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

CRIMINAL APPEAL NO. AAU0055 of 2019
[Lautoka Criminal Action No. HAC 134 of 2017]

BETWEEN	:	**SEREMAIA BATIALIVA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
		Qetaki, JA
		Andrews, JA
Counsel	:	**Appellant in person**
		Ms L. Latu for the Respondent
Date of Hearing	:	**06 November, 2023**
Date of Judgment	:	**29 November, 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Qetaki, JA and agree that the appeal against sentence should be allowed and I also concur with the sentence proposed to be now

imposed on the appellant. However, for the sake of clarity, I may make a few brief observations on one aspect of the appeal.

[2] With the dismissal of the appellant's appeal against conviction under section 35(2) of the Court of Appeal Act, as Qetaki, JA has stated, this court clearly has no jurisdiction to consider his conviction appeal. Therefore, the court is *functus* as far as the renewed grounds of appeal or additional grounds of appeal against conviction are concerned. I believe that Qetaki, JA had considered the two addition grounds of appeal only to demonstrate to the appellant that his appeal against conviction including the additional grounds is frivolous and not because this court assumed jurisdiction to hear the appellant's conviction appeal.

Qetaki, JA

Background

[3] This is an appeal against conviction and sentence arising from a trial at the High Court in Lautoka, where the appellant was charged of one count of Sexual Assault contrary to section 210(1) (a) and one count of Rape contrary to section 207 (1) and 2(b), of the Crimes Act. Following his trial and at the end of the summing up, on 23 April 2019, the learned trial judge had agreed with the unanimous opinion of the assessors that the appellant was guilty of both charges against him.

[4] On 24 April 2019 the appellant was convicted on both counts and was on 29 April 2019, sentenced to an aggregate sentence of 17 years and 10 months imprisonment with a non-parole period of 16 years with a permanent non-molestation and non- contact orders issued under the Domestic Violence Act.

[5] It was alleged that, on 24th June 2017, the appellant came and sat next to his 7 year old grandniece who was in class 3, touched her thighs and inserted his right hand inside the child victim's shorts and touched her private part, meaning her vagina, with his finger.

According to the particulars of the offences in the Information, on Count 1, the appellant, on 24th day of June 2017 at Matanagata, Vatukoula, in the Western Division, unlawfully and indecently assaulted **"JS"**. On Count 2, the appellant, on 24th day of June 2017, at Matanagata, Vatukoula in the Western Division, penetrated the vulva of **"JS"**, a child under the age of 13 years with his finger.

[6] On 30th May 2019 the appellant filed an appeal through his counsel against both conviction and sentence. There were 5 grounds of appeal in support of an application for leave to appeal before a single Judge. Although the appellant only pursued 3 grounds against conviction, all the 5 grounds were considered by the learned single Judge. The appellant abandoned his appeal against sentence and filed Form 3. However, the learned single judge had reservations, stating, at paragraph [33] of the Ruling:

> *"Although the appellant had filed an application to abandon his sentence appeal in Form 3 which has to be considered by the Court of Appeal in due course, upon a perusal of the sentencing order in view of the sentence of 17 years and 10 months, I began to have some reservations of the propriety of the sentence in the larger context whether the sentence fits the gravity of the crime and in keeping with current sentences in similar cases. Uniformity is an important aspect of the sentencing exercise."*

[7] On 23rd March 2021, the learned single Judge dismissed leave to appeal against conviction in terms of section 35(2) of the Court of Appeal Act, and allowed leave to appeal against sentence.

[8] On 23 August 2023, the appellant, who now is unrepresented, filed his intention to renew the grounds of appeal against conviction that were dismissed by the learned single Judge. He also wished to raise new additional grounds of appeal against both conviction and sentence, together with his submissions on the additional grounds. On 1st November 2023 the appellant wrote to the Court expressing his wish to file new grounds against conviction.

The Law

[9] An appeal against conviction and sentence to this Court may be made with leave of Court, pursuant to section 21(a) and (b) of the Court of Appeal Act. The test for leave to appeal against both conviction and sentence is **reasonable prospect of success.** as established through law **Caucau v State** [2018] FJCA 171; AAU0029.2016 (4 October 2018); **Navuki v State** [2018] FJCA 172; AAU0038.2016 (4 October 2018); **State v Vakarau** [2018] FJCA 173; AAU0052.2017 (4 October 2018); **Sadrugu v State** [2019] FJCA 87; AAU0057.2015 (6 June 2019).

[10] When a sentence is challenged the test is not whether it is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles outlined in **Kim Nam Bae v State** AAU0015 of 2011[1999] FJCA 21; (26/02/1999) namely, that the sentencing judge:

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

[11] Section 23(3) of the Court of Appeal Act provides:

> *"On appeal against sentence the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution thereof as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

[12] Section 35 (2) of the Court of Appeal Act provides:

> *"If on filing of notice of appeal or of an application for leave to appeal, a judge of the court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal, the judge may dismiss the appeal."*

Leave stage - Grounds of appeal against conviction

[13] The grounds of appeal against conviction before the learned single judge are as follows:

Ground 1.

That the trial judge erred in law and fact by holding in his voir dire ruling at paragraph 49 that the Appellant's caution interview statement "was not obtained by an improper practice".

In saying so, the Trial Judge failed to consider:

1.1 That the interview statement did not expressly show that:

(a) The appellant was given the opportunity and liberty to read for himself the contents of the statement before signing it; nor

(b) That the record of interview was not read to the Appellant by the police interviewing officer before the appellant signed it.

1.2 That Question 93 of the interview was very unfair to put to the appellant and to be answered by him when the contents of his statement was neither read by him nor read back to him by the interviewing officer.

Ground 2.
The trial judge erred in law and fact by failing to direct the assessors in his summing up that the Appellant's interview statement did not expressly show the Appellant had read his interview statement nor that it was read back to him by the interviewing police officer.

Ground 3.
The trial judge misdirected himself in his judgment by failing to consider that it was unfair for the appellant to sign his caution interview without being given the opportunity and liberty to read it himself nor that it was read back to him by the police interviewing officer.

Ground 4.
The trial judge erred in law and facts by misconstruing the law on recent complaint in the light of the Supreme Court decision in Rohit Prasad v The State, Criminal Petition No. CAV0024 of 2018.

Ground 5.
The learned trial judge erred in law and in fact by misdirecting the assessors and himself on the unreliability of the evidence of the complainant and other prosecution witnesses.

[14] After consideration of each ground. the learned single judge concluded that that none of the five grounds against conviction were arguable. He held that the grounds have no prospect of success in appeal. they are vexatious and should be dismissed in terms of section 35(2) of the Court of Appeal Act: **Naisua v The State** CAV 10 of 2013. 20 November 20.The appellant's appeal against conviction was dismissed in terms of section 35(2) of the Court of Appeal Act.

Full Court of Appeal - Renewal of grounds of appeal against conviction

[15] The appellant's intention to renew the grounds of appeal that have been dismissed by the learned single judge under section 35(2) of the Court of Appeal Act raises the issue on the legal effect of a dismissal under that section. At the hearing. the appellant was informed that the Court cannot entertain the application for renewal of grounds because it did not have the jurisdiction to do so. The dismissal under 35(2) is in effect a final decision of the Court. An appeal against dismissal must go before the Supreme Court, should the appellant wish to take the matter further. The Court's position was explained to the appellant who indicated his understanding and acceptance of the position.

[16] In **Amena Araibulu v The State** [2015] FJSC 31: CAV 3.2015 (23 October 2015): (Court of Appeal AAU 102 of 2013). the Supreme Court had considered and comment on a similar situation where section 35(2) was applied by a single judge in dismissing the grounds of appeal at the leave stage. Calanchini J stated:

> *"[14] Having concluded that none of the three grounds of appeal against conviction were arguable. the learned Justice of Appeal then proceeded to dismiss the appeal under section 35(2) of the Court of Appeal Act on the basis that the appeal was frivolous since in his opinion the appeal could not possibly succeed (**Naisua v The State** CAV 10 of 2013. 20 November 2013).*
>
> *[15]* .....
>
> *[16] The effect of the section is that in the event that a justice of appeal whether in the course of hearing an application for leave to appeal or at any other time may dismiss the appeal under section 35(2) as being (1)*

vexatious, or (2) frivolous, or (3) is bound to fail because there is no right to appeal.

[17] It is well settled that an appeal lies to this Court against a decision of dismissal under section 35(2) of the Act as a final judgment of the Court of Appeal.(See ***Raura v The State*** *CAV10 of 2015,* ***Tubuli v The State*** *CAV 9 of 2006,* ***Naisua v The State,*** *(supra),* ***Tiritiri v The State*** *CAV9 of 2014.The decision of the Justice of Appeal is the decision made in exercise of the Court of Appeal's jurisdiction to dismiss an appeal under section 35(2) of the Court of Appeal Act. It is a result of this conclusion that the Supreme Court's jurisdiction is enlivened under section 98(3) (b) of the Constitution……*

[18] It must be borne in mind that the final judgment of the Court of Appeal in these proceedings is the Ruling of the Justice of Appeal dismissing the Petitioner's appeal on the basis that it was frivolous under section 35(2). In doing so the Judge has denied the Petitioner the statutory option to renew his application for leave to appeal against conviction before the full Court of Appeal under section 35(3) of the Court of Appeal Act."

Section 35(2) dismissal

[17] It is worth mentioning also that in **Amena Araibulu v State** (supra), the Supreme Court (Calanchini J), having allowed the application for enlargement of time, allowed the petitioner's appeal against the decision of the learned single Judge in dismissing his grounds of appeal as vexatious under section 35(2) of the Court of Appeal Act, and remitted the matter to the Court of Appeal.

[18] It is clear that the Supreme Court acknowledged that section 35(2) of the Court of Appeal Act, empowers a single Judge to exercise, amongst other powers, the power to dismiss leave to appeal to the full Court on the basis that the grounds urged are vexatious (section 35(2)). Also, that, when there is a dismissal under this provision, the appellant is deprived of his right to have his appeal heard by the full Court of Appeal. The dismissal is a final decision of the Court of Appeal. The full Court of Appeal has no jurisdiction to hear the appeal arising from that dismissal. An appeal from a decision made under section 35(2) must be to the Supreme Court.

[19] Paragraphs [24] and [27] of the judgment in **Amena Araibulu** case confirms the position:

> *"24. The decision that the petitioner is seeking leave to appeal is the decision of the justice of appeal to dismiss his appeal as being frivolous under section 35(2) of the Court of Appeal Act. The petitioner cannot appeal the decision of the Justice of Appeal that none of the three grounds raised are arguable point.....*
>
> *(25. 26).....*
>
> *27....I have concluded that it would be just in all circumstances to grant an enlargement of time. The Petitioner has been denied the opportunity to renew his application for leave to appeal to the Court of Appeal. It is an option that is given by section 35(3) of the Court of Appeal Act. That option can be removed when a Justice of Appeal determines that the appeal is amongst other things, frivolous. This Court has determined in the **Naisua** decision (supra) that where a petitioner's appeal has been properly brought before the Court of Appeal and has been subsequently curtailed by a wrong application of the law , then a substantial and grave injustice may occur. This is therefore a case where, had the application for leave to appeal to this Court been filed in time, leave would have been granted."*

[20] The Supreme Court did make helpful comments and observations in paragraphs [28], [29] and [30] of the judgment on how applications to grant leave filed before the Court of Appeal might be approached. It is suggested that the exercise of the single Judge's powers under sections 35(2) and (3) have to be viewed (also) in light of the practical considerations relevant to the Record, and the precise nature of the error of law or fact or both specified in the grounds of appeal. The Supreme Court observed:

> *".....it is necessary to recall that at leave stage the justice of appeal does not have the transcript of evidence available to him. The material upon which the application for leave to appeal proceeds in the Court of Appeal is restricted to the summing up, the judgment and the sentencing decision."*[Paragraph 28]

[21] Further, the Supreme Court stated:

> *"29. When an issue arises as to whether the evidence permits an inference to be drawn so as to establish the necessary fault element it seems to me*

that it is not sufficient to rely only on the summing up. It seems to me that the full Court of Appeal, with the benefit of the appeal record including the transcript of evidence, would be in a better position on a renewed application to draw its own inferences rather than a justice of appeal at the leave stage.

30. *Furthermore it does seem to me that the precise nature of the requisite fault element is an issue which it was open to the justice of appeal to conclude that even if not arguable in his opinion, should have been left to the Court of Appeal to consider in the event that the petitioner exercised his option to renew his leave application.*

31. *It is for this reason that I have concluded that it would be just in all the circumstances to enlarge the time for the petitioner to apply for leave from this Court to appeal the decision of the Justice of Appeal. Furthermore I would grant leave to appeal, allow the appeal and remit the matter to the Court of Appeal as a renewed application for leave to appeal."*

[22] The facts and circumstances in **Amena Araibulu** are distinguishable and more complex, where the petitioner and one other were charged with offences under the Illicit Drugs Control Act 2004. The petitioner was charged with aiding and abetting contrary to section 21(c) of the Penal Code Cap.17 and section 6(b) of the Illicit Drugs Act 2004. It was alleged that the petitioner on 6 January 2010 aided and abetted his co-accused to import into Fiji controlled chemicals being pseudoephedrine hydrochloride weighing approximately 2,680 kilograms without lawful authority. The co-accused was charged with the importation of the same controlled chemicals contrary to section 6(b) of the 2004 Act.

[23] In this case, the learned single judge had covered all the conviction grounds in his Ruling dated 23 March 2021, in sequence as follows:

(i) Grounds 1, 2 and 3- in paragraphs [8] to [19].

(ii) Ground 4- paragraphs – in paragraphs [20] to [24].

(iii) Ground 5- in paragraphs [25] to [31].

(iv) The learned single judge summed up in paragraph [32], stating: *"Therefore I dismiss the appellant's appeal against conviction in terms of section 35(2) of*

the Court of Appeal Act on the basis of being vexatious." By virtue of this, this Court has no jurisdiction to deal with the renewal application.

Additional new grounds

[24] The appellant intended to introduce new grounds and on 1st November 2023 filed the following additional grounds against conviction:

> **Ground 1**
>
> *That the learned trial judge may have fallen into an error of law when his Lordship failed to give the appellant the right of election as per section 4(1) (b) of the Criminal Procedure Act on the charge of sexual assault.*
>
> **Ground 2**
>
> *That the conviction ought to be for Sexual Assault and not rape.*

[25] In the recent case **Rashid v State** [2023] FJSC 17; CAV0010.2020 (29 June 2023) (see below), the Supreme Court had commented on the need for petitioners and others to have regard for court procedures and processes, as set out in the Rules and Regulations of the appellate Courts. New additional grounds cannot be considered in this Court, unless, the grounds had been raised first before a single Judge at the leave stage. The Court had explained the above to the appellant (now unrepresented) at the hearing who accepted that the new grounds against conviction cannot be heard.

[26] In **Rashid v State** (supra), the Supreme Court, (Mataitoga JA) ruled (emphasis added):

> *"[8] Unlike the High Court, the Court of Appeal does not have inherent powers to assist in this situation. When new grounds are submitted for the first time at this stage without the clearance of the hearing before the judge alone, the Court of Appeal is constrained from dealing with them because of restrictions imposed by the law."*
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> .....
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> .....
>
> *"[14] There is another likely consequence if the Court of Appeal had accepted the new grounds without following the leave procedure rules*

referred to in paragraphs 9-11 above, their determination as regards the 2 new grounds would be unlawful because they are improperly before the Court……"

[27] There are other pertinent and useful guides contained in the above case, especially in paragraphs [6] to [17] of the judgment, on the necessity and need for appellants and their counsel to note when considering introducing new grounds of appeal in the Court of Appeal.

[28] However, even if the new grounds were to be considered, they are destined to fail, for the following reasons:

(a) On the Ground 1, the appellant asserts that the right to election on the charge of sexual assault were not given to him, hence, it was in violation of his rights in section 4(b) of the Criminal Procedure Act 2009. The appellant was initially charged in the Magistrates Court for one Count of Rape and it was in the High Court that the indictment was filed adding the charge of Sexual Assault contrary to section 210(1)(a) of the Crimes Act 2009. It is conceded that the appellant was not given a right of election, however, in view of the principles observed in the recent case of **Kumar v State** [2023] FJCA 189; AAU009.2019 (28 September 2023), especially paragraphs [27] to [33] thereof, the accused is not entitled to any election as the information filed contained an indictable offence and an indictable offence triable summarily. Both counts are founded on the same facts, there is no merit on this ground.

(b) The appellant raised the issue that the evidence led by Dr Narayan, the Medical Officer suggest that the appellant should be convicted of a lesser charge of Sexual Assault not Rape, with respect to Ground 2. The appellant was charged with rape contrary to section 207 (1) and 2(b) and (3) of the Crimes Act, where he allegedly penetrated the victim's vulva, a child under the age of 13 years with his fingers. The learned trial judge had correctly directed in summing up on Dr Narayan's evidence. Apart from that evidence, the prosecution had relied on the direct evidence of the victim with the recent complaint evidence of the mother of the victim, coupled with the confession of the appellant where he admitted penetrating the child's vulva (Questions & Answers 36-40). The appellant further clarified that he only fondled with her vagina using his right hand fingers. Thus, there was sufficient evidence for rape. Ground 2 has no merit and is dismissed.

[29] **Grounds against sentence.** The appellant had abandoned his appeal against sentence before a single Judge and filed Form 3. However, having considered the information and the sentence, ruled at paragraph [33] (see also paragraph [5] above), that leave against sentence is allowed.

[30] The appellant raised three ground of appeal against sentence:

> **Sentence Grounds**
>
> **A**
>
> *That the sentencing judge failed to take into account some relevant considerations. Further, allowed extraneous or irrelevant matters to guide or affect him in sentencing the appellant on the count of rape without proper consideration on sentencing on the offence of rape.*
>
> **B**
>
> *That the sentencing judge acted upon wrong principle to impose a head sentence too close to the non-parole period.*
>
> **C**
>
> *That there is an element of double counting in the sentence.*

[31] In written submissions filed in August 2023 the appellant had placed reliance on the case **State v Soheb Nasir Ali** [2019] FJHC 42: HAC205.2013 (7 February 2019) and submitted that his case be treated likewise and his sentence ought to be reduced in a similar manner. The accused in **Sohab Nasir Ali** was 20 years old and was charged under section 207(1) and 2(a) and (3) of the Crimes Act 2009.He was alleged to have penetrated the vagina of the complainant aged 12 years and 11 months with his penis between 1st day of October 2013 and 31st day of October 2013, in Nadi western Division. The assessors unanimously returned a guilty verdict after the summing up, which the learned judge agreed with. The accused was convicted and sentenced to 3 years imprisonment. In sentencing the accused, Madigan J stated:

> *"[10.] **Sentence***
>
> *1. Despite this overwhelming mitigatory background, the legislature and the public at large would expect the forcible defiling of a 12 year old to*

be punished, but not to the extent of the usual 11-20 years sentencing band.

11. I take a starting point for this offence of 6 years imprisonment. There are no aggravating features apart from the crime itself and for the mitigation outlined above, (including his clear record and the time he spent in remand custody) I deduct a period of 3 years meaning that the sentence he will serve is a term of imprisonment of three years.

111. In the circumstances, the Court declines to fix a minimum term he should serve before he is eligible for parole.

The facts in this case are quite different and here there are serious aggravating factors and hardly a mitigation feature to be considered in favour of the appellant.

[32] The learned single judge's coverage of the sentencing grounds was in this case was comprehensive, as follows:

(i) Facts and background Paragraphs 1-7;
(ii) Aggravating features with sentencing law and legal authorities (paragraphs 8-18); and
(iii) Sentencing formulation arriving at the aggregate sentence (paragraphs 19 to 27).

[33] The learned trial judge had taken into account relevant considerations and not extraneous or irrelevant matters. In sentencing, at paragraph 14, the learned trial Judge stated:

"Rape of a child is one of the most serious form of sexual violence and offenders should be dealt with severely and there is no two ways about it. Children are to be allowed to live their lives free from any form of physical or emotional abuse. When family members sexually abuse children, violating the Domestic Violence Act, they should expect condign punishment to mark society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations."

I agree.

[34] Reference was made by the learned trial judge to **Mohammed Alfaaz v State** [2018] FJSC 17: CAV0009.2018 (30 August 2018), where the Supreme Court expressed with approval a decision of the Court of Appeal, when the Court stated, at paragraph [54]:

> *"It is useful to refer to the observation expressed by the Fiji Court of Appeal in **Matasavui v State**: Cr. App. No. AAU0036 of 2013; 30 September [2016] FJCA 118 wherein the court said that "No society can afford to tolerate an innermost feeling among the people that offenders of sexual offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such as society will not in the long run be able to sustain itself as a civilized entity. The Court of Appeal referred to the same judgment in paragraph 60 of the judgment which is being canvassed before this court having taken into consideration the gravity and cruelty of the case before court and observed that highest possible punishment should be given to the perspective offenders of sexual assault on children who are vulnerable to fall prey to the offenders. I agree with the observations expressed by the Court of Appeal in this regard and would not hesitate to add further that the Court of Appeal had been lenient not to enhance the sentences on the petitioner in view of the aggravating factors in this case."*

[35] The learned trial judge had also considered the closeness of the non-parole period (16 years) to the head sentence and its effects, and stated, at paragraph 26:

> *"Under section 18(1) of the Sentencing and Penalties Act, I impose 16 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.*

I agree.

[36] On whether the learned trial judge had committed a mistake of double-counting, it would appear that this is possible. The learned trial judge, after assessing the objective seriousness of the offences committed, took 13 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. Section 17 of the Sentencing and Penalties Act empowers the Court to impose an aggregate sentence in the circumstances of this case, that is:

> *"If the offender is convicted of more than one offence founded on the same facts, or which from a series of offences of the same or similar character, the court my impose an aggregate sentence of imprisonment in respect of those offences that do*

not exceed the total period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."

[37] The maximum penalty for the offence of rape is life imprisonment which means that this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in **Gordon Aitcheson v The State** [2018] FJSC29: CAV0012.2018 (2 November 2018) had set a new tariff for the rape of juvenile which is a sentence between 11 years to 20 years imprisonment. This reflects the view of the court of its duty to protect children from sexual exploitation of any kind given that the legislature had statutorily imposed a term of imprisonment for life, as the maximum penalty.

[38] The aggravating features in this case (see paragraph 8 of sentencing) are: (a) Breach of trust; (b) Injuries caused to the victim; (c) Planning; (d) Age difference. In cases of rape committed against children, there are a wide range of factors and aggravating circumstances that may be taken into account, given the facts and circumstances of each case, as in **Felix Ram v State** [2015] FJSC 26; CAV 12.2015 (23 October 2015), in which the Supreme Court mentioned a long list of factors that should be considered in punishing the offenders of child rape cases. In **Anand Abhay Raj v State** [2014] FJSC 12: CAV0003.2014 (20 August 2014), the Supreme Court held that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature. It also found aggravating factors (paragraph [63] of judgment) some of which are relevant to this case.

[39] The learned single judge had commented on the injuries sustained by the victim and the propriety of the sentence in the larger context whether the sentence fits the gravity of the crime and in keeping with similar sentences in similar cases. He was concerned with uniformity in the sentencing exercise-see paragraph [17] above. There had been a few concerns raised by the Supreme Court regarding selecting the 'starting point' in the two tiered approach to sentencing in the face of criticisms of 'double-counting 'and stated that sentencing is an art, not a science, and doing it that way the judge risks losing sight of the wood for the trees: **Senilolokula v State** [2018] FJSC 5: CAV0017.2017 (26 April 2018).

[40] He (learned single judge) in paragraphs [37], [38] and [39], reviewed the Supreme Court's decisions in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018), and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019), and this Court's decision in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013. I agree with the learned single judge that the injuries sustained in this case cannot be compared equally to the aggravating circumstances in **Aitcheson** (supra) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) which the learned trial judge cited, and picked 13 years as starting point and added 6 years for aggravating factors to make it 19 years. One year was deducted for the appellant being a first offender and 2 months for the period of remand. I agree with the learned single judge that the aggregate sentence of 17 years and 10 months would seem excessive compared to the sentences meted to accused with more aggravating features in child rape cases-see also **Chand v State** [2021] FJCA 5; AAU0070.2019 (13 January 2021), a case of digital rape. The State submitted that there could have been an error in the ultimate sentence of 17 years, 05 months and 16 days, in more or less similar facts and circumstances of this case.

[41] Looking at the propriety of the sentence, was the sentence harsh and excessive, and did the sentence fit the gravity of the offence? When a sentence is reviewed on appeal, it is the ultimate sentence that is of importance, rather than each step in the reasoning process that must be considered: **Koroicakau v State** [2006] FJSC 5; CAV 0006U.2005S (4 May 2006).

[42] 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, that the sentence imposed lies within the permissible range: **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[43] In paragraphs [43] and [44] of the Ruling, the learned single judge observed:

> *"[43]. The fact that the ultimate sentence is within the tariff does not necessarily make it appropriate to the gravity of the crime. Therefore, I think that it is in the best interest of justice to leave it to the full court to look at the propriety of the sentence. In the circumstances, I am inclined to grant leave to appeal as to whether the sentence is harsh and excessive. The state is free to make fresh submission to the full court regarding the sentence.*
>
> *[44]. In **Chand v State** [2021] FJCA 5; AAU0070.2019 (13 January 2021), another case of child digital rape, the state submitted that there could have been an error in the ultimate sentence of 17 years, 05 months and 16 days in more or less similar facts and circumstances of this case. Since I have dealt with this issue in detail in paragraphs 38-63 in **Chand**, I do not wish to repeat the same here but the state is advised to consider its own stand in **Chand** in relation to this appeal which also persuaded me to grant leave to appeal against sentence this appeal."*

[44] The respondent stated that it had considered paragraph 9 of the Sentence by the learned trial judge. It submitted that the learned trial judge had considered the correct sentencing guideline. Also, that the imposition of the final aggregate term of 17 years 10 months with the non-parole period of 16 years is in compliance with section 18(1) of the Sentencing and Penalties Act 2009.

[45] Given all the above considerations, and in the interest of justice, I share the concerns that was clearly expressed by the learned single judge on *"the propriety of the sentence in the larger context whether the sentence fits the gravity of the crime and in keeping with current sentence in similar cases. Uniformity is an important aspect of the sentencing exercise."* I hold that the sentence in this case is harsh and excessive. This court is faced with the dilemma of double-counting, although it is not clear what other factors the trial judge had considered in selecting the starting point other than the aggravating factors indicated: **Nandan v State** [2019] FJCA 29: CAV0007.2019 (31 October 2019). As well, the facts in this case cannot be compared to those circumstances in **Aitcheson v State** (supra) and **Raj v State** (supra).

[46] The appeal against sentence is allowed. Pursuant to section 23(3) of the Court of Appeal Act, the appellant's current sentence of 17 years and 10 months with a non-parole period of 16 years is quashed, and substituted with the sentence of 16 years and 10 months with a non-parole period of 14 years imprisonment.

Andrews, JA

[47] I agree with the judgment of Qetaki, JA.

Orders of the Court:

1. *Appeal against sentence allowed.*
2. *Aggregate sentence of 17 years 10 months imprisonment with a non-parole period of 16 years is quashed.*
3. *Appellant is sentenced to 16 years 10 months imprisonment with a non-parole period of 14 years with effect from 29 April 2019.*

Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon Madam Justice Pamela Andrews
JUSTICE OF APPEAL