

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

**CRIMINAL APPEAL NO. AAU 163 of 2020**  
**[In the High Court at Suva Case No. HAC 67 of 2019]**

**BETWEEN** : **TIMOCI VUKI DAWAI**

**AND** : **THE STATE**

**Appellant**

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Mr. S. Seruvatu for the Respondent**

**Date of Hearing** : **21 June 2024**

**Date of Ruling** : **24 June 2024**

**RULING**

[1] The appellant had been charged with three counts (he pleaded guilty to one count and after trial was convicted on the following two counts) under the Crimes Act 2009 in the High Court at Lautoka for having raped his eldest biological daughter of 11 years ('SM') of 07 siblings in the family in 2008 on a representative count and committed indecent assault on another biological daughter of 19 years (AD) in 2019. The charges were as follows:

**'FIRST COUNT**  
***(Representative Count)***  
***Statement of Offence***

**RAPE**: *Contrary to section 149 and 150 of the Penal Code, Cap 17.*

***Particulars of Offence***

***TIMOCI VUKI DAWAI*** *between the 1<sup>st</sup> day of January, 2008, and the 31<sup>st</sup> day of December, 2008 at Nadi in the Western Division, had unlawful carnal knowledge of "SM" without her consent.*

**SECOND COUNT**

***Statement of Offence***

**INDECENT ASSAULT:** *Contrary to section 212(1) of the Crimes Act 2009.*

***Particulars of Offence***

***TIMOCI VUKI DAWAI on the 21<sup>st</sup> of March, 2019 at Nadi in the Western Division, unlawfully and indecently assaulted “AD”.***

- [2] The appellant had earlier pleaded guilty to another representative count of indecent assault on the same eldest daughter - SM (as follows):

**‘Representative count**

***Statement of Offence***

**INDECENT ASSAULT:** *Contrary to section 154(1) of the Crimes Act 2009.*

***Particulars of Offence***

***TIMOCI VUKI DAWAI on between the 1<sup>st</sup> day of January, 2008, and the 31<sup>st</sup> day of December, 2008 at Nadi in the Western Division, unlawfully and indecently assaulted “SM” by touching her breast and her vagina.***

- [3] The High Court judge on 20 September 2020 sentenced him to an aggregate period of 18 years imprisonment (effective period being 16 years, 05 months and 25 days after the remand period being discounted) with a non-parole period of 15 years.
- [4] The appellant’s appeal against conviction and sentence is timely.
- [5] 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. For a timely appeal, the test for leave to appeal against conviction is ‘reasonable prospect of success’ [see **Caucu v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[7] The trial judge had summarized the facts in the sentencing order as follows:

2. *The first victim “SM” in the year 2008 was 11 years of age and a class 6 student the accused is her biological father and she is the eldest of the 7 siblings. In 2008 her father had forceful sexual intercourse with her on two occasions.*
3. *In respect of the first incident the accused called the victim from his bedroom, when she went inside the accused started touching her and then he removed her clothes. When she was lying on the bed, the accused went on top of her and forcefully penetrated her vagina with his penis. This incident happened during the daytime.*
4. *In respect of the second incident it was night time the victim was sleeping in the sitting room with her siblings when the accused woke her and told her to sleep in the corner.*
5. *In the corner the accused started touching her she tried to push the hand of the accused away but he was forceful. Thereafter, the accused removed her clothes and forcefully penetrated her vagina with his penis and had sexual intercourse with her. On both occasions the victim did not consent to have sexual intercourse with the accused and also during these incidents the victim’s mother was not at home.*
6. *The second victim “AD” informed the court that in March 2019, she had knocked off from work at about 11pm when she reached town she met her father, the accused. While walking the accused put his right hand around her shoulder when they reached the front door of the house, she felt the accused right hand around her shoulder touching her breast and his left hand touching her stomach. This complainant was 19 years at the time.*
7. *At this time the accused started kissing her neck she was so scared that she forgot the house door was locked from the outside that she started banging the door. The next day the victim went to town with her elder sister “SM” and she told her sister about what the accused had done to her the previous night.*

8. *The incidents were reported to the police, the accused was arrested, caution interviewed and charged.*

[8] According to the sentencing order, the brief admitted summary facts relating to the representative count of indecent assault on SM is as follows:

[10] *Between the 1<sup>st</sup> day of January, 2008, and the 31<sup>st</sup> day of December, 2008 at night the victim 'SM' would sleep in the sitting room with her other siblings. On numerous occasions the accused would come and lie next to her and touch her breast and slowly put his hand inside her panty and touch vagina. On all these occasions the victim's mother was not at home.*

[9] The grounds of appeal urged by the appellant are as follows:

**'Conviction**

**Grounds of Appeal**

- 1.1 **THAT** *the Learned Trial Judge erred in law when his Lordship misdirected himself with records to the burden of proof causing a miscarriage of justice.*
- 1.2 **THAT** *the Learned Trial Judge erred in law when his worship did not direct the assessors hold to assess the inconsistent statement of the complainant/victim a miscarriage of justice.*
- 1.3 **THAT** *the Learned Trial Judge erred when he stated at [Para 16] of the judgment paper that the first complainant on her own freewill had visited the accused at the cell block and the remand centre and had wanted to withdraw her complainant because nothing had happened. This implying that the burden was on the defence when in fact it was the prosecution who had the burden of proving their case beyond reasonable doubt.*
- 1.4 **THAT** *the Learned Trial Judge erred in law and fact that when he accepted the evidence of the complaint as credible when in fact her evidence was vague thus creating doubt to her credibility. He only rely on assumption without proof.*
- 1.5 **THAT** *the Learned Trial Judge erred in law and fact when he rejected the defence of denial as untenable and implausible considering the totality of the evidence.*
- 1.6 **THAT** *the Learned Trial Judge erred in law and fact when his verdict was perverse that the accused was guilty on the charge of indecent assault and rape.*
- 1.7 **THAT** *the lack of medical evidence: unfortunately in his latest submissions, while the humble appellant makes minimal submissions to earlier (above)*

*responded to grounds such as alleged inconsistent statements, late reporting, trial directions, he raises another new ground about the lack of SM's medical report being adduced in trial. It is respectfully submitted that firstly no medical report was required given the context of historical offending while it is clear that prosecution's case had no relevance for any such medical report. It is patently clear that the matter was reported to the Police in March 2019 so a medical report, per medical science, would not have had any relevance for the defence either. Certainly this ground is unarguable.*

### **Sentence**

### **Grounds of Appeal**

1. **THAT** *the sentence is harsh and excessive in the circumstance of the case.* '

### **Grounds 1.1 & 1.3**

- [10] This complaint is without merit. The trial judge had correctly referred to the burden of proof at paragraphs 08 and 09 of the summing-up although at paragraph 25 of the judgment the trial judge has said that "*the defense has not been able to create a reasonable doubt in the prosecution case*" which is being challenged by the appellant.
- [11] One of the key directions given to assessors in criminal trials in Fiji is to remind them of the accused's right to be presumed innocent of the charge, and only to be convicted if they have been persuaded of his guilt "beyond a reasonable doubt". However, uncertainty often arises as to how high the threshold of a 'reasonable doubt' exists. **In our system, the prosecution is not required to prove the guilt of the accused "beyond any possible doubt"**. Raising the standard of proof to that level would make it nearly impossible to secure a conviction, and would prevent society from being able to police criminal behaviour. On the other hand, if the standard of proof is insufficient, false punishments would be unavoidable, thereby contradicting the very values of the rule of law. According to the High Court's decision in **Green v R** [1971] HCA 55; (1971) 126 CLR 28 (16 November 1971) "*A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances.*"

[12] Similarly, there have been repeated warnings against departing from the time-honored formula of ‘reasonable doubt’ invented by common-law judges by paraphrase and embellishment to explain to juries what is meant by satisfaction beyond reasonable doubt, for it is used by ordinary people and is understood well enough by the average man in the community (see *Green*; *Dawson v. The Queen* [1961] HCA 74; (1961) 106 CLR 1, at p 18; *Thomas v. The Queen* [1960] HCA 2; (1960) 102 CLR 584 at [31]; *Brown v. The King* [1913] HCA 70; (1913) 17 CLR 570 at [584]).

[13] While by itself it has not led to a miscarriage of justice, it is desirable that trial judges avoid the statement "*the defense has not been able to create a reasonable doubt in the prosecution case*". This can be clarified for precision with the following points:

1. **Burden of Proof:** *In criminal trials, the burden of proof is on the prosecution to prove the defendant's guilt beyond a reasonable doubt. The defense's role is to challenge the prosecution's case and create reasonable doubt.*
2. **Reasonable Doubt:** *Reasonable doubt is the standard of proof required for acquittal. If the defense creates reasonable doubt about the defendant's guilt, the jury or judge should acquit.*
3. **Statement Interpretation:** *The statement suggests that the defense's efforts to challenge the prosecution's case have been insufficient to instill doubt about the defendant's guilt in the minds of the jury or judge.*

[14] The defense does not need to prove the accused’s innocence. Instead, the defense aims to show that the prosecution has not met its burden of proof. By presenting evidence, cross-examining witnesses, and pointing out inconsistencies or gaps in the prosecution's case, the defense works to raise reasonable doubt. For clarity and precision, the impugned statement could be rephrased as: "*The defense has not succeeded in raising a reasonable doubt regarding the prosecution's case.*" The improved statement avoids potential misinterpretation by clearly stating that the defense has attempted but failed to raise doubt about the prosecution's case, which implies that the prosecution's evidence remains convincing beyond a reasonable doubt. The improved statement, "*The defense has not succeeded in raising a reasonable doubt regarding the prosecution's case,*" more accurately describes the defence’s role and the concept of reasonable doubt. It emphasizes that the defence’s efforts to challenge the prosecution's evidence were not sufficient to prevent a conviction, aligning closely with legal principles and ensuring clear communication. Precision in

legal language is crucial because it ensures that the roles and responsibilities of the prosecution and defence are clearly understood.

- [15] The trial judge had accepted SM's explanation for visiting the appellant wanting to withdraw her complaint at paragraph 22 of the judgment. I see no issue there at all.

*'Furthermore, I reject the defence suggestion that nothing had happened because this complainant had intended to withdraw her complaint against the accused. In effect, it was the compelling circumstances of the complainant that had led her to inform the accused about the withdrawal of her complaint. She was looking after her younger siblings without any parental support since her mother was in Australia and the accused was in remand. I accept that this was the only reason why this complainant had wanted to withdraw her complaint.'*

### **Ground 1.2**

- [16] The trial judge had directed correctly the assessors as to how they should evaluate inconsistencies at paragraph 52 of the summing-up although there have been no such contradictions, discrepancies, inconsistencies or omissions highlighted by the appellant. The appellate court cannot and should not be expected to go on a voyage of discovery to find out what purported errors on the part of the trial judge have given rise to an appellant's grounds of appeal or the factual or legal foundations thereof (see [19] of **Pal v State** [2020] FJCA 179; AAU145.2019 (24 September 2020)). The 'scatter gun' approach in drafting the grounds of appeal and not substantiated those with sufficient details and particulars at least by way of written submissions would not help the appellant.

### **Ground 1.4**

- [17] SM and AD have been direct and forthright in their testimonies which needed no corroboration to be accepted as credible and the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration (see section 129 of the Criminal Procedure Act). Neither the assessors nor the trial judge had seen any vagueness in their evidence. On the other hand, the trial judge had rejected the appellant's stance in his cross-examination of SM and AD (he remained silent at the trial) that they were fabricating allegations of sexual abuse when nothing

of that sort ever happened. Judicial observations made in **Pal** are equally applicable here as well.

### **Ground 1.5**

- [18] The trial judge had fully ventilated the defense case in the summing-up and the judgment including SM's visit to the prison wanting to withdraw the complaint, delay in reporting. Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

*'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

### **Ground 1.6**

- [19] The concept of a perverse verdict is one that pervades the Criminal justice system of nearly all common law jurisdictions. A perverse decision or finding is an unreliable and unacceptable finding because it is wrong and completely outside the evidence before the trial Court.
- [20] Lord Hobhouse of Woodborough said in **Regina v. Connor and another** (Appellants) (On Appeal from the Court of Appeal (Criminal Division)) **Regina v. Mirza** (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (Conjoined Appeals) [2004] UKHL 2 on miscarriage of justice *vis-à-vis* perverse verdicts said as follows:

*'131. The next point it is necessary to make at the outset is that it is fundamentally wrong to use the phrase 'miscarriage of justice' selectively as if it only*



*related to perverse convictions. This presents a false picture. Most miscarriages, including those referred to be my noble and learned friend Lord Steyn, occur because of some corruption of the evidence used by the prosecution to prove guilt. Such corruptions may take many forms, eg non-disclosure of evidence or information favourable to the defence, undetected lies, undiscovered witnesses, partial or incompetent expert evidence. None of these involve any failure of the jury system: the verdict returned was in accordance with the evidence adduced at the trial. This leads on to the other reason why it presents a false picture: a perverse verdict of not guilty, whatever the reason for it, is also a miscarriage of justice. The criminal justice system has failed to convict a person whose guilt has been proved.'*

- [21] I do not see any of the characteristics described by Lord Hobhouse of Woodborough in this case for the verdict to be treated miscarriages of justice let alone them being perverse. It is well-founded on overwhelming evidence.

**Ground 1.7**

- [22] There was no practical purpose at all in producing a medical report for SM as 11 years had lapsed from the acts of rape committed by the appellant. Such a report would not have helped the defense either.
- [23] The correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way 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. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021)].

- [24] At the same time, the Court of Appeal should make an independent assessment of the evidence before affirming the verdict of the High Court [see **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012)]. However, the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].
- [25] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carry out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)).
- [26] Having considered the summing-up and the judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence. On the totality of evidence before them, it was open to the assessors and the trial judge to have reasonably convicted the appellant.

**Ground 18 (sentence)**

- [27] The trial judge had taken 13 years as the starting point and added 06 years for aggravating factors *i.e.* breach of trust, planning, age difference, exposing a child to sexual abuse and victim impact statement. In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court said that the tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20<sup>th</sup> August 2014) should now be between 11-20 years.

- [28] The only issue that I can see, as highlighted by the State, is whether there had been some degree of double counting because where established, such double-counting amounts to a legal error since “*factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances, and vice versa*” and facts could only be taken into consideration once – either as factors relevant to the gravity of the crime or as aggravating circumstance [see **Tiko v State** [2024] FJCA 95; AAU093.2020 (30 May 2024) at [15)].
- [29] Firstly, the trial judge claims to have taken 13 years as the starting point due to objective seriousness without mentioning the facts which make up of the elements of such objective seriousness. The doubtful aspect here is whether the trial judge even unwittingly considered ‘exposing a child to sexual abuse’ in taking the starting point at 13 years instead of 11 years and used it as an aggravating factor as well. If so, there is double counting. Secondly, exposing a child to sexual abuse is common to every sexual abuse case on children or juveniles and therefore has to be considered as subsumed in the enhanced tariff of 11-20 years. Thus, when ‘exposing a child to sexual abuse’ is again counted as part of aggravation which *inter alia* led to an increase of the punishment by 06 years, there is double counting. The lower end of the tariff for the rape of children and juveniles is long and they reflect the gravity of these offences and it also means that the many things which make these crimes so serious have already been built into the tariff (see **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) and **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)].
- [30] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered and even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (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 lies within the


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

- [31] Although, the final sentence still within the tariff of 11-20, it is for the Full Court to decide whether due to possible double counting, they should revisit the sentence and resentence the appellant. The test for double counting based on same factors being considered twice in the sentencing process is “*even when properly taken into account only once, do such facts still warrant a sentence comparable to that imposed by the trial judge*” (see ***Tiko***). As whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge, the Full Court may consider that in this case undoubtedly subjective seriousness is very high in the appellant’s offending due to the victims being his biological daughters which, however is not among the aggravating factors set out by the judge but deserves a separate increase to the starting point.

**Orders of the Court:**

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.



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

**Solicitors:**

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