IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court at Suva]

CRIMINAL APPEAL NO. AAU 0018 OF 2020

[Suva High Court Case No: HAC 274 of 2019]

BETWEEN : **AVYASH MANI GOUNDEN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Andrews, JA
Clark, JA

Counsel : **Yunus M & Prasad R for the Appellant**
: **Kumar R for the Respondent**

Date of Hearing : **3rd February, 2026**
Date of Judgment : **27th February, 2026**

JUDGMENT

[1] The appellant (41) had been indicted in the High Court at Suva on one count of rape of an eight year old girl contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act of 2009 of the same victim, committed at Waituri, Nausori in the Eastern Division on 14 July 2019.

[2] It was alleged that the complainant had gone with her father to the appellant's house. While there, the appellant asked her to go into a bedroom and play with his young son. The complainant lay down on a bed and was watching a cartoon on a mobile phone. It was alleged that the appellant went into the bedroom then removed the complainant's pyjamas, and penetrated the her vulva with his tongue, and touched her vagina. The appellant denied the allegation. He claimed that he only went to the bedroom because the little boy was crying. He went with his wife and who then pampered the boy for a while.

[3] The information against the appellant read as follows:

COUNT ONE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and 3 of the Crimes Act 2009.*

Particulars of Offence

AVYASH MANI GOUNDEN, *on the 14th day of July, 2019 at Waituri, Nausori, in the Eastern Division, penetrated the vulva of* ***ASHLYN ASHLINI PRASAD****, a child under the age of 13 years, with his tongue.*

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

AVYASH MANI GOUNDEN *on the 14th day of July 2019 at Waituri, Nausori, in the Eastern Division, unlawfully and indecently assaulted* ***ASHLYN ASHLINI PRASAD****, a child under the age of 13 years, by touching her vagina.'*

[4] The appellant's trial commenced on 17 February 2020 and concluded on 20 February 2020. The prosecution adduced the evidence of four witnesses, including the complainant. The accused and one witness gave evidence for the defence. Counsel for the prosecution and the defence then made their respective closing addresses. The trial judge delivered his summing up.

[5] At the end of the summing-up the assessors unanimously opined that the appellant was guilty as charged. The learned trial judge agreed with the assessors' opinion, convicted the appellant in a judgment issued on 2 March 2020,[1] and sentenced him on 5 March 2020 to an aggregate term of imprisonment of 14 years with a non-parole period of 12 years (13 years and 10 months after deducting the remand period with a non-parole period of 11 years and 10 months)[2].

Leave to Appeal

[6] The appellant through his lawyers appealed against conviction and sentence in a timely manner followed by amended grounds of appeal and written submissions on 6 May 2020. The State tendered its written submissions on 11 March 2021. Both counsel agreed to have a judgement on written submissions. A ruling was given by a judge alone of this Court on 8 October 2021.[3]

[7] The appellant submitted the following grounds of appeal in support of his application for leave to appeal:

Conviction

Ground 1

The learned Trial Judge was privy to the facts of the case when full disclosure was given to him prior to the trial, thus the Appellants right to fair trial and his right to be tried by an independent and impartial tribunal has been breached and therefore the conviction is unsafe and unreasonable.

Ground 2

The Learned Trial Judge erred in law when he failed to properly apply section 231(1) of the Criminal Procedure Act 2009, whilst considering the no case to answer submission by the Appellant and failed to give written reasons for refusing the application for no case to answer.

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1 *State v Gounden* [2020] FJHC 188; HAC274.2019 (2 March 2020).
2 *Gounden v State* [2020] FJCA 191; HAC274.2019 (5 March 2020).
3 *Gounden v State* [2021] FJCA 161; AAU18.2020 (8 October 2021).

Ground 3

The Learned Trial Judge erred in law and in fact when he failed to hold a no case to answer in respect of the offence of rape despite there being no evidence of penetration of the vulva by tongue, one of the major elements of the offence charged.

Ground 4

The Learned Trial Judge erred in law and in fact when he failed to hold a no case to answer in respect of the offence of sexual assault despite there being no evidence of touching of the vagina, one of the vital elements of the offence charged.

Ground 5

The Learned Trial Judge erred in law and in fact when he completely failed to properly guide the assessors on how to approach and weigh the evidence of uncharged acts, that is the evidence of the complainant when she said that 'the accused sucked her 'tutu' with his mouth and it went deep inside.

Ground 6

The Learned Trial Judge erred in law and in fact when in his summing up he failed to direct the assessors and himself that the evidence of the mother of the complainant must be completely disregarded since there was evidence that her evidence touching the root of the offence charged was hearsay evidence.

Ground 7

The Learned Trial Judge erred in law and in fact when is his judgment he held that the evidence of recent complaint strengthened the consistency of account given by the complainant, despite there being material inconsistency in the Complainants evidence in court and what she told to the class teacher and the mother after the incident.

Ground 8

The Learned Trial Judge erred in law and in fact when in his judgment he has failed to provide the reasons why he did not believe the sworn evidence of the Appellant.

Ground 9

The Learned Trial Judge erred in law and in fact when he failed to consider the sworn evidence of the Defence witness because he found her to be evasive when asked about the nature of the cartoon the complainant was watching, a non-issue in the matter. He failed to consider that the defence witness was watching another program in her father's mobile thus it was impossible for her to answer the counsel about the nature of the cartoon the complainant was watching.

Ground 10

The Learned Trial Judge erred in law and in fact when in his judgment he held that 'the evidence of the complainant establishes that the accused had penetrated her vulva with his mouth or tongue', despite there being no shred of evidence adduced by the prosecution in regards to penetration of the vulva by the tongue.

Ground 11

The Learned Trial Judge erred in law and in fact when in his judgment he held that 'I do not find the inconsistencies between the evidence given by Ms. Devi, and her statement to the police is materially important to the main issue in this dispute' whilst the inconsistencies were very much evident and were touching the root of the matter.

Ground 12

The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on how to approach circumstantial evidence, on the issue of penetration by mouth or tongue and touching of the vagina or genitalia by hand or finger.

Ground 13

The Learned Trial Judge erred in law when he allowed the State Prosecutor to conduct the competency inquiry of the child witness to establish her understanding of the nature of oath, which is in contravention of section 10 of the Juvenile Act [Cap 56] thus the Appellants right to fair trial was infringed.

Sentence

Ground 1

The Learned Trial Judge erred in his sentencing discretion when he took into consideration level of culpability and harm twice (double counting) to enhance the sentence of the Appellant.

Ground 2

The Learned Trial Judge erred in his sentencing discretion when he took the age of the complainant, breach of trust, and harm as aggravating factors despite the fact that these factors have been construed in the tariff, thus there has been double counting of these features to elevate the sentence.

The leave ruling

[8] The judge alone carefully evaluated each of the above grounds of appeal against conviction. He found that none of the grounds had a reasonable prospect of success, and refused leave to appeal. In summary, he found that ground 1 was misconceived

because it was based on the hypothetical assumption that the trial judge may lack impartiality by virtue of being given disclosures by the prosecution ahead of it being given to the defence. The judge said that it had been a long-established practice in Fiji to provide trial judges with all the disclosures given to the defence by the prosecution.

[9] For grounds 2, 3, 4 and 10 the appellant claimed that the trial judge had failed to give reasons for refusing the application of no case to answer. The judge alone observed that the law does not make it mandatory for a trial judge to give written reasons for refusing a "no case to answer" application, although reasons would "obviously" be given if the application were allowed. The judge alone went on to refer to the evidence set out by the trial judge in his summing up and in his judgment.

[10] The judge alone held that ground 5 was misconceived, because the trial judge was not required to give directions on facts which were not part of the charges the appellant faced in court and were not part of the evidence before the court.

[11] In respect of ground 6, the judge alone held that what the teacher told the complainant's mother was hearsay, but what the complainant told her mother and teacher was not hearsay, but recent complaint evidence. He found that the trial judge had properly alerted the assessors to this aspect in his summing up, and had directed himself accordingly.

[12] For grounds 7 and 11 the appellant argued that the trial judge erred when he did not find that inconsistencies in the complaint's evidence in court and what she told her teacher and mother were materially important to the main issues in dispute. The judge alone held that the appellant had failed to highlight inconsistencies that were "material" in the complainant's evidence.

[13] On ground 8, in which the appellant claimed that the trial judge erred in law in not providing cogent reasons to support his agreeing with majority verdicts of the assessors, the judge alone held that while it is good practice to provide reasons if possible, it is not a requirement of law.

[14] On ground 9, the appellant argued that the trial judge did not give reasons for rejecting the appellant's daughter's evidence. The judge alone referred to the reasons for rejecting the daughter's evidence, and the contrast between her evidence and that of the complainant.

[15] The appellant claimed in ground 12 that the trial judge had "failed to direct the assessors on how to approach circumstantial evidence, on the issue of penetration by mouth or tongue and touching the vagina or genitalia by hand or finger". The judge alone noted that the prosecution case depended on the complainant's direct evidence as to penetration and touching. The case against the appellant was not sought to be proved on circumstantial evidence given by the complainant's mother, teacher, and father, and their evidence was only supportive in nature. The judge alone went on to say that the appellant's counsel could have asked for a redirection, but did not, and cannot raise it on appeal: **Tuwai v State** [2016] FJSC 35 (26 August 2016).

[16] With respect to ground 13, the judge alone observed that although eight years old at the time of the incident, and still a child when she gave evidence, the complainant appeared to have given cogent evidence. Further, even if the prosecutor had asked certain questions of her, it was for the trial judge to satisfy himself of her competence to understand the nature of her oath, and her duty to tell the truth.

[17] On the sentence appeal, the appellant argued that double counting in the setting of the starting point of the tariff sentence made the sentence harsh and excessive. The judge found that on the totality of the evidence, it was reasonably open to the trial judge reach the sentence imposed in this case.

[18] The conclusion reached by the judge alone was that leave to appeal against both conviction and sentence would be refused.

Full Court Hearing

[19] The leave ruling was issued on 8 October 2021. When the appellant filed his application to renew his application for leave to appeal on 3 December 2021, it was 28 days late. The court waived the strict requirement because there were good reasons provided by the appellant, to explain the delay in his renewal application: **Julien Miller v State** [2007] FJCA 104; AAU076.2007 (23 October 2007). The main reason for the delay was the restrictions faced by appellant due to the COVID19 containment policy of the government. The other reason was the constant change in which prison facility he was incarcerated. The court accepted these reasons for the delay for filing his renewal application to the full court, and that holding it against the appellant would be unfair and unjust.

Grounds of Appeal

[20] On appeal to this court, the appellant maintained nine grounds of appeal against conviction. He did not pursue grounds 1 and 11 to 13 of his original application for leave to appeal. He maintained both grounds of his appeal against conviction.

Relevant Law – Section 23(1) Court of Appeal Act 2009

[21] Before undertaking the assessment of the grounds of appeal submitted by the appellant, we set out the relevant statutory law that guides the work of the Court of Appeal.

[22] Section 23(1) (a) of the Court of Appeal Act 2009 states:

> 23.-*(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or ii) 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 iii) that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;*
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> *Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss*

the appeal if they consider that no substantial miscarriage of justice has occurred.

[23] The difficulty with the grounds of appeal submitted by the appellant is that they are not presented in a manner which links directly to the powers of the Court of Appeal as set out in s 23(1) of the Court of Appeal Act 2009 which limits those powers to four aspects and they are that a verdict may be set aside:

[a] on the grounds that it is unreasonable;

[b] if it cannot be supported having regard to the evidence;

[b] on the grounds of a wrong decision on a question of law;

[c] on any ground where there has been a miscarriage of justice.

[24] The Court of Appeal in **Kishore v State** [2022] FJCA 40; AAU 085.2016 (26 May 2022) explored the requirements of the section 23(1) of the Court of Appeal Act 2009 in these terms. The Court said:

> *[19] The appellant's complaint has to be considered in the context of section 23(1) of the Court of Appeal Act which provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred. In other words, although a miscarriage of justice may enable the Court to decide the ground of appeal in favour of the appellant, the appeal will nevertheless be dismissed on the application of the proviso if the Court considers that there has been no substantial miscarriage of justice. Thus, for an appellant to succeed he or she must demonstrate that not only is there a miscarriage of justice but also there is a substantial miscarriage of justice.*
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> *[20] It has been held that if a verdict is unreasonable or cannot be supported having regard to the evidence it amounts to a substantial miscarriage of justice (see **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 and **Pell***

> ***v The Queen*** *[2020] HCA 12, [45]). The High Court of Australia has identified three non-exhaustive situations in* ***Baini v R*** *(supra) where substantial miscarriage of justice may occur namely (i) where the jury's verdict cannot be supported by the evidence (2) where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome (3) where there has been a serious departure from the proper processes of the trial. In the latter two categories, the court may find a substantial miscarriage of justice even if it was open to the jury to convict. However, finding that it was not open to the jury to acquit (that is, the accused's conviction was inevitable), may lead the court to conclude that there was not a substantial miscarriage of justice.*

[25] The Court does not retry the matter as a trial *de novo*, on what it considers evidence gleaned from the trial record before it. The Supreme Court in **Rokete v State** [2022] FJSC 11; CAV 002. 2019 (29 April 2022) stated at [109] that:

> *... the function of the Court of Appeal is to look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the appellant was guilty of the charge he faced. It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused.*

[26] When the court has a list of several grounds, as in this case, which are argued by counsel for the appellant as if it were a trial in the High Court, the judges of the Court of Appeal are left to identify exactly what it is being asked to determine in reference to the powers of the court discussed above. That is not the duty of the Court. In that situation, this court is open to a claim that it grouped certain grounds incorrectly, when the real failure was on the part of the appellant in not articulating in precise terms which of the several issue raised is relevant to which of power the court of appeal has under section 23(1) of the Court of Appeal Act 2009 it is requesting the court to exercise in their favour.

Assessment of the Grounds of Appeal

[27] The approach of the Court will be to assess the grounds of appeal submitted for the full court hearing, by grouping the grounds under the four powers of the court that it

may exercise in determining the grounds of appeal. Most of the grounds of appeal submitted by the appellant refer to certain evidence which they consider highly relevant, but without submissions to demonstrate why that is so.

Verdict based on "an error of law"

[28] The appellant's grounds of appeal which claim "error of law" allege that the trial judge misapplied section 231(1) of the Criminal Procedure Act 2009, in relation to the submission of no case to answer on the evidence in the trial.[4] The appellant claims that the trial judge should have given cogent reasons to explain why he did not accept the no case to answer submission made his counsel at the end of the prosecution case; that no evidence of penetration was proven by the prosecution beyond reasonable doubt; and that there was evidence to establish the 'touching of the vagina' an essential ingredient of the sexual assault charge.

[29] Section 231 of the Criminal Procedure Act 2009 provides, as relevant:

> *(1) When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person committed the offence.*
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> *(2) When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more of several accused persons) committed the offence inform each such accused person of their right—*
> *(a)to address the court, either personally or by his or her lawyer (if any); and*
> *(b)to give evidence on his or her own behalf; or*
> *...]*
> *(d)to call witnesses in his or her defence.*

[30] In **Raqio v State** [2020] FJCA 6; AAU 061.2015 27 (February 2020)) the Court of Appeal said:

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[4] As set out in the appellant's submissions, these grounds are numbered 1-4 and 9. They are grounds 2-5 and 10 in the appellant's Notice of Appeal.

[23] Section 231, inter alia envisages two situations, namely '...there is no evidence... [... [to proceed with]' sub-Section (1) and '...there is evidence ... [to proceed with]' under sub-Section 2. In either situation, the court has to make a provisional determination. It was in the spirit of sub-Section (1), and on application of principles of fairness that court hears submissions from both counsel albeit the court was empowered to make such a determination ex-mero motu.

[24] The learned judge, in this case, exercised the power under Section 231 quite reasonably, lawfully and in a fairness when he considered the status of the prosecution case against the appellant in the absence of the assessors on 13 May 2015 in the course of the trial in respect of all counts.

[31] In **Tamanalevu v State** [2015] FJCA 127; AAU 078.2012 (30 September 2015), **Goundar JA stated:**

[4] His first complaint relates to the no case to answer ruling. The appellant submits the trial judge failed to give cogent reasons for his ruling. The test for no case to answer is whether there is some evidence on each element of the charged offence. The test does not permit the trial judge to carry out any assessment of the credibility or reliability of evidence."

[32] On the facts of this appeal, it is clear that when the prosecution finished its case, evidence had been adduced that covered all the ingredients of the offence. What the appellant is arguing is that at the time the trial judge made his ruling, he did not give reasons for his ruling. As a matter of law, the trial judge was not required to do that. At the close of the prosecution case, it was established that a prima facie case existed. On that basis he could have proceeded to hearing the defence case or, as he did in this case, held that there was a case to answer and called on the defence to present its case.

[33] A summary of the relevant evidence is recorded in paragraphs 25 to 27 of the Summing-up, as follows:

25. The first witness of the prosecution is the complainant. She is eight years old girl. On the evening of the 14th of July 2019, she had gone to the accused place with her father. There were two to three visitors at the accused's home. She was sitting in the living room with her father. After a while, she got her father's mobile phone and started to watch the cartoon on it. While she was watching the cartoon, she received a call from her mother. Her mother asked her, "Is everything okay." The complainant had responded, saying, "yes." Her mother then finished

the conversation, informing the complainant that she will pick her from the school on the afternoon of Monday.

26. In a while, the accused asked the complainant to go to the room and play with the young boy. The accused has two daughters and one young son. The complainant then went to the room and laid down on the bed. She continued watching the cartoon. None of the daughters of the accused was present in the room. The small boy then told the accused to do something. The accused then started to touch the genitals of the complainant. She used the word "tutu" The complainant said the "tutu" used in the washroom. You have seen the complainant pointed out the place where the accused touched and then sucked using a toy bear.

27. The complainant was wearing a t-shirt and pajama. The accused lift her pajama up to her knee. After touching the genitals of the complainant, the accused went down and started to suck the genitals of the complainant. He used his mouth. When he sucked, it went a little deep inside. The wife of the accused then walked into the room. The accused suddenly got up and lifted the pajama of the complainant. He started to talk to the little boy.

[34] It is clear from the above summary of the evidence that there was no basis on which a "no case to answer' submission could succeed. The evidence of the complainant is set out in pages 4 to 21 of the Supplementary Court Record and given her tender age, it is relevant in evaluating her evidence. It should not be expected that her evidence would be similar to that of an adult in similar situation. The court in **Volau v State** [2017] FJCA 51; AAU 011.2013 (26 May 2017) discussed the difficulty of child witnesses in explaining penetration in technical terms. In the present case, the trial judge did not consider whether the penetration was by the tongue or mouth and in doing so followed the **Volau** precedent, when at paragraph 10 of the judgment stated:

10. The complainant precisely said the accused licked her "tutu" and it went a little deep. I find that evidence is sufficient to establish the penetration of vulva with the mouth or the tongue. The particulars of the offence said the accused had penetrated the vulva of the complainant with his tongue. I do not find the word of the tongue or the mouth is materially important in this matter. The evidence of the complainant establishes that the accused had penetrated her vulva with his mouth or tongue.

11. I do not find the inconsistencies between the evidence given by [the complainant's mother], and her statement to the police is materially important to the main issues in this dispute.

[35] It is evident that the appellants appeal on these grounds cannot succeed on the evidence at the trial. They are dismissed.

Was the Guity Verdict Unreasonable or Not supported by Evidence

[36] In **Navunisaravi v State** [2023] FJCA 68; AAU 150.2017 (25 May 2023) the Court of Appeal stated:

> *[63] When examining whether a verdict is unreasonable or cannot be supported by evidence, as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence including defence evidence, the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt which is to say whether the assessors **must** as distinct from **might**, have entertained a reasonable doubt about the appellant's guilt.*
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> *...*
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> *[65] **Sahib v State*** [1992] FJCA 24*; AAU0018u.87s (27 November 1992) too applied more or less a similar test in considering whether the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the* Court of Appeal Act.
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> *[66] When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him [vide **Kaiyum v State*** [2014] FJCA 35*; AAU0071.2012 (14 March 2014.*

[37] The Supreme Court in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) stated as follows:

> *[72] [The appellants] do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its*

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

[38] It has been said many a time that the trial court has a considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict: **Sahib v State** [1992] FJCA 24; (AAU0018 of 2017) (27 November 1992).

[39] In grounds 5, 6, 7, 8 and 9,[5] the appellant argued that the trial judge erred in various respects in his treatment of the evidence. He argued that the trial judge wrongly found that the evidence of the complainant's mother strengthened the consistency of the complainant's account, when it was hearsay (ground 5), that the trial judge failed to recognise material inconsistencies in the evidence (ground 6), that he failed to provide reasons why he did not believe the appellant's evidence (ground 7), that he failed to consider the evidence of the appellant's daughter (ground 8) and that he wrongly found that the complainant's evidence established the charge of rape (ground 9).

[40] None of the appellant's arguments can be sustained, as is evident from the trial judge's directions to the assessors. The trial judge dealt with the appellant's evidence as follows:

> *53. I now kindly draw your attention to the evidence adduced by the defence. The accused elected to give evidence on oath and also called one witness for the defence. The accused, in his evidence, denies this allegation. He claims that he neither touched the vagina of the complainant nor penetrated her vulva with his tongue. Furthermore, he explained his version of the events that took place on the evening of the 14th of July 2019.*
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> *54 The witness of the defence gave evidence explaining that the accused never touched the vagina of the complainant. The witness further said the accused never penetrated the vulva of the complainant either.*

[5] Grounds 6-10 of the appellant's Notice of Appeal.

55. *It is for you to decide whether you believe the version of the accused. The accused is not required to establish the defence beyond a reasonable doubt. If the accused establishes that the defence is or may reasonably be true, although it is not convinced that it is true, then you have to find the accused not guilty of these two offences as charged. Accordingly, if you consider that the account given by the defence is or may be true, then you must find the accused not guilty of the two offences as charged.*

56. *If you neither believe nor disbelieve the version of the accused yet, it creates a reasonable doubt in your mind about the prosecution case, you must then find the accused not guilty of any of the two offences as charged.*

57. *If you reject the version of the defence, that does not mean the prosecution has established the accused guilty of these offences. Still, you have to satisfy the prosecution has proved on its evidence beyond a reasonable doubt that the accused has committed the two offences as charged.*

[41] On the appellant's claim that his daughter's evidence was rejected by the trial judge because she appeared evasive and untruthful, the judge assessed the evidence of the appellant's daughter and the complainant in his judgment:

15. *[The appellant's daughter] said she started to watch a movie on the phone when the little boy stopped playing with it. She was observing the complainant, who was watching a cartoon on the mobile phone just next to her. I observed the evasiveness and the demeanour of [the appellant's daughter] when the learned Counsel asked her about the nature of the cartoon the complainant was watching.*

16. *I observed the manner and the way the complainant gave evidence. She was straight, forthright, and coherent. During the cross-examination, the complainant maintained the same position that she explained in her evidence in chief. There are no adverse inaccuracies, errors, and mistakes in her evidence. Neither I find any intentional lies nor intentional attempts to deceive in her evidence. As a result, I find the evidence of the complainant is reliable, credible, probable, and truthful. Hence, the defence failed to establish or create a reasonable doubt about the case of the prosecution.*

[42] We accept the respondent's submission that it was properly open to the trial judge to make those assessments of the witnesses and their evidence.

[43] With respect to the prosecution evidence, the trial judge directed the assessors as follows:

> *66. You may recall [the complainant's mother] said in her cross-examination that the head teacher told her everything about this alleged incident and not the complainant. However, she explained in her evidence in chief, that the complainant explained her the incident when she asked about it. If you find the complainant told [her mother], about the incident, then you can consider the evidence of [the mother] as evidence of recent complaint. On the other hand, if you find the head teacher told [the mother], about the incident, then you must not consider her evidence as evidence of recent complaint. Then [the mother's] evidence becomes hearsay, and you must not consider it.*
>
> *67. You have heard that the learned Counsel for the accused cross examined [the complainant's mother] about the inconsistent nature of the evidence she gave in the court with the statement she made to the police during the investigation.*
>
> *68. You can consider such inconsistencies and contradictions when you determine the credibility and reliability of the evidence given by the witnesses. However, you have to be mindful that the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.*
>
> *69. The passage of time will affect the accuracy of memory. Memory is fallible, and you might not expect every detail to be the same from one account to the next. A victim of sexual assault or close relative of such victim may find it challenging to gather every detail immediately after such an incident. She or he may struggle to gather herself or himself after encountering or hearing such a traumatic ordeal. Therefore, you have to be mindful of these practical limitations and conditions when you consider these inconsistencies and contradictions.*
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> *70. In respect of the inconsistency between the evidence presented in the court and the previously made statement, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is substantial, you will next need to consider whether there is an acceptable explanation for it. If there is a satisfactory explanation for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then you have to decide as to what extent that influences your judgment of the reliability of such witness.*

[44] After the summing-up was concluded the trial judge gave both prosecution and defence counsel the opportunity to seek for redirections if they wished. There were no

redirections requested. Issues that could have been cleared up at trial cannot be raised on appeal: **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016).

[45] In conclusion, the appeal against conviction must fail.

Appeal Against Sentence

[46] The appellant's two grounds of appeal can be merged and considered as one. The Court of Appeal in **Kim Nam Bae v State** [1999] FJCA 21; (AAU0015U.1998S (26 February 1999) stated:

> *It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the 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. This 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) 55 CLR 499."*

[47] The issue of law submitted by the appellant is that there has been double counting by the trial judge in picking 13 years as the starting point of the sentence – two years above the starting point of the tariff sentence of 11 to 20 years set by the Supreme Court in **Aitcheson v State** [2018] FJSC 29; CAV 0012.2018 (2 November 2018). While it can be accepted that the facts of the rape and sexual assaults in *Aitcheson* are more serious than those in this appeal, we are left in some doubt that on the facts here, in selecting 13 years as the starting point, the trial judge would have already factored in some of the factors which the trial judge later counted as aggravating factors. This is the argument put forward by the appellant: that the judge double counted some factors.

[48] A new sentence is required. We would take the starting point as 11 years' imprisonment and increase that by two years for the aggravating factors identified by the trial judge (the age difference between the appellant and the complainant, the breach of trust involved, and the harm caused to the complainant). This gives an interim sentence of 13 years. For the mitigating factors (the appellant was a first offender and an active member of the village temple) the sentence is reduced to 11

years. There will be a non-parole period of 9 years imprisonment under s 18 of the Sentencing & Penalties Act. The appellant was remanded in custody for 42 days, which must be deducted from the final sentence: s 24 of the Sentencing & Penalties Act.

[49] The actual sentence period is 10 years and 10 months imprisonment with a non-parole period of 9 years imprisonment, effective from 5 March 2020.

ORDERS:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is allowed. The appellant's sentence of 13 years and ten months' imprisonment is quashed and replaced by a sentence of 10 years and 10 months imprisonment, effective from 5 March 2020.

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

COURT OF APPEAL FIJI

The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

The Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL