

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

CRIMINAL APPEAL NO. AAU 065 OF 2020
[Lautoka Criminal Case No. HAC 166 of 2017]

BETWEEN : **KAMAL KAPOOR** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, P**
Qetaki, RJA
Heath, JA

Counsel : **Mr. G. O’Driscoll for the Appellant**
: **Mr. S. Seruvatu for the Respondent**

Date of Hearing : **04 July 2025**

Date of Judgment : **25 July 2025**

JUDGMENT

Mataitoga, P

[1] I support the arguments and conclusion of Qetaki, RJA.

Qetaki, RJA

(A). Background

[2] The Appellant was charged with one count of rape contrary to section 207(1) and (2) (c) of the Crimes Act 2009 committed at Yalalevu, Ba in the Western Division.

- [3] After the summing up, the assessors unanimously opined that the Appellant was guilty as charged. The learned judge had agreed with the assessors and convicted the Appellant for rape. The Appellant was sentenced on 8th July 2020 to 10 years 11 months and 15 days imprisonment with a non-parole period of 9 years.
- [4] The Appellant lodged a timely appeal against conviction and sentence in this Court urging 15 grounds of appeal.
- [5] On 25th January 2023, the Court delivered its leave Ruling refusing both the leave to appeal against conviction and sentence.
- [6] The Appellant filed his notice of appeal before the Full Court urging 2 grounds of conviction (**Grounds 3 and 6**) and 1 ground against sentence (**Ground 15(b)**).

(B). Facts

- [7] The complainant was a cleaner at the construction site of the new hospital in Ba. On 13 July 2017, she was called by the accused to come and clean his office during the lunch hour.
- [8] When the complainant was in the office of the accused, she was told to clean the tables, as she turned around the accused locked the office door
- [9] The accused asked the complainant to have sex with him. When she refused, he then told her to suck his penis. He pushed his pants down and told the complainant to suck his penis. When she refused, he forcefully pushed her down from her head and then forcefully pushed his penis inside the complainant's mouth.
- [10] The accused also told the complainant that if she did not suck his penis, he will terminate her from her employment. The accused was forceful in what he was doing. The complainant tried to struggle with him but she couldn't. The accused also ejaculated inside her mouth. The complainant tried to close her mouth but couldn't since the accused was forcefully penetrating her mouth.
- [11] The complainant did not consent to what the accused had done to her. After covering her mouth with a tissue paper the complainant left the accused's office and went to her room.

[12] The complainant was crying, and told her friends about what the accused had done to her. The matter was reported to the police on the same day.

(C). Grounds of Appeal

[13] Only three grounds of appeal were raised at the hearing, as follows:

Ground 3: That the learned trial Judge erred in law and in fact in not adequately directing/misdirecting himself and the assessors, on the previous inconsistent statements/evidence made by the complainant and as such there has been a substantial miscarriage of justice

Ground 6: That the learned trial Judge erred in law and in fact in misdirecting himself and the assessors, in paragraph 88 of the summing up, that, "indeed you do not have to accept the unchallenged evidence of the doctor," when such evidence was favourable to the defence and as such ought to have directed himself and the assessors that serious doubts could be created.

Ground 15(b): That the learned trial Judge erred in law and in fact in misdirecting himself in finding that a trust relationship existed between the complainant and the Appellant was aggravating factor and as such there has been a substantial miscarriage of justice.

(D). The Law

[14] In terms of section 21 (1) (b) and (c) of the Court of Appeal Act, the Appellant could appeal against with his conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction or sentence is "reasonable prospect of success": see **Caucu v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2016) and the line of similar cases, including **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **Sadrugu v State** [2019] FJCA 87; AAU0057 of 2015 (06 June 2019).

[15] When the sentence is challenged, the Court is guided by the requirements set out in **Kim Nam Bae v. The State**, unreported Criminal Appeal AAU 15 of 1998 (26 February 1999), as follows:

*“It is well established law that before the Court could disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its discretion. If a trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the appellate Court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v The King**) [1936] HCA 40; (1936) 55 CLR 499.”*

(E). High Court Judgment (per Sunil Sharma, J)

[16] The learned Judge reviewed the evidences of the four prosecution witnesses, namely “A.N” the complainant, Mariama Likutabua, Lavinia Adi Tukana and WDC Shiwani, Investigation Officer.

[17] The learned Judge observed that:

- (i) The complainant was crying in her room after the incident. Witnesses Miriama and Lavinia had seen the victim crying. That upon questioning the complainant told them what the accused had done to her. Both Miriama and Lavinia told the Court the complainant was talking in Hindi and both witnesses were able to narrate what the complainant had told them and they were also able to explain it in the English language.
- (ii) Accepted the evidence of both these witnesses as forthright and believable, even though there were inconsistencies in Lavinia’s statement to the police and her evidence in court.
- (iii) Accepted the witnesses’ observations that the complainant was crying when they saw her in the room.

- (iv) Accepted the evidence of WDC Shiwani, who also observed that the complainant was crying in the charge room when she came to report the incident at the Ba Police Station so she took the complainant to another room and calmed her down. Shiwani had also taken the complainant to hospital. She stated that on the way the complainant was quiet. Shiwani was not present when the complainant was examined by the doctor.
- (v) Accepted the evidence of all prosecution witnesses as reliable and credible.

[18] On the evidence of the three defence witnesses (including the complainant) the learned Judge stated, that Doctor Shahid:

- (a) Was not able to make a finding whether or not the complainant had been sexually assaulted since he did not see any injuries on the complainant;
- (b) Had the general impression that it was quite strange for a victim of sexual assault to be laughing in front of him;
- (c) Did not have any discussion with WDC Shiwani before or after the medical examination of the complainant;
- (d) Could not rule out sexual assault based on the history given, but upon his professional examination he could not find any evidence of whether the sexual assault had taken place or not;
- (e) Rejected the doctor's observations that the complainant was laughing at him at the time of medical examination, and stated that the explanation is not possible given the totality of the evidence;
- (f) Did not accept that WDC Shiwani and a staff nurse were present at the time of examination, and the Fiji Police Medical Examination Form which was completed by the doctor did not mention that anybody was present during examination other than the complainant and the doctor.

[19] The Learned trial Judge held that the accused was not telling the truth in court when the accused testified that:

- (a) He was having an intimate relationship with the complainant and on occasion he had given her money.
- (b) He called the complainant to his office when she came they had hugged and kissed each other after a while the accused opened his pants. The complainant sat on her knees and started sucking the penis of the accused while he was standing.
- (c) The complainant had agreed to suck her penis and she had continued doing that for about 3 to 4 minutes. The accused ejaculated into the complainant's mouth since she was continuously sucking his penis.
- (d) The complainant had consented to suck the accused's penis. She did not shout or resist or bite his penis. She had opened her mouth to allow the penis go inside her mouth. The complainant also did not squeeze his testicles which she had the opportunity to do.
- (e) It was professional to date an employee of the Contractor. He agreed that he had totally denied the allegation when he was questioned by the police.
- (f) When it was suggested to the accused that he had lied to police, the accused suggested that it was a white lie since it was an incorrect allegation that he had forced the complainant and if he had not said it never happened, he could have lost his family.
- (g) He did not tell the police that the complainant had consented to the act because he wanted to save his family and the complainant's reputation, and it was a white lie. The accused denied committing the offence as alleged and also, he had not tried to get the matter settled after the report was lodged by the complainant.

[20] The learned trial Judge held that the accused took advantage of his position due to the fact that he knew the complainant's employer as a Ministry of Health representative

based at the construction site. The complainant had obtained employment at the construction site through the accused. He accepted that the accused was threatening the complainant with termination when she was refusing his advances, although the accused was not in a position to sack the complainant.

[21] Witness Pauliasi Maraiwai evidence was regarded as unbelievable by the learned Judge who also did not believe in Pauliasi's testimony.

[22] The learned Judge accepted Miriama and Lavinia's evidence that Pauliasi and his group were not around during the lunch hour on the day of the alleged incident.

[23] The learned trial judge observed that there were some inconsistencies between the police statement of the complainant and her evidence in court. He found that the inconsistencies were not significant but a natural occurrence due to passage of time which did not adversely affect the reliability of the complainant's evidence.

[24] The learned trial judge held that the evidence before the Court leads to the inevitable conclusion that the complainant had not consented to the sexual acts committed on her by the Appellant.

[25] As a result, the defence had not been able to create a reasonable doubt in the prosecution case and the court was satisfied beyond reasonable doubt that the accused on 13th July 2017 had penetrated the mouth of 'A.N' with his penis without her consent. The learned trial Judge accepted that the complainant was not consenting or didn't care if she was not consenting at the time.

(F). Ruling (per Prematilaka, RJA, delivered on 25 January 2023)

[26] Ground 3: The learned single Judge did not think that the inconsistencies highlighted by the Appellant go to the very root and shake the foundation/basic version of the complainant: **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015); **R v O'Neill** [1969] Crim.L.R 260. More so when the all - important 'probabilities - factor' echoes in favour of the complainant's version narrated by the witnesses.

[27] Ground 6: An expert opinion is admissible to provide the court with scientific information or criteria which are likely to be outside the experience and knowledge of

a Judge or assessors so as to enable the Judge or assessors form their own independent judgment by the application of those information or criteria to the facts proved in evidence. as on the proven facts.

- [28] If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. Where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received: vide **Gounder v State** [2021] FJCA 117; AAU0042.2018 (6 August 2021).
- [29] The learned single judge held that there cannot be any reasonable criticism of the learned Judge's directions. This was an allegation of oral sex and the complainant did not complain of any injuries. The medical evidence is inconclusive. Further, there does not seem to be a link between the medical evidence and the allegation of oral sex. The doctor's evidence of no consent has no relevance to the allegation of oral sex. The doctor's evidence does not rule out the probability of oral sex as alleged by the complainant.
- [30] **Ground 15 (b)**: The learned single Judge held that the evidence revealed a trust relationship existed between the complainant and the Appellant, and the trial Judge was not mistaken in referring to that in sentencing. The 10 years, 11 months and 15 days imprisonment for the count of rape is within tariff of 7 to 15 years for adult rape: **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018). The sentence is not harsh and excessive.
- [31] 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: **Koroicakau v State** [2006] FJSC 5; CAV0006U.2005S.
- [32] In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the 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 can reasonably be imposed by a sentencing Judge or, in other words, that the sentence lies within the permissible range: **Sharma v State** [2015] FJCA 17.

(G). Appellant's Case

[33] Ground 3: The Appellant submits that:

- (i) The central issue is the inadequacy of direction related to prior inconsistent statements. It is usually expected that if a submission of inconsistent statements is put forward, then a direction setting out what the assessors would need to direct their minds to, would be expected. See paragraphs 57, 58 and 59 of the Judge states what should be considered for inconsistencies between what was said in court and what was in previous statement. Paragraph 58 in particular appear ill advised and could only suggest that the learned trial Judge was not himself convinced that the inconsistencies were of consequence. The Appellant contends that this direction led to a substantial miscarriage of justice.
- (ii) The complainant had given inconsistent evidence regarding the alleged incident during trial. It was highlighted through cross examination. That the complainant had made prior inconsistent statements in relation to key aspects of the allegation. These were significantly different from the testimony in court. For example: (i) Complainant could not explain why it was not in her police statement that she was pushed down by the accused; (ii) phone records produced in court showed that a 2 seconds call was placed by the complainant to the accused-both the matters were raise in the summing up but the direction given was inadequate for the assessors to properly consider the information of inconsistencies. (See paragraphs 42 and 45 summing up, page 83 of Record);
- (iii) The learned trial Judge erred in law and in fact in failing to adequately direct or misdirect himself and the assessors on the significance of the complainant's prior inconsistent statements. That the relevant law and legal principles require the inconsistencies in a complainant's testimony must be carefully scrutinised, so that they go directly to the issue of credibility. Failure to do so amounts to a failure in properly

assisting the assessors in their task of evaluating the complainant's reliability.

- (iv) The trial Judge failed to: (a) Adequately direct the assessors on inconsistencies, meaning that the learned trial Judge did not adequately explain to the assessors the importance of the previous inconsistent statements made by the complainant, nor did he provide any guidance on how to treat such discrepancies in the context of the complainant's overall testimony; (b) Highlight the material nature of the inconsistencies, meaning the trial Judge failed to emphasise to the assessors the materiality of the inconsistencies, given that these inconsistencies were fundamental to the core of the complainant's version of events- as such the failure to address them was a significant error, and (c) Failure to consider the cumulative effect of the inconsistencies , meaning the trial Judge failed to properly assess the cumulative effect of the inconsistencies. The complainant's conflicting statements created a significant issue of credibility, which the trial Judge should have recognised as a crucial matter in evaluating the overall reliability of the complainant's testimony and left to the assessors to determine.

[34] The failure to direct assessors on these inconsistencies meant that the complainant's testimony was accepted uncritically, which ultimately led to the miscarriage of justice. **Heinrich v State** [2021] FJCA 41, AAU0029 of 2017 (7th March 2019) approving as correct the principles in **Driscoll v The Queen** (1977) 137 CLR 517.

[35] Ground 6: The Appellant submits that the direction given by the learned trial Judge in paragraph 88 of summing up improperly shifted the burden of proof and introduced a standard of evaluation that was not warranted by the facts of the case. In is argued that it is well established in law that where evidence is unchallenged, particularly when it is favourable to the defence, a Judge must not lightly suggest that the evidence can be dismissed without adequate consideration.

[36] In this case, the doctor's unchallenged evidence provided a material element in the appellant's defence and ought to have been considered with due weight with a proper

direction given. The wording of the direction suggested that the doctor's evidence could be disregarded altogether, given there was no guidance on how such evidence might be evaluated or directing the assessors to give the doctor's evidence appropriate consideration. The doctor's evidence was particularly favourable to the defence as it supported the Appellant's version of events and, if accepted, could have led to a reasonable doubt in the minds of the assessors.

[37] The misdirection in paragraph 88 of summing up resulted in a potentially unfair trial for the Appellant. The misdirection in paragraph 88 was prejudicial and resulted in a miscarriage of justice. As such, the conviction should be quashed or the matter be remitted for a new trial.

[38] Ground 15(b): On sentence, the Appellant submits that the learned trial Judge misdirected himself in finding that a trust relationship existed between the complainant and the Appellant, and by treating this as an aggravating factor in the case. That the Judge's finding was not supported by the evidence, and that this misdirection resulted in a substantial miscarriage of justice and a wholly inappropriate uplift of sentence

(H). Respondent's Case

[39] Ground 3: The State submits the ground is unfounded. The learned trial Judge had explicitly addressed the issue at paragraphs 41 to 45 and paragraphs 57 to 59 of summing up, highlighting discrepancies in the complainant's testimony while concluding they were minor and did not undermine her credibility. More crucial, at paragraphs 119 and 120 of summing up, the Judge directed the assessors to evaluate witness reliability holistically, stating:

"119. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witness were straight forward? You may use your common sense when deciding on the facts. Assess..."

120. *In deciding the credibility of the witnesses 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 a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he may be accurate in saying one thing and not be accurate in another."*

[40] The direction ensured the assessors understood their duty to weigh inconsistencies against the totality of the evidence. The trial Judge's handling of inconsistencies was neither erroneous nor prejudicial. As such, this ground has no merit and should be dismissed.

[41] Ground 6: The Respondent submits that the appellant's submissions on this ground is misconceived, and further;

- (i) The learned Judge correctly directed that expert evidence is advisory, and not binding: **Gounder v State** [2021] FJCA 117). The assessors were entitled to weigh the medical evidence against other evidence.
- (ii) The prosecution case rested on the complainant's credible testimony, corroborated by witnesses who attested to the complainant's immediate distress and the accused's threats of termination, rendering the absence of injuries immaterial to the question of voluntary participation.
- (iii) The doctor's evidence was inconclusive, as no physical injuries were found. This was consistent with the alleged offence (oral penetration). The Judge's direction did not undermine the defence case but emphasised the need for holistic assessment.
- (iv) The medical evidence was not essential to proving lack of consent. The credible testimony of the complainant and supporting witnesses provided an ample basis for the verdict, with or without a medical report.

- (v) The Judge’s direction was legally sound, balanced, and consistent with the evidence. It preserved the assessors’ role as arbiters of fact and did not occasion miscarriage of justice. No miscarriage of justice arose, and the ground must fail.

[42] Ground 15 (b): The State submits that the evidence clearly establishes a trust relationship between the Appellant and complainant, which the Appellant exploited to commit the offence.

(I). Analysis

[43] In this appeal the Appellant has urged three grounds only from the fifteen grounds that were before the learned single Judge when he made his Ruling and Orders on 25 January 2023 refusing the Appellant’s application for leave to appeal against conviction and sentence.

[44] In Ground 3 the Appellant contends that the learned trial Judge was at fault by not adequately directing/misdirecting himself and the assessors on the previous inconsistent statements/evidence made by the complainant at the trial, and as such, there has been a substantial miscarriage of justice.

[45] The crucial question is whether the learned trial Judge had failed to adequately direct the assessors on how to assess and evaluate the inconsistencies, and if so, has there been a substantial miscarriage of justice as a result.

[46] The learned trial Judge had adequately highlighted the discrepancies in the complainant’s testimony in paragraphs 41 to 45 of the summing up. In paragraphs 24 to 27 of the judgment, the learned trial Judge had considered the evidence of the parties, the issue of consent and the inconsistencies. He held (paragraph 27), the inconsistencies did not adversely affect the reliability of the complainant’s evidence.

[47] At paragraphs 57 to 59 of the summing up the learned Judge stated:

“57. The learned counsel for the accusedwas cross examining the complainant and Lavinia about some inconsistencies in the statements they gave to the police when facts were fresh in their minds with their evidence in court. I will tell now explain to you the purpose of

considering the previously made statement of these witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible. However, the police statement itself is not evidence of the truth of its contents.

58. *It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.*
59. *If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.* (Underlining is for emphasis).

[48] The learned trial Judge also directed the assessors to evaluate witness credibility and the reliability of their evidence holistically. These directions cannot be faulted and are justified in the circumstances and considering the totality of the evidence adduced at the trial. See also paragraphs 119 and 120 of summing up, as follows:

- “119. *Which version are you going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witness were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.*
120. *In deciding the credibility of the witnesses 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 part 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 a witness's*

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.”

[49] These directions ensure the assessors understood their duty to weigh inconsistencies against the totality of the evidence. Inconsistencies go to the credibility of the witnesses: **R v O’Neill** (supra). The inconsistencies highlighted by the Appellant do not go to the very root and shook the basic version of the complainant: **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra). The trial Judge’s handling of the inconsistencies was not erroneous. The assessors were unanimous that the accused was guilty of the offence as charged. The learned trial Judge agreed with them and convicted the accused accordingly. There is no substantial miscarriage of justice. This ground has no prospect of success. It is unfounded and without merit.

[50] Ground 6: The direction complained of is on the medical opinion given by Doctor Shahid. The learned trial Judge directed as follows:

“88.*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.*” (Underlining is for emphasis).

[51] Paragraph 89, gives context to the direction, where, the learned trial Judge reminded the assessors that the doctor’s evidence relates only to part of the case, and while it may be of assistance to the assessors in reaching their decisions, they must reach their decisions having considered “the whole of the evidence”.

[52] The direction is not misdirected as alleged. It relates to an expert opinion which is advisory only. It is not binding: **Gounder v State** (supra). The assessors are also to assess the credibility of the witness and the reliability of the evidence in light of the whole or totality of the evidence at the trial.

[53] I add a word of caution. In this case, the doctor’s evidence was directed to two different issues. The first was his medical opinion. For the reason given the Judge’s direction cannot be faulted on this point. The second was primary fact evidence of

the way in which the doctor observed the complainant's demeanour while undergoing medical examination. Read in context, I do not consider the Judge fell into error in his direction but this is a point on which Judge's need to take care when addressing both primary fact and opinion evidence of an expert witness.

[54] The prosecution case rested on the complainant's credible testimony, corroborated by witnesses who attested to the complainant's immediate distress and the accused threat of termination. The absence of injuries is immaterial to the prosecution case.

[55] The effect of the Judge's direction on expert opinion did not shift the burden of proof to the Respondent, or undermine the defence, however, it emphasised the need for holistic assessment of the credibility of the witnesses and the reliability of the evidence.

[56] The doctor's evidence was inconclusive as no injuries were found, but consistent with the alleged offence. The medical evidence was not essential to proving the lack of consent. The credible testimony of the complainant and supporting witnesses provided an ample basis for the verdict, with or without a medical report.

[57] The Judge's direction was legally sound, balanced, and consistent with the evidence. It did not cause miscarriage of justice. This ground has no prospect of success. It has no merit.

[58] Ground 15 (b): The Appellant contends that the learned Judge's acceptance of trust relationship as an aggravating factor was a mistake, which 'inappropriately' raised or uplift the sentence. However, the totality of the evidence suggests that there is a trust relationship between the complainant and the Appellant. The complainant was a cleaner at the construction site where the accused was a senior officer as a representative of the Ministry of Health and Medical Services. The complainant had gone to the office of the accused upon his request and had trusted him. The accused breached the trust of the complainant by what he had done to her.

[59] In sentencing, the learned trial Judge considered the objective seriousness of the offence and took 7 years (lower end of tariff for rape of adult which is 7 to 15 years) as starting point. 5 years was added for aggravating factors. He took account of the following factors as aggravation: breach of trust, victim was alone and vulnerable,

planning, and the victim impact assessment. The total sentence is 10 years, 11 months 15 days was fixed after consideration of the provisions of Section 4(1) and 18 (1) of the Sentencing and Penalties Act and the mitigating factors.

[60] Considering the totality of the evidence, the 5 years added to the “aggravating factors” is on the high side, and the trial Judge has not specified the proportion of the 5 years that is added due to the breach of trust. The sentence is reviewed downward to 9 years 11 months 15 days imprisonment with a non-parole period of 8 years.

[61] 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: **Koroicakau v State** (supra). The approach taken by appellate courts in determining whether the sentencing discretion has miscarried, do not rely upon the methodology used by the sentencing Judge. The approach taken is whether in all the circumstances of the case the sentence is one that can reasonably be imposed by a sentencing Judge, or in other words, that the sentence imposed lies within the permissible range: **Sharma v State** (supra). This ground has merit.

(J). Conclusion

[62] The learned trial Judge was not mistaken in his direction to the assessors on the inconsistencies in the complainant’s statement to the police and her evidence in court. He was not mistaken nor misdirected the assessors on the medical opinion. There is no substantial miscarriage of justice.

[63] The learned trial Judge did not misdirect himself on the existence of a trust relationship between the complainant and the Appellant. However, the addition of 5 years for “aggravating factors” is on the high side considering the totality of the evidence.

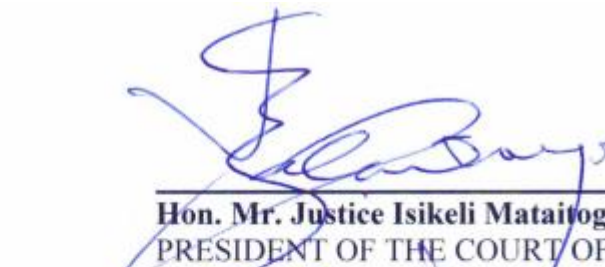
Heath, JA

[64] I agree with Qetaki, RJA.

Orders of the Court

1. *Appellant's appeal against conviction is refused.*
2. *Appellant's conviction is affirmed.*
3. *Appellant's appeal against sentence is allowed.*
4. *The Appellant's sentence of 10 years 11 months 15 days imprisonment with a non-parole period of 9 years is set aside.*
5. *The Appellant is sentenced to 9 years 11 months 15 days imprisonment, with a non-parole period of 8 years with effect from 26 June, 2020.*





Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT OF THE COURT OF APPEAL



Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL



Hon. Mr. Justice Paul Heath
JUSTICE OF APPEAL

Solicitors

O'Driscoll & Co for the Appellant

Office of the Director of Public Prosecutions for the Respondent