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

CRIMINAL APPEAL NO. AAU 123 of 2019
[In the High Court at Suva Case No. HAC 168 of 2016]

BETWEEN	:	**TUALAUTA UTUELI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Mataitoga, RJA** **Winter, JA**
Counsel	:	**Appellant in person** **Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**13 February 2024**
Date of Judgment	:	**28 February 2024**

JUDGMENT

ORDER OF THIS COURT PROHIBITING PUBLICATION OF NAME AND IDENTIFYING PARTICULARS OF THE COMPLAINANT WHO MAY ONLY BE REFERRED TO AS 'AB' IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE

Prematilaka, RJA

1. I have read in draft the judgment of Winter, JA and agree with his reasons and conclusion.

Mataitoga, RJA

2. I concur with the reasons and conclusion of this judgment by Winter, JA.

Winter, JA

3. Tualauta Utueli was found guilty as charged by the unanimous opinion of his assessors, the trial Judge agreed with them. He was convicted in the High Court at Suva on the 2nd of August 2019 on seven counts of rape[1] and two counts of sexual assault[2] of his stepdaughter. The child was under 13 years of age when the sexual offending began on the 16th of March 2013 and continued, over 4 years, until March 2016. He was sentenced to imprisonment for 16 years with a non-parole period of 14 years.

4. Being dissatisfied with the conviction and sentence decisions he filed a timely application to appeal on the 27th of August 2019 against both conviction and sentence. Then on the 31st of July 2020 the appellant by notice abandoned his appeal against sentence. However, at the conclusion of this hearing the self-represented appellant took up the opportunity to renew his sentence appeal. On the 19th of October 2021 the single appeal Judge refused leave to appeal against conviction

5. In his conviction appeal the appellant with written and good oral argument put his best case forward in support of often misguided grounds of appeal. This court patiently listened to his submissions and by reference to the record clarified much of the appellant's complaint about his conviction. For the sake of completeness that clarification will be briefly recorded.

6. The appellant did not file a renewal application to re-argue the grounds rejected properly and thoroughly by the learned single Judge considering his leave application. At the appeal hearing the several grounds dissolved to a consideration of whether the convictions for rape

[1] Crimes Act 2009, s 207(1) and (2)(b) and (3)
[2] Crimes Act 2009, s 210(1) (a) and (2).

and sexual assault were supported by the totality of the evidence and on the sentence appeal whether the sentence given was harsh and excessive.

7. While the courts may look with some leniency upon procedural lapses and submissions made by self-represented prisoners on appeal in the final analysis despite any leniency afforded this Court is obliged to consider both the conviction and renewed sentence appeal in light of the applicable principles.

Background

8. The agreed facts filed before trial on the 18th of October 2016[3] record:

- AB was a 16-year-old student born on the 2nd of April 2000.
- The accused was a 33-year-old unemployed male of Nabuni settlement Cunningham who at the time of this offending was married to the child's mother and so AB's stepfather.
- That between the 4th of January 2014 and the 31st of December 2014 the accused had carnal knowledge with the complainant on more than one occasion.
- That between the 1st of January 2015 and the 31st of December 2015 the accused had carnal knowledge with the complainant on more than one occasion.
- That between the 1st of January 2016 and the 9th of May 2016 the accused had carnal knowledge with the complainant on more than one occasion.

9. The prosecution case relied on the direct evidence of the complainant supported as it was by the evidence to her mother. Although of little relevance to the proof of essential ingredients of these offences, the Doctor's examination establishing her pregnancy at the end of the appellant's offending added reliability to AB's testimony.

10. The appellant remained silent at his trial and did not call any witnesses. His position recorded in the agreed facts and taken up in extensive cross examination was a denial of

[3] See Volume 1 page 240 of the record.

any offending in 2013 up to the date the child turned 13 on the 4th of April 2013. However, thereafter he accepted there was consensual sexual activity in 2014, 2015 and 2016. Defence counsel bound by those instructions professionally and diligently pursued this defence.

11. It is clear the trial court after proper consideration accepted the child's evidence of sexual offending throughout 2013 and believed she never at any time consented to an intimate sexual relationship with her stepfather thereafter. Put simply using the accepted onus and burden of proof in a criminal trial the assessor's opinion with the concurrence of the trial Judge unanimously rejected both the appellants denials and any suggestion that he only engaged in consensual sexual acts with the complainant after she had attained 13 years of age.

12. The summary of the evidence starts at page145 of the record. It is an accurate account of the complainant's testimony and that of her mother and doctor.

13. The complainant told the court when she was 12 her stepfather started sexually abusing her at first by penetrating her vagina with his fingers and tongue. (Counts 1, 2 and 3). These specific charges were accompanied by restraint, force, and threats that if the offending was disclosed then her stepfather would kill the family by chopping her, her mum, and her brothers up into little pieces. He also threatened to disclose a photo he claimed he had of her with her hands down her little brother's pants. AB was told she was a bad girl, and his sexual activity was a punishment. He would force her legs apart and hold her hands over her head. AB was very scared by these threats and didn't want to complain as she was confused and afraid it would break the family up. Thereafter (counts 4-9) the appellant would take advantage of times when AB was alone in the house remove her clothes or towel and rape her in a bedroom, on the sofa and even once in the pantry. She would tell him to stop and try to escape and wriggle away from his advances, but he would overpower her physically and /or by further threats and he never stopped his sexual abuse.

14. AB was adamant she never consented to any sexual activity with her stepfather. Once she ran away and when she came back, he smacked and raped her. When asked how often this would occur over late 2013 to 2016, she said almost every other weekend until it stopped. In 2016 when he discovered she was pregnant he then tried to kill the baby by punching her in the stomach or by jumping on her from a height and by using medicinal herbs. AB told the court as her stepfather returned to Samoa, he told her that if a complaint was made to tell the police she was attracted to him and she consented.

15. AB maintained her stance under lengthy cross examination. Her mother confirmed that once her daughter was assured her stepfather had returned to Samoa and was not returning to the family in Fiji, she disclosed her abuse and pregnancy. As to evidence of the two having times alone in the home, mother confirmed her busy work life took her away from home daily.

Grounds dispensed with

Assessors use of inadmissible caution interview. Ground 1

16. The appellant complained that in his summing up at paragraphs 25 and 35 the learned trial Judge erred in law by leaving an excluded caution interview exhibit with the assessors. The simple answer is his honour did not do so. The appellant has confused the provisional numbering of prosecution exhibits pre-trial and the production of the final prosecution exhibits at the trial after his police statement was excluded at a pre-trial hearing, commonly known as a voir dire.

17. After the voir dire as the accused's police interview was excluded, the exhibits were renumbered. The record in volume one pages 145 to 150 confirms that PE1 and PE2 referred to by the trial Judge are not the excluded caution interview. Rather the complainant produced her birth certificate PE1 (refer p 482), and the medical report produced by the examining Dr. PE2 (refer p 365).

18. The appellant has misapprehended the facts of the summing up there is no reference to his caution interview made by the trial Judge in his summing up. The prosecution called only three witnesses for trial the victim the victim's biological mother and the doctor. This ground is not supported by the record and obviously fails

Conduct of accused counsel. Ground 1(A)

19. The appellant did not follow the correct procedure for raising this ground. This court in *Chand v State*[4], laid down judicial guidelines regarding the issue of trial counsel criticism raised on appeal. However, exercising some leniency, we apprehend the appellant complains that the learned trial Judge did not investigate the poor conduct of trial counsel in failing to follow instructions for redirection on the improper admissibility of his caution interview. For the practical reasons already referred to that is incorrect.

20. Further the appellant misapprehended the essential ingredients and proof required to secure a conviction for rape and so misunderstood the relevance of the medical evidence and counsel's wise decision not to cross examine the Doctor on irrelevant matters.

21. More importantly the complaint about counsel was not maintained at trial but withdrawn. A trial note on Wednesday 24th July at 10am found at page 532 of the record notes first the appellant's request to withdraw instructions from Legal Aid Counsel and then his retraction of that application.

22. Bound as counsel was by the instructions the appellant gave, of a hybrid defence of both denial of any sexual activity at first when the complainant was under 13 and then a fully consented intimate relationship thereafter, we find in a diligent and professional way each prosecution witness, sometimes at length, was properly cross examined.[5]

[4] *Chand v State* [2019] FJCA 254; AAU0078.2013 (28 November 2019)
[5] Referred to in the trial judge's summing up found in volume 1 pages 149 and 150 of the record.

23. We agree with the single Judge and reemphasise his Honours remarks at pages 13 and 14 of his leave judgment. We too do not see any *'flagrant incompetence'* on the part of the appellant's trial counsel. Rather regret at a tactical trial election by an appellant eager to overturn an inevitable conviction.

24. There is simply no foundation for this ground to succeed and it must fail.

The conviction appeal.

The conviction for rape and sexual assault is not supported by the totality of the evidence.

25. In considering whether a verdict is unreasonable or cannot be supported having regard to the evidence, the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors *must* as distinct from *might*, have entertained a reasonable doubt about the appellant's guilt.

26. The Court of Appeal in *Sahib v State*[6], while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court in having seen and heard the witnesses. The trial court is often in a better position to assess credibility and weight of witnesses and evidence so an appellate court should be slow to interfere with those primary trial findings[7].

27. Sexual offending is commonly misunderstood. The offence of Rape under section 207(2) covers various forms of non-consensual sexual penetration. The offence pivots around consent rather than force. Consent means true consent freely given by a person who can make a rational decision. Lack of protest or physical resistance does not of itself amount to consent. Consent must be voluntarily given. Consent given because a person feels powerless or because they fear for their safety if they do not consent is not true consent.

[6] *Sahib v State* [1992] FJCA 24; AAU0018u.87s (27 November 1992)
[7] *Kumar v State* [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); *Naduva v State* [2021] FJCA 98; AAU0125.2015 (27 May 2021)

28. Any consent must be freely given. It is important to distinguish between a consent that is freely given and submission to what a person may regard as unwanted but unavoidable. For example, submission because someone is frightened of what might happen if they do not give in is not true consent. Equally submission because someone feels powerless or trapped or is exhausted is not true consent either. The fact that a complainant does not protest or physically resist or ceases to do so is not of itself to be taken as consent.

29. Consent may be conveyed by words or by conduct or by a combination of both. The behaviour and attitudes of the parties before or after the act itself may be relevant to that issue but it is not decisive of it. Lack of consent is an express element however, a child under the age of 13 is incapable of giving consent.

30. The appellant gave no evidence but maintained his defence that he denied sexual activity with AB until she turned 13 and afterwards through to 2016 the state could not prove an absence of her consent beyond reasonable doubt.

31. When complaining about the examining doctor's medical evidence and submitting it did not *'prove'* rape the appellant overlooked these legal principles. There was nothing of relevance to the complainant's consent or lack of it to be found from his medical examination of her. The absence of genital damage would in any event never assist in confirming an absence of consent.

32. Similarly, the fact of AB's pregnancy confirmed by the examination might help fix a time when sexual intercourse last occurred but would not assist any fact finder on the consent issue. This is why defence counsel conceded there was nothing prejudicial to the defence case from this witness's medical report and consented to its production. (Trial record p 362).

33. Consent could not have been an issue when AB was under 13 in counts 1, 2 and 3. However because of his concession and cross examination the appellant indicated his stance that once AB was over 13 years of age AB consented to any sexual activity. The

appellant called no evidence. While that is his constitutional right, and he does not have to prove his innocence and it is for the State to prove his guilt beyond reasonable doubt that requires an assessment of the reliability and credibility of the prosecution evidence alone.

34. In a thorough and balanced analysis the learned trial Judge in his summing up reviewed the only available evidence of the child, her mother, and the examining doctor. He gave directions about the burden and standard of proof, the elements of the offences and focused the assessor's attention on examining the reliability and credibility of AB and her mother and even left an alternate offence of defilement for their opinion. It was a balanced and proper address. Also, in a moderate and temperate way in his judgment he drew to his inevitable conclusion that the unanimous decision of the assessors to convict the appellant on all counts was correct.

35. The difficulty for the defendant in the absence of any evidence from him was always that it is simply implausible that a child would lie about events of rape and sexual assault by her stepfather before she was 13 complaining of his smacks to the head and restraint as he used his fingers to penetrate and his mouth to lick her vagina accompanied by threats to cut her and her mum and her brothers up if she told anyone, which scared her. Then, for the same scared child, to form an intimate relationship with the same man, her stepfather a short while later when over 13 years of age and thereafter give fully informed consent to multiple penile, digital, and oral penetrations and accompanying sexual assaults.

36. In our view, it was quite open to the assessors, properly directed and the trial Judge to confirm on the material available that the appellant was guilty of the rapes and sexual assaults of his stepdaughter as charged. The court concludes that, on the whole of the evidence, a reasonable jury, after being properly directed, would without doubt have convicted the appellant. No substantial miscarriage of justice within the meaning of the proviso has occurred[8]. This ground fails.

[8] *Aziz v State* [2015] FJCA 91; AAU112.2011 (13 July 2015)

37. The conviction appeal is dismissed.

Sentence Appeal

Rape starting points

38. The appellant had little to say about his sentence appeal beyond it being excessive. He was given leave to file any further submissions in writing in those submissions he emphasises:

> 1. *The appellant is a first offender with no previous conviction and have no other pending matters.*
> 2. *The appellant cooperated during police investigation.*
> 3. *The appellant left his parent and his country for the sake of a family on his own in Fiji.*
> 4. *He enter Fiji under his Fiji citizen sponsor (his former wife) who neglected his citizenship application so that he can't work and provide for his young family, but instead he forced to sell food without a hawker license.*
> 5. *As a stranger in foreign country the appellant sponsor takes advantage of his situation, putting him under mistreatment and discrimination.*
> 6. *Being instructed to leave the house knowing that he have no family in Fiji to stay with apart from her.*
> 7. *Being threaten that if he not convert to the Muslim faith, he will not see his two sons again.*
> 8. *The appellant submit, that he was now been separated from his former wife, who is the complainants mother. He adds that he is currently assisting his defector partner in looking after their 6 months old child, who is now 5 years old.*

39. No statutory criteria for allowing an appeal are specified in section 23 (3) of the Court of Appeal Act, however, ordinarily appellate courts will interfere with the exercise of the trial Judge's discretion only where the sentence is based on an error of principle or reasoning, not just because it would have chosen a different sentence. The Supreme Court

in *Naisua v State*[9], suggested these grounds for allowing an appeal where the sentencing Judge had:

- Acted upon a wrong principle.
- Allowed extraneous or irrelevant matters to guide or affect the sentence.
- Mistook the facts.
- Failed to consider something relevant to the sentencing.

40. The approach 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 consistent with statutory sentencing purposes and lies within the permissible range.[10] When a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered.[11]

41. In *State v Waqa* [2019] FJCA 26; AAU24.2015 (7 March 2019), at paragraph 22, Prematilaka, RJA observed:

> *"By way of some general observations, I wish to place on record that the Courts in Fiji for many years had taken 05 years as the starting point with no aggravating or mitigating circumstances for rape committed by an adult until it was increased to 07 years in Kasim v State AAU 0021 of 93s: 27 May 1994 [1994] FJCA 25. In Drotini the starting point for cases of rape committed by fathers or stepfathers was increased to 10 years as such cases happen far too frequently. The Court of Appeal then decided that the accepted range of sentence for rape of juveniles (under the age of 18 years) is 10–16 years [vide Raj v State AAU0038 of 2010: 05 March 2014 [2014] FJCA 18] as the heavy sentences had still not deterred would be 'family rapists' and still more and more of such heinous crimes come before courts. The Supreme Court in **Raj v State** [CAV0003 of 2014: 20 August 2014 [2014] FJSC 12] confirmed that the tariff for rape of a child is between 10–16 years which was raised to be between 11–20 years imprisonment in Aitcheson v State CAV0012 of 2018: 02 November 2018 [2018] FJSC 29 by the Supreme Court stating that increasing prevalence of these crimes characterised by disturbing aggravating circumstances means the court must consider widening the tariff for rape against children."*

[9] *Naisua v State* [2013] FJSC 14; CAV0010.2013 (20 November 2013)
[10] *Sharma v State* [2015] FJCA 178; AAU48.2011 (3 December 2015). See also *Navuki v State* [2022] FJCA 25 at [25], where Prematilaka RJA explained these purposes.
[11] *Koroicakau v The State* [2006] FJSC 5; CAV0006U.2005S (4 May 2006)

42. It is essential, that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Guideline judgments are intended to assist the Judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial Judge.

43. The Appellant's recent submissions repeat mitigating factors available to the Sentencing Judge. Each mitigation suggested is a reasonable consequence of his offending. We find His Honours sentence of Mr Utueli was very reasonable for an offender who raped and sexually assaulted and beat up and overpowered and abused his stepdaughter over 4 years. More so as the appellant still maintains his innocence, even now, and shows absolutely no remorse.

Orders of the Court:

1. *Appeal against conviction; dismissed.*
2. *Appeal against sentence; dismissed.*

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

COURT OF APPEAL FIJI

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

.....
Hon. Mr. Justice G. Winter
JUSTICE OF APPEAL

Solicitors:

Appellant in person
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