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

CRIMINAL APPEAL NO. AAU 111 of 2020
[In the High Court at Lautoka Case No. HAC 145 of 2017]

BETWEEN : **ALFRED AJAY PALANI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**
Dobson, JA
Heath, JA

Counsel : **Mr. S. Heritage for the Appellant**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **08 July and 11 July 2024**

Date of Judgment : **26 July 2024**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka on one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009.

[2] According to the information, the act of rape (carnal knowledge) had occurred on 31 March 2015 and the indecent assault (touching the breasts on top of clothes without consent) had happened between 01 and 24 December 2014, both at Toko, Tavua in the Western Division. In both instances, the victim had been 'AL'.

[3] At the end of the summing-up[1], the assessors had unanimously opined that the appellant was guilty of both charges. The learned trial judge had agreed with the

[1] **State v Palani** - Summing Up [2020] FJHC 617; HAC145.2017 (31 July 2020)

assessors' opinion, convicted the appellant[2] and sentenced him on 18 August 2020 to an aggregate sentence of 17 years and 10 months of imprisonment (after the remand period was deducted) with non-parole period of 15 years[3].

[4] The appellant's appeal against conviction and sentence was timely. However, a judge of this court refused leave to appeal against conviction but allowed leave against sentence on 16 December 2021.[4] The appellant had then renewed his appeal against conviction before the Full Court in terms of section 35(3) of the Court of Appeal Act. This judgment will deal with his renewal application as well as the appeal itself.

[5] On a perusal of the written submissions filed by Messrs. Iqbal Khan & Associates on behalf of the appellant for the Full Court hearing, it becomes clear that it is nothing but a mere reproduction of the leave stage submissions tendered by the same lawyers. At the appeal hearing, the counsel for the appellant abandoned the 03rd, 05th and 06th grounds of appeal against conviction. Thus, the grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

Conviction

Ground 1

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

Ground 2

THAT the Learned Trial Judge erred in law and in fact in not adequately directing the assessors the significance of Prosecution witness conflicting evidence during the trial.

Ground 4

THAT the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the complainant and as such there has been a substantial miscarriage of justice.

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[2] **State v Palani** [2020] FJHC 615; HAC145.2017 (4 August 2020)
[3] **State v Palani** - Sentence [2020] FJHC 660; HAC 145 of 2017 (18 August 2020)
[4] **Palani v State** [2021] FJCA 244; AAU111.2020 (16 December 2021)

Ground 7

THAT the Learned Trial Judge erred in law and in fact in not properly directing himself and/or the assessors, that the Medical Report of the complainant demonstrated doubts of the complaint.

Ground 8

THAT the Learned Trial Judge erred in law and in fact in misdirecting himself when he took into consideration the demeanour of witnesses to believe or not to believe relying only on the demeanour of the complainant and not whole evidence as a whole caused a substantial miscarriage of justice.

Sentence

Ground 9

(a) THAT the appellant relies on Grounds 1 to 8 stated hereinabove.

(b) THAT the appellant's appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

(c) THAT the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into relevant consideration.

(d) THAT the Learned Trial Judge erred in law and in fact in passing sentence of imprisonment was disproportionately severe punishment contrary to Section 25 of the Constitution of Fiji (1998) (Section 11 (1) of the 2013 Constitution of Fiji.)

(e) THAT the Learned Trial Judge erred in law and in fact in ordering the appellant to pay restitution as well as imposing custodial sentence.

(f) THAT the Learned Trial Judge erred in law and in fact in not taking into consideration adequately the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the appellant.

A summary of prosecution and defence versions

[6] The prosecution had constructed its case on the evidence of the complainant, her grandfather/uncle Viliame Dalituicama, her teacher Alena Vodivodi and Dr. Jimi Taria. The appellant had testified on his behalf but not called other witnesses. The trial judge had summarized the evidence in the judgment as follows:

> *5. In 2015 the complainant was 14 years of age and a class 8 student. The complainant informed the court of two occasions she was sexually abused by*

the accused. The first incident happened in late 2014 when the complainant was in class 7. The complainant had gone to wash clothes with the accused at Toko river.

6. *After the complainant finished washing and bathing in the river the accused touched her breasts from on top of her clothes. The complainant did not consent to the accused to touch her breasts. When the complainant came home she informed her grandmother about this incident which was not reported to the police.*

7. *The second incident was on the 31st of March, 2015 in the afternoon when the complainant was in the house with the accused. The accused had sent the brother of the complainant to the shop to buy some panadol and had told the complainant to have her shower.*

8. *When the complainant came out of the bathroom she was wearing a long towel the accused gave her a small towel to change. The complainant was scared of the accused so she changed into a small towel. The accused was also wearing a towel when the complainant went into her room to look for her clothes the accused came from behind and held her tightly and dragged her to his bedroom.*

9. *The accused made the complainant lie down on his bed and then told her "if you tell anyone I would kill you" after this the accused started kissing the complainant's neck then her breast and then her vagina. He then forcefully tried to insert his penis into her vagina for about 5 minutes, the complainant was frightened and scared. After sometime the accused was able to penetrate her vagina with his penis, the complainant felt the accused penis in her vagina. The accused then told the complainant "if you tell anyone or if you report this, I will kill you".*

10. *The complainant did not consent to have sexual intercourse with the accused. After wearing her clothes the complainant went and told her uncle Dalituicama who was living next door about what the accused had done to her. Next morning the complainant went to school and also told her school teacher Alena Vodivodi.*

11. *Viliame Dalituicama the uncle of the complainant informed the court that the accused was his younger brother. The accused lived next door with his mother, the complainant and her brother Edward.*

12. *On 31st March, 2015 at about 7pm the witness was at home when the complainant came crying into his house. When he first asked her what happened she did not respond. On the second occasion the complainant told the witness that the accused had touched her. After sometime the mother of the witness came and he told his mother what the complainant had told him.*

13. *Alena Vodivodi told the court that on 1st April, 2015 at 8.30am the witness was told by a student that the complainant who was a class 8 student wanted to see her in respect of a problem.*

14. *The witness met the complainant and both went to her office. When the witness asked the complainant about her problem the complainant cried for*

a while and then told the witness that her uncle Ajay had raped her the previous evening that is on 31st March.

15. *The complainant continued to cry when she was relating her problem. The head teacher was informed and the matter was reported to the police.*

16. *Edward Palani the younger brother of the complainant informed the court that on 31st March he was playing with a cousin when the accused called him to go to the shop and buy panadol. The witness went with his cousin Dela to the shop.*

17. *After 20 to 30 minutes the witness left the shop for home, on the way he saw his grandmother and aunty getting off the bus so everyone came home together. At home the witness saw the complainant crying.*

18. *The final witness Dr. Jimi Taria narrated to the court the medical findings of Dr. Virisila Sema who had examined the complainant. Dr. Sema had mentioned that her examination was inconclusive meant it was difficult for her to draw any conclusion on what had happened to the patient although there was sign of trauma to the outer lower part of the vagina.*

19. *On the other hand, the accused denied committing the offences as alleged. The complainant did not tell the truth in court she made up a story against him. The incident at the Toko river did not happen because it is a public place where other children were also around so it was not possible for the accused to touch the breasts of the complainant.*

20. *As for the allegation of rape it is again another made up story the complainant did not like the accused who was strict on her. When she went to her uncle Dalituicama's house she did not say anything about being raped because nothing had happened.*

21. *The complainant made up a story overnight to tell her teacher the next day both the incidents did not happen the complainant could have screamed, yelled and shouted but she did not. The house of her uncle Dalituicama was only 10 steps away so a shout or a scream or a yell would have alerted her uncle who was at his home at the time.*

22. *The accused denied the allegations saying it was a lie and he did not do it.*

<u>01st ground of appeal</u>

[7] The appellant's counsel submits that the trial judge had failed to direct the assessors that the prosecution evidence did not prove the case beyond reasonable doubt as there were serious doubts and as such the benefit of such doubts ought to have been given to the appellant. However, the appellant has not demonstrated how the so called 'serious doubts' arose or why they should arise in the prosecution case. The only point taken up in the written submissions is that the trial judge had failed to consider that the victim had lied under oath that the appellant had taken advantage of her.

[8] The totality of evidence shows that there was no factual basis for the trial judge to have directed the assessor on the lines suggested by the appellant. This is a classic case of 'family rape' where the appellant (father's younger brother/paternal uncle) had taken advantage of the motherless victim (aged 14).

02nd and 04th grounds of appeal

[9] The counsel highlights under both grounds of appeal more or less the same evidence of the victim allegedly in conflict with her police statement and argues that the trial judge had failed to give directions as expressed in **Singh v The State** [2006] FJSC 15; CAV0007U.05S (19 October 2006) and **Ram v The State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012).

[10] In ***Singh*** and ***Ram*** the Supreme Court dealt with inconsistencies in the evidence at the trial with previous statements 'on oath' or previous sworn statements. The alleged inconsistencies in this case were not referable to any such previous sworn statement but only with the victim's police statements.

[11] In any event, is the alleged conflicting evidence pointed out by the appellant so material as to affect the credibility of the complainant? The test for evaluation of any alleged omissions, contradictions and inconsistences is whether they go to the root of the prosecution case as to discredit the complainant; whether it shakes the very foundation of the prosecution case [see **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) & **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280].

[12] The Supreme Court in **Lulu v State** Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to ***Bharwada*** in the context of apparent discrepancies (which do not shake the basic version) in an adult rape victim's recollection *'Their evidence is not a video recording of events.'*

[13] The Court of Appeal usefully analyzed the issue of memory and recollection of events by child and adult victims of sexual abuse cases in **Alfaaz v State** [2018] FJCA 19; AAU0030.2014 (8 March 2018) and said:

> *'[35] …….. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scars with her.'*

[14] The following remarks of the Supreme Court of India regarding an adult victim of rape in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280) is applicable with greater force to a child or juvenile.

> *"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; .... (3) The powers of observation differ from person to person. What one may notice, another may not. ...... It is unrealistic to expect a witness to be a human tape recorder;….."*

[15] The judge had addressed the assessors as to how they should evaluate inconsistencies in the victim's evidence *vis-à-vis* her police statement at paragraphs 52-54 and dealt with one such inconsistency which the appellant has not found to be objectionable in this appeal. I have carefully considered other instances pointed out by the appellant in the written submissions.

[16] I find that whether the victim heard the appellant telling her brother to go to the shop after she went for bathing or whether he asked her to have a shower after sending her brother to the shop is not so material as to cause her testimony under oath incredible.

[17] Other two instances relate not to anything in the victim's police statement but what her grandfather/uncle (father's elder brother) and teacher said in their evidence as told to them by the victim. Therefore, they are not inconsistencies *per se* but *inter se*. The victim's testimony was that she had told her grandfather that the appellant licked her but Dalituicama had only said in his evidence that she told him that the former touched her. It would be unrealistic, if not naïve to expect a 14 year old granddaughter to tell her father's elder brother vivid details of a traumatic sexual abuse such as rape

soon after the incident. I do not consider this discrepancy to be of material importance as to affect her credibility.

[18] The victim's teacher Ms. Vodivodi had said at the trial that the former told her that she had been raped by her uncle but not the details whereas the victim's evidence was that she told the teacher as to what happened. There was no reason for Ms. Vodivodi to make up any evidence as to what the victim related to her unless the latter had in fact told her that she was raped. In any event, that specific allegation is not extraneous to 'what happened' on that day. On the other hand if the victim were to fabricate anything, it would have been very easy for her to say that she told her teacher not what happened but specifically that the appellant raped her. I do not think that this discrepancy had dented the victim's evidence.

[19] When examining whether a verdict is unreasonable or cannot be supported by evidence , as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) 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 including defence 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 reasonably 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. The same test could be applied *mutatis mutandis* to a trial by a Judge alone (without assessors) or a Magistrate.[5]

[20] Having read the transcript, keeping in mind the above guiding principles, I have no doubt that it was clearly open to the assessors and the trial judge, being the ultimate judge of facts and law, to have arrived at a verdict of guilty against the appellant.

[5] **Filippou v The Queen** (2015) 256 CLR 47

Keith, J said in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] ……….The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[21] In **Pell v The Queen** [2020] HCA 12 it was held that in a criminal case, the prosecution is required to prove the case beyond all reasonable doubt and if there is any evidence that would raise doubt, then the accused cannot be convicted, however, the prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but only beyond reasonable doubt. I have no doubt, that the prosecution has accomplished its task to this criminal standard in this case. In coming to this conclusion, while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses[6], I have evaluated the evidence and made an independent assessment thereof[7]. I am convinced that the trial judge could have reasonably convicted the appellant on the evidence before him[8].

Ground 7

[22] The appellant argues that the trial judge had not properly directed the assessors and himself that the medical report of the victim showed doubts in the complainant's allegation of rape.

[23] The cornerstone of the argument is that the medical report had shown the complainant's hymen to be intact. However, it had recorded (a) slight bruise at 7 o' clock and 5' o'clock (b) vaginal opening (orifice) pea size bruise measuring 0.5 cm by 0.5cm (c) no tears, no active bleeding and no discharge. The medical evidence was inconclusive but did not rule out an act of rape.

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[6] **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)
[7] **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)
[8] **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 (14 March 2013)

[24] There cannot be any valid criticism of the trial judge's directions at paragraphs 90-94 on expert evidence and at paragraphs 83-89 specifically on the medical report in the summing-up. The trial judge's consideration of the medical report in the judgment is at paragraph 18 and he was correct in his assertion at paragraph 32 that although the examining doctor did not make any conclusive findings in regard to penetration it did not affect the complainant's version. The appellant's argument also seems to indirectly suggest that a *vaginal* penetration is essential to carnal knowledge and if only a penetration of *vulva* is present, there is no carnal knowledge under section 207(2)(a) of the Crimes Act and consequently there is no rape either.

[25] Rape is either carnal knowledge or penetration of the vulva, vagina, anus or mouth, as the case may be [vide section 207(2) (a), (b) and (c)]. According to section 206(4) of the Crimes Act 2009, carnal knowledge is considered complete upon penetration to any extent. Additionally, section 206(5) specifies that carnal knowledge includes sodomy. According to section 207(2) (b) of the Crimes Act, penetration of the vulva, vagina or anus to any extent with a thing or a part of a person's body that is not a penis is rape. This indicates that carnal knowledge involves penetration of the vulva as well as other forms of penetration. Thus, carnal knowledge is complete not only when penetration of vagina occurs but also with penetration of vulva. Therefore, even in the absence of a specific statutory definition of carnal knowledge in the Crimes Act, penetration of the vulva can be interpreted as falling within the scope of carnal knowledge under section 207(2)(a) of the Crimes Act 2009.

[26] Moreover, even if there is no statutory definition, it is possible for the courts to interpret carnal knowledge to include penetration of the vulva, especially in the context of sexual offenses aimed at protecting minors or addressing sexual violence. Courts may look at the purpose of the statute and public policy considerations when interpreting the term in the absence of a statutory definition. Given that section 207(2) (b) of the Crimes Act makes penetration of the vulva, vagina or anus to any extent with a thing or a part of a person's body that is not a penis, an act of rape, there is every reason to hold that penetration to any extent (*i.e.* even the slightest penetration) of vulva by a penis would constitute carnal knowledge under section 207(2)(a) of the

Crimes Act and accordingly, it would be an offence of rape in terms of section 207(1) of the Crimes Act.

[27] **R v Murray** (1963) 2 QB 396 suggested that penetration of the vulva might be included within the broader definition of carnal knowledge, especially in cases involving minors or sexual offenses. The Australian case of **R v M** (1991) 1 Qd R 170 suggested that even the slightest penetration of the vulva could constitute carnal knowledge.

[28] The fact that the victim's hymen was intact shows that she was a virgin until and after she was forced to undergo this distasteful sexual experience. Would it be reasonable for any rational mind to expect a 14 year old girl experiencing an act of forceful sexual penetration, most likely for the first time in her life, to describe the act to a mathematical accuracy differentiating vaginal and vulva penetration?; to be more precise, how far the penis went inside her genitalia; whether it penetrated her vagina or vulva. Would she know the bodily difference between her vulva and vagina, where vulva ends and vagina begins? I think not.

[29] The Court of Appeal in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) advisedly said[9]:

> *'[13] .... It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.'*

[9] See also **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)

[30] Therefore, even if there had been only a penetration of the victim's vulva, it would still constitute rape. Slight bruise at 7 o' clock and 5' o'clock on the hymen and a pea size bruise measuring 0.5cm by 0.5cm on the vaginal opening (orifice) clearly shows that there had been a penetration of vulva. However, these injuries do not rule out penetration going beyond the vaginal opening. The fact that the victim's hymen being intact does not necessarily mean that. Nor does the fact that medical opinion is inconclusive on penetration of vagina mean that there had not been even a slight penetration of vagina. The victim was certain that there was penetration of her vagina. To what extent, she had not said. Bruises on the hymen and at the vaginal opening could be signs of slight penetration of the vagina while leaving the hymen intact considering that the hymen is a flexible membrane that can stretch to accommodate penetration without necessarily tearing or breaking. Either way, the evidence does not cast a reasonable doubt that carnal knowledge indeed took place.

[31] It may be pertinent to place on record that the prosecution had informed the defense at the pre-trial conference that it would rely on penetration of vulva to prove carnal knowledge. Thus, the defense should have known from the beginning that they had to confront with the allegation of rape based on penetration of vulva. The defense, perhaps did so by way of a total denial of the alleged incidents. In that context, the appellant's current complaint as to whether there was penetration of vagina or not loses steam.

<u>08th ground of appeal</u>

[32] The appellant complains that the trial judge had taken into consideration only the demeanor of the victim and not the whole evidence in entering a verdict of guilty against the appellant.

[33] On a plain reading of the judgment it becomes clear that this complaint is devoid of any merit. Having carefully considered all the evidence for the prosecution, the trial judge had also held that the victim's demeanor was consistent with her honesty. His finding of guilt was not solely or even significantly based on the victim's demeanor.

[34] The Court of Appeal in **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024) said that demeanour can hardly even be decisive in determining the outcome of a case but merely one factor to be taken into account: In addition to the demeanour of the witness one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry. The court, of course, admitted that a trial court is obviously in a better position than the court of appeal to make a finding on demeanour ; and the court of appeal "must attach weight, but not excessive weight" to the trial court's finding.[10] It has been stated before in Fiji that the trial court has a considerable advantage of having seen and heard the witnesses and it was in a better position to assess credibility and weight and the appellate court should not lightly interfere with it.[11] However, it is a general rule of importance that a trial court should record its impression of the demeanour of a material witness.

[35] Therefore, I do not think that the learned trial judge had in any way exceeded the judicially demarcated threshold or parameters for considering *inter alia* the victim's demeanour in coming to a finding of guilt.

Grounds of appeal (sentence)

[36] Ground (a) states that the appellant relies on all grounds of appeal urged against conviction and what is meant by that is not elaborated.

[37] Ground (b) claims that the sentence is harsh and excessive while ground (c) states that the trial judge had taken into consideration irrelevant matters and not taken into account relevant matters. Ground (d) argues that the sentence is disproportionately severe while ground (e) claims that the trial judge had ordered restitution in addition to the sentence. Ground (f) raises an issue that the trial judge had not taken into account the provisions of the Sentencing and Penalties Act.

[10] See also paragraph [16] in **Natakuru v The State** [2006] FJCA 36; AAU0093J.2005 (14 July 2006)
[11] **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)

[38] The written submissions of the appellant had not substantiated any of the above grounds of appeal against sentence. Ground (e) is totally misconceived. The appellant's written submission has not indicated what matters have or have not been taken into account by the trial judge or what provisions of the Sentencing and Penalties Act have been ignored.

[39] It has been said that quantum of the sentence alone can rarely be a ground for the intervention by the appellate court[12]. The single judge, however, considered the complaint that the sentence is harsh and excessive and disproportionately severe to the offending from a different angle and allowed leave to appeal. This aspect was not adverted to by the appellant's counsel at the leave or appeal hearing.

[40] According to the trial judge, having taken into consideration the 'objective seriousness' of the crime he had decided to fix a higher starting point and picked 13 years following sentencing tariff for child/juvenile rape set as 11-20 years in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018). What the trial judge had mentioned at paragraphs 15-20 as to how serious child/juvenile abuse is, in my view, beyond question.

[41] The aggravating factors highlighted by the trial judge are at paragraph 10 of the sentencing order and they cannot be censured as not being so except (f) i.e. exposing a child to sexual abuse which is part and parcel of almost any child abuse offending. Nevertheless, in my view, the enhancement of the sentence by 06 years on account of aggravating factors also cannot be unduly criticized.

[42] The trial judge had also refused to consider most of the appellant's purported mitigating factors as they were all personal circumstances. No serious complaint can be made in this respect as in Fiji personal circumstances carry little mitigation value in sexual offences – vide ***Raj***. The judge had correctly afforded a discount for his previous good character.

[12] **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)

[43] However, in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting'.

[44] The Supreme Court further elaborated in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features.

[45] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. This is exactly the problem that this court is faced with in this appeal. If the judge did, he would have fallen into the trap of double-counting.

[46] I am somewhat concerned with the starting point of 13 years purportedly based on the 'objective seriousness' of the crime as I do not know whether some aggravation, which was later considered to enhance the sentence, had already been taken into account (even inadvertently) when the trial judge selected as his starting point a term towards the middle of the tariff thereby falling into the trap of double-counting (see ***Nadan***). If not, it is not clear what other factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated except the 'objective seriousness' of the crime.

[47] This leads to another issue. I am inclined to believe that when the tariff for child/juvenile rape was increased to 11-20 years in **Aitcheson v State** (supra) from

previously existing tariff of 10-18 years set in **Raj v State** (supra), the Supreme Court would have been mindful of all the matters expressed at paragraphs 15-20 in the sentencing order by the trial judge as to the seriousness of child/juvenile abuse and therefore the 'objective seriousness' of acts of child/juvenile sexual abuse. Thus, my concern is that when a trial judge picks a starting point in the middle of ***Aitcheson*** tariff without indicating what matters had been taken into account but purely on 'objective seriousness', whether the judge may be considering what is already inbuilt in the sentence range once again in selecting the starting point. This can amount to double counting as the Supreme Court said in ***Kumar*** that:

> *"58. Secondly, the lower [end] of the tariff for the rape of children and juveniles is long. Sentences of 10 years' imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of 'double-counting', which must, of course, be avoided."*

[48] This court considered a similar complaint in the recent case of **Tiko v State** [2024] FJCA 95; AAU093.2020 (30 May 2024) and some takeaways could be stated as follows:

> 1. *Where established, double-counting amounts to a legal error since factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa.*
> 2. *Even relying on different aspects of the same fact twice (when assessing both the gravity of the crime and the aggravating circumstances) is not permissible. They could only be taken into consideration once – either as factors relevant to the gravity of the crime or as aggravating circumstances.*
> 3. *The test for any reduction in appeal is whether 'even when properly taken into account only once, still warrant a sentence comparable to that imposed by the trial court'. If not, no reduction is warranted on this basis.*

[49] However, in order to apply the above test, the appellate court should be able to identify for certain that the trial court had taken into account some aspects of the

gravity of a crime and the same factors had been additionally taken into account as separate aggravating circumstances, and vice versa. As already stated, it is not known as to what factors had gone into the starting point of 13 years. This is the problem that this court encounters in this appeal.

[50] One must also be mindful of what the Supreme Court said in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) that 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 even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question.

[51] I also remind myself of some general principles referred to in **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024):

> 1. *Interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed.*
>
> 2. *Interference with the sentence imposed can only be done where there has been an irregularity that results in the failure of justice.*
>
> 3. *An appellate court may not interfere with the trial court's discretion merely because it would have imposed a different sentence. It must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not.*

[52] Given the uncertainty as to what aspects of gravity of the offending had been included in the starting point of 13 years and the possibility that some of them may have been considered as aggravating circumstances or *vice versa* and, therefore the difficulty in applying the test referred to in ***Tico***, I am inclined to give the appellant the benefit of a reduction of 02 years, hypothetically taking the starting point at 11 years keeping all other considerations intact, for I do not find any sentencing error in the rest of the exercise undertaken by the trial judge.

Dobson, JA

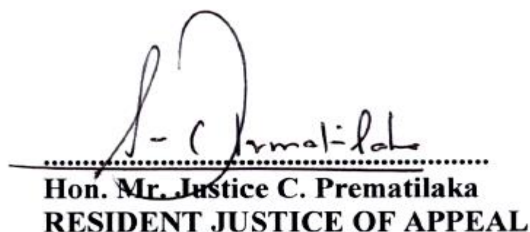
[53] I agree with the reasoning, and the outcome.

Heath, JA

[54] I have read the judgment of Prematilaka, RJA in draft. I agree with his reasons and the orders proposed.

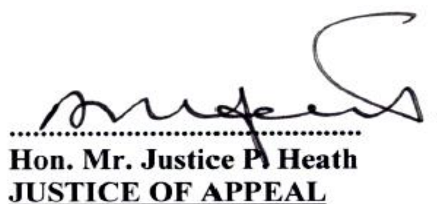
Orders of Court are:

1. Leave to appeal against conviction is refused.
2. Appeal against conviction is dismissed.
3. Leave to appeal against sentence is allowed.
4. The aggregate sentence of 17 years and 10 months of imprisonment with non-parole period of 15 years is set aside.
5. An aggregate sentence of 15 years and 10 months of imprisonment with non-parole period of 13 years and 10 months is imposed with effect from 18 August 2020.



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

Hon. Mr. Justice R. Dobson
JUSTICE OF APPEAL



Hon. Mr. Justice P. Heath
JUSTICE OF APPEAL

Solicitors:

Iqbal Khan & Associates for the Appellant
Office of the Director of Public Prosecution for the Respondent