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

CRIMINAL APPEAL NO. AAU 077 of 2016
[In the High Court at Lautoka Case No. HAC 196 of 2013]

BETWEEN	**:**	**SERUVI RALIVANAWA**
		Appellant
AND	**:**	**STATE**
		Respondent

Coram	**:**	**Gamalath, JA**
	:	**Prematilaka, JA**
	:	**Dayaratne, JA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant**
	:	**Ms. J. Prasad for the Respondent**
Date of Hearing	**:**	**02 May 2022**
Date of Judgment	**:**	**26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have read in draft the judgment of Prematilaka, JA and I am in agreement with its reasoning and the conclusions.

Prematilaka, JA

[2] The appellant had been granted enlargement of time to appeal against sentence but the single judge refused leave to appeal against conviction entered by the High Court against him on a single count of rape under section 207 (1) and 207 (2)(a) of the Crimes Act, 2009

alleged to have been committed at Lautoka in the Western Division for having had carnal knowledge of KD (name withheld) without her consent.

[3] At the end of the summing-up, the majority of assessors had opined that the appellant was not guilty of rape; one assessor had held otherwise. The learned trial judge had disagreed with the majority opinion, convicted the appellant of the charge of rape and sentenced him on 13 June 2016 to 10 years and 10 months of imprisonment with a non-parole period of 08 years.

[4] At the hearing before the full court the counsel for the appellant stated that he was renewing the conviction appeal on the same grounds urged before the single judge and that the Legal Aid Commission (LAC) had in deed filed an application to renew the appeal against conviction. However, no such renewal application was available in the certified appeal records provided to the Bench. The appellant's counsel too did not have a copy of the renewal notice; neither did the state counsel. Nevertheless, the Legal Aid Commission appears to have indicated to the Court of Appeal Registry in writing on 22 July 2020 that it had filed a Notice of Renewal Application on conviction appeal. Upon a perusal of the case file maintained by the Registry, it was found that the counsel for the LAC had informed the single judge on 07 October 2021 that the appellant would proceed both against conviction and sentence before the full court and the respondent had been directed to file its written submissions on the conviction appeal by 11 November 2021. However, the state counsel informed court that no renewal application on conviction was ever served on the State and as a result the respondent had tendered written submissions only on the sentence appeal. The LAC had informed court that it would rely on written submissions filed at the leave stage and those submissions have dealt with both conviction and sentence. Nevertheless, there was still a doubt as to whether the appellant or his counsel had in fact renewed the conviction appeal and if not, it could not have been prosecuted before the full court.

[5] However, having considered the above circumstances and given the benefit of doubt to the appellant on the issue as to whether his counsel had renewed the appeal against conviction or not and also in all fairness to him and in the interest of justice, the court decided to permit

the appellant's counsel to be heard on the conviction appeal on the same grounds of appeal canvassed at the leave to appeal stage and directed the respondent's counsel to tender written submissions accordingly. The State has tendered its submissions on the conviction appeal on 06 May 2022.

[6] The grounds of appeal urged before this court are as follows.

Conviction

"That the conviction was unreasonable and cannot be supported having regard to the evidence at trial, in particular, to the following:

(a) Failure of the complainant to make a prompt complaint was necessarily consistent with consensual sexual intercourse; and

(b) appellant's knowledge of complainant's pregnancy before anyone else disproved the reasonable belief that complainant did suffer trauma and subtle fear psychoses thus preventing her from complaining in the ensuring (sic) months; and

(c) contradictory stances taken by Defence Counsel and the appellant regarding the first sexual encounter was not necessary an indication that appellant's conduct and demeanour were not consistent with his honesty."

Sentence

1. THE Learned Trial Judge erred in law and fact in failing to give proper consideration to the Appellant's first offender status and the principles of sentencing under the Sentencing and Penalties Act 2009.

2. THE Learned Trial Judge unfairly adjudged at Clause 20 of the Appellant's sentence that Appellant not showing genuine remorse by not admitting the offence was an aggravating feature of the offending.

3. THE Learned Trial Judge erred in fact and law at Clause 19 of the Appellant's sentence that Appellant's offending left a scar and trauma for the rest of her life was an aggravating feature of the offending when evidence showed that Appellant and Complainant interacted with each other before and after the birth of the child.

A brief summary of evidence

[7] In June 2013, KD, then 17 years old and a Form 05 student, was living with her parents and siblings. In one night she was at home sleeping with her 12-year-old small sister. She heard the appellant calling her and saying that her mother was at his place and she was calling her. KD had then opened the door. When she came outside she had got scared of him and tried to scream. However, the appellant had blocked her mouth with his hand and taken her beside the house. He had told her that he wanted to have sexual intercourse with her. Her attempt to escape had not succeeded. He had sat on her thighs and undressed her. The appellant had then tried to insert his penis into her vagina but she had resisted. He had kept on doing it and finally managed to insert his penis into her vagina. She had felt unconscious. When she regained consciousness the appellant had still been there. Blood had come out of her. He had told her to go back and sleep. She had felt tired in the end.

[8] KD had not informed the incident to anyone because she was scared that she would get beaten by the family members which her mother (PW2) had confirmed in her evidence. The appellant used to call KD 'mother' because his father was KD's cousin. The incident came to light after 04 months when her mother found her to be pregnant, who had then reported the matter to the police. Upon being questioned, KD had told her mother what the appellant did to her and that the appellant was the father of the baby. However, she claimed to have had no intimate relationship with the appellant before the incident. Under cross-examination, KD had admitted to have noticed the appellant in the village prior to the incident and even attended church devotions at his house. Admittedly, both families were also attending the same church. Nevertheless, she had denied that she was in a romantic relationship with the appellant prior to the incident. She, however, had admitted that she told the appellant of her pregnancy before she disclosed it to her mother. KD had later given birth to a male child and at the time the baby was born the appellant had supported KD by giving food and money but not continued with the same thereafter.

[9] The appellant on his part had taken up the position in his evidence that KD was his girlfriend despite calling her 'mother' and admitted that on the day in question he visited her house and called her out. After she came out both of them had gone near a breadfruit tree outside

the house and started talking about their relationship. After a while, they started kissing each other and when he asked KD whether they could have sex, the complainant had agreed. Then, he placed his sulu on the ground and they had sex. According to the appellant, for the first time they had engaged in sexual intercourse on the beach in January 2013. However, the suggestion put to KD in cross-examination was that the first-time sex took place in a vacant house near her house. The appellant had further said that KD had told him that she was pregnant before she had disclosed that to her mother. All in all, his position in cross-examination of KD and in his own evidence was that he had consensual sexual intercourse with KD on the day in question.

Grounds of appeal against conviction.

Verdict is unreasonable or cannot be supported having regard to the evidence.

[10] The trial judge while disagreeing with the view taken by the majority of assessors on facts had in his judgment found the appellant guilty based on the same facts of the case. The appellant invites this court to take a view different to that of the trial judge on the same facts.

Principles of law applicable.

[11] The House of Lords in **Watt v Thomas** [1947] AC 484 laid down the principles on which an appellate court should act when the appeal is against the findings of fact by the trial judge. The Lords held that when a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

[12] Lord Thankerton said:

> *'(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (II) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...'*

[13] Lord Macmillan added:

> *. . And: 'So far as the case stands on paper it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of profound importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone plainly wrong.*
>
> *. .If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge.' (emphasis added)*

[14] Viscount Simon opined:

> *'.....An appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the*

truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given'.

'....It not infrequently happens that a preference for A.'s evidence over the contrasted evidence of B. is due to inferences from other conclusions reached in the judge's mind, rather than from an unfavorable view of B.'s veracity as such: in such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the material admit of this; and if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B.'s evidence was due to the error, it will be justified in taking a different view of the value of B.'s evidence. I would only add that the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration....' (emphasis added)

[15] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere but based its decision on the reading of the whole record.

[16] However, one might be tempted to point out that the assessors in this case also had the same advantage of having seen and heard the witnesses in the same way the judge did and therefore, their view or inference of fact was entitled to be treated on par with that of the trial judge. This argument is misconceived. The assessors were not the ultimate finders of fact in Fiji (in any event with effect from 12 February 2021 assessors play no role in criminal proceedings after the promulgation of Criminal Procedure (Amendment) Act 2021] but, as it is now, the trial judge was the sole judge of fact and law. The assessors' opinion was not binding on the trial judge and they were there only to assist the trial judge and the decision to convict or acquit an accused was always the prerogative of the trial judge [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and

Rokopeta v State [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)]. Thus, it is the trial judge's view or inference of fact that ultimately matters.

[17] Therefore, the above principles laid down by the House of Lords in **Watt v Thomas** (supra) could be suitably adopted in Fiji to deal with a situation where the trial judge has overturned the assessors' opinion and made a contrary finding of fact, as in that event it is similar to a situation where the trial is held by the judge without assessors.

[18] On the other hand, the High Court of Australia in **Weiss v The Queen** [2005] HCA 81 dealing with a provision of law similar to section 23(1)(a) read with the proviso of the Court of Appeal Act in Fiji, held that an appellate court must review the whole of the record of the trial, make its own independent assessment of the evidence and determine whether, making due allowance for natural limitations that exist in the case of an appellate court proceedings wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty.

[19] Though criminal trials in the High Court in Fiji were before the assessors with a trial judge being the final arbiter on facts and not the assessors, more or less the same test appears to have been adopted. In **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) where the trial judge had agreed with the assessors' guilty opinion, Justice Marsoof speaking on behalf of the Supreme Court of Fiji said *'On the contrary, it is my considered opinion that upon the whole of the evidence in this case, it was not open for a judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of murder.'*.

[20] The Supreme Court has reminded that in every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons though an appellate court will be greatly assisted if a written judgment setting out

the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered, but he must give his reasons for disagreeing with the assessors [vide **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015)].

[21] The reasons must be cogent meaning that they should be founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7*;* CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** (supra); CAV21.2015 (10 December 2015) and **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019)].

[22] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events [**Lautabui v State** (supra)]

[23] The Supreme Court has also held that in independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and that the function of the Court of Appeal or even the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature [vide **Ram v State** (supra), **Chandra v State** (supra) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)].

[24] Therefore, I would now proceed to consider the judgment and then assess the evidence presented at the trial and I have already outlined the gist of the respective cases advanced by the prosecution and defense. I will also refer to salient points of contention keeping in

mind that the only issue in dispute was whether the sexual intercourse was without consent as contended by the prosecution or whether it was consensual as alleged by the defense.

[25] The appellant primarily takes up two maters as proof of the fact that the sexual intercourse admitted by both parties was consensual namely that the failure on the part of KD to make a prompt complaint and that KD had informed the appellant of her pregnancy before she disclosed it to her mother showing that she had no fear or mental trauma that prevented her from making an early complaint. These two planks form part of the ground of appeal against conviction.

[26] The trial judge had correctly identified at paragraph 07 of his judgment the only issue to be resolved was whether sexual intercourse had taken place without KD's consent. He had then referred to the failure on the part of KD to make a prompt complaint and KD's explanation at paragraphs 09-11. The trial judge had then turned his attention to the second point of KD having informed her pregnancy first to the appellant at paragraph 12.

[27] The trial judge's findings on both contentions are at paragraphs 14 -16 of the judgment and I take the liberty to quote them in verbatim.

> *'[14] Time has now come for me to explain my finding on that point. Complainant was seventeen years old when the alleged incident occurred. Accused knew her since she was a young girl. They grew in the same Kese village and attended church together. Both complainant and accused maintained that they are closely related to each other despite repeated cross examination on the basis that their familial relationship was not that close. In that context, it would have been a hard decision for her to implicate the accused who was destined to father the child she was carrying in her womb.*
>
> *[15] An another possibility can be described like this. Complainant had informed him about her pregnancy when she was three months pregnant. Circumstances or reason that prompted her to inform the accused did not come to light in evidence. Whatever may be the reason, she would have known that, with the growth of the fetus, keeping the secret of her pregnancy under the carpet was not possible for too long. Despite that knowledge she continued to suppress her pregnancy from her mother. Why? It is not impossible for one to believe that her fear was based not only on possible reaction from her family but also on the accused's ineffable hidden influence. In light of the direction I gave with regard to late complaints by rape*

victims, her explanation and her conduct are reasonable and probable in all the circumstances of this case.

[28] The judgment at paragraph 16 also deals with defense contentions that the appellant had supplied KD with food and money following the child birth and her lack of physical resistance as showing that sexual intercourse was consensual.

> *[16] Accused had provided money and food to raise the child even after a serious allegation against him had been made. His conduct cannot be described as a genuine reconciliation effort. Courts view this type of interference with skepticism when a serious charge is hanging over the accused's head. Accused himself admitted that he knew she was still schooling and what he was doing was wrong. Accused's conduct is consistent with his guilty mind. Complainant and her family could have easily accepted his apology, money and food and given up the fight for justice in court if she had been complicit in the wrong. They did not do so. They decided to bring their close relative to book. Complainant's conduct is consistent with her honesty.'*
>
> *[17] During the course of cross examination, it was suggested to the Complainant that she could have struggled, shouted or otherwise objected to what the accused was doing. In his closing argument Defence Counsel contended that her 'no reaction' was consistent with her consent. According to her version, he had tied her with his hands. When she tried to scream he blocked her mouth. She tried to escape but could not. When he tried to insert his penis into her vagina she pushed him. She became unconscious with 'no reaction'. Obviously, she can't be expected to react after she became unconscious. Her conduct amply demonstrates her dissent to sexual intercourse.*

[29] What made the trial judge not believe the defense version is explained at paragraphs 19-22.

> *'[19] Version of the defence is unacceptable and unbelievable. Although the Defence had nothing to prove in this case, it failed to create any doubt in the prosecution case.*
>
> *[20] According to the accused, they had been in a girlfriend-boyfriend relationship for some time. This is not the first time they had exchanged their love in this manner. She readily consented to kissing and sexual intercourse.*
>
> *[21] For this, they had gone outside the house, near a breadfruit tree in the night. It was not a comfortable and proper place for her to lie down. That is why he took off his sulu and spread it on the ground for her to lie down. I can't understand why they would want to go to that place when no one was home except her younger*

sister who was at sleep. They could have behaved as they wished inside the house if she had consented.

[22] According to him, it was not the first time she had consented to sexual intercourse with him. First such experience was in the beach during day time. His evidence is not consistent with the stance taken by his Counsel when he subjected the Complainant to cross examination. His Counsel cross examined her on the basis that her first encounter was in a nearby vacant house, not in the beach. Version of the Defence is not consistent.

[30] The trial judge's finding on the demeanor of KD and the appellant is follows.

'[18] I watched Complainant giving evidence in court. Her conduct and demeanor in court are consistent with her honesty.

[23] I watched accused giving evidence in court. His conduct and demeanor were not consistent with his honesty.

[31] No serious complaint could be made in the manner in which the trial judge had analyzed the evidence and of his conclusions. I concur both with his assessment and conclusion of the main issue in the case namely 'consent'. Having evaluated the totality of evidence myself, I cannot come to a different finding from that of the trial judge even without having the benefit of having seen and heard the witnesses. I shall now proceed to deal with a few other matters raised by the appellant's counsel before this court.

[32] At the hearing the appellant's counsel also submitted that the fact that KD voluntarily opened the door having heard the appellant calling her and closed the door from outside once she came out demonstrates her consent to go out with him. KD's recognition of the appellant's voice should not come as a surprise in as much as her family and the appellant's family were attending the same church and she had attended church devotions at his house before. She made no attempt to deny any of them. Further, for the appellant to have called KD 'mother' due to his father being her uncle, there obviously must have been sufficient acquaintance between the two. Nothing significant could be deduced from closing the door from outside. It may well have been a habitual thing on her part or it may have been for reasons of safety because her own sister was still sleeping inside the house and the mother was not at home. These are also trial issues that should have been canvassed at the trial stage.

[33] Although the appellant has submitted that the contradiction as to where the alleged first-time sex took place may have played a decisive part in the mind of the judge to have disbelieved him, I do not find any reference to that effect in the judgment. Nevertheless, it is of some significance as far as his credibility goes that what was suggested to KD was that it happened in a vacant house near her house whereas the appellant's evidence was that it occurred on the beach. However, KD had denied having had any sex with the appellant anywhere before.

[34] Thus, having independently assessed the evidence in the case, I do not see any compelling reason to disagree or take a view of facts different to that of the trial judge who had the advantage of seeing and hearing the witnesses. Even if the trial judge's findings on the credibility based on the demeanor of KD and the appellant are disregarded, there is ample evidence to uphold the conviction. The Court of Appeal quoting from **Ram v State** (supra) stated in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) that when a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him. In this case the answer to that question is in the affirmative. No grounds identified in **Watt v Thomas** (supra) exist for this court to reverse the trial judge's finding of fact and he has committed no error of law. Therefore, I am satisfied that the ultimate verdict is supported by the evidence and it is not unreasonable.

Sentence appeal

[35] When a sentence is challenged in appeal the guidelines are whether the trial judge (i) acted upon a wrong principle (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts (iv) failed to take into account some relevant consideration [vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011].

[36] The appellant grievance is that the trial judge had not adequately considered his first offender status, erred in treating lack of remorse as an aggravating factor and not considered that KD and the appellant had interacted with each other after the birth of the child. The impugned paragraphs in the sentencing order are as follows.

> *'[19]. Victim lost he r virginity and became pregnant at a young age. Offending left a scar and trauma for the rest of her life.*
>
> *[20]. Mr. Seruvi did not show genuine remorse by not admitting the offence. He did not save the complainant from giving evidence of sexual nature which would have been a distasteful experience for her.'*

[37] The trial judge had indeed considered the appellant as a first offender for mitigation and given a discount of 03 years for three mitigating factors including his first offender status. In the light of 11 years imprisonment as the starting point, 03 years for mitigation cannot be criticized. It must be borne in mind that when the appellant was sentenced, tariff for child rape had been set between 10-16 years of imprisonment [vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] which was subsequently enhanced and fixed between 11 to 20 years in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[38] The judge was right in treating the fact that the offending had caused trauma and left a scar for the rest of KD's life. There is no evidence that the appellant had continued to look after KD and his child except providing food and money just after the child birth. Thus, no allowance needed to be given for any subsequent interaction between KD and the appellant.

[39] Obviously, an accused cannot be punished or given an enhanced punishment for not having admitted the offence. It is an accused's right to defend himself or herself against criminal charges as guaranteed by the Constitution. The Supreme Court in **Raj v State** (supra) expressed its view as to what conduct on the part of an appellant cannot amount to mitigation.

> *'[61] However the suggestion that he was remorseful could count for nothing. He had pleaded not guilty, which was his right. But in doing so, he had put the complainant through the misery, fear, and embarrassment of having to give evidence and be cross-examined. Then he gave no evidence. Such a combination has been considered to*

amount to no mitigation at all: ***Asesela Drotini v. The State*** *Crim. App. AAU0001/2005S 24th March 2006. She gave evidence in court from behind a screen. Indeed in his appeal, and by his appeal against conviction, he has maintained his innocence. No value can be attached to such remorse.*

[40] Thus, it is clear that the appellant's decision to contest the case and lack of remorse cannot be treated as aggravating factors to enhance the sentence while genuine remorse and an early plea of guilty would always be treated as mitigating factors and attract a discount to the sentence. Therefore, the trial judge had clearly erred in this respect.

[41] However, the matter does not end there. After making adjustments upward for aggravating features and downward for mitigating factors and discounting the remand period, the trial judge had fixed the final sentence at 10 years and 10 months which to me is neither harsh nor excessive given the nature and gravity of the offending. In fact, the ultimate sentence is at the lower end of the tariff of 10-16 years. I shall now proceed to consider whether the sentence should stand notwithstanding the error highlighted above.

[42] The Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) held that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it and 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.

[43] Similar sentiments were echoed in **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) where it was held that in determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by appellate courts 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.

[44] Therefore, the appellate courts in revisiting the propriety of the sentence would not necessarily follow the same process as in the original court but would take a holistic view of the final sentence. In doing so, I see no reason to interfere with the sentence imposed by

the trial judge despite the sentencing error pointed out earlier. In my view, the sentence imposed on the appellant is fully justified.

Dayaratne, JA

[45] I agree with the reasoning and the conclusions of Prematilaka, JA.

Orders

(1) Appellants' appeal against conviction is dismissed.

(2) Appellants' appeal against sentence is dismissed

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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

.....
Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL