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

CRIMINAL APPEAL NO. AAU 26 of 2022
[Suva High Court Case No. HAC 37 of 2020]

BETWEEN : **RUSIATE MATAKITOGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Qetaki, RJA**

Counsel : **Mr M. Fesaitu for the Appellant**
: **Ms. S. Shameem for the Respondent**

Date of Hearing : **04th February, 2025**

Date of Ruling : **28th February, 2025**

RULING

Background

[1] The Appellant was charged with three (3) Counts of Sexual Assault contrary to section 210(1) (a) of the Crimes Act 2009, and three (3) Counts of Rape contrary to section 207(1) and (2) (a) of the Crimes Act 2009, against a minor, who is his stepdaughter. According

to the Information, the Sexual Assault offences (Counts 1, 2 and 3) occurred on 24th, 25th and 26th day of November 2020 at Natokalau Village, Ovalau, in the Eastern Division, The incidences of Rape (Counts 4, 5, and 6) occurred on 26th, 27th and 30th day of November 2020 also at Natokalau Village, Ovalau, in the Eastern Division.

[2] The Appellant was represented by the Legal Aid Commission throughout the trial. At the end of the prosecution's case, both the parties agreed that on the evidence so far laid before the court, there was a prima facie case against the accused on counts 1, 2, 3, 4, and 5.

[3] The defence submitted with respect to count 6 that the accused had no case to answer, as the evidence did not support the charge. The point was conceded by the prosecution, and the court found the accused had no case to answer on count 6, and found him not guilty as charged.

[4] At the trial the accused chose to give sworn evidence in his defence and called one witness only. In his evidence he denied the complainant's allegations in counts I, 2, 3, 4, and 5. The accused essentially said that the complainant consented to the sexual acts he performed on her at the material time.

[5] At the end of a three days trial, the Appellant was found guilty as charged on Counts 1, 2, 3, 4 and 5 and convicted accordingly. The Appellant was sentenced on 25th March 2022.

[6] The summary of the Appellant's sentences are as follows:

(i) Count No.1-Sexual Assault-4 years imprisonment;

(ii) Count No.2- Sexual Assault- 4 years imprisonment;

(iii) Count No.3- Sexual Assault -4 years imprisonment;

(iv) Count No.4- Rape- 13 years imprisonment;

(v) Count No.5- Rape-13 year's imprisonment.

[7] In sentencing the Appellant, the learned trial Judge directed that all the above sentences be made concurrent to each other, making a total final sentence of 13 years imprisonment, with a non-parole period of 11 years.

[8] The learned trial Judge stressed that, pursuant to section 4 (1) of the Sentencing and Penalties Act 2009, the sentence is designed to punish the Appellant in a manner that is just in all the circumstances, protect the community, deter like-minded offenders and to signify that the court and the community denounce what the Appellant had done to the 15 years old complainant.

[9] Aggrieved by the conviction and sentence, the Appellant lodged a timely appeal against both conviction and sentence.

[10] The Appellant filed several grounds of appeal on different dates, namely; on 3rd May 2022 (3 Grounds of Appeal); on 31st July 2023 (3 Grounds of Appeal); on 25th October 2023 (1 Ground of appeal) and on 14the November 2024 which was filed by the Legal Aid Commission on behalf of the Appellant (2 grounds, 1 against conviction and 1 against sentence). In its written submissions and at the hearing the Appellant, who is represented by the Legal Aid Commission argued on the latter ground filed by the Commission.

[11] The Appellant's Amended Notice for Leave to Appeal against Conviction and Sentence (filed on 14th November 2024) contained the following grounds:

> *Against Conviction-Ground 1: That the learned trial judge erred in law and in facts by inadequately evaluating the evidences and as a result no cogent reasons are provided to convict the Appellant thereof causing a substantial miscarriage of justice.*
>
> *Appeal Against Sentence-Ground 1: The sentence imposed on the appellant is harsh and excessive in the circumstances of the case as result of;*
>
> *i) Double counting as some of the aggravating factors itemised by the learned trial judge is already subsumed in selecting a starting point; and*
>
> *ii) The learned trial Judge had allowed extraneous matters that are not part of the facts* of *the case.*

[12] The Appellant prays that: Leave to appeal against conviction is granted, Leave to appeal against sentence is granted, and any other orders as the honourable court deem just.

Law and Principles

[13] For a timely appeal the test for leave to appeal against conviction is ***"reasonable prospect of success"-*** see **Caucau v State** [2018] FJCA 171; **Navuki v State** [2018] FJCA 172 and **State v Vakarau** [2018] FJCA 173; and **Sadrugu v The State** [2019] FJCA 87.

Appellant's Case

[14] The Appellant relied on the written submissions filed on his behalf by the Legal Aid Commission on 14th November 2024.

[15] On Conviction Ground 1: It is alleged that the learned judge erred in law and in fact by inadequately evaluating the evidences and as a result no cogent reasons are provided in the judgment to convict the Appellant therefore causing a substantial miscarriage of justice.

[16] The Appellant submits that on reading the judgment, it is clear that there is an inadequate assessment carried out with no cogent reasons provided to convict the Appellant on the evidences presented at the trial. The Appellant referred to the reasoning of the learned trial Judge contained in paragraph 14 of the judgment which states:

> *"The law required the prosecution to prove the allegations against the accused in count no. 1,2,3,4 and 5 beyond reasonable doubt. The court had heard the evidence of the complainant as against the evidence of the accused. Throughout the trial, the court had carefully examined and considered the demeanours of the complainant and the accused. During cross-examination the accused admitted that it was wrong in god's eyes for a 58 year old father to lick the vagina of his 15 year old stepdaughter. He also admitted during cross–examination that, it was wrong for him to insert his penis into his stepdaughter's vagina.After carefully considering all the evidence, I find the complainant to be a credible*

witness. I accept her evidence that she did not give her consent to the accused licking her vagina and breasts, at the material time. I also accept that she did not give her consent to the accused having sexual intercourse with her, as alleged in count no. 4 and 5.I also find that the accused was not a credible witness. I reject his sworn denials."(Underlining is for emphasis)

[17] The Appellant finds support in **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023), which states that giving adequate reasons lies at the heart of judicial process, and that trial Judge's reasons should not be so generic to be no reasons at all. Paragraph [26] states:

> *"[26] Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rule. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be equivalent of a jury instruction or summing- up to the assessors. Not every failure of deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial."*

[18] The Appellant submits that the disputed issue at the trial was the element of consent, and the reasons provided by the learned Judge is inadequate. It seems that the learned Judge did not carry out a proper assessment before arriving at a finding as to the guilt of the Appellant.

[19] The Appellant submits that equally, the learned Judge did not provide cogent reasons why he disbelieved the Appellant.

[20] The Appellant submits that, equally, no cogent reasons are given as to why he had found the complainant to be a credible witness.

[21] The Appellant submits that, the point which the learned Judge focused on, which is a finding that the Appellant is not credible, is insignificant on the evidence.

[22] The Appellant submits that, the learned Judge appear to disbelieve the Appellant, by placing weight on morality with the substantial age gap and that the Appellant having admitted in cross-examination that it was wrong to insert his penis into his stepdaughter's vagina. Such reasoning, is not cogent on the evidences in its totality.

[23] Further, the Appellant submits that the learned Judge's reasoning to convict the Appellant is based on his examination and consideration of demeanour of the complainant and the Appellant. In **Daunivucu v State** [2024] FJCA 108; AAU0152.2019 (30 may 2024), this Court had given a guideline on the dangers of using the demeanour of a witnesses to accept credibility. Without having the benefit of the full court record, it can be said as evident from the judgment that the learned trial Judge had relied on his observation of the complainant's demeanour when she testified in court to find her credible.

[24] The Appellant submits that the appeal ground advanced against conviction has a reasonable prospect of success, therefore the leave to appeal should be granted.

[25] On Sentence Ground 1: It is alleged that the sentence imposed on the Appellant is harsh and excessive in the circumstances of the case as result of double- counting as some of the aggravating factors itemized by the learned trial Judge is already subsumed in selecting a starting point; and the learned trial Judge had allowed extraneous matters that are not part of the facts of the case.

[26] The trial Judge relied on the applicable sentencing tariff for child rape set out in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) to select a starting point. He chose 12 years starting point. There were five aggravating factors identified, which push the starting point upwards by five years. For being a person of good character, a deduction of 3 years and 2 months, and a deduction of 10 months for the time spent in remand,

arriving at 13 years imprisonment. For the offence of Sexual Assault a final sentence of 4 years is imposed. Having considered the totality principle, the trial Judge made the sentence run concurrent to each other offence the Appellant is convicted for. The final sentence imposed is 13 years with a non-parole period of 11 years imprisonment.

[27] The Appellant submits that the learned trial Judge had fallen into error in two respects when exercising his discretion in sentencing , which has made the sentence given to the Appellant both harsh and excessive. The first error is of "*double counting*". The Appellant submits that a close look at the sentencing decision:

> *"whilst the learned trial Judge had in mind the seriousness of the offending, the maximum prescribed penalty for rape under the Crimes Act and the applicable sentencing tariff when selecting a starting point, it appears that aggravating factors itemised as (iii) and (iv), rape of children and no regards to the right of the child, had formed part of selecting the starting point. The same two items are again re-accounted for as part of the aggravating factors to enhance the sentence."*

[28] This was commented upon by Justice Keith in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018), when he stated:

> *"[57] ....First, a common complaint is that a judge has fallen into the trap of "double-counting", i.e. reflecting one or more of the aggravating features of the case more than once in the process by which, the judge arrives at the ultimate sentence. If judges chose to take as their starting point somewhere in the middle of the range, that is an error which they must be vigilant not to make. They can only use the aggravating features of the case which were not taken into account in deciding where the starting point should be.*
>
> *[58] Secondly, the lower of the tariff for the rape of children and juveniles is long. Sentences for 10 years imprisonment represent long periods of incarceration by any standards. They reflect the gravity of these offfences. But it also means that the many things which make these crimes so serious have already been built into the tariff. That puts a particularly important burden on judges not to treat as aggravating factors those features of the case which will already have been reflected in the tariff itself. That would be another example of "double- counting", which must, of course, be avoided."*

[29] The second error which makes the ultimate sentence harsh and excessive, is that the learned Judge had taken into account a factor that, "*the appellant had caused untold miseries* to *the complainant's family."* This has no basis in evidence. There is nothing in the judgment or the sentence decision to justify the consideration of this aspect as an aggravating factor. The learned judge was in error to have allowed extraneous factors to enhance the Appellant's sentence.

[30] The Appellant submits that the ground against sentence has a reasonable prospect of success.

Respondent's Case

[31] On the conviction ground, the Respondent submits that, the trial issue was consent. The respondent refers to paragraph 12 of the judgement which states:

> *"12 ….she said, she was afraid of the accused, as she had seen him assault her mother before. She said, the accused after having sex with her, warned her not to tell anyone about the incidents, or he would do something to her."*

[32] The Respondent also referred to paragraph 14 of the judgment, the same paragraph which the Appellant had relied upon–see paragraph [16] above where the paragraph is quoted in full. Additionally, the Respondent referred to paragraphs 3 and 4 in the Sentence, which state:

> *"3. Between 24 and 27 November 2020, you committed various sexual offences against the complainant. She was your stepdaughter at the time. The offences were all committed in the family bedroom when the complainant's mother, your wife, was away. You started the sexual attacks on the complainant on the night of 24 November 2020 (count no.1).While she was asleep you secretly undressed her and licked her vagina. On 25 November 2020 (count no.2), you repeated the above episode when the complainant returned from school after 4pm. On 26 November 2020 (count no.3), you forced yourself on the complainant by undressing her top and licked her breasts for about 10 minutes. You attacked her after she returned from school after 4pm.*

4. *On the same day, after PW1 completed her homework at 7.15pm, she went to bed (count no.4).You went to her and forced yourself on her. You had sexual intercourse with her without her consent and you knew at the time that she was not consenting to the same. Afterwards, you threatened her not to reveal the above to anyone. On 27 November 2020 (count no.5), you repeated the above episode to the complainant, after she returned from school. You had been tried by the High Court and found guilty of all the above crimes."*

[33] The respondent submits that the learned trial judge gave cogent reasons to safely convict the Appellant. It submits that the ground against conviction does not have a reasonable prospect of success.

[34] On the Appellant's sentence ground, the Respondent refers to **Kim Nam Bae v The State** (supra) which establishes the factors that the Appellant must demonstrate before the Court can disturb the sentence.

[35] The respondent submits that, it is well settled that, the ultimate sentence rather than each step in the reasoning process that must be considered: **Koroicakau v The State** [2006] FJSC 5; CAV006U.2005S (4 may 2006).The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing Judge or, in other words, that the sentence imposed lies within the permissible range: **Sharma v State** [2015] FJCA 178;AAU48.2011 (3 December 2015).

[36] The Respondent submits that at paragraph 5 of the Sentence, the learned Judge is making comments at how the offence is viewed and that one must expect a lengthy sentence. He does not go on to select a starting point. The starting point is selected at paragraph 9 where upon selecting 12 years, there was no further comments. There was no evidence of double-counting noted.

[37] The Respondent disagrees with the Appellant's submission that there was no evidence of Appellant causing "*untold miseries*" to the complainant's family. Respondent submits:

"It goes without saying that the appellant, being the stepfather of the complainant and who was married to her mother for 8 years, conveyed the acts on a child would have definitely caused misery to the family. It is said to be untold because it is untold. The complainant has also given evidence that she had seen the Appellant assault her mother and therefore, she was afraid of him."

[38] The Respondent submits that there was evidence indicating that the family was miserable by the Appellant's actions.

[39] The final sentence of 13 years imprisonment with a non-parole period of 11 years imprisonment, is well within the tariff, if not, leaning towards the bottom end and it cannot be said to be harsh and excessive in any regard.

[40] The Appellant should not be allowed leave on this ground.

Analysis

[41] Did the learned trial Judge adequately analyse the evidences? Did the learned Judge give cogent reasons in convicting the Appellant?

[42] The Appellant had summerised the evidences of the Complainant and the Accused in paragraphs 6 and 7 of his written submissions, which may be restated as follows:

1. The Appellant is the stepfather of the complainant. Complainant was 15 years old at the time of the allegations.
2. According to complainant, the Appellant licked her breast and vagina without her consent.
3. Complainant did not consent to the Appellant penetrating her vagina with his penis.
4. Complainant said that after sexual intercourse on two separate occasions the Appellant had warned her not to tell anyone or he would do something to her.

5. According to the Appellant the complainant had consented to him licking her breasts and vagina on different occasions, and she had also consented to him penetrating her on two occasions.

[43] The Appellant's whole submissions in support of the ground of appeal against conviction is focused on the learned Judge's comments and observations in paragraph 14, of the judgment. The Appellant has not taken account of the other paragraphs of the judgment preceding paragraph 14, where the trial Judge had begun to summarise the evidences of both the complainant and her witnesses, and the evidence of the Appellant.

[44] After discussing the burden of proof, the elements of the offences, the meaning of "*consent*", the elements of Sexual Assault (paragraphs 4-10) of the judgment, the trial judge at paragraphs 11 and 12, examined the prosecution's case. The Judge stated in his analysis:

> *"11. ……Legally, to lick someone's vagina or breasts, would constitute the application of force to the person of another. In this case it would appear that, when the appellant was licking the appellant's vagina or breasts, at the material time, he was applying force to the person of the complainant. This would amount to an assault to the person of the complainant. The assault becomes unlawful, if the complainant does not consent to the accused licking her vagina or breasts. In this particular case, the complainant said, in her evidence that, she did not consent to the accused licking her vagina and/or breasts. If the complainant's evidence was to be accepted by the court, after considering all the evidence, the accused's actions of licking the complainant's vagina and breasts, would be considered unlawful. However, the offence of "sexual assault", demands the satisfaction of another element of the offence that is, the assault must be "indecent". An assault is indecent, if right thinking members of society, consider it indecent. In this particular case, a 58 years old stepfather licking his 15 years old stepdaughter's vagina and breasts, would certainly, by right thinking members of society's standard, would be considered indecent. It would appear, that if the court accepted that the complainant did not give her consent to the accused licking her vagina and breasts, at the material times, the prosecution would have proven the accused's guilt on count 1, 2 and 3, beyond a reasonable doubt.*
>
> *12. We will now examine the alleged rape in count no.4 and 5.Both complainant (PW1 and the accused (DW1) agreed that, at the material times, the accused inserted his penis into the vagina of the*

complainant……. The complainant said that when the accused's penis was in her vagina, as mentioned above, she did not give her consent to the same. She said on both occasions, she told him to stop, but he ignored her. She said she was afraid of the accused, as she had seen him assault her mother before. She said, the accused after having sex with her, warned her not to tell anyone about the incidents, or he would do something to her. If the complainant's evidence of non-consensual sexual intercourse with the accused, at the material times, were accepted by the court, after considering all the evidence, the prosecution would have proven beyond a reasonable doubt the accused's guilt on counts no.4 and 5."

[45] The assessment of the defence's evidence is contained in paragraph 13 of the judgment. I note that the Appellant did not dispute that he licked the complainant's vagina and breasts. The Appellant admitted in his evidence that he had sexual intercourse with the Complainant on 26 November 2020 and 27 November 2020. Paragraph 13 states:

"13. For the defence, the accused did not dispute that he licked the complainant's vagina on 24 November 2020 (count.no 1), and again on 25 November 2020 (count o.2). He also did not dispute that he licked the complainant's breasts on 26 November 2020 (count no.3). He said the complainant gave her consent to the above. As to inserting his penis into the complainant's vagina on 26 November 2020 (count no.4) and repeating the same on 27 November 2020(count no.5), the accused did not dispute the same. He admitted in his evidence that he had sexual intercourse with the complainant on 26 November 2020 and 27 November 2020. However, he said on both occasions, the complainant gave her consent to the same. If the accused's evidence mentioned above was to be accepted by the court, after considering all the evidence, the accused would not be guilty as charged on all the counts laid against him."

[46] Paragraph 14 of the judgment appears to be the culmination of the trial Judge's consideration of the evidences, and the basis of the trial Judges decision on whose evidence is to be accepted. It would appear, as the Appellant contends, that the Judge did not adequately evaluate the evidence. It was quite prominent in the analysis of the evidence that the Appellant did not deny committing the acts complained of. It is also clear that the Appellant had denied the charges. He maintained throughout that the complainant had consented to his licking her vagina and breasts at the material times; the Appellant also admitted and agreed that he had sexual intercourse with the complainant on 26 and on 27 November 2020. However, he maintained that it was consented to by the complainant.

[47] It is evident that prior to paragraph 14 of the judgment, the learned judge had not made up his mind on whose evidence he would accept. In paragraph 11, last sentence, the trial Judge stated:

> *"It would appear, that if the court accepted that the complainant did not give her consent to the accused licking her vagina and breasts, at the material times, the prosecution would have proven the accused's guilt on count no.1, 2 and 3".*

[48] In paragraph 12, the trial Judge stated:

> "*If the complainant's evidence of non-consensual sexual intercourse with the accused, at the material times, were accepted by the court, after considering all the evidence, the prosecution would have proven beyond reasonable doubt the accused's guilt on count no.4 and 5."* (See paragraph 12, last sentence).

[49] In paragraph 13 of the judgement, the trial judge states:

> *"If the accused's evidence mentioned above was to be accepted by the court, after considering all the evidence, the accused would not be guilty as charged."*
> - See paragraph 13, last sentence).

[50] The learned trial judge's decision on whose evidence to accept, and the reasons are also in paragraph 14 of the judgment. The contents of the paragraph, may be broken up as follows:

i) The Court had carefully examined and considered the demeanours of the complainant and the accused.
ii) The accused had admitted in cross-examination that it was wrong in god's eyes for a 58 year old father to lick the vagina of his 15 year old stepdaughter.
iii) The accused also admitted in cross-examination that it was wrong for him to insert his penis into his stepdaughter's vagina.
iv) After carefully considering all the evidence, I find the complainant to be a credible witness.

v) I accept her evidence that she did not give her consent to the accused licking her vagina and breast, at the material time.

vi) I also accept that she did not give her consent to the accused having sexual intercourse with her, as alleged in count no.4 and 5.

vii) I also find the accused was not a credible witness.

[51] The Appellant's contention that there was no cogent reasons for convicting the Appellant require further examination. In **Daunivucu** (supra) it is stated:

> *"In general usage, "cogent' as referring to reasons or an argument means strong or compelling. When used in respect of judicial reasoning, it has connotations of logical progression to a conclusion, in terms that are capable of being objectively assessed."*

[52] The reasons for the conviction are clear and set out in paragraphs 1-14 of the judgment. Paragraphs 3 and 5 of the Sentence is relevant, as cited by the Respondent. The reasons contained in paragraph 14 has to be considered together with the analysis in paragraphs 11- 13 of the judgment, and paragraphs 3-5 of the Sentence.

[53] In **Dauvucu v State** (supra), the Supreme Court, had made a thorough analysis of the effects of reliance on demeanour by trial judges .It cites relevant authorities from England, New Zealand and South Africa. Dobson, JA in his judgment, in opening his analysis of the topic stated –

> "*Primary reliance on demeanour is a cause of concern .Substantial research in numerous jurisdictional has found that demeanour is not a reliable indication of the truthfulness of a witness."*

[54] It would appear, that an assessment based demeanour would be more meaningful, when done together with "*objective assessment of the coherence of a party's total evidence."* A trial judge should also consider the probability of the complainant's story, the reasonableness of her conduct, the manner in which he emerges from the test of memory, the consistency of his statements and the interests he may have in the matter under enquiry. It may be added also that the totality of the evidence of the trial, need to be

considered. Other factors could be considered also to enable a safe decision to be made on the guilt of the Appellant, in the circumstances when consent is the substantive issue in the evidence of the complainant as against that of the Appellant, as in **Sakeasi Sauleqaraki v The State**; Criminal Petition No: CAV 007 of 2021 (29 June 2023).

[55] In this case, it would appear that there are insufficient assessment and analysis of whether the totality of the evidence took the State's case to the point where there was no doubt about the guilt of the Appellant. The complainant had contended that she was in fear of the Appellant because of what she had seen done by him to the mother; she alleged she told him to stop in relation to count 4, and she had asked him to stop in another occasion. It appears that evidences are not properly assessed and evaluated. The assessment, evaluating and weighing of the evidence is critical to determining with confidence whether there was no consent and whether the Appellant was aware there was no consent, but carried on regardless, taking account of the Appellant contention that the complainant had consented to these acts being done to her by the Appellant. The availability of the High Court Record will enable a proper assessment and evaluation of the totality of the evidence at the trial, to determine the disputed absence or presence of consent, and if it is determined that, there was no consent, did the Appellant continue to violate the Complainant with the knowledge that consent was not given.

[56] The ground is arguable.

[57] On the sentence appeal ground, the Appellant's contention that the sentence if harsh and excessive, due to the mistake committed by the sentencing Judge, in two respects, firstly in "*double counting*" and secondly in, taking account of an aggravating factor which is not established by evidence. I have considered the sentencing by the learned trial judge and find that, there are no mistakes. There is no double- counting. I also agree with the Respondents, for the reasons in the Respondent's submissions, that the aggravating factor complained of, under the circumstance, is justifiable, relevant and proper.

Conclusions

[58] The Appellant's conviction ground is arguable. It has merit. The appeal against sentence, for the reasons given, fails.

Order of Court:

1. Application for leave against conviction is allowed.

Hon. Justice Alipate Qetaki

RESIDENT JUSTICE OF APPEAL