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

CRIMINAL APPEAL NO. AAU 44 OF 2019
High Court Criminal Case No. HAC 338 of 2017

BETWEEN : **NIKO ROKARA LEVULA**

Appellant

AND : **THE STATE**

Respondent

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

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

Dates of Hearing : **6 and 16 November 2023**

Date of Judgment : **29 November 2023**

JUDGMENT

Mataitoga, RJA

[1] The appellant had been indicted in the High Court at Suva on one count of Burglary contrary to section 312 (1) of the Crimes Act, 2009, one count of rape contrary to section 207 (1) and (2) (a) of the Crime Act, 2009 and one count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act, 2009. The charges against the appellant were as follows:

Count 1
Statement of Offence

BURGLARY: *Contrary to section 312 (1) of t of the Crimes Act of 2009*

Particulars of Offence

NIKO ROKARA LEVULA *on the 5th day of November, 2017, at Nasinu in the Central Division, broke into the property of KG with intention to commit theft*

Count 2

Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crime Act of 2009.*

Particulars of Offence

NIKO ROKARA LEVULA *on the 5th day of November 2017 N at Nasinu in the Central Division, penetrated the vagina of KG, with his penis, without her consent.*

Count 3

Statement of Offence

AGGRAVATED ROBBERY: *Contrary section 311 (1) (b) of the Crime Act of 2009.*

Particulars of Offence

NIKO ROKARA LEVULA *on the 5th day of November, 2017, at Nasinu in the Central Division, being armed with an offensive weapon, namely a knife, stole 1X handbag brown in colour valued at $5.00, 1 x dark blue BLU brand mobile phone valued at $50.00, 1 x brown Roxy brand purse valued at $30.00, cash amounting $100.00 and coins amounting $5.00, all to the total value of $200.00, the property of KG*

[2] After trial, the assessors had unanimously opined that the appellant was guilty of all charges. The Learned High Court judge had agreed with the assessors, convicted the appellant and sentenced him on 19 February 2019 to an imprisonment of 20 years with a non-parole period of 19 years.

Summary of Facts

[3] The brief facts of the case were as follows. The complainant was 39 years old. She resided with her 3 young children and 2 nieces in Nasinu. She works in Suva. The accused was 26 years old. He was unemployed and resided in a village in Naitasiri. When he comes to Suva, he resided with his uncle, whose house is near to the complainant. It appeared the accused had been observing the complainant for a while. On 4 November 2017, a Saturday, the complainant went out with friends to a nightclub. Liquor was consumed. Later, she went with friends to Nabua, and further consumed liquor. At 3 am on 5 November 2017, a Sunday, she returned home in a taxi.

[4] She went into her mother's bedroom and slept. She was alone in the same. At about 5.00 am in the early morning, she was awoken by the accused. The accused had covered his face with a piece of cloth. The accused had a knife in his hand. The accused later stabbed the complainant in the lip and chin and proceeded to forcefully take off the complainant's clothes. He later raped her. Then he stole the complainant's properties as itemized in count no. 4. Thereafter he fled the crime scene.

Court of Appeal

[5] The judgement of the court is in two parts because of the way in which the appellant was vexed in the manner he made submissions to the court, some of which were withdrawn only to be resubmitted as new grounds with rewording. The first part under the subtitle 6 November 2023 Issues, will deal with the review of renewed application grounds and ruling of the Judge Alone and part two under the subtitle 16 November 2023 issues, will deal with the new grounds submitted to the court vide his letter 17 August 2023 where the appellant informed the court that he was withdrawing his appeal against conviction and he asked in

the same letter for the court to allow him to give a new date for the hearing of his appeal based on the new grounds submitted to the court on 21 September 2023.

Part 1

6 November Hearing Issues

[6] The appellant's appeal against conviction and sentence was out of time by about a month (17 April 2019) but the respondent had no objection to treat it as a timely appeal. Legal Aid Commission appearing for the appellant had subsequently filed an amended notice of appeal against conviction and sentence along with written submissions on 20 October 2020. The state had tendered its written submissions on 23 March 2021.

[7] 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. The test for leave to appeal is 'reasonable prospect of success': **Caucau v State** [2018] FJCA 171, **Sadrugu v The State** [2019] FJCA 87 and **Waqasaqa v State** [2019] FJCA 144

[8] The Judge Alone considered the 4 grounds of appeal; 2 grounds against conviction, and 2 grounds against sentence. The 2 grounds against conviction were:

(i) *Ground 1*

THAT the Learned Trial Judge had erred in lawn law and in facts to have usurped the function of the assessors when directing the assessors on how to approach the confession of the Appellant.

(ii) *Ground 2*

THAT the Learned Trial Judge had not directed the assessors and himself on how to approach circumstantial evidence.

[9] The Judge Alone, after reviewing the evidence at the trial and applying the relevant principles of laws concluded that both grounds of appeal had no reasonable prospect of success and dismissed them.

[10] With regard to the sentence appeal the following 2 grounds were urged:

> (i) *Ground 1 - That the Learned Trial Judge had erred in his sentencing discretion by double counting in considering aggravating factors that is reflected in the starting points and part of the offending for the respective offence of rape and aggravated robbery.*
>
> (ii) *Ground 2 - that the Learned Trial Judge had erred in his sentencing discretion to have sentenced the Appellant for the offence of burglary which is wrong in law and thereafter passing a consecutive sentencing that is not reasonably justified.*

[11] The Judge Alone ruled that the full court should review the sentence imposed by the trial judge in this case. The learned Judge Alone concluded after reviewing relevant case law and section 22 (1) of the Sentencing and Penalties Act 2009 the issues raised by the appellant that:

> *'In my view, the full court may consider this aspect of the sentence and decide whether it is desirable in the interest of justice to make the sentence for aggravated robbery partly consecutive to the sentence of 15 years on rape as done by the trial judge.'*

[12] Following the ruling of the Judge Alone on 15 October 2021, the appellant filed a renewed application under Section 35(3) Court of Appeal Act for the full court to consider his appeal. He made the 4 written submissions against conviction, which were received by the court registry on the 10 January 2023, 14 February 2023, 12 April 2023 and 17 August 2023.

[13] The court explained to the appellant that a renewed application under section 35(3) of the Court of Appeal Act Cap 12, is limited to the application that was submitted and considered by the Judge Alone. It is not for a totally new application with new grounds of appeal. The wording of the subsection clearly states:

> *'if the judge refuses <u>an application</u>...to exercise a power subsection (1) in the appellant's favour, the appellant may have <u>the application</u> determined by the court as duly constituted for the hearing and determining appeal under this Act.'*

[14] It was also made clear to the appellant that he may submit a Notice of Motion to Amend Grounds of Appeal under the relevant rules of the Court of Appeal: Rule 37 (1). This was not followed. In that light, it is clear that the only grounds of appeal submitted to the Judge Alone constitute "the application". This is what the full court reviewed and nothing more. While new submissions in support of the grounds of appeal that was before the Judge Alone were submitted to the full court. The nature of the new submissions must be such as to be supportable from the evidence at the trial. In making these submissions it would assist the court greatly, if relevant passages from the court record of the trial were included. In this case there were no reference made in reference to the evidence adduced in the trial to support the new claims. They are just bald statements of claim.

[15] The full court reviewed the grounds of appeal that were urged by the appellant at the 'Leave to Appeal' stage. The first claimed that the trial judge had erred in lawn law and in fact to in usurping the function of the assessors when directing the assessors on how to approach the confession of the Appellant. This claim is based on paragraph 33 of the summing-up of the trial judge which states:

> *'After question and answer 5, the allegation was put to the accused. From questions and answers 30-36, 63 to82, 91 to 100 and 105 to 111, the accused allegedly admitted count no 2 and 4. He basically admitted that he burgled the complaints residence at the material time. He also allegedly admitted that he raped and robbed the complainant as alleged in count 2 and 4. If you accept the above alleged confessions, then you must find the accused guilty on all counts. If otherwise, you must find the accused not guilty on all counts. It is a matter entirely for you.'*

The appellant claimed the above directions went too far in that, instead of letting the assessors decide on the probative value of questions and answers, he basically directed them to find the appellant guilty. But the trial judge added the following at paragraph 34:

> *'In any event, when considering the above alleged confession by the accused, I must direct you as follows as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact- is strong evidence against the maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statement contained in his police caution statements? If your answer is no, then you have to disregard the statements.*

If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrests to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.'

[16] The relevant law on this issue was outlined as follows in **Tuilagi v State** [2017] FJCA 116 (AAU 090/2013)

> *The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows.*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness:* ***Volau v State [2017] FJCA 51)****.*
>
> ....
>
> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.*
>
> *(emphasis added) (vide* ***Volau****).*
>
> *(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily:* ***Noa Maya v. State*** *[2015 FJSC 30])*
>
> *(v) However,* ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have*

*been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State [2017] FJSC 19** (CAV 0035/2016).*

[17] In the absence of any further evidence coming from the appellant regarding the cautioned interview statements when he gave evidence at his trial on this issue, there was not further basis before the trial judge that would lawfully move him to reject the assessor's verdict. Conviction was also inevitable once the questions and answers were accepted by the assessors. The conclusion of the trial judge was correct. This ground of appeal is dismissed as having no merit.

[18] As regards ground 2 for appeal against conviction, the appellant alleges that there were no directions in the summing-up regarding circumstantial evidence, as regards the recovery of the stolen items by the police in possession of the appellant's wife. On this issue, paragraph 36 of the summing-up is important because it covers the admissions in the caution interview statement of the appellant to all the stolen and recovered items. In this context, whatever inferences may be drawn from the recoveries would not have any impact on the convictions. There is no substantial miscarriage of justice arising from this omission. The second ground has no merit and is dismissed. The submission dated 17 August 2023, was made available to the court on the date of the hearing 6 November 2023. This submission requested the full Court to withdraw all the grounds and submissions filed for the full court consideration except sentence appeal. This created a major problem because if agreed to, it would effectively mean that there are no grounds of appeal for the court to deal with. The court clarified with the appellant if in fact he was abandoning his appeal against conviction. He confirmed the same. After it was also confirmed from the appellant that his decision is his alone not influenced by someone else. He confirmed his understanding and accept that once the Court accepts his decision to abandon his conviction appeal, it will never be allowed to be brought again. The appellant was advised that the court staff would assist him to have Form 3 in the Court of Appeal rules to be filled by the appellant and filed in court registry.

Sentence Appeal

[19] The appeal against sentence proceeded to the hearing on 6 November 2023. The appellant relied on the grounds submitted at the Leave to Appeal Stage hearing before the judge alone.

[20] For the sentence appeal the following 2 grounds were urged:

> (i) *Ground 1 - that the Learned Trial Judge had erred in his sentencing discretion by double counting in considering aggravating factors that is reflected in the starting points and part of the offending for the respective offence of rape and aggravated robbery.*
>
> (ii) *Ground 2 - that the Learned Trial Judge had erred in his sentencing discretion to have sentenced the Appellant for the offence of burglary which is wrong in law and thereafter passing a consecutive sentencing that is not reasonably justified.'*

[21] The Judge Alone ruled that the full court should review the sentence imposed by the trial judge in this case. The learned Judge Alone concluded after reviewing relevant case law and section 22 (1) of the Sentencing and Penalties Act 2009 the issues raised by the appellant that:

> *'In my view, the full court may consider this aspect of the sentence and decide whether it is desirable in the interest of justice to make the sentence for aggravated robbery partly consecutive to the sentence of 15 years on rape ad one by the trial judge.'*

[22] In this case the sentence passed against the appellant was as follows: 15 years imprisonment for Rape, 15 years imprisonment for Aggravated Robbery, of which 5 years to be consecutive to the rape sentence and 4 years imprisonment for Burglary to be serve concurrently. This makes the total imprisonment of 20 years. In addition, it will be noted that the 3 charges arose from the same transaction. The appellant had a clean Antecedent Record [Page 219 CR].

[23] The section 22(1) of the Sentencing and Penalties Act 2009 provides for a sentencing judge to direct that a sentence may be served consecutive with any uncompleted or sentences of imprisonment, otherwise the default position is that all sentences are concurrent. The Court

of Appeal in **Tomasi Bulivou v State** [2014] FJCA 215 referred to the Supreme Court in **Joji Waqasaqa v. The State** Cr. App. No. CAV 009 of 2005 pronounced:

> *"... If the Court said (and it did) that where the 'default position' to depart from that position in making sentences concurrent, then a Court must know when the 'default' position is concurrency makes a reasoned justification to depart from the 'default' position in making sentences consecutive or partly consecutive."*

[24] In **Wong Kan Hong v State** [2003] FJSC 13, the Supreme Court referred to the following:

> *'The principles. which govern whether sentences of imprisonment should be ordered to run concurrently or consecutively, are well established. The power to order sentences to run consecutively was said by D.A. Thomas, in his classic work Principles of Sentencing, to be subject to two major limiting principles. He described them as the* ***"one-transaction rule"*** *and the* ***"totality principle".*** *The* ***"one-transaction rule"*** *can be stated simply. Where two or more offences are committed in the course of a* ***"single transaction"****, all sentences in respect of these offences should, as a general rule, be concurrent rather than consecutive. The underlying principle is that all the offences taken together constitute a single invasion of the same legally protected interests. The difficulty lies in arriving at a satisfactory definition of a* ***"single transaction".***
>
> *Thomas provides some helpful examples of the operation of the relevant principle. When the one attack upon another constitutes both malicious wounding and indecent assault, concurrent sentences should generally be imposed. However. the fact that two or more offences are committed simultaneously, or close together in time, does not necessarily mean that they amount to a single transaction. Thus, consecutive sentences may be appropriate for theft of a motor vehicle, and driving it dangerously. Rape following a burglary has been held not to fall within the* ***"single-transaction"*** *principle. Nor does resisting arrest form part of the same transaction as the offence for which the arrest is being made.'*

[25] To depart from the default position referred to in section 22(1) of the Sentencing & Penalties Act, the trial judge in this case is required to provide a 'reasoned justification'. In the court's view from the words 'reasoned justification' what was expected are some **objective reasons** for not following the default position. This may require discussing the proportionality of sentences, totality principles and the balance the court must ensure in sentencing the appellant to meet the requirement of section 4(1) of the Sentencing &

Penalties Act. In the absence any 'reasoned justification' given by the trial judge in his ruling, the default position as regards the sentence must apply. In that regard the consecutive portion of 5 years from the 20 Year sentence imposed for aggravated robbery is removed.

[26] The second issue that was raised by the appellant in his renewed submission was that there may have been double counting in the sentence imposed on him. It is noted that in paragraph 15 and 16 of the Sentencing Ruling [Pages 157-158 CR] the trial judge referred to the aggravating factors, which was identified by the court obviously used in selecting the higher starting point of 12 years imprisonment, in the tariff of 7- and 15 years range for rape sentence. Some of the same aggravating factors would have been factored in that selection, which may have been used when the court further added 5 years imprisonment for aggravating factors to make the sentence 17 years imprisonment. In the view of the court there may have been double counting of the aggravating factors in reviewing the sentence ruling and the doubt that exists must benefit the Appellant. In the context of this case and given the approach this court is taking to review the sentence imposed by the trial judge, the issue of double counting may not have much consequence because the court will look to impose a sentence in respect of the multiple instances of offending and not concerned with arithmetic calculations of each sentence.

[27] In **Johnson v The Queen** [2004] HCA 15, the High Court of Australia [per - Gummow, Callinan and Heydon JJ], citing DA Thomas, Principles of Sentencing (2nd ed, 1979) 56-57, accepted that when:

> *'cases of multiplicity of offence come before the court, the court must not content itself by doing arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all offence'*

[28] When a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered: **Koroicakau v The State** [2006] FJSC 5 (4 May 2006)]. The approach taken by the appellate court in an appeal against sentence 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 is within

the permissible range **Kumar v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[29] The Court of Appeal **Donu v State** [2021] FJCA 819 (AAU 005/2020) that the totality principle depends on the sentence for each of the offences committed in one transaction having been correctly determined [vide **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. The totality principle requires a sentencer who is considering whether to impose consecutive sentences for a number offences to pause for a moment and review the aggregate term and then decide when the offences are looked at as a whole whether it is desirable in the interest of justice to impose consecutive or partly consecutive and part partly concurrent sentences or concurrent sentences only in relation to the head sentences. If this is done sensibly then experience shows that the total sentence imposed will be fair and correct [vide **Rawaqa v State** [2009] FJCA 7; (AAU009.2008).

[30] In light of the above, the court is satisfied that the appeal against sentence succeeds. The other factors considered as important in arriving at the total sentence in this case, are the sentences imposed by the High Court in a few recent comparable cases. These are:

(i) **State v Raitekiteki** [2016] FJHC 1105 (HAC 285/2015) – Convicted of 1 count of Rape and 1 count of Aggravated robbery – sentence 17 years imprisonment, non-parole of 14 years

(ii) **State v Mubarak Hussein** [2015] FJHC 161 (HAC 248/2015) – Convicted of 2 counts of Rape, 1 count of sexual assault and 1 count of burglary – sentence of 16 years imprisonment non parole period of 15 years

(iii) **State v Isei Korodrau** [2014] FJHC 514 (HAC 219/2014) – convicted of 1 count of Rape, 1 count of Aggravated Robbery, 1 count of theft – sentence of 17 years imprisonment with non-parole of 16 years.

[31] The new sentence would be as follows:

- Count 1 - Burglary – 4 years imprisonment

- Count 2 – for Rape – starting point of 12 years, add 5 years for aggravating factors, making the sentence 17 years imprisonment, after allowances for time is custody of 1 year 4 months and 1 year 8 months for being a first offender. Total sentence of 14 years imprisonment for Rape in Count 2.

- Count 4 – Aggravated Robbery – starting point of 12 years, add 5 years for aggravating factors, making total sentence 17 years. Deduct 1 years 4 moths for time in custody awaiting trial and deduct a further 1 year 8 months for first time offender, deduct 3 years from the total sentence of 17 years imprisonment. Total sentence of 14 years imprisonment for Aggravated Robbery.

[32] The new sentence for the appellant is 14 years imprisonment with a non-parole period of 12 years effective from 19 February 2019.

Notice to Adduce Fresh Evidence

[33] Two further submissions were filed in the court registry by the appellant:

(i) A Notice of Motion to Adduce Fresh Evidence under section 28 of the Court of Appeal Act;

(ii) Another Renewed Application for Leave to appeal.

[34] On the Notice to Adduce fresh evidence, I explained to the appellant that for the court to allow this, the new evidence must have been not available at the time of the trial or cannot be obtained with due diligence and that it is such that it would have substantial influence on the case outcome. There was no sworn affidavit by the appellant to support this notice for new evidence to be called. The court concluded that the grounds for adducing new evidence is not made out by the appellant and dismissed the submission

[35] The Appellant's Notice to adduce fresh evidence was made in terms of section 28 (a) of the Court of Appeal Act the supplementary powers of the Court of Appeal. There was no affidavit filed by the appellant to clearly state what fresh evidence was sought except a reference to his medical report on an examination that was done on 11 March 2008. He also claims in the affidavit that he was seriously prejudiced in not having a fair trial due to

the admission of the second confession as having been made voluntarily in the absence of the said medical certificate. The court have tried to state here exactly what is in the submission of the appellant. We are not rephrasing it.

[36] The relevant principle of law followed in Fiji for dealing with an application to adduce new evidence was outlined in **Mudaliar v State** [2018] FJSC 25 (CAV 0001 of 2007: 17 October 2008) wherein the Supreme Court remarked

> *'The application to adduce further evidence before the Court of Appeal was based upon s 28 of the* Court of Appeal Act. *That section relevantly provides that the Court of Appeal may, if it thinks it "necessary or expedient in the interest of justice" receive such evidence'.*

[37] The Supreme Court in **Mudaliar** [supra] quoted with approval **Ladd v Marshall** [1954] 3 All ER 745, the Court of Appeal in England stated three preconditions to the reception of new evidence on appeal as:

> (i) the evidence could not have been obtained prior to the trial by reasonable diligence;
>
> (ii) it must be such as could have had a substantial influence on the result and
>
> (iii) it must be apparently credible.

[38] From the evidence in this case, the medical report of the appellant dated 11 March 2018 is the new evidence he wants leave of the court to adduce. This is not new evidence because it was available at the time of the trial but was not part of the agreed facts to be included in the agreed exhibits. Even if it was produced at the time of the trial it is not clear from the submission of the appellant what impact if any it would have on the outcome of the case. Its credibility is also unclear. This application is frivolous with no reasonable prospects of success. It is dismissed.

[39] In light of the above review of the renewed appeal submitted by the appellant the court have concluded that none of the grounds advanced for the leave to appeal have merit and are dismissed.

[40] As regards leave to appeal against sentence, leave is granted and sentence is dismissed. A new sentence of 14 years imprisonment with non-parole period of 12 effective from 19 February is imposed.

Part 2

16 November Hearing Issues

[41] This hearing was arranged because the court had thought that based on the statements of the appellant in court that he had was withdrawn his appeal against conviction as he had submitted by letter earlier to the court registry. As to the nature of his decision to withdraw his appeal against conviction to the submission give to the court during the 6 November 2023 hearing, that the appellant had withdrawn his appeal against conviction but not sentence. The appellant had written a letter to the Court which was filed in on 17 August 2023. This letter was not notified to the members of the court until the date of the hearing on 6 November 2023, when a copy was made available. The court became aware of the full implication of the letter from the appellant purportedly withdrawing his appeal after it has adjourned on 6 November 2023.

[42] In the interest of justice, the court issued an order that the appellant be summoned to appear before the Court again on 16 November 2023 for his appeal to be fully heard. It was pointed out to the appellant that his appeal was untimely in the first instance and only due the DPP's office not objecting because the delay was not substantial, the appeal was allowed by the court proceed. He is now trying to get more extension of time to file proper new grounds without following relevant procedures. This is an abuse of the court procedure that cannot be allowed, otherwise it will cause inordinate delay in the timely disposal of other cases needing the court's attention,

[43] The appellant was told by the court that his application is under section 35(3) of the Court of Appeal, which is a renewed application for review by the full court of the ruling of the

judge alone on the grounds and supporting submissions the appellant had submitted to the Court for the Leave to Appeal hearing. Rule 5 of the Court of Appeal rules states:

> *'The appellant shall not, without leave of the Court of Appeal, urge or be heard in support in support of any ground of objection not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the ground so stated:*
>
> *Provided that the Court of Appeal shall not rest it decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground.'*

[44] There were 5 new grounds of appeals urged by the appellant in his submission to the court during the 16 November 2023 hearing. None of the new grounds were in the Notice of Appeals before the Judge Alone, yet the appellant had sufficient opportunity of raising them before the court, but did not so violating Rule 5 of the Court Rules. The appellant was asked to explain why he did not follow court procedures, in filing an Amended Notice of appeal to incorporate these new grounds. He advised because he had no legal counsel. But the Court record at page 350 of Court Record at the start of the trial in the High Court the appellant had withdrawn his counsel [Ms L Manulevu] from Leal Aid Commission [LAC] to engage a private Counsel. This high-handed approach is characteristic of this appellant attitude because as will be noted from one of his new grounds of appeal he claims that he was unfairly treated because he was unrepresented, yet he was the one who refused counsel from LAC

[45] The Court of Appeal in **Waqaninavatu v State** [2023] FJCA 72(4 May 2023) directed the following:

> ***'Follow the Rules of the Court***
>
> *[14] Due to the haphazard way in which the grounds of appeal have been put together and submitted to the court registry, it was difficult to focus the court's assessment of the claims made and the supporting*

*evidence in a coordinated way. This was clear derogation from the requirement in **Rule 35(4) Court of Appeal Rules** which states that the Notice of Appeal shall precisely specify the appeal grounds. Further, Rule 36(1) **of the Court of Appeal Rules,** requires that the precise question of law, upon which the appeal is brought must be set out in the Notice of Appeal. Despite these rules, the appellant was allowed to submit barebones claims of unfairness and unreasonableness by the trial judge without reference to any basis in law or evidence adduced in court.*

[15] *<u>This appeal should have not been listed until the above rules were fully satisfied. I hope for the future, these rules will be better implemented to avoid the situation in this appeal, where the grounds of appeal have been amended so often; even on the day of the hearing further amendment were being sought by the appellant, to be considered.</u>'*

And further, the Supreme Court stated in **<u>Abdul Rashid v State</u>** [2023] FJSC 17(CAV 0010/2020), as regards submitting new grounds of appeal for the first time, after the leave to appeal hearing, <u>without following proper court rules and procedures</u>:

[7] *As regards the other two grounds, they are contextually new in nature and clearly fashioned in a way that carries no affinity to the ground for which leave had been granted by the single judge. <u>Counsel for the appellant also conceded that fact in his submissions.</u> The full court rejected the 2 new grounds of appeal proposed because there is no statutory provision in the <u>Court of Appeal Act</u> and Regulations **[Cap 12] that would allow the Court receive the new grounds without following proper procedures.***

[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.*

[9] *The principle laid down by the Judicial Committee of the Privy Council in the United Kingdom in **<u>Ratnam v. Cumaraswamy</u>** <u>[1964] 3 All ER 933</u> at 935, is a sound principle to start with. It said:*

"<u>The rules of court must prima facie be obeyed, and in order to justify a court in extending the time</u> during which some step-in procedure requires to be taken there must be

some material upon which the court can exercise its discretion."

[10] *In relation to the new two grounds [i.e., the two that are totally new], the Court was advised of its existence, on the day of the hearing. On that day when the matter was taken up for hearing the counsel appearing for the Petitioner informed the Court he needed time to prepare arguments for it was only on a few days ago that he was retained to appear for the appellant. Having consulted the State, the Court allowed his application on the understanding that he will be arguing the appeal based on the ground for which leave had been granted by the learned judge alone.*

[11] *However, when the Court of Appeal convened as was agreed by both parties, on 10 May 2020, the Court received submissions on behalf of the Petitioner in which new grounds of appeal were submitted; the emergence of the new grounds after a period exceeding 4 years from the leave hearing before the judge alone. Even in the written submissions filed on behalf of the appellant, there was no explanation given why the court procedures and processes as set out in the Court of Appeal Act and Rules [Cap 12] was not followed. It was as if it did not matter. Rule 5 of the Court of Appeal Rules, made under the provisions of the Court of Appeal (Cap12) states:*

> *'All applications shall not, without leave of the court, urge or to be heard in support of any grounds of objection, not stated in his or her notice of appeal...provided the court of appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the respondent has had sufficient opportunity of contesting the case on that ground.'*

[12] *This requirement was not followed and to make matters worse, no attempt was made by the counsel to obtain leave to proceed to amend the initial Notice of Appeal to include the new grounds, which is a requirement under Rule 37 of the Court of Appeal Rules. This rule states:*

> *"37. A Notice of appeal may be amended –*
> *(a) by or with the leave of the Court of Appeal, at any time;*
> *(b) without such leave, by supplementary notice filed with the Registrar..., not less than 14 days before opening day of the sitting of the Court of Appeal at which the appeal is listed to be heard ..."*

[13] *In these circumstances when the court rules and procedures are not followed, the two new grounds were rejected outright by the court.*

This is the correct outcome when such disrespect is shown by petitioners and their advisers in not following court procedures' (*Emphasis added*)

New Grounds of Appeal before Court after Hearing by Single Judge

[46] There were 5 new grounds of appeal advanced by the appellant, which was urged without following the Rules of Court. It is set out here as a matter of record. These are:

> (i) *the learned trial judge erred in law and in fact in failing to accept the amended voir dire grounds that the appellant filed (29/05/2018) in person and to only consider and entertain the voir dire grounds filed by the legal aid counsel which was not upon the appellants instruction and has been the result of affecting the appellant's defence during voir dire hearing due to inconsistent and contradiction of appellant defence and voir dire grounds.*
>
> (ii) *The learned Judge had erred in law in failing to consider the amended voir dire grounds and the subpoena order (leave not granted) that contains of documents and witnesses that is crucial to the defence case challenging the caution interview statements which had been obtained unfairly under authoritative circumstances.*
>
> (iii) *the learned trial judge had erred in law in interrupting the appellant's cross examination to the complainant when the complainant has agreed to the description of the culprit to be of quite difference to the appellant description.*
>
> (iv) *the learned trial judge had erred in law in interrupting the appellant's cross examination and make complainant to step out of the dock to size up the height of the culprit and then shoot the appellant with the comment (Look at that height Mr. Levula and that is you) in front of the assessors and unfairly poison the mind of the assessors to find me guilty.*
>
> (v) *he learned trial judge misconduct during hearing and unfairly prejudice the unrepresented accused who had no experience of fighting for his innocence in court and thus the trial was totally bias and unfair*

[47] All the above grounds are made without any supporting reference to evidence in the court record. The first new ground was adequately covered in the ruling of the singe judge and in our review we find no reason to disagree with his conclusion. The remainder have no merit because they are bare claims made with no supporting evidence from the trial. In three of the five new grounds the claim by the appellant is that the trial judge erred in law, without any specific reference to the principle of law which the trial judge may have erred in applying and or misapplication of that principle to the evidence at the trial. The court may not presume what exactly those grounds may mean on behalf of the appellant.

[48] As regards ground (i) in paragraph 10, it should be noted that when submissions were made with regard to the voir dire, there was only the submission from LAC counsel dated 16 April 2018 on behalf of the appellant. There is no evidence that another submission submitted on behalf of the Appellant was ever made except for the claim made in this new ground of appeal.

[49] After, careful review by the Court the conclusion reached are that the new grounds (ii)(iii) and (iv) referred to paragraph 10 are all frivolous because they lack merit and has no realistic chances of success. They are dismissed. As clearly stated in the case laws referred to in paragraph 9 above when grounds of appeal are file without respect for the Court Rules and Procedures, they will be dismissed summarily. The other 2 grounds are also dismissed because it is vexatious in that it purports to allege misconduct on the part of trial judge and court process with no supporting evidence at all.

[50] The Court orders are as follows:

Qetaki, JA

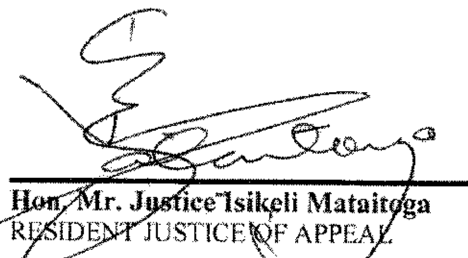
[51] I have considered the judgment of Mataitoga, RJA in draft and I agree with it, the reasoning and the orders proposed.

Andrews, JA

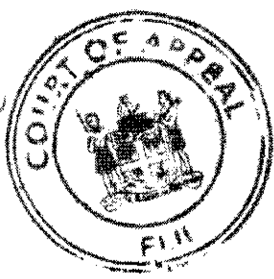
[52] I have read and agree with the judgment of his Honour Justice Mataitoga.

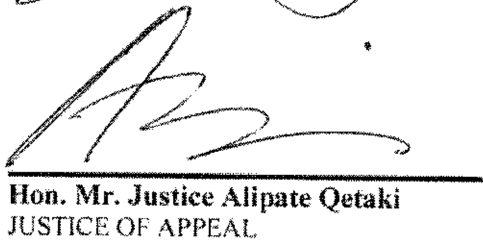
ORDERS

1. Leave to appeal against conviction is dismissed.
2. Leave to appeal against sentence is allowed and new sentence substituted.
3. New Sentence imposed on the Appellant is 14 years imprisonment with a non-parole period of 12 years effective from 19 February 2019.



Hon. Mr. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL





Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL