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

CRIMINAL APPEAL NO. AAU0167 OF 2019
[Lautoka High Court No: HAC 19 of 2016]

BETWEEN : **ISIKELI BAINITABUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, RJA
Qetaki, JA

Counsel : **Appellant in Person**
Mr S. Seruvatu, for the Respondent

Date of Hearing : **4 September, 2024**

Date of Judgment : **27 September, 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Qetaki, JA and agree that the appeal against conviction and sentence should be dismissed.

Mataitoga, RJA

[2] I have read the draft judgment of Qetaki, JA. I agree with the dismissal of the appeal against conviction and sentence.

Qetaki, JA

Background

[3] The appellant is appealing against his conviction and sentence in the High Court at Lautoka after being found guilty with two counts of indecent assault contrary to section 212(a) of the Crimes Act 2009, two counts of sexual assault contrary to section 210(1) of the Crimes Act 2009 and two counts of rape contrary to section 207(1) and 2 (b) and (3) of the Crimes Act 2009 committed at Lautoka in the Western Division against three victims in December 2015 and January 2016.

[4] The following particulars of offences were provided for each of the counts:

> **Count 1 -** *Isikeli Bainitabua, on, on, on, on the 6th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted ''LM" by pinching the nipple of the said "LM".*
>
> **Count 2 -** *Isikeli Bainitabua, on, on, on the 20th day of September 2015 at Lautoka in the Western Division. Unlawfully and indecently assaulted "AV" by touching the vagina of the said "AV".*
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> **Count 3 -** *Isikeli Bainitabua, on the 20th day of December, 2015 at Lautoka in the Western Division, penetrated the vagina of "AV" with his finger.*
>
> **Count 4 -** *Isikeli Bainitabua, on the 28th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted "AV" by licking the vagina of the said "AV".*
>
> **Count 5 -** *Isikeli Bainitabua, on the 28th day of December, 2015 at Lautoka in the Western Division, penetrated the mouth of "AV" with his penis.*

Count 6 - *Isikeli Bainitabua, on the 7th day of January, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted "RM" by poking his finger in between the buttocks of the said "RM".*

[5] After the summing up the assessors had returned a unanimous opinion that the appellant was not guilty of the first count but guilty of all the other counts. The learned trial judge did not agree with the assessors on the first count's verdict of not guilty. He agreed with the assessors on the guilty verdicts for counts two to six. He convicted the appellant on all the counts and sentenced him on 25 October 2019 to an aggregate sentence of 16 years and 05 months and 25 days of imprisonment with a non-parole period of 13 years.

[6] The appellant filed a timely appeal in person. The ground for leave before the single judge were:

"1. That the learned judge erred in law and in fact in convicting the appellant after accepting evidence from State when the same could not be relied upon to secure a conviction;

2. That the learned trial judge erred in law and in fact in sentencing the appellant to a sentence that is harsh and excessive."

[7] After hearing before a single judge (Prematilaka RJA) the application for leave to appeal against conviction and sentence were both refused.

[8] On 27 June 2022 the appellant filed a Notice of Renewal Application pursuant to section 35(3) of the Court of Appeal Act, however, no grounds of appeal were specified.

[9] On 14 August 2024 by letter to the Chief Registrar, the appellant attached a Notice of Appellant's Submission on Renewable Application to the Court of Appeal dated 5th April 2024, and also apply for Enlargement of Time.

The Facts

[10] The following facts are agreed before the trial , between the prosecution and the defence under the provision of section 135 of the Criminal Procedure Act 2009:

"1. That the accused is married to Seleima Bainitabua and she is the youngest sister of the three complainants mother, Lavenia Qolo.

2. That between November 2015 and January 2016, the three complainant's parents were away in Australia for three months.

3. That while the complainants' parents were away, they were looked after by their grandparents, until their return on the 8th of January 2016.

4. That while the complainants' parents were still away in December 2015, the complainant "AV" and her sickly grandmother went to reside with the Accused and his family for one week at Jinnu Road, Shakoor Place, since their toilet was under repair.

<u>Issue</u>

The issue that the Court is now left to deliberate on is:-

1. Whether the Accused indecently assaulted "LM" on the 6th of December 2015?

2. Whether the Accused sexually assaulted "AV" on the 20th of December 2015?

3. Whether the Accused penetrated the vagina of "AV" with his finger on 20th December 2015?

4. Whether the Accused sexually assaulted "AV" on the 28th December 2015?

5. Whether the Accused penetrated the vagina of "AV" with his finger on the 28th of December 2015?

6. Whether the Accused indecently assaulted "RM" on the 7th of January 2016?"

[11] Additional facts are contained in the following passages from the learned trial judge's sentencing order:

"2. The brief facts were as follows:

On 20th December 2015 the victim "AV" who was 9 years of age was at the house of her uncle, the accused. After having her shower, she was on her way to get her towel from her room when she saw the accused standing at the doorway. The victim got scared when she saw the accused. At this time he came and touched her vagina.

3. *The victim went into the room to get her clothes after a while the accused called her into the sitting room. In the sitting room the accused showed her videos in his phone of a man and a woman having sex the accused also told her for them to do what was in the video, this made the victim scared and she refused.*

4. *After the victim refused, the accused forcefully removed the victim's pants and panty and then poked his index finger inside her vagina she felt pain so the accused sought forgiveness.*

5. *The accused then licked and sucked the victim's vagina for about 5 minutes. After this, the victim wore her clothes and went to her grandmother and lay beside her. She did not tell her grandmother about what the accused had done to her because her grandmother was sick and sleeping. Since her parents were in Australia, she told her cousin, Litiana about what the accused had done to her. Litiana told the victim to wait till her parents returned.*

6. *The victim also recalled on 28th December 2015 she was at the house of the accused, on this day the accused was at home with his son. When the victim was sitting on the settee in the sitting room the accused told the victim to suck and lick his penis, she refused.*

7. *Thereafter, the accused pushed the victim's head towards his penis, at this time the accused was not wearing his pants the victim refused so he again pushed her head towards his penis. The accused held the victim's jaws forced open her mouth and then put his penis inside her mouth for about 5 minutes.*

8. *After this, the accused told the victim not to tell anyone and he will give her money. On 29th December the victim left the house of the accused, at home she complained to her cousin Litiana and her sister "LM".*

9. *The second victim "LM" who was 15 years of age in 2015 informed the court that on 6th December 2015 she was at home, in the afternoon the accused with his wife and their baby were returning home to Sakur Place. The accused was carrying baby Rupeni in his arms and the baby was leaning on the chest of the accused.*

10. *The victim went near the accused to kiss her cousin Rupeni as she leaned forward to kiss Rupeni she felt the hand of the accused touch her breast. When her breast was touched, she was scared at this time she took a step back and looked at the accused who was staring at her. The accused did not say anything, she went into her house and told her cousin Litiana about what had happened.*

11. *The third victim "RM" who was 14 years of age in 2016 on 7th January 2016 he was at the house of the accused babysitting Rupeni the accused's son. The wife of the accused was doing night shift from 5pm to 12 midnight at around 9 to 10pm the victim went to the washroom. When he returned, he went to watch the TV the accused was sitting on the settee in the sitting room.*

12. *After a while, the victim lay on the mattress face down and fell asleep he woke up after he felt someone was touching his buttocks. When he turned around her saw the accused laughing at him. He did not like what the accused had done to him.*

13. *The victim was able to recognise the accused because at that time the light in the sitting room was switched on together with the TV when the accused touched the victim's buttocks, he inserted his fingers inside from on top of the victim's shorts. The accused told his aunt the wife of the accused and his cousin Litiana the next day at his house at Vunato about what the accused had done to him.*

14. *The parents of the victims were informed when they returned from Australia and the matter was reported to the police. An investigation was conducted, the accused was arrested and charged."*

Grounds of Appeal

[12] The grounds of appeal filed on 5th April 2014 and confirmed on 14 August 2024 are as follows:

Conviction ground:

Ground 1: *That his Lordship, the learned trial judge erred in law and in fact to apply adequate safeguard of a fair general warning to both, the defence and prosecution to prevent adverse inferences. Thus, causing grave injustice to the appellant.*

Ground 2: That the learned trial judge erred in law and in fact when he misdirected himself in addressing the Legal Aid services to prepare a closing submission for the appellant. Thus causing substantial injustice to the appellant.

Ground 3: That his Lordship, the learned trial judge erred in law and in fact the analyzation of the of the entire evidence that infers that a verdict or sentences was affected by "improper motive" … such as bias may be prescribed as scandalizing the court.

***Ground 4**: That the learned trial judge erred in law and in fact when he blundered the fundamental averment binding bona-fides in cognizance of the appellant's constitutional rights to receive a fair and just hearing of his trial leading to substantial miscarriage of the appellant i.e., …. Arrest of judgment; market police station diary; report book; required fleet book of market police post at Lautoka…"*

Sentence

***Ground 1**: The sentence is harsh and excessive in the circumstances of this case*.

The Law

[13] The appellant could appeal against conviction on any ground on a question of law alone. However, leave is required when on an appeal against conviction on any ground of mixed law and fact, or on any other ground which appears to the court to be sufficient ground of appeal as set out in section 21(1)(b) of the Court of Appel Act. In a leave to appeal application, the test is for the appellant to demonstrate that the ground has "*reasonable prospects of success* "as established in cases including **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (4 October 2018); **Navuki v State** [2018] FJCA172; AAU0038 of 2016(4 October 2018); **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (4 October 2018); and **Sadrugu v State** [2019] FJCA 87; AAU0057 of 2015 (6 June 2019). Further, whether the grounds are arguable: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008); **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July2014); **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013) **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (6 June 2019).

[14] In appeals against sentence, the accused is required to show that the trial judge acted upon a wrong principle; allowed extraneous or irrelevant matters to guide or affect him; mistook the facts, and flailed to take into account some relevant considerations: **House v King** [1936] HCA 40; (1936) 55 CLR 499, which was adopted in **Kim Nem Bae v The State**, Criminal Appeal AAU0015.

[15] Applications for Enlargement of Time and Renewal of Grounds will be considered in line with the legal standards and principles applicable. However, it is noted that the appellant has not provided the reasons or grounds for requesting the enlargement of time, as its grant is at the discretion of the court.

[16] Section 21(1), (b) and (c) of the Court of Appeal Act, allows a person convicted on a trial held before the High Court to appeal to the Court of Appeal, with leave of the Court, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact, or against the sentence passed on a person's conviction, unless the sentence is one fixed by law. Section 23 of the same Act states:

> *"23(1) The Court of Appeal-*
>
> *(a) On any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;*
>
> *(b) ……..*
>
> *Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

<u>In The High Court</u>

[17] The summing-up given on 30 August, 2019 contained 160 paragraphs covering the Role of assessors (paragraphs 2 to 7; Burden of proof and standard of proof (paragraphs 8 to 12; Information (paragraphs 13 to 35); Prosecution case (paragraphs 36 to 92); Defence case (paragraphs 93 to 134), including Defence of Alibi (from paragraphs 110 to 134);

Analysis 135 to 159).It was thorough. The learned trial judge had placed all the materials before the assessors, and directed them adequately on the defence evidence in paragraphs [150] to [157] of the summing up. At paragraph [155], he states:

> *"If you accept the version of the defence, you must find the accused not guilty. If you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember the burden of prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial."*

[18] The Judgment delivered on 02 September, 2019 contained 80 paragraphs, and was equally thorough. The learned trial judge directed himself in accordance with the summing-up, and after evaluating and assessing the evidence of the prosecution and defence witnesses stated:

> *"63. Upon carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of all the prosecution witnesses as truthful and reliable.*
>
> *64. All the complainants gave a detailed account of what the accused had done to them some three years ago their demeanour in court was consistent with their honesty.*
>
> *65. All the complainants were able to withstand lengthy cross examination and were not discredited they were also forthright and not evasive in their answers.*
>
> *66. I accept the complainants were living with their grandparents who were sickly hence, the complainants did not make any complaints to them about what the accused had done, however the complainants promptly informed their cousin sister Litiana who suggested they await the arrival of their parents from Australia.*
>
> *67. I also accept that Litiana was afraid of the accused and therefore she did not wish to confront the accused with what the complainants had told her. Litiana was also a reliable and truthful witness and this court can rely on her evidence.*
>
> *68. Considering the age of the complainants at the time they had told Litiana relevant and important information in respect of the unlawful sexual conduct by the accused which was enough to alert her of what the accused had done. There is no requirement of the law that the complainant has to tell all the details of the unlawful sexual conduct to the person complained (see Anand Abhay Raj v State, CAV 003 of 2014 (20 August, 2014). Although the first and third complainants "VK" and "RM" did not fully*

tell Litiana what he accused had done to them that is complainant "VK" did not tell Litiana that the accused had inserted his penis into her mouth and the complainant "RM" did not tell Litiana the accused had poked his finger in between his buttocks does not in my judgment affect the credibility and the reliability of their evidence.

69. There were some confusion over the dates and the incidents but the omissions were not significant to affect the credibility of the complainants since passage of time does affect ones memory.

70. At the time of the alleged incidents the complainant "VK" was 9 years of age and the complainant "RM" was 14 years of age but they had relayed to Litiana important information about what the accused had done to them. Victims of sexual abuse react differently when asked to explain the unexpected sexual ordeal to someone."

[19] The judgment covered the caution interview. The learned trial judge stated:

"71. Furthermore, I accept the admissions contained in the caution interview of the accused was obtained by the police officers in just circumstances and that the accused had voluntarily given his answers to the questions asked which the truth was. The answers in the caution interview do not give any iota of indication that the answers were fabricated by the interviewing police officers.

72. The answers mentioned in the caution interview could only be known to the accused and nobody else. Moreover, the accused in his evidence raised issues of assault during his arrest and at the Lautoka Police Station, and breach of Constitutional Rights, however, this was not put to the interviewing officer in cross examination.

73. Furthermore, the accused did not raise any issues of assault when he was produced in the Magistrates Court the day after caution interview was completed that is on 14th January 2016.I reject the issue of involuntariness and the forgery of the accused signature in the caution interview as an afterthought which is unbelievable. I also reject the defence assertion that the complainants had colluded with their parents to make a false complaint against the accused because he had damaged their toilet system and had consumed grog in their house which was against their religious belief as implausible on the totality of the evidence."

[20] On the evidence of the accused and his witnesses, the learned trial judge stated:

"74. The accused and his witnesses did not tell the truth in court. It was observed that the accused was not forthright in his evidence or in cross examination. He was cautious in answering questions he took his time to

answer questions which allowed him the opportunity to choose his words properly so as not to put himself in a difficult situation. The accused demeanour was not consistent with his honesty."

[21] On the Defence of Alibi, the learned trial judge stated:

"75. The alibi witnesses called by the accused were his friends and drinking partners who were close to each other. It appeared to me that the witnesses were rehearsing whatever they had discussed their evidences was similar and was narrated without any second thought. The only truth by Peni Nakarawa was when he said on 28th December, 2015 the accused was not at work.

76. The accused stated on 20th December, 2016 he went to work it was Sunday he knocked off from work at 1.00pm. From work he went to farmers Club, Nadi to drink with Peni Nakarawa and Joape Ralulu and it was very late in the evening he reached his home.

77. Peni Nakarawa did not mention anything about finishing work at 1pm and going to drink at Farmers Club with the accused. Jope Ralulu and Apakuki Sowane told the court that on 20th December the work has finished at 1.00pm and after that he and the accused joined the party organised by the company.

78. Furthermore, the accused did not say anything about the selling of food parcels and cigarette rolls at the work site yet the alibi witnesses said otherwise. Another interesting aspect about the defence evidence was that the accused told the court that he was on Christmas leave from 23rd December 2015 to 04th January, 2016 and he did not say anything about going to work during this period yet the alibi witnesses saw the accused at work during this period is unbelievable. The alibi witnesses were unreliable and untruthful and no weight can be given to their evidence in respect of the above.

79. The demeanour of the accused and all the alibi witnesses led me to the inescapable conclusion that the defence of alibi was a planned afterthought. The evidence of the accused is inconsistent with his alibi witnesses. It was obvious that these alibi witnesses came to court to help the accused. The alibi witnesses and the accused persons are known to each other and all had concocted a story to tell the court.

80. The accused and the alibi witnesses were also discredited in cross examination. The prosecution has rebutted the defence of alibi beyond reasonable doubt in the prosecution case.

81. The defence has not been able to created a reasonable doubt in the prosecution case."

[22] The learned trial judge then confirmed his determination on the charges in each count, as follows:

> *"82. This court is satisfied beyond reasonable doubt that on 6th day of December, 2015 the accused had unlawfully and indecently assaulted "LM" by pinching her nipple.*
>
> *83. This court is satisfied beyond reasonable doubt that the accused on 2oth December, 2015 had unlawfully and indecently assaulted the complainant "AV", by touching her vagina and had also penetrated the vagina of the complainant "VK" with his finger a child under 13 years of age.*
>
> *84. This court is also satisfied beyond reasonable doubt that the accused on 28th December, 2015 unlawfully and indecently assaulted the complainant "AV" by licking her vagina and had also penetrated the mouth of the complainant "AV" with his penis a child under 13 years of age.*
>
> *85. The court is also satisfied beyond reasonable doubt that on 7th of January, 2016 the accused unlawfully and indecently assaulted the complainant "RM" by poking his finger in between his buttocks.*
>
> *86. For the above reasons, I overturn the opinion of the assessors that the accused is not guilty of count one indecent assault. I agree with the unanimous opinion of the assessors that the accused is guilty of counts two to count six."*

Note that the reference to "*VK*", a child under 13 years of age" in paragraph 83 above, appears to be a mistake by the learned trial judge, as it should be a reference to "*AV*", consistent with paragraph 84.

[23] The Sentence delivered on 25 October, 2019 contained 41 paragraphs. The reasoning was sound and reflects the learned judge's evaluation and assessment of the evidence.

Before a Single Judge

[24] The learned single judge restated Ground 1, as it seems too general, and it appears that the gist of the ground is that the verdict is unreasonable or cannot be supported having

regard to the evidence. After discussing the summing up and the judgment, he held that, in the circumstances, there is no reasonable prospect of success. He stated at paragraph [18] of Ruling:

> *"In a very comprehensive judgment running into 18 pages and 88 paragraphs the trial judge had discharged his duty in agreeing with the assessors in respect of two 02nd - 06th count and disagreeing with them on 01st count. Therefore, in my view upon the whole of the evidence it was open to the assessors [02nd-06th counts] and the trial judge [01st-06th counts] to be satisfied of the accused's guilt beyond reasonable doubt……..".*

[25] On the sentence ground, the learned single judge held, there was no real prospect of success. That, given the seriousness of the crime committed and the number of victims, the appellant's sentence cannot be called disproportionate, harsh or excessive.

Discussion

Preliminary

[26] From the outset, it is important to note that, the appellant has from the initial apprehension by the Police to the end of the trial, been consistent in denying that he committed the offences he has been charged with. The denial continues to this Court at the appeal hearing. Also, at the end of the trial the assessors had returned a unanimous verdict of not guilty of the first count, and guilty of the remaining counts. As such, this Court has a duty to, in addressing the appeal grounds, to carefully scrutinize the judgment of the learned trial judge, and the evidence before him, to ascertain whether, and the decision has been made after proper and accurate evaluation, assessment and weighing of the evidence, given the environment and circumstances of the case. To begin, I will address two significant aspects of the case, before the grounds of appeal are discussed, namely the caution interview which was challenged in *Voir Dire* and *Alibi,* as a defence in this case.

Voir Dire

[27] At the trial, the prosecution wishes to adduce in evidence the caution interview of the accused dated 12th and 13th January, 2016.This was objected to by the accused on two

grounds. Firstly, that the accused was assaulted and intimidated by the interviewing and the arresting officer during and after arrest; secondly, that the accused was arrested at Namaka, Nadi and taken to Lautoka Police station and was assaulted during arrest by the arresting office. There were three witnesses called by the prosecution, namely: (i) Cpl. Asenaca Taufa, who was the interviewing officer, and investigating officer; (ii) Seruvi Cagusau, who was the arresting officer;(II) Senitiki Nakatosavu. All gave evidence and were cross examined. The accused also gave sworn evidence, and was cross examined. He was to call one Jimilai as a witness, but this was not to be the case.

[28] The hearing took four days 15, 16, 17, and 19 July, 2019. I have read the transcripts and also the judgment by the learned trial judge on the accused's objections. I agree that the prosecution case at the hearing, proved beyond reasonable doubt that the caution interview of the accused was conducted fairly, and the answers by the accused were given voluntarily. I agree with the learned judge's analysis of the evidence, and conclusion.

Alibi

[29] The accused had wholly denied the charges against him, and he relied on the defence of alibi. He maintained that he was not at the scene of the crimes when they were committed. He had called three witnesses namely Apakuki Sowane, Joape Ralulu and Peni Nakarawa, all of whom had made statements to the police which were recorder on 12/08/2019.It is for the prosecution to disprove the alibi beyond reasonable doubt. I have read the statements made by the three witnesses, and their evidence at the trial, and I agree with the determination of the learned trial judge, and the reasons expressed in paragraphs 75 to 81 of the judgment dated 02 September, 2019. The defence of alibi is not available on the evidence here.

Conviction Grounds

[30] ***Ground 1:*** In his written submissions, the appellant states that the learned trial judge's summing –up was not fair, objective and balanced, and must relate to the evidence or case

of both the prosecution and of the defence, such that the assessors have a fair and balanced summary of the case and position of both the parties. The appellant is specifically focussing on the evidence of Miss Teri Konrote, an expert medical witness at the trial, and how the learned trial judge had put her evidence before the assessors, causing grave injustice to the appellant.

[31] Dr Teri Konrotes evidence are summed up in paragraphs 60 to 64 of the summing-up. The doctor confirmed that she had examined the first complainant "AV" on 15th January 2016 at the Lautoka hospital. Her medical report on the said complainant is at pages 169 to 171 of Record of High Court, Vol.1 of 2. The specific medical findings are stated in paragraph [60] of the summing up, as follows:

(a) The hymen was not visible at the location of 12 o'clock to 9 o clock, and
(b) There was no active bleeding or discharge.

Contrary to the appellant's challenge on the summing up being not fair or unbalanced, the learned trial judge did provide relevant direction and guidance on the evidence provided by Dr Konrote in paragraphs 65, 66 and 67 of summing-up.

[32] The medical findings was also raised in paragraphs 21, 22 and 23 of the judgement of the learned trial judge.

[33] The appellant was concerned with the contents of Disclosure (D 10), which states as follows:

History as related by the person to be examined: -

Patient says her uncle Sikeli took off her panties and licked her mimi and then put his balls into her mimi and it was painful.

He told her not to tell anyone and did this on two occasions.

[34] The respondent submits that, D 10 was not addressed by the learned trial judge in summing-up because D 10 is hearsay evidence. In **Koroitamana v State** [2018] FJCA 89, Criminal Appeal No. AAU01119 of 2012 (5 June 2018) His Lordship Justice Chandra

JA cited the High Court of Australia in **Ramsay v Watson** (1961) 108 CLR 642 at 649 at paragraph 63 as follows:

> *"[63] Medical practitioners are able to give evidence of what the complainant said during the course of an examination. However, the purpose of any such conversation is not to prove the truth of what the complainant said happened, but to indicate the reason why the medical practitioner examined particular parts of the complainant's body".*

[35] The respondent submits that, in consideration of **Koroitamana v State** (supra) and the evidence of D10 by Dr Konrote in her medical report, the history related by "*AV*" is not to prove the truth but the weight to be given such evidence is only to indicate the reason for the medical examination.

[36] The learned trial judge reminded the assessors on the respective cases for the prosecution and defence, he directed, at paragraph 35 of the summing-up that;

> *"If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case."*

[37] A closer look at the summing-up, confirm that the learned trial judge had not misdirected himself and fully covered the main aspects on how to consider Dr Tari Kornrote's evidence and had comprehensively and fairly addressed evidence of both sides. He stated:

> *"65. You have heard of the evidence of Dr Konrote who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.*
>
> *66. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you*

should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.

67. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence."

[38] Two more points need to be raised with respect to this ground, firstly, there was no objection to or request for redirection on this aspect at the end of the summing-up. Secondly, the case for the defence was that of complete denial at the trial, and he relied on an alibi. In view of above, the ground has no merits and should be dismissed. There is no miscarriage of justice.

[39] ***Ground 2:*** That the learned trial judge erred in law and in fact in requesting the Legal Aid Commission to make submissions on behalf of the appellant at the end of the trial leading to substantial injustice to the appellant. The appellant, rightly or wrongly, appears to have developed a distrust of legal representation, and preferred to conduct his defence in person, as demonstrated by this ground and the arguments in support of the ground. The Legal Aid Commission was established with the objective of assisting those who needed legal representation, pursuant to conditions and requirements under the Legal Aid Commission Act. It is there to assist those who needed legal assistance and such assistance is provided by professionals who are trained and qualified in law, at no cost or at a much-reduced cost to the client. However, it is on the accused person to choose and apply for legal representation.

[40] It is clear that the learned trial judge was very accommodating to facilitate the preparation of the appellants closing address at the end of his defence. This in the face of the issues and difficulties that the appellant is faced with, including the need to hasten the closing of the formal trial -see page 638, Vol.2 of 2 of Record. The appellant was not ready when the closing address had been scheduled, and the learned trial judge allowed further time for the appellant to complete his closing address, stating at page 641, Vol 2 of 2:

"Court: No, I am prepared to give you time, I can even make an order that you go to the High Court Library where there are facilities for you to write. What you have to do in your closing speeches is confine your speech to the evidence that has been adduced and that is how it is going to be and do not ask assessors to assume or speculate on any fact, so that going to be what is……"

[41] The Record shows that the trial judge had suggested to the appellant if he wanted Legal Aid assistance, and it seems the appellant did wish for a Legal Aid lawyer. The learned trial judge had provided the written transcripts of the trial to the Legal Aid Commission to assist the appellant. It is the appellant's right to choose whether to have legal representation or conduct his case in person.

[42] There was no injustice to the appellant in having a lawyer from the Legal Aid Commission to assist the appellant in his closing address. Legal representation and assistance, offered to an accused in a serious criminal case, in effect, would have bolstered the appellant's closing address since the appellant is a lay person with no formal training or professional experience in law. At the hearing, the appellant was not able to clearly explain the difference between the closing address prepared by him, from that prepared by the legal representative proposed by the learned trial judge. There is no merit on this ground. There is no miscarriage of justice.

[43] ***Ground 3:*** This ground alleging that the learned trial judge erred in law and in fact in his analysis of the evidence before him. For instance, in respect to Count 1, 'LM' submits that she had not seen the appellant touch her breast, and what 'LM' said in trial is different from what she said in her statement. The elements of indecent assault was highlighted by the learned trial judge in summing-up, stating:

"14. To prove counts 1 and 6 the prosecution must prove the following elements of the offences of indecent assault beyond reasonable doubt:

(a) The accused;

(b) Unlawfully and indecently;

(c) Assaulted the complainant" by pinching her nipple and assaulted the complainant ''RM" by poking his finger in between his buttocks."

It was *'LM'* who stated in evidence that, she felt a hand of a grown person touch her breast as she leaned to kiss her baby cousin. Rupeni who the appellant was holding and not the pinching of her nipple may have been why the assessors returned with a verdict of not guilty for count 1.

[44] The learned trial judge, overturned the unanimous opinion of the assessors, and giving his reasons, as follows:

> *"16. The second complainants'" who was 15 years of age in 2015 informed the court that on 6th December 2015 she was at home, in the afternoon the accused with his wife and their baby were returning home to Sakur Place. The accused was carrying baby Rupeni in his arms and the baby was leaning on the chest of the accused.*
>
> *17. The complainant went near the accused to kiss her cousin Rupeni as she leaned forward to kiss Rupeni she felt the hand of a grown-up person touch her breast. When her breast was touched, she was scared at this time she took a step back and looked at the accused who was staring at her. The accused did not say anything, she went into her house and told her cousin Litiana about what had happened. The complainant stated that she felt the hand that touched her breast was not the hand of a child or a baby."*

[45] The difference between the statement made by "*LM*" to Police and the evidence given in court by her on this aspect, was never raised by the appellant as an inconsistency.

[46] With regard to count 3 and 4, the appellant submits that there was no corroborating evidence to support the evidence of "*AV*". However, corroboration of evidence is not required in sexual offences. In summing-up, at paragraph 33, the learned trial judge stated:

> *"As a matter of law, I have to direct you that offences of sexual nature do not require the evidence of the complainants to be corroborated. This means that if you are satisfied with the evidence given by the complainants and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainants."*

[47] In any event, the appellant had wholly denied the offences he was charged with, and had relied in the alibi defence. The ground fails. There is no miscarriage of justice.

[48] ***Ground 4:*** That the constitutional rights of the accused to receive a fair and just hearing of his trial was denied leading to a substantial miscarriage of justice. The appellant submits that his right protected under section 14(2) of the Constitution was breached. That he had made requests to Police (i.e., Arrest of judgment, market place police post diary, report book. He was not provided facilities and assistance. Section 14 (2) (c) states-

> *"(2) Every person charged with an offence has the right-*
> *……*
> *……..*
> *(c) to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right to access to witness statements."*

[49] The appellant sets out his supporting arguments in paragraphs 3.7 to 4.7 of his written submissions dated 14 August 2024. He alleged that evidence of the assaults against him by the Police were suppressed. For example, at paragraph 3.8, the appellant submits:

> *"3.8 The Appellant had basically requested fleet record of vehicle used by the officers who had thoroughly abused and assaulted him, including the market police post diary; post report book which would attest to his strategy of defence binding to the constitutions mandatory established eligibility to the appellant's defence. Yet, it was refused to be taken into consideration by the trial judge. Even though, there was an inkling to his (appellants) beseeching rectification consolidating his defence……"*

[50] The appellant argued that his caution interview was fabricated and his signature was forged. These assertions were considered by the learned trial judge in his summing up at paragraphs 81 to 91, 101 to 106, and 146 to 149 and as such, there was no substantial miscarriage of justice contrary to the appellant's assertions.

[51] The learned trial judge had in the *Voir Dire* found based on the evidence adduced, that there was no breach of the accused's /appellant's constitutional, and common law rights. There is no merit on this ground. There is no miscarriage of justice.

[52] In concluding the discussion on the grounds of appeal urged against conviction by the appellant, I am satisfied and hold that, considering the copy record of the trial transcript and the summing up, it was open for the assessors to be satisfied of guilt beyond reasonable doubt.

Sentence Ground

[53] **Ground 1**: The appellant's complaint is that the sentence is harsh and excessive. He submitted that his ground satisfies the guidelines/ principles set out in **House v King**, [1936] HCA 40; (1936) 55 CLR 499, which was adopted in **Kim Nam Bae v The State** [1999] FJCA 21, Criminal Appeal: AAU 0015, that the trial judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him; mistook the facts and failed to take into account some relevant consideration. The appellant however, did not elaborate to demonstrate any specifics connected with any of those principle.

[54] The trial judge had followed the sentencing tariff for juvenile rape i.e., 11 -20 years set in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018). The learned trial judge had addressed sentencing at length, and he had examined all relevant matters. He has considered the evidence, and assessed, evaluated and weighed these in light of the seriousness of the offences committed and other relevant factors, including, the aggravating factors, the Impact of the offences on the victims and the nature of the sentence under the Sentencing and Penalties Act. The sentence, is not harsh and excessive taking all relevant factors into consideration, including the totality of the evidence, the serious nature of the crimes committed and the legal authorities.

[55] That the learned trial judge had carefully considered sentencing issues, is illustrated in the passages below on consideration of the total sentence and whether or not a non- parole period need to be ordered. As follows:

"31. This court is satisfied that the term of 16 years and 5 months and 25 days imprisonment does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each offence.

32. Mr Bainitabua you have committed serious offences against your two nieces and one nephew who you were supposed to protect and care. The victims were unsuspecting and venerable in fact the victims were without the supervision of their parents who were in Australia at the time you were abusing the victims. The three children were under the care of your wife and you. You cannot be forgiven for what you have done to these victims who were 9. 14 and 15 years of age at the time.

33. As a result of your actions as per the victim impact statements the victims were psychologically and emotionally affected for some time even to the extent that their school work was affected. Rape is not only a physical act, it not only destroys the very soul of the victims, but also brings about hopelessness and anxiety which cannot be measured or repaired by anyone.

34. Under section 18(1) of the Sentencing and Penalties Act, this court has a discretion to impose a non-parole period. During the sentence hearing the accused was asked to submit on whether a non-parole period should be imposed or not. The accused submitted that no non-parole period be imposed since he is a person of good character since his previous conviction is unrelated to this offending which ought to be disregarded and that he has a family to support……..

39. Considering the above, I impose 13 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances of this case."

[56] I agree that the sentence is not disproportionate, in view of the offences committed on the victims under the circumstances, nor is it harsh and excessive. This ground fails, there is no miscarriage of justice.

Conclusion

[57] In view of the foregoing, and for the reasons given in this judgment, extension of time is granted, Leave to appeal is denied. The appellant's conviction and sentence are affirmed.

Orders of Court:

1. *Leave to appeal against conviction and sentence refused.*
2. *Appeal against conviction and sentence dismissed.*

The Hon. Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

The Hon. Mr Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL