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

CRIMINAL APPEAL NO. AAU 29 of 2018
[High Court at Labasa Case No. HAC 27 of 2016]

BETWEEN : **DANIEL BHURRAH**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **05 July 2023**

Date of Ruling : **27 July 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court of Labasa on one count of indecent assault (kissing the lips) contrary to section 212 (1) of the Crimes Act 2009, one count of sexual assault (touching the vagina) contrary to section 210 (1) (a) of the Crimes Act 2009, one count of penile rape contrary to section 207 (1) and 2 (a) of the Crimes Act 2009 and an alternative count of digital rape contrary to section 207 (1) and 2 (b) of the Crimes Act 2009, committed on 14 May 2016 at Wainunu, in Bua in the Northern Division

[2] The assessors had expressed a unanimous opinion of guilty on the first three counts. The learned High Court Judge had agreed with the assessors and convicted the appellant of counts 01, 02 and 03 as charged and sentenced the appellant on 02 March

2018 as follows and all sentences were directed to run concurrently subject to a non-prole period of 08 years. Count 01(indecent assault) – 6 months' imprisonment, count 02 (sexual assault) – 2 years' imprisonment and count 03 (rape) – 12 years' imprisonment.

[3] On 22 May 2020, leave to appeal against conviction was refused by a judge of this court [see **Bhurrah v State** [2020] FJCA 56; AAU29.2018 (22 May 2020)]. The appellant was refused leave to appeal against sentence as well on 19 August 2020 [see **Bhurrah v State** [2020] FJCA 134; AAU029.2018 (19 August 2020)]. He had renewed both conviction and sentence appeals with fresh grounds of appeal.

Evidence in a nutshell

[4] On 14 May 2016, the victim aged 72, had been left alone at home by her family members who were attending a church service. She was living with her daughter and her family at the time. The victim's daughter had become her carer after the victim had a stroke seven years ago. The appellant had been returning home from a drinking session when he noticed that the victim was sitting alone on the veranda of her home. He had gone and sat beside her. He was her nephew. He called her 'Aunty'. He was also her neighbour and a frequent visitor to her home according to her daughter Ms. Gardenia Murphy. He knew about the victim's physical and mental health and that she was alone at home. He exploited the situation, kissed her and touched her genitals. Later he sexually penetrated her genitals. The victim was vulnerable due to her age and illness. 14 year old Miss. Erica Molly had seen the appellant in the act of kissing her grandmother. Dr. Elizabeth Koroivuki had expressed an opinion that the complainant did not have the mental capacity to give free and voluntary consent to the sexual acts due to dementia. She was about 72 years old when the appellant sexually molested her.

[5] The appellant was defended by counsel. He remained silent and did not call any witnesses. He had admitted in the agreed facts that he touched the complainant's vagina who had not been wearing a panty while sitting outside on 14 May 2016. He had also admitted in the additional agreed facts that he kissed the complainant's lips at the verandah and penetrated her vagina on the same day with his finger. Thus, the

appellant had admitted the allegations relating to the first, second and alternative count except the third count of penile rape. His defense suggested in cross-examination was 'consent'.

Law on leave to appeal

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[7] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows.

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? 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).'*

[8] ***Bae*** was adopted by the Supreme Court in **<u>Naisua v State</u>** [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **<u>House v The King</u>** (1936) 55 CLR 499.

[9] Accordingly, the grounds of appeal urged by the appellant before the full court are as follows.

> ***'<u>Conviction:</u>***
>
> ***<u>Ground 1</u>***
>
> *<u>THAT</u> his Lordship erred in law and in fact in not having considered to fairly direct the assessors and himself the questionable imprint of the expert witnesses chronological analyzation of WDC 3184 Maca Baleinamotos's Police Examination Report and, Dr. Koroivuki's mental Evaluation Report, causing injustice to the appellant.*
>
> ***<u>Ground 2</u>***
>
> *<u>THAT</u> his Lordship failed to admonish fairly to the assessors and himself the additional agreed facts which caused an inequitable imprint to the appellant's constitutional rights to a fair trial.*
>
> ***<u>Ground 3</u>***
>
> *<u>THAT</u> his Lordship erred in law and in fact to equally specify justifiably to the assessors that the burden of proof was always on the prosecution side and never shifts to the accused but, not in a subterfuge where, the benefit of the doubt should have been given to the appellant.*
>
> ***<u>Sentence:</u>***
>
> ***<u>Ground 1</u>***
>
> *<u>THAT</u> the trial judge erred in law in not putting to the appellant to submit reasons why the court should not imposed a binding authority of the Supreme Court of Fiji in **<u>Nacani Timo –v State CAV 022/2018.</u>** Particular with the appellant good character and first offender status*
>
> ***<u>Ground 2</u>***
>
> *<u>THAT</u> the learned trial Judge failed to give out and order for parole detailing and specifying the requirements about the completion of the non-parole period. Failure to give out the order for parole caused a gross failure in the criminal administration of our justice system.*

Ground 3

THAT the trial judge mistook the facts by finding the appellant guilty and sentencing him on inconsistent and irrelevant evidence.

Ground 4

THAT the sentence is harsh and excess in an evidence and circumstance of the case.

Ground 5

THAT the learned trial Judge did not consider the health condition of the appellant as a mitigating factor and the possibilities of the appellant dying in prison given the lengthy prison term thus contradicting the principles of ***Lord Bingham Endorsed in Athwal and others EWCA [2009] WLR 2439 Crim 789***

Ground 6

THAT the learned trial Judge was not astute in his judgment and the appellant should have a lesser sentence and a different charge

Ground 7

THAT the learned trial Judge should inform the appellant that the sentencing tariff has increased because he doesn't know anything about criminal law.

01st ground

[10] The appellant's main plank of the challenge appears to be the evidence of Dr. Elizabeth Koroivuki and her Competency Evaluation Report (P1). The prosecution led expert evidence from Dr Elizabeth Koroivuki, a qualified doctor and a psychiatrist in the field of medicine and psychiatry. She carried out a psychiatric evaluation of the complainant, Ms Simpson on 18 May 2017 (one year after the sexual abuse) and according to Dr Koroivuki the complainant was very likely to be suffering from a neurological condition called Vascular dementia possibly caused by Stroke. The doctor also said that the left side of the complainant's brain was not functioning, affecting her reasoning process or judgment. Dr Koroivuki was of the opinion that the complainant understood that the sexual events that occurred were wrong but her ability to reason out what had been done to her was impaired by her mental condition at the time of the incidents. Dr Koroivuki also expressed an opinion that the complainant did not have the mental capacity to give a free and voluntary consent to the sexual acts due to dementia.

[11] The appellant complains that the trial judge had not properly directed the assessors as to how they should treat expert evidence of Dr Koroivuki depriving him of a fair trial.

[12] The learned trial judge had addressed the assessors on the doctor's evidence as follows.

> *'[32] I need to give you a further direction on law regarding Dr Koroivuki's evidence. Expert evidence is permitted in a criminal trial to provide you with scientific information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence, namely whether the complainant had the mental capacity to give a free and voluntary consent to sexual acts (kissing, touching of vagina and penetration of vagina) performed on her by the Accused.*
>
> *[33] Dr Koroivuki is entitled to express an opinion in respect of the mental capacity of the complainant to give a free or voluntary consent to sexual acts performed on her by the Accused and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by Dr Koroivuki 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 Dr Koroivuki, you do not have to act upon it. It is for you to decide whose evidence, and whose opinions you accept, if any. You should remember that this evidence relates only to part of the case, and that whilst it may be of assistance to you in reaching an opinion, you must reach your opinion having considered all the evidence.*

Law on expert evidence

[13] In **R. v. Abbey** [1982] 2 S.C.R. 24 speaking for the Court, Dickson J. (as he then was) said at p. 42:

> *With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)*

[14] It was held in **Davie v. Magistrates of Edinburgh** [1953] S.C. 34, at p. 40, by Lord Cooper:

Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.

[15] In **R v Beland** [1987] 2 SCR 398; [1987] 43 DLR the Supreme Court of Canada stated:

'16. ………The function of the expert witness is to provide for the jury or other trier of fact an expert's opinion as to the significance of, or the inference which may be drawn from proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. The expert witness is permitted to give such opinions for the assistance of the jury. 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.'

[16] The expert will not be permitted to point out to the jury matters which the jury could determine for themselves or to formulate his empirical knowledge as a universal law (**Clark v Ryan** [1960] HCA 42; (1960) 103 CLR 486 at 491; **Matioli v Parker** [1973] Qd R 499; **Turner** (1974) 60 Crim Appn R 80, per Lawton LJ). The decision of the High Court in **Clark v Ryan** (1960) 130 CLR 486 has become a touchstone for the principles in this area of the law. In that case Dixon, CJ (with whom Fullager, J agreed) said:

"The rule of evidence relating to the admissibility of expert testimony as it effects the case cannot be put better than it was by J. W. Smith in the notes to Carter v Boehm, 1 Smith L.C., 7th ed. (1876) p 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it." Then after the citation of authority the author proceeds: "While on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the enquiry is into a subject matter the nature of which it is not such as to require any peculiar habits or study in order to qualify a man to understand it." Adapted by Harding A.C.J. in R v Camm (1883) 1 Q.L.J. 136"(emphasis added)."

[17] It is clear that the prosecution had called Dr Koroivuki to assist the assessors and the trial judge regarding the crucial issue whether the complainant was in a position give consent to the sexual acts performed by the appellant given her mental condition in the light of the appellant's defense of 'consent'. In this regard, I have no doubt that the directions by the trial judge were in line with above authorities on expert evidence.

[18] Given the evidence of her daughter Ms. Gardenia Murphy that the complainant had a Stroke seven years ago (*i.e.* 2011) and the doctor's evidence that about one in four people who suffer from Stroke would most likely go into dementia and can have issues with reasoning and judgment and their brain start regressing with the passage of time, her evidence that after 07 years of the Stroke the complainant was not fit or had the mental capacity to freely and voluntarily give consent to sexual intercourse, was quite acceptable and the assessors and the trial judge had obviously considered the doctor's evidence as a valuable expert opinion to determine the question of consent.

[19] The appellant's argument that Dr Koroivuki's examination had been done a year after the incident and is therefore devalued does not carry much weight in as much the doctor as an expert was in a position to express her opinion as to what the complainant's condition would have been a year ago given her own examination and the information provided by her daughter who was also a witness.

[20] The learned trial judge in the judgment had given his mind carefully to the issue of consent at paragraphs 4-9 and agreed that the complainant was not in a position to give her consent freely and voluntarily for any of the sexual acts.

02nd ground of appeal

[21] The appellant's contention is that the trial judge had not put to the assessors the additional agreed facts.

[22] Although, the learned trial judge had not specifically referred to the agreed facts and additional agreed facts, he had at paragraphs 36, 37 and 38 had clearly referred to the admissions by the appellant stating that the physical acts on the first and second

counts were not in dispute and regarding the third count penetration was admitted but the mode of penetration was in dispute; whether penile or digital.

[23] It must be remembered that the fourth count based on digital penetration was an alternative count to the third count based on penile penetration. Once the assessors and the trial judge decided to accept the complainant's evidence on penile penetration under count 03 there was no basis for them to consider the fourth count on penile penetration though the appellant had admitted the same. The appellant could not have been convicted for the alternative count even on his own admission.

03rd ground of appeal

[24] The trial judge had given textbook directions on burden and standard of proof and contrary to the appellant's complaint, the learned trial judge had specifically asked the assessors to opine that the appellant was not guilty if they entertained a reasonable doubt of his guilt (see paragraph 5 of the summing-up)

04th ground of appeal (sentence)

[25] The appellant contends that the trial judge had not requested the appellant to give any reasons as to why a non-parole period should not be imposed in terms of **Timo v State** CAV0022 of 2018:30 August 2019 [2019] FJSC 22. Lokur, J in ***Timo*** said that fixing a non-parole period is quite a drastic power and to make it reasonable, it should be exercised by a court after giving the convict an opportunity of having a say to enable him or her to persuade the Court to not fix any non-parole period or at worst a short non-parole period. However, Gates, J stated in paragraph 11 in ***Timo***, section 18(1) speaks of *'..must fix a period..'* and therefore, compelled the court to impose a non-parole period when the sentence was 02 or more years which was not merely directory but mandatory and section 18(2) makes that intention clearer by the use of the words *'the court may decline'* leaving discretion with sentencing court.

[26] There is judicial opinion that the sentencing judge should give reasons as to why he or she selects a particular non-parole period *i.e.* the length of the non-parole period (vide **Rarasea v State** AAU0118 of 2014: 4 October 2018 [2018] FJCA 156 and **Rohit Prasad v State** AAU0010 of 2014: 4 October 2018 [2018] FJCA 170. Moreover,

when a particular non-parole period is fixed the sentencing judge should have regard to section 4(1) and (2) of the Sentencing and Penalties Act, in particular 4(1) (a) , (c) and (d) as held by the Court of Appeal in **Tora v State** AAU0063 of 2011:27 February 2015 [2015] FJCA 20. Thus, section 4 of the Sentencing and Penalties Act comes into equation not only in deciding the head sentence but also in fixing the non-parole period.

[27] As against ***Timo*** we have **Kean v State** CAV0007 of 2015: 23 October 2015 [2015] FJSC 27 where the Supreme Court said the *'Unless the nature of the offence or the past history of the offender made the fixing of a non-parole period inappropriate, the court sentencing an offender to imprisonment for life or for a term of two years or more must fix a non-parole period during which the offender is not eligible to be released on parole.'* and **Wise v State** CAV 0004 of 2015: 24 April 2015 [2015] FJSC 7 where the Supreme Court held that ' *the sentencing court must fix a non-parole period – section 18(1) of the Sentencing and Penalties Decree'*. In other words according to ***Keen*** and ***Wise*** no discretion is left with the sentencing judge whether to fix a non-parole period or not under section 18(1) of the Sentencing and Penalties Act 2009.

[28] In **Turogo v State** CAV 0040 of 2016: 20 July 2017 [2017] FJSC 17 the Supreme Court had cited **Bogidrau v State** CAV0031 of 2015: 21 April 2016 [2016] FJSC 5 with regard to the principles enunciated in ***Tora(CA)*** and **Raogo v The State** CAV 003 of 2010: 19 August 2010 (a) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation; (b) nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent and (b) minimum term of imprisonment should not be fixed at or less than two thirds of the primary sentence of the Court.

[29] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

> "*While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that* ***the sentencing Judge would be in the best position in the particular case to***

***decide on the non-parole period depending on the circumstances of the case*.”

“…. was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission”.

[30] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."

[31] Facing with a similar complaint the Court of Appeal said in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019)

*‘[116] However, if this Court is to send back all appeals to the High Court to go through a hearing regarding fixing of non-parole periods only on the basis that such a hearing had not been given, it will lead to unnecessary delays to the detriment of the appellants themselves and chaos in case management as High Courts would be flooded with such cases. What is more pragmatic for this court is to examine all the material before it including sentencing submissions and decide whether (i) the period of non-parole and (ii) its proximity to the head sentence, is justified in the light of **Bogidrau** guidelines (incorporating **Tora** and **Raogo)** In doing so, in my view, this Court could act under section 23(3) of the Court of Appeal Act.*

[32] Section 27(2) of the Correction Service Act, 2006 (previously known as Prisons and Corrections Act 2006) is was follows.

27. (1) All convicted prisoners shall be classified in accordance with the procedures prescribed in Commissioners Orders.

(2) For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one-third of the sentence for any term of imprisonment exceeding one month.’

[33] The Parliament introduced amendments to both section 18 of the Sentencing and Penalties Act and section 27 of the Corrections Service Act. The amendments were brief and can be reproduced omitting formal provisions as follows:

> *"2. Section 27 of (the Act) is amended after subsection (2) by inserting the following new subsections:-*
>
> *(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009 for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one third of the sentence not taking into account the non-parole period.*
>
> *(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18, the prisoner must serve the full term of the non-parole period.*
>
> *(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.*
>
> *3. The Sentencing and Penalties Act is amended by:*
>
> *(a) in section 18:-*
>
> *(i) in subsection (1), deleting 'subject to sub section (2), when' and substituting 'when' and*
> *(ii) deleting subsection (2); and*
>
> *(b) deleting subsection 20(3)."*

[34] The amending legislation came into force on 22 November 2019 and has retrospective effect. The section 27 amendments therefore apply to the appellant and his grounds of appeal must be considered in the context of the amended legislation.

[35] In **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023) the Supreme Court said

> *[20] The retrospective application prescribed by section 27(5) applies only to sub sections (3) and (4). The amendments to section 18 of the Sentencing*

and Penalties Act do not operate retrospectively. Furthermore the repeal of section 18 (2) means that the discretion whether a non-parole period should be fixed has been taken away from the sentencing court. As from 22 November 2019 a sentencing court must fix a non-parole term when sentencing an offender to be imprisoned for life (as a maximum sentence but not as a mandatory sentence) or for a term of 2 years or more.' (emphasis added)

[36] Therefore, as far as section 18 of the Sentencing and Penalties Act is concerned, it as it stood before 22 November 2019 would apply to the appellant. However, because of the retrospective application of sub sections (3) and (4) of section 27 of the Corrections Service Act, the appellant would now be serving only the non-parole period of 08 years provided he remains of good behaviour. Even if there was no non-parole period prescribed the earliest that he would be released is on the completion of 08 years. As the Supreme Court said in ***Kreimanis*** at paragraph [17], the amendments to section 27 mean that when a prisoner has a non-parole term fixed as part of his sentence the prisoner is to be released (provided that he has been of good behaviour) either after he has served two thirds of his sentence or on the expiry of the non-parole period, whichever is the later. In the appellant's case both events fall on the same day.

[37] Thus, there is no reason for this court to interfere with the fixing of the non-parole period or the length of the non-parole period.

[38] However, when sentencing an offender to be imprisoned for life (as a maximum sentence but not as a mandatory sentence) or for a term of 2 years or more, the trial judges should invite the parties to address them on the matter of the length of the non-parole period (in addition to the usual aggravating and mitigating circumstances, period of remand etc.) if they so wish under section 18(1) of the sentencing and Penalties Act as part of the sentencing procedure and mitigation of sentence followed by brief reasons on the length of the non-parole period and its proximity to the head sentence.

05th ground of appeal

[39] This ground of appeal has been addressed by the Supreme Court in ***Kreimanis*** and no further directives to the Commissioner of Prisons is necessary for calculating the date of release of a prisoner that involve reference to both the early release date after

remission had been calculated and to any non-parole period fixed by the sentencing Court under section 18(1) of the Sentencing and Penalties Act.

06th ground of appeal

[40] There is simply no merits in the appellant's complaint that the trial judge had sentenced him on inconsistent and irrelevant evidence. No sentencing error within the principles in ***Bae*** has been demonstrated.

07th ground of appeal

[41] The tariff for adult rape is well settled to be between 07 and 15 years of imprisonment [vide **Lal v State** [2021]; AAU 016.2016 (03 June 2021), **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) and **Rokolaba v State** [2018] FJSC 12; CAV0017 (26 April 2018)].

[42] The final sentence will be tested in appeal in the legal framework pronounced in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006).

> *'13……. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. 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…'*

[43] Similar sentiments had been expressed earlier in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) where the Court of Appeal stated:

> *[45] In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust.*'

[44] Having pursued the sentencing order and given the gravity of the offending (see **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) for aggravating factors), I do not find the sentence to be excessive or harsh. The sentence is well within the range. No sentencing error within ***Bae*** principles has been demonstrated.

08th ground of appeal

[45] In **Ljuboja v The Queen** [2011] WASCA 143, while sentencing under the Crimes Act 1914 (Cth), the court reviewed the principles applicable to elderly offenders, stating at [102]–[103]:

> *Australian authorities have established that advanced age is a relevant consideration in determining whether a sentence will be crushing. The rationale is that each year of a sentence represents a substantial proportion of the period of life which is left to an offender of advanced age…*
>
> *However, whether and, if so, to what extent leniency should be given to an offender of advanced age, depends on all of the facts and circumstances of the particular case. As Steytler P noted in Guylas (Gulyas v The State of Western Australia [2007] WASCA 263), the authorities emphasise that age is only one factor in the sentencing process, and that advanced age can never be a justification for a sentence which is not fairly proportionate to the offence or otherwise inappropriate. See also Hunter (103) (R v Hunter(1984) 36 SASR 101). An offence may be so serious that humanitarian considerations cannot be accommodated.*

[46] In ***Ljuboja***, the court dismissed an appeal against a 25 year term imprisonment with a minimum of 16 years for serious drug charges, where at the time of sentencing the offender was 60 years old. The court stated at [116]–[117]:

> *The imposition of condign punishment was justified and necessary. As the sentencing judge noted, the appellant's prospects of rehabilitation were poor. The most significant mitigatory factors were his age and his pleas of guilty. However, the extent of any leniency that could be extended to the appellant on account of his age was limited by the very serious nature of his offending.*

[47] In **Mokbel v The Queen** [2013] VSCA 118, the Court dismissed an appeal against a 30 year federal sentence imposed on a 46 year old for serious drug trafficking offences. The offender was also suffering from ill-health. In considering the argument that such a sentence was manifestly excessive or 'crushing' the court cited the principles listed in the state sentencing case of **R v R L P** [2009] VSCA 271, stating at [114]–[115] that:

[T]he age of an offender is always a relevant consideration and may, in particular cases, be of considerable significance. But it will never be determinative: <u>DPP v Kien [2000] VSC 376.</u>

In R v R L P (2009) 213 A Crim R 461 this Court was considering the case of an offender who was 77 when sentenced. The Court summarised the applicable propositions as follows:

We approach the conjunction of the appellant's advanced years and ill health with these propositions in mind.

1. *The age and health of an offender are relevant to the exercise of the sentencing discretion.*
2. *Old age or ill health are not determinative of the quantum of sentence.*
3. *Depending upon the circumstances, it may be appropriate to impose a minimum term which will have the effect that the offender may well spend the whole of his remaining life in custody.*
4. *It is a weighty consideration that the offender is likely to spend the whole or a very substantial portion of the remainder of their life in custody.*
5. *Other sentencing considerations may be required to surrender some ground to the need to exercise compassion to take account of the real prospect that the offender may not live to be released and that the offender's ill health will make his or her period of incarceration particularly onerous.*
6. *Just punishment, proportionality and general and specific deterrence remain primary sentencing considerations in the sentencing disposition notwithstanding the age and ill health of the offender.*
7. *Old age and ill health do not justify the imposition of an unacceptably inappropriate sentence: R v R L P(2009) 213 A Crim R 461, 476 [39].*

[48] In **<u>R v Knight</u>** [2004] NSWCCA 145, [33] Howie J (Grove and Simpson JJ agreeing) emphasized that advanced age and ill health cannot, generally speaking provide an excuse for the commission of criminal activity and does not necessarily warrant leniency. The offender in Knight had committed offences including defrauding the Commonwealth and dishonestly obtaining a financial advantage from a Commonwealth entity. The Court stated at [33] that:

In a case such as this where the applicant has a record for serious fraudulent conduct over a lengthy period of time and these present offences continued unabated until his arrest, these subjective considerations can be given little, if any, weight.

[49] In **R v Sellars** [2010] NSWCCA 133, at [16] the Court noted that 51 years of age was not 'an age where his advancing years were of any particular significance' (also see **R v Hall** (No 2) [2005] NSWSC 890, [118]; **R v Loiterton** [2005] NSWSC 905, [188]. Conversely, in **Mokbel v The Queen [2013] VSCA 118,** [111], the age of the 46 year old offender was considered relevant, where the offender was also suffering from ill-health. The offender had heart disease, and it was evidenced that as a result, he had a life expectancy of 24 years, 11 years less than a person without the health condition.

[50] Having considered the above principles, I have no reason to uphold the appellant's contention that the trial judge should have considered his health condition for which no evidence was available and possibilities of the appellant dying in prison. The appellant was only 56 years of age at the time of sentencing.

09th ground of appeal

[51] The appellant submits that the trial judge should have imposed a lesser sentence on a different charge such as defilement of intellectually impaired persons under section 2016 of the Crimes Act.

[52] No argument of this kind had been addressed to the trial judge. Thus, it appears to be an afterthought. This court is not the proper forum to re-agitate trial issues. The learned trial judge for good reasons had not on his own addressed the assessors or himself on these lines as the facts of the case proved rape instead of defilement of intellectually impaired persons. In any event, this is not a matter to be addressed as part of the sentence appeal.

10th ground of appeal

[53] The appellant argues that the trial judge should have informed the appellant that the sentencing tariff had increased. The appellant was defended by counsel (02) and it was no part of the trial judge's duty to advise the appellant on the law or facts when

he had full legal representation. This is also strictly not a matter to be considered as part of a sentence appeal.

Mataitoga, JA

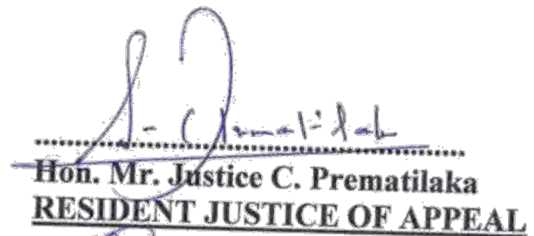
[54] I have read draft judgment and I concur with reasons and the conclusions.

Qetaki, JA

[55] I have read and considered the judgment in draft. I agree with it and its reasoning and conclusions.

Order of the court are:

1. *Leave to appeal against conviction is refused*
2. *Leave to appeal against sentence is refused*
3. *Appeal against conviction is dismissed.*
4. *Appeal against sentence is dismissed*



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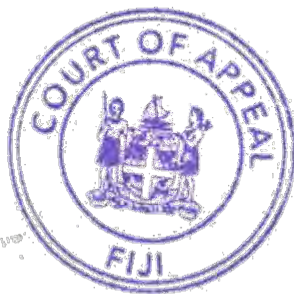
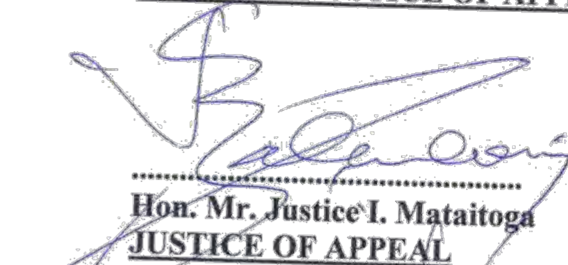
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL





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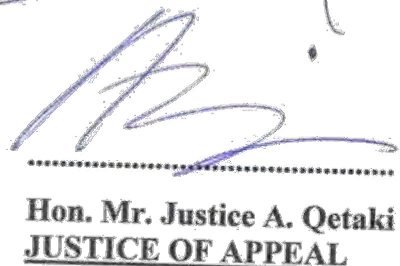
Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL



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Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL