

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

**CRIMINAL APPEAL NO. AAU0112 OF 2019**  
**[Lautoka Criminal Action No: HAC 145/16]**

**BETWEEN** : **BILL JACKSON**

*Appellant*

**AND** : **THE STATE**

*Respondent*

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

**Counsel** : **Appellant in Person**  
**Mr. Kumar for the Respondent**

**Date of Hearing** : **7 February 2024**

**Date of Judgment** : **28 February 2024**

**JUDGMENT**

**Mataitoga, RJA**

[1] I concur with the reasons and conclusions.

## **Qetaki, JA**

### **Background**

- [2] This is an appeal against conviction and sentence. The appellant had been indicted in the High Court at Lautoka with one representative count of sexual assault contrary to section 210 (1) (a) of the Crimes Act 2009 and one representative count of rape contrary to section 207 (1) and (2) (a) of the Crime Act 2009.
- [3] In respect of representative count 1, it was alleged that the appellant, between the 11<sup>th</sup> day of July 2016 and 12<sup>th</sup> day of July 2016 at Mataniqara, Ba, in the Western Division, had unlawfully and indecently assaulted Vaciseva Wati. On representative count 2, it was alleged that the appellant between the 11<sup>th</sup> day of July 2016 and 12<sup>th</sup> day of July 2016 at Mataniqara, Ba in the Western Division had carnal knowledge of Vaciseva Wati, without her consent.
- [4] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge agreed with the assessors' opinion, convicted the appellant and sentenced him on 26 June 2019 to an aggregate imprisonment term of 12 years and 05 months with a non-parole period of 10 years.
- [5] The appellant had in person appealed against his conviction and sentence out of time by less than a week, which is within the acceptable limit of delay. He had subsequently tendered additional and further grounds of appeal from time to time. The Legal Aid Commission had lodged amended grounds of appeal on behalf of the appellant with legal submissions on 21 September 2020.

### **Grounds of appeal**

- [6] The grounds of appeal urged by the appellant, by himself or on his behalf by the Legal Aid Commission (LAC) against conviction and sentence are set out below:

**Conviction Ground (Filed by LAC on 21 September 2020)**

**Ground 1**

*That the learned trial judge erred in law and in fact when he failed to properly and fully consider the defence case and material doubts that was caused by the defence case in the State's case which would have in turn lead to his acquittal.*

**Conviction Grounds (Filed by Appellant on 15 September 2020)**

**Ground 1**

*That the whole summing-up the learned trial judge was against the defence case, in that he failed to highlight or out to the assessors and prospects of defence of the appellant.*

**Ground 2**

*That the Legal Aid Counsel did misinterpreted the appellant and failed to advise him adequately or even at all the consequences of remaining silent during trial.*

**Ground 3**

*That the defence counsel did misrepresent the appellant and was incompetent to regard the appellant's instructions in calling his witnesses.*

**Ground 4**

*That the learned trial judge erred in law in failing to make an in depth assessment to all the evidence before agreeing with the assessors that the appellant was guilty of rape.*

**Ground 5**

*That the learned trial judge erred in law when he failed to put the defence case to the assessors in a balance evenhandedness and objectiveness manner in a fairness of the trial.*

### **Ground 6**

*That the learned trial judge erred in law in shifting the burden of proof to the appeal to prove his innocence.*

### **Sentence Ground (Filed by LAC on 21 September 2020)**

#### **Ground 1**

*That the sentencing judge failed to give a proper discount for the appellant's mitigation thus making the sentence harsh and excessive.*

### **Sentence ground (Filed by Appellant on 15 September 2020)**

#### **Ground 1**

*That the sentence is harsh and excessive in the circumstances of the case.*

- [7] The application for leave to appeal was heard before a single judge on 07 October 21, and in his Ruling delivered on 08 October 2021. Leave to appeal against both conviction and sentence were refused, it being held that there was no prospects of success in an appeal on the grounds or that the grounds were without merit. Meanwhile, the appellant had filed notice of additional grounds of appeal on 24 November 2021, and an application to adduce fresh evidence at the hearing.

### **The Facts**

- [8] The facts of this case are as follows:

- “2. On 11<sup>th</sup> July, 2016 at about 7pm the victim reached Ba Town from Nausori, thereafter she went to Vadravadra Village. After getting off the carrier while walking home the victim saw the accused drinking alcohol with others.
3. The victim knows the accused since they were neighbours, when the accused saw her he told her to wait so that he can accompany her home.
4. As they went near the house of the accused which was before the victim's house the accused asked the victim to accompany him to his house for a drink. The victim refused saying she was going home.

5. *At this time, the accused started pulling the victim's t-shirt, since the victim was unable to push the accused away, she started to scream for help. The accused punched the victim and after holding the collar of her t-shirt tightly forcefully took the victim to his house.*
6. *When the victim reached the house of the accused she thought of escaping. The victim ran out of the accused house towards the neighbor's house. While running, the victim fell towards the fence of the neighbor's house at this time the victim screamed on top of her voice again, she was punched by the accused and brought to the house of the accused for the second time.*
7. *Inside the house, the accused started kissing the victim, forcefully removed the victim's t-shirt, bra, removed her pants and start licking the victim's vagina. This victim did not like what the accused was doing after this the accused had forceful intercourse with the victim.*
8. *When the accused had finished, he stood up and walked around the house. After a while, the accused came and sat beside the victim and once again started kissing her mouth and then went on to lick her vagina and then inserted his penis into the victim's vagina and had forceful intercourse with the victim.*
9. *The victim pretended to sleep, after a while the accused fell asleep when the accused was snoring the victim after wearing her clothes left the house without closing the door and started running towards her house. At home, the victim told her boyfriend Tevita Buto what the accused had done to her.*
10. *The victim did not consent to what the accused had done to her. The next day the victim reported the matter to the police. The accused was arrested and charged."*

[9] The accused's position is that of denial as stated in paragraph 22 of the Judgment as follows:

*"22. The accused denies committing any of the offences as alleged. The defence contention is that the incidents as narrated by the complainant did not happen, the accused had not accompanied the victim as stated by the complainant. In respect of the accused seeking forgiveness, he denies going to the house of the complainant as stated by the prosecution witnesses."*

## **Application for additional grounds**

[10] Notice of additional grounds of appeal was filed on 24 November 2021 pursuant to Rule 37 of the Court of Appeal Act. The grounds of appeal are as follows:

### **Conviction**

**Ground 1.***That the learned trial judge may have fallen into an error of law when he failed to give the right to election on the count of Sexual Offence making the conviction unsafe and resulting in a miscarriage of justice.*

**Ground 2.***That the learned trial judge may have fallen into an error of law when his Lordship inadequately direction to himself and the assessors regarding the Admitted Facts is not in accordance with established principles result in a substantial miscarriage of justice.*

**Ground 3.***That the learned trial judge may have fallen into an error of law when his Lordship shift the burden of proof to the appellant on paragraph 29 of the judgment to prove his innocence by stating that the appellant has not been able to create a reasonable doubt in the prosecution case resulting in a substantial miscarriage of justice.*

**Ground 4.***That the learned trial judge may have fallen into an error of law when His Lordship failed to properly and accurately direct himself and the assessors on all the aspects and components of law applicable to properly assist the assessors to apply it to the facts before them in reaching their opinion results in a substantial miscarriage of justice.*

**Ground 5.***That the verdict is unreasonable and dangerous having regards to evidence.*

### **Sentence**

**Ground 1.***That the sentence is harsh and excessive.*

### **Before Full Court of Appeal**

[11] The appellant was unrepresented at the hearing of his appeal. He confirmed he is appealing against conviction (see page 1 of record) and sentence. He confirmed that the documents filed in November 2021 are his grounds of appeal. That he also appeals against conviction asserting that it is harsh and excessive. The appellant indicated that he had provided additional grounds and submissions on 22 December 2023 but they never reached the registry. He was referring to a Notice of Further Additional Grounds of Appeal against conviction an application to adduce fresh evidence.

### **Applications for Further Additional Grounds and Fresh evidence**

[12] At the hearing the appellant alluded to his attempted filing of further additional grounds of appeal and application to adduce fresh evidence. The further additional grounds are as follow:

1. *That the learned trial judge had erred in law and fact for admitting evidence of prosecution witnesses without any careful examination of such evidence resulting in a substantial miscarriage of justice.*
2. *That the direction of the trial judge to the assessors at paragraph 45 of the summing-up was flawed and had unfairly prejudiced the appellant's rights to fair trial.*

[13] These grounds were not supported by any written submissions nor explained by the appellant at the hearing. The first ground appear to have been adequately dealt with at the leave stage with other conviction grounds. On the second, the appellant was legally represented at the trial and it appears there was no redirection sought by his counsel. In any event, as relate to injuries, the matter was adequately addressed by the single judge in paragraphs [9] to [12] of the ruling.

[14] A handwritten application to adduce fresh evidence dated 23 December 2023 was shown to the Court, the particulars of such evidence was not disclosed to the Court making it difficult to assess the application as to admissibility. No submission in support of the request was made.

[15] In the circumstances, the Court will not entertain the further additional grounds and any fresh evidence as applied for.

### **Appellants Case**

#### **Ground 1**

[16] The complaint by the appellant is that he was not given the right to election. He was not given time to speak during trial. He had a lawyer from LAC representing him. When asked whether he had anything else to say, he stated that he would leave matters to the Court's discretion.

#### **Ground 2**

[17] The appellant alleges that the learned trial judge did not adequately direct himself and the assessors regarding the Agreed facts which is not in accordance with the established principles, resulting in a substantial miscarriage of justice. That the learned trial judge did not give reasons why he was found guilty. That the learned judge committed an error of law. That the judge made a decision on his own and found him guilty of the offence. When questioned that he was complaining about admitted facts, he could not say anything, as, according to him, he *“was not aware of what was going on during my case because my lawyer was representing me.”*

#### **Ground 3**

[18] The appellant's complaint is that the learned trial judge may have fallen into error of law when he shifted the burden of proof to the appellant on paragraph 29 of the judgment to prove his innocence. He stated that the appellant was required to prove his innocence but that appellant was not able to create reasonable doubt in the prosecution case, which resulted in substantial miscarriage of justice. The Court pointed out to the appellant that his submission is not connected to paragraph 29 of the summing up as in the ground of appeal, but may be found in paragraphs 18 and 19 of the summing up. Paragraph 29 of judgment of the learned trial judge stated:

*“29. The defence has not been able to create a reasonable doubt in the prosecution's case in respect of both the representative counts the accused is charged with.”*



[19] Paragraphs 18 and 19 were read out, and the appellant was asked to indicate where the learned trial judge had gone wrong:

*“18. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.*

*19. In this trial the accused has denied committing the offence of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently licked the vagina of the complainant between 11<sup>th</sup> day of July, 2016 and the 12<sup>th</sup> day of July, 2016.”*

He stated he did not know how to explain this but in trial he just relied on his lawyer. He does not know how to explain his concerns but he denies sexual assault.

#### **Ground 4**

[20] The appellant complains that the learned trial judge erred in law when he failed to properly and adequately direct himself and the assessors on all aspects and components of law applicable to properly assist the assessors to apply it to facts before reaching their opinion, resulting in substantial miscarriage of justice. The appellant could not explain what he meant under this ground. The appellant stated that he did not know anything about the law and he was not with his brother who prepared these grounds of appeal at the time it was being prepared- *“so I did not know what he put in it.”* The court assisted by referring appellant to relevant paragraphs in the summing up. The Court referred the appellant to the directions in the summing up, in paragraphs 72 (page 209), 75(page 210), 70 (page 208) and 69 (page 208).The appellant stated these are not true.

#### **Ground 5**

[21] No specific submission was made on this ground.

## **Against Sentence**

[22] The appellant complained that the sentence was harsh and excessive. When asked the basis for saying that the sentence was excessive, the appellant stated that he was sentenced to 12 years and 05 months even though he denied what happened, and believe the sentence is too long. He stated the non-parole term of 10 years is too long and felt that the learned judge did not consider some relevant factors or considered irrelevant factors in his sentence. He mentioned that the learned trial judge was relying solely on confession of the complainant and his voice was not heard on this issue. He stated the sentence was excessive, *“if I committed the act I could gladly accept the life imprisonment for this offence but I don’t know what else to say.”* In responding to Court the appellant stated he did not know if the learned trial judge considered his family situation sufficiently, it’s too long as he has 7 children. The accused felt the court did not consider his family sufficiently- *“don’t know if my children are at home or on the streets and don’t know if my wife is at home or somewhere else or my children.”*

[23] Toward the end of the appeal hearing, when accused was asked whether he had anything else to say, he replied: *“I sincerely apologise if the grounds that have been written, I have little knowledge about and did not know what to say. I would just like to seek your help with what I am trying to do here.”*

## **Respondents Case**

### **On conviction**

[24] The respondent relies largely on its written submissions in leave submissions, given that the appellant did not file a written submission for this hearing. In oral submissions addressing the grounds of appeal, the respondent indicated that there is only one new ground which is the matter of election. The point raised is unanswerable.

[25] In relation to the other grounds, Counsel emphasized that the complainant had walked someway to her parent’s home, and she was raped by her friend, the appellant. The complainant heard the accused snoring and made her escape to the place she knew was

sanctuary. He (Meli) saw her distressed-she told her story, which is evidence of recent complaint.

[26] Counsel for the respondent submitted that the accused's denial does not hold up. The complainant's mother collected clothes on the way to accused's house, but her evidence on oath is not believed. Accused did not give weight to the scream. Given the denial, one would expect the accused to give evidence, although he did not have to. The Court could not expect more than undeniable evidence of the complainant at the trial.

### **On sentence**

[27] The respondent submitted that this is an emotional area depriving the appellant of seeing his wife and children, neighbourhood and home. It is always difficult with personal circumstances not being mitigatory and counsel drew an analogy with a father of 6 who is charged and convicted of raping 1 of the children. Would he get a discount? No. There would be no discount for good character because of previous conviction in 2021. Counsel submitted that the sentence was stern but not harsh or excessive.

[28] Counsel noted that there is the danger of double-counting that comes to mind with the additional 5 years for the aggravating features. Counsel accepts that it could exist. In defending the sentence, Counsel stated it started at the lower end of the tariff. It was a stiff enhancement (5 years) which should be viewed against the harrowing circumstances the complainant experienced. Further, Counsel submitted that some discount could have been afforded for the appellant's community service.

### **Analysis**

[29] Both the appellant and the respondent did not file written submissions for the full court hearing, and have relied on their respective submissions filed at the leave stage before a single judge, and the oral submissions that were made at the hearing. The learned single judge had considered the appellant's application for leave to appeal thoroughly in his ruling delivered on 08 October 2021. In that ruling the learned single judge refused both the leave to appeal against conviction, and leave to appeal against sentence. I have carefully read the Record and noting the grounds in this appeal are "*Additional Ground*"

filed on 24 November 2021, but which are connected to and related to the grounds that were before the learned single judge at the leave stage, but abandoned by the accused, who confirmed that his appeal grounds are contained in the November 2021 document.

### **Conviction**

[30] On **Ground 1**, the failure to give right of election, the accused was not been able to fully explain what his contentions were. He merely referred to the fact that he was represented by counsel, and was not given time to speak or raise questions at the trial. He left matters to the discretion of the Court, the meaning of that is not clear either. The ground is dismissed and there is no miscarriage of justice.

[31] **Ground 2** of appeal states:

*“2. That the learned trial judge may have fallen into an error of law when his Lordship inadequately directed to himself and the assessors regarding the Admitted Facts is not in accordance with the established principles resulting in a substantial miscarriage of justice.”*

The ground does not make sense as the Amended Admitted Facts, at pages 233 and 234 of the record simply confirms the names of the complainant, accused/defendant that fact that the complainant was in a relationship with one Tevita Buto, the complainant’s and accused’s residential locations and confirms the name of Tevita Buto’s mother (Marilina Liku).

[32] In view of the appellants explanation at the hearing that, he was not given reasons why he was guilty and so on, it is presumed that the appellant was referring to the summing up by the learned trial judge, which would appear to link this ground to grounds 4 and 5 of the accused’s leave to appeal grounds, before a single judge. He may also be referring generally to the way his evidence /case, was presented to the assessors.

[33] If so, in my view, given that the accused is in complete denial and did not give evidence at the trial or called any witness, which are his rights as an accused, that did not disadvantage him as, his position (denial) had been vigorously raised

through cross-examination to the effect that he did not commit the offences as alleged; he did not go anywhere with the complainant that night, and he denied seeking forgiveness from the complainant and her family as stated by the prosecution witnesses. The appellant's interests and positions were well covered/protected in the summing up:

*“64. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent.*

*65. From the line of cross-examination the defence takes the position that the accused did not commit the offences as alleged. He did not go anywhere with the complainant that night. The complainant had asked him to accompany her, but he refused since he had been drinking. The next morning he did not go and meet the complainant as alleged and therefore seeking forgiveness from the complainant and her family does not arise.”*

.....  
*70. The accused on the other hand, denies committing any of the offences as alleged. The defence contention is that the incidents as narrated by the complainant did not happen, the accused had not accompanied the complainant as stated by her. In aspect of the accused seeking forgiveness he denies going to the house of the complainant as stated by the prosecution witnesses.”*

[34] In agreeing with the assessors, the trial judge acted within the accepted principles established by legal precedents. When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment, but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement. This ground has no merit and no substantial miscarriage of justice occurred.

[35] On **Ground 3**, see also paragraph (x Reference). The burden of proving the elements of the offence has always been with the prosecution who must do so beyond reasonable doubt. The learned trial judge was quite clear on this aspect in summing up:

“18. *If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.*

19. *In this trial, has denied committing the offence of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently licked the vagina of the complainant between the 11<sup>th</sup> day of July, 2016 and the 12 day of July, 2016.”*

[36] Paragraphs 73 to 75 of summing up also addresses this ground adequately, and there is no shift in the burden of proof to the appellant as urged:

“73. *You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or own evidence or with other witnesses who gave evidence.*

74. *It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*

75. *If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused’s guilt beyond reasonable doubt lies with the prosecution through out the trial and it never shifts to the accused at any stage of the trial.”*

The ground has no merit. There is no miscarriage of justice.

#### **Ground 4**

[37] The appellant was unable to explain the specifics of the contention related to “*error of law*”, and “*all aspects all the aspects of law applicable.*” The learned trial judge had given very clear directions on the elements of the offences in the summing up at paragraphs 14 to 17, after outlining the *Information* at paragraphs at 12 and 13 thereof. He could not be any clearer in my view.

[38] This ground is partly answered by reference above. The learned trial judge had also provided useful directions, bearing in mind the relevant legal principles relevant to evidence and the burden of proof in criminal cases to assist the assessors in their fact-finding task, in the summing up at paragraphs 70 and 72 as follows:

*“70 .The accused on the other hand, denies committing any of the offences as alleged. The defence contention is that the incidents as narrated by the complainant did not happen, the accused had not accompanied the complainant as stated by her. In respect of the accused seeking forgiveness he denies going to the house of the complainant as stated by the prosecution witness.*

.....

*72. In deciding the credibility of the witness and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of the witnesses’ evidence and reject other parts. A witness may tell the truth about one matter and lie about another he or she may be accurate in saying one thing and not be accurate in another.”*

**Ground 5**

[39] There were no specific submissions made in respect of this ground. The ground as framed is over-arching and I believe that the discussions around the grounds against conviction urged at the leave stage and in this Court have been sufficiently addressed to displace any perceived notion of unreasonableness, risk or danger, in the resolution of the conviction grounds.

**Sentence**

[40] In considering the sentence grounds, it is appropriate to reproduce paragraphs 10 to 27 (at pages 78-80 of Record) of the Sentencing given the seriousness of the offences and the facts and circumstances of the case, as follows:

*“19. The court is mindful that the accused faces one representative count of sexual assault and one representative count of rape. The evidence before the court*

*was of more than one occasion the accused had sexually assaulted and raped the victim. The accused cannot be punished for the (2) occasions of sexual assault and rape mentioned by the victim under the representative counts but for one occasion only (see Senilolokula v State, Criminal Petition No.CAV0017 of 2017 (26 April 2018).*

20. *Bearing in mind the seriousness of the offences committed I take 8 years imprisonment (lower end of the tariff) as the starting point of the sentence. I add 5 years for the aggravating factors, bringing an interim total of 13 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value, however, after taking into account all the letters written on behalf of the accused I further reduce the sentence by 6 months for mitigation. The accused has one previous conviction dated 23<sup>rd</sup> February, 2011 (although not related to sexual offending) hence he does not receive any discount for good character. The sentence is now 12 years and 6 months imprisonment.*
21. *I note the accused has been in remand for about 21 days. I exercise my discretion to further reduce the sentence for the remand period by one month in accordance with the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence of imprisonment is 12 years 5 months.*
22. *Having considered section 4(1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.*
23. *Under section 18(1) of the Sentencing and Penalties Act, I impose 10 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 which is just in the circumstances of this case.*
24. *Rape not only affects the physical integrity of a victim, it violates the human dignity, leaving lifelong scars of psychological devastation bringing about a sense of self blame and hopelessness which does not heal easily even long after the physical injuries have healed.*
24. *Mr Jackson you have committed serious offences against the victim who was your neighbor and who had trusted you. I am sure it will be difficult for the victim to forget what you had done to her. Your actions towards the victim were cowardly and selfish.*
25. *The court will be failing in its duty if a long term deterrent custodial sentence was not imposed. It was night time and the victim was alone and vulnerable*



*and you took advantage of this. According to the victim impact statement the victim was emotionally and psychologically affected by the incident.*

27. *In summary, I pass an aggregate sentence of 12 years 5 months imprisonment for on representative count of sexual assault and one representative count of rape that the accused has been convicted, with a non-parole period of 10 years to be served before he is eligible for parole.”*

[41] It is the appellant’s contention that the sentence was harsh and excessive under the circumstances of the case-see appellant’s case, above. In **Anand Abhay Raj v State**, CAV0003 of 2014 it was established that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature. At the hearing in this Court, the appellant pleaded for the court to reconsider the sentence handed down by the learned trial judge. It was harsh and excessive. He sought mercy given his personal circumstances and the welfare of his family members.

[42] In cases where sentence is being appealed/challenged, the guidelines are whether the sentencing judge had:

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant considerations.*

The guidelines are well stated in **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v King; Kim Nam Bae v State**, Criminal Appeal No.AAU0015 and **Chirk King Yam v State**, Criminal Appeal No. AAU 0095 of 2011.

[43] The Court noted that the learned trial judge had taken a starting point of 8 years (lower end of the tariff), bearing in mind the objective seriousness of the offence, as the starting point, and added 5 years for the aggravating factors, being Breach of Trust; Use of Violence and Victim Impact Statement-see paragraph [14.] of Sentencing at page 77 of Record. There is likelihood a possibility of double counting with some of these factors being taken into consideration when the starting point was fixed, although at the lower end of the accepted tariff of 7 years to 15 years for the rape of an adult. There appears to

be double-counting in the consideration of aggravating factors with the addition of 5 years to the sentence. This is also the view of Counsel for the respondent

[44] When a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered: **Koroicakau v State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing direction has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or in other words that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)).

[45] Having considered the appeal ground against sentence, the appellant's oral submissions and request for leniency (in its reconsideration), the sentencing guidelines and Sentencing and Penalties Act, and the respondent's submission, there is the risk of double-counting. The sentence is harsh and excessive. The aggregate imprisonment term of 12 years and 05 months with a non-parole period of 10 years, is set aside, and is substituted with an aggregate imprisonment term of 11 year and 05 months with a non-parole period of 9 years. This is still within the tariff and permissible range and proportionate to the gravity of the offence.

### **Conclusion**

[46] The appeal against conviction is dismissed for lack of merit, there being no substantial miscarriage of justice. The conviction is affirmed. The appeal against sentence is allowed, the sentence is set aside and a new sentence as substitute is now imposed being an aggregate imprisonment term of 11 years and 05 months with a non-parole period of 9 years.

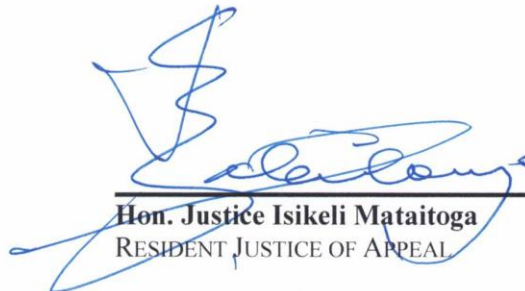
**Clark, JA**


[47] I have read the judgment of Qetaki J in draft and agree with the orders proposed for the reasons he gives.


**Orders of Court:**

1. *Conviction appeal dismissed and conviction affirmed.*
2. *Sentence appeal is allowed.*
3. *Aggregate imprisonment term of 12 years 05 months, with a non-parole period of 10 years is set aside with effect from 28 February 2024;*
4. *Substitute aggregate imprisonment term of 11 years 05 months with a parole period of 9 years is ordered with effect from 28 February 2024.*



  
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**Hon. Justice Isikeli Mataitoga**  
RESIDENT JUSTICE OF APPEAL

  
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**Hon. Justice Alipate Qetaki**  
JUSTICE OF APPEAL

  
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**Hon. Justice Karen Clark**  
JUSTICE OF APPEAL