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

CRIMINAL APPEAL NO. AAU 0040 of 2019
[In the High Court at Lautoka Criminal Case No. HAC 34 of 2015]

BETWEEN	:	**NIKOLA ROKOCIKA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Mataitoga, RJA** **Clark, JA**
Counsel	:	**Appellant in person**
	:	**Ms. E. A. Rice for the Respondent**
Date of Hearing	:	**03 November 2023**
Date of Judgment	:	**29 November 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka on one representative count of penile rape contrary to section 207 (1) and (2) (a) of the Crime Act, 2009 committed between the 01 May 2014 and 31 August 2014 at Nadi in the Western Division. The appellant was the 14 year old complainant's ('VR') stepfather.

[2] Two assessors (third one had been discharged due to absenteeism) had unanimously opined that the appellant was guilty of the representative count of rape. The learned High Court judge had agreed with the assessors, convicted the appellant and sentenced him on 22 February 2019 to an imprisonment of 17 years (effectively 16

years and 07 months and 10 days after deducting the remand period) with a non-parole period of 15 years.

[3] A Judge of this court refused leave to appeal on the appellant's appeal against conviction and sentence[1]. The appellant had renewed his application for leave to appeal before the Court of Appeal and filed written submissions on 06 new grounds of appeal on conviction on 03 September 2023. He confirmed at the hearing that those are the only grounds of appeal that he would urge at this stage against conviction in addition to the single ground of appeal against sentence. The grounds of appeal are as follows:

> ***Conviction***
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> ***Ground 1:***
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> *THAT the Learned Trial Judge erred in law when His Lordship had not directed the assessors and himself properly and adequately on the issue of consent in terms of section 206 and 207 (2) (a) of the Crimes Act no. 44 of 2009 a grave miscarriage of justice occurred.*
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> ***Ground 2:***
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> *THAT the Learned Trial Judge erred in law when His Lordship did not direct the assessors of the alternative lesser offence of defilement if they [assessors] were satisfied beyond reasonable doubt that the appellant was not guilty of rape, they could convict on defilement failure to do so was a miscarriage of justice.*
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> ***Ground 3:***
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> *THAT the Learned Trial Judge erred in law in not directing the assessors on the complainant's possible motive to lie that she was raped without her consent and other related evidence of the complainant.*
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> ***Ground 4:***
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> *THAT the Learned Trial Judge erred in law in shifting the burden of proof to the appellant to prove his innocence though creating doubt in the prosecution's case. A miscarriage of justice occurred.*

[1] **Rokocika v State** [2021] FJCA 173; AAU0040.2019 (26 October 2021)

Ground 5:

THAT the 3rd incident of the representative count of rape was defective as it was falsely accused the appellant such error was unfair and had caused a grave injustice to the appellant.

Ground 6:

THAT there were inconsistencies in the victim's evidence which the former judge admitted as truthful or reliable without any proper examination on the facts. This error by the trial judge and the differences in the victim's testimonies really prejudiced the appellant's right to a fair trial.

Sentence

Ground 7:

THAT the sentence imposed on the Appellant is harsh and excessive.

Factual Matrix

[4] The complainant, VR was 14 years of age in 2014 and she lived with her stepfather the appellant, her mother and three younger step siblings. VR recalled three Saturdays between 01 May 2014 and 31 August 2014 where the appellant had sexually abused her against her will.

[5] On the first occasion after lunch the victim was at home with two of the siblings and having washed the dishes she went for a rest in the bedroom. As she was reading the Bible the appellant entered the bedroom and locked the door. He then removed her yellow skirt and panty with one hand and with the other he removed his pants. VR tried to push the appellant away, however, he forcefully inserted his penis in her vagina and VR felt pain and wetness in her vagina. After the appellant left the bedroom, VR saw blood stains on the mat and her clothes and blood had come out of her vagina. The victim did not consent to sexual intercourse with the appellant. In the afternoon, VR told her mother about what the appellant had done to her.

[6] On the second occasion, VR's mother had gone to catch mussels from the river leaving at home her and a stepsister with the appellant. VR was in the bedroom trying to make her stepsister sleep. The appellant entered the room, removed her skirt and panty and forcefully inserted his penis into her vagina and she felt his penis in her

vagina. VR could not push the appellant away since he was strong. She did not consent to what he did. The appellant told the victim not to tell anyone or he would beat her. However, VR told her mother about what he had done to her but her mother asked her not to lie and not to be cheeky.

[7] On the third occasion VR was making the bed of the appellant and mother when the appellant entered the room and locked the door. She tried to leave the room but could not do so since the appellant had the key. He made her lie on the bed, removed her clothes and his ¾ pants and forcefully inserted his penis into her vagina. It was painful and she did not agree to have sexual intercourse with him. In the afternoon VR told her mother about what the appellant had done to her but her mother beat her with a hose pipe.

[8] As a result of the appellant's acts of sexual intercourse, VR got pregnant and later she gave birth to a boy. According to VR the only person who had sexual intercourse with her was the appellant and he is the father of her son. Her mother (DW1) giving evidence for the appellant admitted that she asked VR to give the hospital the name of one Peni as the father of the child. The matter was later reported to the police.

[9] The appellant opted to remain silent but his counsel suggested to VR that acts of sexual intercourse were consensual. VR denied the suggestion in no uncertain terms.

[10] The appellant called his wife (VR's mother) to give evidence on his behalf. Adi Laite Tuirewa, VR's mother testified that she had been married to the appellant for the past 15 years and had 3 children from him. According to her, in 2014 VR got pregnant and when she asked her whether the appellant was the father of the child VR said 'no'. However, in cross-examination Adi was shown to have stated in her police statement that the appellant had told both her and VR not to give his name to the police for impregnating VR and when she questioned VR at the police station whether the appellant had raped her she said 'yes'. Adi also stated that VR did not tell her at any time about the appellant having had sexual intercourse with her or showed any blood stains. She also denied assaulting VR with a hose pipe or beating her. She, however, agreed that she cared about the appellant and that she was financially and emotionally

dependent on him for support. Adi admitted that she had told the complainant to inform the hospital of the name of one Peni to be the father of her child but denied that the appellant had told her not to give his name to the police as being responsible for VR's pregnancy or that the appellant had told her to give Peni's name for raping VR.

01st Ground of Appeal

[11] The main issue to be resolved in the case was the question of 'consent', for it was suggested to VR in cross-examination that on all three occasions she had consensual sexual intercourse with the appellant and further supplemented with a motive that VR decided to fabricate a 'story' of rape because she got pregnant. The appellant complains that the trial judge had not directed the assessors (summing-up) and himself (judgment) adequately on the issue of 'consent'.

[12] The trial judge has sufficiently directed the assessors on the legal aspects of the element of consent in the offence of rape at paragraphs 15, 16 and 19-21. The judge has also reminded the assessors at paragraphs 31, 34, 36 and 63 on VR's evidence that she did not consent to sexual intercourse on any of the three occasions and referred to the suggestion by the defence counsel that they were consensual but claimed to be against her will by VR only after she got pregnant (see paragraph 68, 69 and 70). The trial judge at paragraph 39 and 65 had also informed the assessors that VR (obviously referring to the suggestions as well) denied having consensual sex on those occasions. Then, the trial judge had directed the assessors at paragraphs 75 and 76 as follows:

> *76. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
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> *77. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.'*

[13] Therefore, I do not think that there is any inadequacy in the summing-up with regard to the issue of 'consent' in the summing-up, particularly in the context that there was

only a suggestion of consensual sex which was denied by VR and as a result there was no *evidence* of 'consent' as opposed to VR's unequivocal evidence of lack of consent on her part. No suggestion becomes evidence unless admitted by the witness. One must also remember that this was not a case of 'word against word' between VR and the appellant on the issue of consent and directions on such a scenario [as proposed in **Anderson** [2001] NSWCCA 488; (2001) 127 A Crim R 116 & adopted in **Naidu v State** [2022] FJCA 166; AAU0158.2016 (24 November 2022)] need not have been given.

[14] The appellant's criticism about the judgment on the issue of 'consent' should be considered in the proper legal context. When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter. Further, a trial judge is not expected to repeat everything he had stated in the summing-up in his written decision referred to as the judgment when he agrees or disagrees with the majority of assessors as long as he has directed himself according to his summing-up to the assessors [vide: **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[15] In the judgment at paragraph 3, the trial judge states that that he directed himself in accordance with the summing-up and the evidence at the trial. Although he did not specifically address himself on the issue of 'consent' in the same way he had done in the summing-up, having rejected the defence version, the judge had at paragraph 31 had stated that he was satisfied beyond reasonable doubt that between 01 May 2014 and 31 August 2014 the appellant had penetrated VR's vagina with his penis without her consent. Accordingly, the trial judge agreed with the assessors and convicted the appellant.

[16] In **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), Keith, J said that since the trial judge is the ultimate finder of the facts in Fiji, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the accused. However, His Lordship did not think that the law requires the trial judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

[17] The trial judge had fully ventilated all the evidence in the summing-up. He had then given his mind to the victim's evidence at paragraphs 4-14 and the evidence of the defence witness at paragraphs 16-24 of the judgment. Upon considering all the evidence, the trial judge had accepted the victim as a truthful and reliable witness as her credibility had stood unscathed under cross-examination despite some not so significant inconsistency with her police statement. On the other hand, the trial judge had rejected the evidence of defence witness (whose callous, if not wilful disregard of the victim's complaints had perpetuated the appellant's sexual abuse of the 14 year old victim until she got pregnant) for the reasons set out in the judgment and been satisfied beyond reasonable doubt that the appellant had penetrated the victim's vagina without her consent and that he knew that the victim was not consenting or did not care whether she was consenting. Therefore, the trial judge had agreed with the assessors.

[18] The trial judge had considered evidence in the judgment and concluded, as the assessors did, that the acts of sexual intercourse were without VR's consent. Therefore, the judge need not have spelt out reasons for agreeing with the rejection of the appellant's position by the assessors that sexual intercourse was consensual, and secondly, his evaluation and analysis of evidence could be reasonably inferred from the summing-up.

[19] In **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) the Supreme Court held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a

supervisory nature and the Court of Appeal should make an independent assessment of the evidence before affirming the verdict of the High Court.

[20] As I have already pointed out, there was no *evidence* at all that the acts of sexual intercourse were consensual. The suggestion to that effect was not accepted by VR and it remained a suggestion. The appellant did not say that it was indeed the case. The evidence of VR's mother Adi did not speak on behalf of the appellant regarding the question of consent in her evidence. Her evidence to a great extent was as if VR was not being truthful with regard to the appellant having had any sexual intercourse with her. Her evidence that VR never complained to her and she did not reprimand and hit her on two occasions was in line with this narrative. It is Adi who admittedly asked VR the leading question whether the appellant was responsible for her pregnancy as he was her stepfather. Isn't it because she was already aware of him having had sexual intercourse with VR. According to Adi's police statement VR's answer was 'yes'. Adi obviously lied in court when she said that VR said 'no'. It was Adi who admittedly asked VR to give the name of a boy called Peni to the hospital as the father of the child. She understandably did not want her husband's name to be mentioned as the father of her daughter. It was Adi who had told the police that the appellant told her and VR not to give his name to the police for having impregnated VR though she denied it at the trial. Adi understandably did not want her husband to be brought before court. In my view, all in all Adi's endeavour at the trial was to protect the appellant at the expense of VR (the daughter from her previous marriage), most probably because she had three other children from him and all of them were dependent on him to sustain the family. The assessors and the trial judge who had the benefit of seeing the demeanour and deportment of all witnesses believed VR to be a credible witness but rightly rejected Adi's evidence.

[21] 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 and there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)]. I am also convinced that upon the whole of the evidence it was open to the assessors to be satisfied of

appellant's guilt beyond reasonable doubt [vide **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021)]. Similarly, the trial judge also could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). Therefore, the verdict of guilty is reasonable and could be supported having regard to the evidence (see section 23(1)(a) of the Court of Appeal Act).

02nd Ground of Appeal

[22] The appellant argues that the trial judge had erred in failing to direct the assessors on the lesser or alternative count of defilement resulting in a miscarriage of justice.

[23] In terms of section 162(1)(f) of the Criminal Procedure Act, defilement of a young person between 13 and 16 years under section 215(1) of the Crimes Act is a lesser or alternative offence to rape.

> *"162. — (1) Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction made after due process for —*
>
> *(f) any sexual offence where the charge has been for rape;*

[24] The precondition for the operation of section 162 (1) is that the court should be satisfied that the *evidence* adduced in the trial supports a conviction only for a lesser or alternative offence. Therefore, it is not in every case that a situation envisaged in section 162 (1) would arise.

[25] The appellant's argument suggests that in every case where the defence is 'consent' a trial judge is bound to direct the assessors to consider the lesser or alternative offence of defilement.

[26] For the offence of rape of a child under the age of 13 years, consent is immaterial for a conviction. Thus, having consensual sex with anyone under 13 years of age is still rape, for a child under the age of 13 years is incapable of giving consent [section

207(3) of the Crimes Act, 2009]. If not for section 215, consensual sex with any person between 13 and 16 years of age would be no offence. However, section 215(1) makes unlawfully and carnally knowing such a person an offence called *'defilement of young person between 13 and 16 years of age'* and in order to do so, section 215(3) excludes 'consent' as a defence for defilement. Thus, sexual intercourse with or without consent with a person between 13 and 16 years of age is prohibited and attracts a penal sanction less severe than for rape. The term 'unlawfully' in the context of the offense of defilement emphasizes that the act of engaging in sexual intercourse with a person between 13 and 16 years of age is a violation of the law, regardless of the minor's apparent willingness or consent.

[27] Therefore, for a trial judge to direct the assessors on the lesser or alternative offence of defilement, he should have been in a position to satisfy himself that there was a credible narrative in the evidence before him that supported a conviction for a lesser or alternative offence or some evidential basis capable of persuading the assessors to hold in favour of defilement as opposed to rape. In my view, there was no such credible narrative or evidential basis before the trial judge.

[28] On the other hand, the defence counsel too had not thought that there was any prospect of a conviction for a lesser or alternative offence of defilement based on his suggestion of consensual sex, for he had not sought any redirections on the lesser or alternative offence of defilement from the trial judge who asked for such redirections from counsel at the end of the summing-up. This ground is not made out.

[29] On constant complaints on alleged non-directions and misdirection, the Supreme Court said that the raising of re-directions in this way is a useful function and in following it, counsel assist in achieving a fair trial and in doing so they act in their client's interest and added that the appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point when issues in directions should have been raised with the judge.[2] The Supreme Court again reiterated that litigants must not wait for trial judges to make mistakes to find a point of appeal, because the transparent nature of litigation requires that the trial judge be

[2] **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)

given an opportunity to correct any errors made. If the trial judge ask the parties for re-directions and they do not and subsequently raise the issue in the appellate court then in the absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point[3]. The Supreme Court once again emphasised that the appellate courts must not approach the issue of non-directions and misdirection leniently if the opportunity had been afforded to the appellant for re-direction at the end of summing up and if he did not seek re-direction and the omission is in itself sufficient to disregard such a ground of appeal in the appellate court[4].

03rd Ground of Appeal

[30] The appellant complains that the trial judge had not directed the assessors and himself on VR's motive to lie thereby denying him a fair trial. The appellant's counsel had suggested to VR that she fabricated the allegation against the appellant only because she got pregnant by him.

[31] The trial judge had addressed the assessors on this motive at paragraphs 39, 69 and 70. Though, the trial judge had not discussed the issue of motive in the judgment, he had directed himself in accordance with the summing-up.

[32] The appellant argues that the trial judge had failed to give to the assessors what has come to be known as the *Jovanovic* direction that reminds the jury that an accused has no burden to prove a motive or reason for complainant to lie. In **R v Jovanovic** (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

> *"It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about'.*

[3] **Tuwai v State** [2016] FJSC 35, CAV0013.2015 (26 August 2016)
[4] **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)

[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:

> *'If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.*

[34] NSW Criminal Trial Courts Bench Book also states that:

> *'A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true:* ***South v R*** *[2007] NSWCCA 117 at [42];* ***MAJW v R*** *[2009] NSWCCA 255 at [31].'*

[35] It appears that the trial judge had not given the said *Jovanovic* direction to the assessors though he had given a complete direction on burden of proof. However, despite having the appellant's suggested (but not proven) motive for VR to lie before them the assessors had believed VR's evidence that on all three occasions of sexual intercourse she complained to her mother who either reprimanded, ignored or beat her. In other words, the assessors and the trial judge had accepted that VR had complained of sexual abuse by the appellant to her mother well before she became pregnant and therefore, pregnancy was not the motive for VR's allegations against the appellant. On the other hand Adi's testimony in court (as opposed to her police statement) was that VR did not implicate the appellant as responsible for her pregnancy even after she discovered that VR was pregnant.

[36] Therefore, I am inclined to conclude that no substantial miscarriage of justice had occurred due to the absence of *Jovanovic* direction. In my view, even if such a direction had been given the assessors would not have come up with a different verdict and on the whole of the facts even with such a direction, the only proper, fair

and reasonable verdict would be one of guilty and thus, no substantial miscarriage of justice had occurred by the non-direction (See **R v Haddy** (1944) Cr. App. R. 182). In any event, the defence counsel had not asked for *Jovanovic* direction to the assessors when requested for redirections by the trial judge at the end of the summing-up and therefore, in the absence of any cogent reasons for the failure to do so the appellant has little chance of canvassing this as a fresh ground of appeal at this stage.

04th Ground of Appeal

[37] The appellant's argument is twofold. Firstly, he contests the trial judge's statement at paragraph 30 of the judgment that the defence has not been able to create any reasonable doubt in the prosecution case had shifted the burden of proof from the prosecution and placed on him. Secondly, he also argues that the direction by the trial judge at paragraphs 72 of the summing-up that *'Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you'* is wrong in law as the burden of proof was fairly and squarely was on the prosecution and it was never a question of who was the more credible witness.

[38] It is the prosecution's responsibility to prove the accused's guilt beyond a reasonable doubt and that burden of proof always rests with the prosecution, and it is not the accused's responsibility to prove his or her innocence who is presumed innocent until proven guilty. The defence's job, if so desires, is to challenge the prosecution's evidence and arguments and if possible to create a reasonable doubt in the minds of the assessors or the judge. If the defence successfully raises a reasonable doubt, it can lead to an acquittal or a verdict of not guilty. However, even if the defence remains silent throughout, still the prosecution has got to prove its case beyond reasonable doubt.

[39] The trial judge had considered VR's evidence from paragraphs 5-14, 25 and 26 in the judgment and accepted VR as a truthful (i.e. credible) and reliable (i.e. accurate) witness and determined that her evidence had satisfied the judge beyond reasonable doubt of the allegation in the information. To put it in the correct context, I find from the judgment that the impugned statement that 'the defence has not been able to create

any reasonable doubt in the prosecution case' is the result of the trial judge's analysis of VR's mother's evidence on behalf of the appellant at paragraphs 15-24 and 27 – 29 and therefore, all what the trial judge was asserting at paragraph 30 was that VR's mother's evidence had failed to create a reasonable doubt in the prosecution case.

[40] In the legal context, stating that the defence has not been able to create any reasonable doubt in the prosecution's case is not inherently wrong or improper. It is a common way to assess the strength of the defence's arguments in court. It does not amount to shifting of burden to an accused.

[41] In support of his second point, the appellant relies on **Liberato v The Queen** (1985) 159 CLR 507 and submits that the trial judge had failed to give *Liberato direction* to the assessors.

[42] It is never appropriate to frame the issue for the jury's determination as one which involves making a choice between conflicting State and defence evidence. The issue is always whether the Crown has proved its case beyond reasonable doubt [see: **Haile v R** [2022] NSWCCA 71)]. Thus, the trial judge's impugned statement *'Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you'* should have been avoided. However, that statement had been made in the context of telling the assessors that it was for them to decide the truthfulness of each witness considering their demeanour as well. It was not a statement where the assessors were given the choice between the evidence of VR and her mother in coming to their conclusion. The trial judge had clearly told the assessors that the prosecution carried the burden to prove the case beyond reasonable doubt (see paragraphs 8, 9, 16, and 22 of the summing-up). I do not see anything objectionable in the rest of paragraph 72 or 73 (which deals with divisibility of credibility).

[43] Brennan J in his dissenting judgment in Liberato spoke of a case in which there is evidence relied upon by the defence conflicting with that relied upon by the State and said that the jury should be directed that:

> *(a) A preference for the prosecution evidence is not enough — they must not convict unless satisfied beyond reasonable doubt of the truth of that evidence;*

(b) Even if the evidence relied upon by the accused is not positively believed, they must not convict if that evidence gives rise to a reasonable doubt about guilt.

[44] However, in **De Silva v The Queen** (2019) 268 CLR 57, the High Court noted that there were differing views as to whether a Liberato direction was appropriate in a case where the conflicting defence version of events was not given on oath by the accused, but was before the jury, typically in the accused's answers in a record of interview and said such a direction should be given if there is a perceived risk of the jury thinking they have to believe the accused's evidence or account before they can acquit, or of the jury thinking it was enough to convict if they prefer the complainant's evidence over the accused's evidence or account (De Silva v The Queen at [11], [13]).

[45] The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused's account (second aspect): **Park v R** [2023] NSWCCA 71 at [102]–[103].

[46] In this case, there was no evidence given by the appellant at the trial. Nor was the appellant's cautioned interview led at the trial. The only item of evidence for the defence version of consensual sex was the suggestion put to VR. The defence witness, Adi also did and could not give evidence of consensual sex. Her evidence under oath did not speak to any acts of sexual intercourse between the appellant and VR leave aside them being consensual or otherwise.

[47] However, the trial judge had still directed the assessors at paragraphs 75 and 79 as follows:

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

76. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the

prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

77. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

[48] In my view, the above direction though not containing a specific reference to the second aspect referred to in **Park v R** (supra) - what the assessors should do if they neither believe nor disbelieve the defence version - is quite adequate in the facts and circumstance of this case, for the defence version of consensual sex was presented by way of only a suggestion which was rejected by VR. VR's mother's version is no evidence of such consensual sex. There was little risk of the assessors thinking that they have to believe the defence evidence or account before they could acquit, or of the assessors thinking that it was enough to convict if they prefer the complainant's evidence over the defence evidence or account given the unambiguous and unequivocal directions on burden of proof by the trial judge.

05th Ground of Appeal

[49] The appellant argues that the third incident spoken to by VR was not mentioned in her police statement or as part of the history given to the doctor by her as per the medical report and therefore it was a concocted incident.

[50] The problem with the appellant's submission is that VR's medical report had not been produced at the trial and she had not been confronted with the alleged omission in her police statement under cross-examination. The defence counsel was obviously armed with both documents provided by the State as part of disclosures prior to the trial and he could have brought up these so-called omissions during the trial which he had failed to do for reasons best known to him. The only aspect of her police statement dated 18 February 2015 with which VR was cross-examined was her position under oath that when the second incident of rape happened her mother had gone to collect fresh water mussels whereas she was shown to have said to the police that her mother had gone to the town to do some shopping. She explained that she said so to the police at the instance of her mother.

[51] This court would not examine the relevant contents of witness statements or expert reports which were only part of disclosures unless they had been led in evidence or used in cross-examination at the trial by either party. The outcome of the trial had been decided on the material placed before the assessors and the trial judge by both parties and the appellate court would examine only such material and no more to decide the appeal in terms of section 23 of the Court of Appeal Act with the possible exception of fresh evidence to be considered only after an application for fresh evidence is allowed in terms of the law applicable.

06th Ground of Appeal

[52] The appellant's grievance is that the trial judge had accepted VR's evidence as truthful without a proper examination of the inconsistencies, both inter se and per se in her evidence. He relies on the decision in **Singh v The State** [2006] FJSC 18; CAV0007U.2005S (19 October 2006) in support of his argument.

[53] Having examined several past decisions including ***Singh,*** the Court of Appeal discussed how to evaluate inconsistencies or omissions and held in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015):

> *[13] ……..the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*
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> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

[54] The Court of Appeal in ***Nadim*** quoted from ***Bharwada Bhoginbhai Hirjibhai*** the following passage:

> *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ……. (3) The powers of observation differ from person to person. What one may notice, another may not. …… It is unrealistic to expect a witness to be a human tape recorder;"*

[55] The trial judge had *in extenso* addressed the assessors on how they should evaluate inconsistencies at paragraphs 43-45 after referring to the only inconsistency at paragraph 41 highlighted in cross-examination where VR in her police statement had said that when the second incident took place her mother had gone to the town with her sister whereas her evidence in court was that her mother had gone to collect fresh water mussels. VR explained the discrepancy by stating that that she told the police what her mother wanted her to tell the police. The trial judge had further addressed the assessors on how to evaluate discrepancies in Adi's evidence at paragraphs 57-59.

[56] The appellant in his written submissions has pointed out some other 'inconsistencies'' in VR's evidence concerning her mother's retort that VR should not lie and not be cheeky. The appellant submits that according to VR's evidence she said that it happened on the second occasion whereas she had attributed mother's response to the first occasion in her police statement. However, this argument is misconceived. VR had clearly and consistently said in evidence that her mother's rebuke came when she complained of the second occasion and VR had not been contradicted at all with her police statement on this point by the defence.

[57] The appellant has also pointed out that VR had not given inconsistent evidence regarding who were at home in addition to her and the appellant on the three separate occasions. It appears from the transcript (examination-in-chief, cross-examination and re-examination) that there had been some discrepancies in VR's evidence with regard to that matter. Firstly, in the light of the appellant's position of consensual sex these

discrepancies pale into insignificance. Secondly, they are not material discrepancies and VR's memory on the number of siblings at home and who they were could very well have faded over the 05 years that had lapsed.

07th Ground of Appeal (Sentence)

[58] The appellant's argument is that the trial judge had not considered his full mitigation including the fact that he was a first offender and therefore, the sentence was harsh and excessive.

[59] The trial judge had correctly guided himself by ***Aitcheson*** sentencing guidelines [**Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018)] where sentencing tariff for juvenile rape was set at 11-20 years of imprisonment.

[60] The judge had also correctly stated that the appellant's mitigation consisting of personal circumstances had little migratory value in cases of sexual offences (vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). The trial judge nevertheless had accorded a discount of 01 year for his 'good character' despite the fact that the appellant had raped the victim not only once but thrice within about 04 months. I have serious doubts whether sexual offenders of children should receive any discount for being first time offenders. Nevertheless, if at all, the appellant did not deserve more than one year's discount for his 'good character'. Other aggravating factors were serious enough to enhance the sentence by 06 years.

[61] 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA

178; AAU48.2011 (3 December 2015). The appellant's final sentence of 17 years of imprisonment is within ***Aitcheson*** sentencing guidelines and cannot be said to be harsh and excessive or disproportionate to the gravity of his offending.

Mataitoga, RJA

[62] I support the reasons and conclusion of the judgment.

Clark, JA

[63] I have read the judgment of Prematilaka, RJA. I agree with the conclusions and orders.

Orders of the Court:

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.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL

.....
Hon. Madam Justice K. Clark
JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent