliged to acquit The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, the also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit."* (vide: **R v Amyouni** (NSWCCA 18/2/88 unrep.).*"*

[29] Then Prematilaka JA, did also cite with approval Blackstone's Criminal Practice 1993 at page 1773 stated that;

> *'Although there is no general rule of law that in every case where **alibi** is raised the judge must specifically direct the jury that it is for the prosecution to negative the **alibi,** it is the clear duty of the judge to give such a direction, if there is danger of the jury thinking that an **alibi**, because it is called a defence, raises some burden on the defense to establish it (Wood (No.2) (1967) 52 Cr App R 74 per Lord Parker CJ). See also Johnson [1961] 1 WLR 1478 and Denney [1963] Crim LR 191.'*

[30] However, when the very basis and the evidence of alibi is contradictory and false there is no way in which such evidence could create a reasonable doubt. This in my view is sufficient reason for the Assessors and the trial judge to disbelieve and reject the defence evidence of alibi. Therefore, this ground of appeal has no merit.

[31] It is relevant to note the fact that despite the Learned High Court Judge having afforded an opportunity to both Counsel for redirections, no such redirection which forms the basis for the Appellant's this ground of appeal (alibi) as well as ground 1(c), (belated complaint) had been sought at the trial. This also is an additional reason why I am not inclined to uphold the Appellant's said grounds of appeal in this instance. The Court of Appeal In **Prasad v State** Criminal Appeal No. AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 held as follows;

> *'The appellate courts have from time and again frowned upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said that if not, the appellate court would not look at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. The appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in Raj that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in Tuwai v State CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in Alfaaz v State CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.'*

Ground of appeal No. 3

[32] Some of the reasons in considering this ground may appear to be repetitive but is unavoidable. The Appellant submitted that as the Judge acquitted the Appellant from Counts 2, 4 and 5 he could not have convicted him in respect of counts 1, 3, and 7 as they '*arise from the same events'*. The incidents in respect of counts 1, 3 and 7 have all happened between 01st January, 2010 and 27th August, 2011. The acquittal from counts 4, 5 and 6 have been on the basis of a doubt as to consent. According to the victim's evidence the first incident of inserting the finger into her vagina takes place between 01st February to 27th August, 2010 when she was 12 years and was living at Nadera. This incident takes place when her mother was in the hospital. According to her on the same occasion he had touched her breast. This is the act which proved count no. 7, sexual assault. Then she goes onto to narrate that whilst living at New Town close to the Appellant's house he had come one morning when she was alone and inserted his penis into her vagina for the first time. She was then less than 13 years. This evidence proved the Rape count No. 3. However, she specifically denies the insertion of the penis into her mouth. She says that on the day he inserted his penis into her vagina, he had also wanted her to suck his penis, which she refused and did not do. This evidence was believed and the Appellant was acquitted from count No. 2. As for the reason for the Appellant to be acquitted from the rape counts 4, 5 and 6 is also based on the Complainant's evidence. These acts are alleged to have been committed between the 01 January, 2012 and 31st October, 2014 during which period the victim was over 13 years and lack of consent was a necessary and determinate ingredient. Her evidence is that during this period she did have sexual intercourse with the Appellant and consented on some occasions. Then she said that in 2014 the Appellant used to take her to his house and used to have sexual intercourse in his bedroom. She does say that the Appellant's wife and daughters were at home and when he did this, she did not alert anybody. In view of this evidence there arises an uncertainty as to consent.

[33] The trial judge at paragraph 15 of his judgment gives his reasons for coming to the finding as to why counts 4, 5 and 6 were not proved. The trial judge says that he is not implying that the complainant is an incredible witness. He says that her evidence is

vague. This vagueness arises from her evidence of consenting on some occasions. It is this confusion and vagueness that caused the trial judge to so conclude and acquit the Appellant from counts 4, 5 and 6.

[34] The finding that she is a truthful witness is not erroneous. On the consideration of the totality of her evidence the findings of guilt and convicting in respect of count 1, 2, and 7 and simultaneously not guilty findings and acquitting from counts 2,4,5 and 6 is lawful, correct and not unreasonable by any standard. That being so leaving to the assessors to decide on counts 4, 5, and 6 is lawful and has caused no prejudice to the Appellant.

Ground of appeal No. 1(c) – *Delay in complaining*

[35] It is submitted that the issue of delay had not been considered or addressed by the trial judge. On a perusal of the summing up and the judgment it does appear that the delay in complaining (belated complaint) has not been specifically addressed. However, during the course of the cross examination of the victim she had been repeatedly asked why she did not raise any alarm or tell anyone else of the abuse.

[36] The Appellant submits that the convictions are unreasonable due to the failure to give cogent reasons for the delay in complaining. There was no doubt a delay of almost of 04 years. In **State v Serelevu** [2018] FJC; 163; AAU141.2014 (4 October 2018) it was held that in law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test".

[37] It is correct that she did not tell anyone and remained silent. When the first act of abuse took place, she was just 12 years or may have been less and she seem to have not known what this was all about. It is in evidence that on the first occasion prior to inserting his penis the Appellant had told that he wants to have sex with her and her response had been, "*I don't know how to do it*". This clearly shows that the Complainant was of such a tender age she may have not known the true nature of what was being done to her to start with. Then when she was not consenting to sexual intercourse the Appellant has told her that when she has sex at an early age it would

be easy for her to have sexual intercourse with her husband; *(*vide: page 174 of the brief -*"...when I said no he said that when I have sexs on an earlier ages it would be easy for me to have sexs with my husband."*). This along with the fact that the Appellant was her step uncle would certainly have prevented her from promptly telling this to any other.

[38] The issue of belated complaint or delay had not been raised by the defence nor had it been considered in the summing-up as well as in the judgment in that sense. As observed by the single judge in refusing leave in this matter it does not appear that the appellant's trial counsel had sought any redirections on the alleged omission in the summing-up on the issue of delay in complaining. Therefore, technically the appellant is not entitled even to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35SC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 20).

[39] Even in an adult victim, sexual abuse will cause intense feeling of embarrassment, fear and humiliation. A survivor of sexual abuse may even be afraid that she would not be believed by her family members if the abuser happens to be either a family member or a close relative of the victim. This fear can keep the victim under silence without disclosing the abuse to anybody. At times, the survivor may allow her to be exploited repeatedly under threat by the abuser that he would expose her. Thus, there are so many reasons for even adult survivors of sexual abuse to keep silent without disclosing about the harm caused to her. This is in effect, a psychological and emotional phenomenon. In order to relieve such survivors from the said trauma, the victim may need intensive counselling by experts and the family members or the persons in whom the survivor reposes confidence.

[40] Similarly, in the case of a child victim, it is quite common for the child survivor of sexual abuse to keep silent either due to fear for the abuser or their relationship with the abuser or without understanding the consequences of the sexual abuse. In such cases, the child victim may not disclose the occurrence to anyone or may even go to the extent of saying that nothing had happened to her. (**Ganesan v State** - HIGH

COURT OF JUDICATURE AT MADRAS Criminal Appeal No.401 of 2015-27.04.2017).

[41] Subsequently, she had told her aunt Tajatoka and then her mother. All that her mother told her to keep away from the Appellant and she did nothing more. In these circumstances the girl with the passage of time even when realising that something wrong has been done remaining silent is highly probable.

[42] Delay *per se* will not make her evidence inadmissible or unreliable, provided that there's a valid reason or a plausible explanation for the same. However, there is a serious duty on a trial judge to address and consider the issue of delay and the reasons and to consider if it is reasonable and satisfactory. It is settled law that recent complaint is relevant to the question of consistency, or inconsistency, of the complainant's conduct, and as such is a matter that goes to her credibility and reliability as a witness. (vide: **Raj v The State 92014) FJSC 12: CAV 3 of 2014, 20 August 2014**).

[43] It is also relent to note that the exposition made by Justice Anthony Fernando (President of the Court of Appeal of Seychelles) in **Jean-Luc Louise v State [2021] SCCA 72** in considering a similar case of delay which is thus;

> "*The matter of recent complaint only goes to the issue of credibility and consistency of the complaint*…." and that, "…*Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders*".

[44] This is applicable to the present case too. The familiar connection of the Appellant with a mother who was not very receptive, would require courage and emotional strength to reveal this even to another. It appears that the Complainant had, with the passage of time and the gradual aggravation and resentment of the abuse gained courage and understanding and was psychologically prepared for the consequences of divulging and has finally told her aunt and mother. Hence, I hold that the reasons for the delay are reasonable and acceptable and the failure to consider the same has caused no substantial miscarriage of justice.

Ground of appeal No. 4- *not having sufficient access to his legal counsel*

[45] Under this ground the Appellant's submission is that he did not have sufficient access to his legal counsel. However, the perusal of the court record shows that he was represented by counsel even during the PTC stages. He was represented by the Legal Aid counsel Ms. Tarai. Then he has changed his counsel and obtained the services of a private counsel. Appellant was represented by the said counsel during the trial. No complaint of whatever nature has been made to the trial judge in this respect. Therefore, I see no merit on this ground of appeal.

Ground of appeal No. 9 – *leaving Counts 2, 4, 5 and 6 for the assessors to decide without determining that there was no case to answer*

[46] The argument advanced is that the minds of the assessors was prejudiced and they were induced to merely follow the directions and convict the Appellant in respect of counts 1, 3 and 7. The opinion of the assessors in count No. 1 and 3 are unanimous. As for count no. 7 the majority opinion is one of guilty. As for counts 5 and 6 it is a majority opinion of not guilty. This clearly proves that the assessors were not in any way unduly influenced nor have they blindly followed the directions of the trial judge. When the judge directed that count No. 2 does not require their consideration it was on the basis of there being no evidence of the physical act. This cannot cause any prejudice in the minds of the assessors. In the summing-up the trial judge has placed the evidence in its totality for the consideration by the assessors and has emphasized on the requirement of lack of consent in respect of counts 4, 5 and 6. This is a necessary and fair summing-up. This cannot cause any prejudice in the minds of assessors to believing that the judge's sum-up indicating a possible not guilty plea in respect of these counts is an indirect direction to convict in respect of the other counts. If there be a weakness in the evidence in respect of some of the counts a trial judge should address on such issues. It is in the interest of the Accused to do so. Therefore, judge's directions in respect of count 2, 4, 5 and 6 has not in any way prejudiced the opinion of assessor they reached in respect of counts 1, 3 and 7. As a matter of fact the assessors have expressed an opinion of not guilty for count No. 3 which the trial judge has not agreed with. The aforesaid clearly demonstrates that the summing up

was fair and the assessors have independently made assessments without any prejudice. Accordingly, this ground of appeal is misconceived and is rejected.

Grounds of appeal No. 2(a) and (b)-on the sentence

[47] The Appellant's submission is that the learned trial judge had double counted the aggravating factors and added 06 years on account of them. In this regard I reiterate the sentiments of the single judge expressed at leave stage. The submission of the Appellant is double counting and the failure to consider mitigating factors. The final sentence imposed is imprisonment of 13 years, 6 months and 25 days imprisonment with a non-parole period of 11years 6 months and 25 days. As per the written submission, *"the appellant submits that the learned trial judge had taken his having no previous convictions and age as mitigating features but not given adequate discount separately. Then it is submitted that breach of trust, victims step farther and authority over the victim have been considered separately as aggravating facts when they should have been considered as one ground."*

[48] As per the sentence ruling dated 7th July 2016 the trial judge had deducted 04 years for no previous convictions and the appellant being 55 years and having 05 children. In this matter the appellant was found guilty and convicted for sexually exploiting the complainant who was at the beginning under 13 years of age, for 04 years certainly is not entitled for the benefit of previous good character and thus not entitled for any discount either. I find that breach of trust arising from the appellant's familial affiliation being the complainant's stepfather's elder brother that is one factor and using the authority the appellant exercised over the complainant as an elder and exploiting her vulnerable position though listed separately has been considered to gather for the purposes of determining and quantifying the period to be added for aggravating circumstances.

[49] As held in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) the sentencing process is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognising that the so-called starting

point is itself no more than an inexact guide. …… It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered.

[50] It is relevant to note that the tariff of sentences in rape and other sexual abuse cases, especially when the victims are children there have been an increase of tariff in view of the gravity and the appreciable increase of such incidents. The Court of Appeal has decided that the accepted range of sentence for rape of juveniles (under the age of 18 years) is 10-16 years [vide: **Raj v State** AAU0038 of 2010: 05 March 2014 [2014] FJCA 18] the tariff so set for rape of a child was raised to be between 11-20 years imprisonment in **Aitcheson v State** [2018] FJSC29; CAV12 of 2018 (2 November 2018) by the Supreme Court in consideration of the increasing prevalence of these crimes accompanied with appreciable aggravating circumstances.

[51] In the aforesaid circumstances the final sentence arrived at is well within the tariff set for this offence of 11-20 years. It is commensurate with the facts and circumstances of this case. I see no sentencing error in this regard. And this ground of appeal thus fails.

Conclusion

[52] In **Ram v. State** Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12**]** where the Supreme Court held *inter alia* that *'an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case'*. To my mind the verdicts of guilt against the Appellant is neither unsafe nor dangerous. I have no doubt that on the available evidence the counts 1, 3 and 7 against the Appellant has been proved beyond reasonable doubt and on the whole of the facts not withstanding some non-directions of the summing up, the only reasonable and proper verdict is one of guilty of counts 1, 3 and 7 against the Appellant. No substantial miscarriage of justice has occurred. Having regard to the evidence led the Appellant could have been convicted of counts 1, 3 and 7 levelled against him and therefore the verdicts of guilt and the convictions

in respect of the said counts against the Appellant are well founded, lawful, reasonable and supported by evidence.

[53] Therefore, I conclude that the appeal should stand dismissed and the conviction and sentence be affirmed.

[54] In the aforesaid circumstances as there is no reasonable prospect of success with regard to the Appellant's appeal against the conviction and the sentence leave to appeal and for extension of time should be refused. As this court has now fully considered the Appellant's appeal against the conviction and sentence, both the appeal against the conviction and sentence should be dismissed in terms of section 23(1) (a) of the Court of appeal Act.

Orders of the Court:

1. Enlargement of time for the new grounds of appeal against conviction is refused.
2. Leave to appeal against the conviction is refused.
3. Leave to appeal against the sentence is refused.
4. Appeal against the conviction is dismissed.
5. Appeal against the sentence is dismissed.

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

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice G. Kulatunga
JUSTICE OF APPEAL

Solicitors:
Appellant in person
Office of the Director of Public Prosecutions for the Respondent