

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CRIMINAL APPEAL NO. HAA 15 OF 2025**

**IN THE MATTER** of an Appeal from the Decision of the Magistrate's Court of Lautoka, in Criminal Case No. 19 of 2017.

**BETWEEN** : RAHUL GULAB SINGH

**APPELLANT**

**AND** : THE STATE

**RESPONDENT**

**Counsel** : Mr. Jiten Reddy for the Appellant  
Mr. Laisiasa Baleilevuka for the Respondent

**Date of Hearing** : 24 September 2025

**Judgment** : 6 November 2025

*The name of the Complainant is suppressed. Accordingly, the Complainant will be referred to as "M.H."*

**JUDGMENT**

- [1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Lautoka, in Criminal Case No. 19 of 2017.
- [2] The Appellant was first produced in the Magistrate's Court of Lautoka, on 6 January 2017, charged with one count of Abduction of a Young Person, contrary to Section 285 of the Crimes Act No. 44 of 2009 (Crimes Act); and one count of Indecent Assault,

contrary to Section 212 (1) of the Crimes Act [Vide page 37 of the Magistrate's Court Record]. The full details of the Charge are as follows:

**CHARGE**  
**(COMPLAINT BY A PUBLIC OFFICER)**

**FIRST COUNT**

***Statement of Offence (a)***

**ABDUCTION OF A YOUNG PERSON:** Contrary to Section 285 of the Crimes Act No. 44 of 2009.

***Particulars of Offence (b)***

**RAHUL GULAB SINGH**, on the 15<sup>th</sup> day of September 2015, at Lautoka, in the Western Division, unlawfully took away **M.H.**, a young person under the age of 18 years, out of the possession and against the will of her mother, namely **NAZREEN FARZANA ALI**, who had the lawful care of the said **M.H.**

**SECOND COUNT**

***Statement of Offence (a)***

**INDECENT ASSAULT:** Contrary to Section 212 (1) of the Crimes Act No. 44 of 2009.

***Particulars of Offence (b)***

**RAHUL GULAB SINGH**, on the 15<sup>th</sup> day of September 2015, at Lautoka, in the Western Division, unlawfully and indecently assaulted **M.H.**, by sucking her breast.

- [3] On 10 April 2017, the Appellant took his plea and pleaded not guilty to the two charges [Vide page 111 of the Magistrate's Court Record].
- [4] It must be mentioned that the date of offending on Count 2 originally read as 15 September 2016. However on 10 March 2023, the prosecution sought the Leave of Court to amend the said charge. The Learned Resident Magistrate had permitted the amendment and the date of offending on Count 2 was amended to read as 15

September 2015. The Amended Charge was read out again to the Appellant and he pleaded not guilty to the same [Vide page 75 of the Magistrate's Court Record].

- [5] On 27 November 2017, the matter was fixed for trial to commence on 16 July 2018. However, on the said day the Appellant was not present in Court and the Counsel from the Legal Aid Commission, who was in carriage of the matter was said to have been engaged in the High Court. As such, the trial was vacated and re-fixed for the 19 July 2018. A bench warrant was issued on the Appellant [Vide page 113 of the Magistrate's Court Record].
- [6] On 19 July 2018, the Appellant was again not present in Court. His Counsel from the Legal Aid Commission made an application to withdraw as counsel due to the lack of instructions from the Appellant. The Learned Resident Magistrate had permitted the application for Counsel from the Legal Aid Commission to withdraw.
- [7] The Learned Resident Magistrate had also recorded that it appears that the Appellant is deliberately absconding from Court to defeat justice. In the circumstances, he had decided to proceed with the trial in the absence of the Appellant (Trial in Absentia) [Vide page 114 of the Magistrate's Court Record].
- [8] Accordingly, on 19 July 2018, the matter was taken up for Trial in Absentia. The testimony of the Complainant, M.H., and her mother, Nazreen Farzana Ali, had been recorded and the case for the prosecution concluded. The matter had been fixed for Judgment on 5 October 2018 and re-fixed for 16 November 2018.
- [9] On 16 November 2018, the Appellant had been present in Court and had filed an application by way of a Notice of Motion together with an Affidavit in Support seeking a Trial De Novo. On the same day, the bench warrant issued against the Appellant had been cancelled [Vide page 115 of the Magistrate's Court Record].
- [10] On 23 November 2018, it is recorded that the Learned Resident Magistrate who had heard the case had been newly appointed as a High Court Judge.
- [11] With effect from 30 November 2018, Mr Jiten Reddy commenced appearing for the Appellant.

- [12] After many adjournments, on 5 August 2019, the Learned Resident Magistrate who took over the matter ruled in favour of the Notice of Motion for Trial De Novo. The Ruling on Trial De Novo is found from pages 189 to 191 of the Magistrate's Court Record.
- [13] After many further adjournments, the Trial De Novo commenced on 10 March 2023. The evidence of the Complainant, M.H., and her mother, Nazreen Farzana Ali, had been recorded once again and the case for the prosecution concluded [Vide pages 39 to 75 of the Magistrate's Court Record].
- [14] At this stage, the defence made an application that the Appellant had No Case to Answer. The Learned Resident Magistrate called for written submissions from both parties in respect of the No Case to Answer application.
- [15] By his Ruling dated 18 August 2023, the Learned Resident Magistrate held that the Appellant had a Case to Answer and called for his defence. The No Case to Answer Ruling is found at pages 167 to 171 of the Magistrate's Court Record.
- [16] With effect from 22 July 2024, the Learned Resident Magistrate Ms. Seini Puamau, began to proceed over the case and all further proceedings in the case were held before her.
- [17] On 5 August 2024, the case for the defence commenced and the Appellant testified on his own behalf [Vide pages 77 to 85 of the Magistrate's Court Record]. At the conclusion of the Appellant's testimony the defence closed its case. Thereafter, the matter was fixed for Judgment.
- [18] On 28 February 2025, the Judgment was pronounced. The Appellant was found not guilty and acquitted of the first count of Abduction of a Young Person. However, he was found guilty and convicted of the second count of Indecent Assault. The Judgment is found from pages 31 to 36 of the Magistrate's Court Record.
- [19] On 4 April 2025, the Appellant had been imposed a sentence of 1 year and 4 months imprisonment, with a non-parole period fixed as 1 year imprisonment. The Sentence is found from pages 5 to 7 of the Magistrate's Court Record.

[20] Aggrieved by the said Order, on 24 April 2025, the Appellant filed a timely appeal in the High Court. The Petition of Appeal filed is in respect of both his conviction and sentence.

[21] This matter was taken up for hearing before me on 24 September 2025. The Learned Counsel for the Appellant and the State Counsel for the Respondent were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[22] As per the Grounds of Appeal filed by the Appellant the Grounds of Appeal are as follows:

**Grounds of Appeal against Conviction**

1. That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant on the charge of Indecent Assault; contrary to Section 212 (1) of the Crimes Act 2009.
2. That the Learned Trial Magistrate erred in law and in fact when she failed to consider the fact that there were different versions of events placed before the Court which created doubts on the prosecution case.
3. That the Learned Trial Magistrate erred in law and in fact when she found the Complainant to be credible when in fact there is no reasoning given how she arrived at that decision as she did not have the privilege to witness the demeanour of the said witness.
4. That the Learned Trial Magistrate erred in law and in fact when she failed to consider the fact that this is a case which was not spontaneously investigated by Police who did not lay charges against the Appellant until the 6<sup>th</sup> of January 2017, which is almost after 16 months of the commission of offence and no reasonable explanation was provided for this.
5. That the Learned Trial Magistrate erred in law and in fact when she failed to consider the fact that the Complainant's version about love bites on her breasts were not in any way supported by a medical report or even some evidence from an independent witness.
6. That the Learned Trial Magistrate erred in law and in fact when she failed to consider the fact that this was a clear case of impossibility and improbability in

view of the fact that there were too many inconsistencies and omissions in the evidence of the Complainant.

7. That the Learned Trial Magistrate erred in law and in fact in not considering the fact that this was a late complaint, and no reasonable explanation was provided for the same.
8. That the Learned Trial Magistrate erred in law and in fact when she failed to consider the fact that the evidence of the prosecution witnesses were mostly not in line with each other and not in line with their Police statements thus there were lot of omissions and contradictions in their evidence.

### **Grounds of Appeal against Sentence**

1. That the sentence is manifestly harsh and excessive and wrong in principles in all circumstances of the case in view of the foregoing grounds:
  - (a) That the Appellant was a 1<sup>st</sup> offender.
  - (b) That the Appellant had a good character generally.
  - (c) That the Appellant was remorseful for his actions.
2. That the Learned Trial Magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances in view of the fact that this case has been hanging over the Appellant's head for almost 10 years.

**[23]** As can be observed there are eight Grounds of Appeal against conviction; and two Grounds of Appeal against sentence.

### **The Law**

**[24]** Section 246 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

*“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.*

*(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.*

*(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.*

*(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.*

*(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.*

*(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.*

*(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."*

[25] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

*"(2) The High Court may —*

*(a) confirm, reverse or vary the decision of the Magistrates Court; or*

*(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*

*(c) order a new trial; or*

*(d) order trial by a court of competent jurisdiction; or*

*(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*

*(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

*(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.”*

### **The Grounds of Appeal against Conviction**

[26] There are eight Grounds of Appeal against conviction. As can be observed, all the said Grounds of Appeal against conviction are in relation to the evidence in the case and to the manner in which the Learned Magistrate has analysed the said evidence. Most Grounds of Appeal against conviction are repetitive. Grounds 2, 6 and 8 of the Grounds of Appeal against conviction are to the effect that the evidence of the prosecution witnesses were mostly not in line with each other and not in line with their Police statements thus there were lot of inconsistencies/contradictions and omissions in their evidence. With regard to Grounds 4 and 7 of the Grounds of Appeal against conviction, they specifically refer to the fact that the complaint made in this matter was a belated one. Therefore, it is my opinion that all the said Grounds of Appeal against conviction are inter related and could be discussed together.

[27] The Learned Magistrate’s Judgment is found at pages 31 to 36 of the Magistrate’s Court Record. She has duly identified the elements of the two charges - Abduction of a Young Person, contrary to Section 285 of the Crimes Act; and Indecent Assault, contrary to Section 212 (1) of the Crimes Act.

[28] Thereafter, she has gone on to summarize the evidence of the two prosecution witnesses led in the case, namely the Complainant, M.H., and her mother, Nazreen Farzana Ali. She has then analysed the evidence in relation to the elements of the offences. The transcripts of the evidence (proceedings) given by the two prosecution witnesses the Complainant, M.H., and her mother, Nazreen Farzana Ali, are found from pages 39 to 75 of the Magistrate’s Court Record.

- [29] The Complainant in this case was 16 years of age at the time of the offending. As per her Birth Certificate, which was tendered to Court as a prosecution exhibit (Prosecution Exhibit 1), her date of birth is 11 April 1999. At the time she testified in Court (on 10 March 2023), she was 23 years of age.
- [30] The second, sixth and eighth Grounds of Appeal against conviction are to the effect that the evidence of the two prosecution witnesses were not consistent with each other and that there were several contradictions and omissions in their evidence when compared to the statements made by the said witnesses to the Police.
- [31] Going through the transcripts of the proceedings in this matter, I do concede that there were certain contradictions and omissions in the evidence of the Complainant and her mother. The issue is whether the said contradictions and omissions were crucial to the prosecution case or whether they were minor contradictions and omissions for which a reasonable explanation has been provided by the witnesses.
- [32] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions. His Lordship Justice Gamalath held as follows:

*[9] When a court is dealing with the issues arising out of “contradictions”, “omissions”, it is necessary for the Court to carefully examine the impact that such discrepancy could have on the total credibility of evidence of a witness. As decided in the case of Appabhai v. State of Gujarat, AIR 1988, S.C. 694, (1988 Cri.L.J.848) (a decision of the Indian Supreme Court).*

*“The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters, in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.”*

In the case of **Arjun and Others v. State of Rajasthan**, (1994) AIR - SC-2507, it was held that; (A decision of the Indian Supreme Court).

*“A little bit of discrepancies or improvement do not necessarily demolish the testimony. Trivial discrepancies, as is well known, should be ignored. Under circumstantial variety, the usual character of human testimony is substantially true. Similarly, innocuous omissions are inconsequential.”*

[10] More often contradictions and omissions become the main tool used in courts to evaluate the testimonial trustworthiness of a witness's evidence. As defined in the Oxford Dictionary “contradictions” means ‘to offer the contrary’. On the other hand, if a witness has testified in the examination-in-chief on a certain thing which he has omitted to state in his statement to the police, it is called “omission”. If the said omission is on minor points, it is not contradiction and court will not take cognizance of those omissions. Court will take cognizance of those omissions which are on material points and they are called “contradictions by way of omissions”. In order to prove the omissions, it is necessary to find out as to what the witness has deposed before the court in the examination-in-chief.

[11] Any statement of a witness made to an investigating police officer does not form part of the evidence in trial. Court would not be looking into police statements of witnesses to find out the truth involved in a case. However, if any party to a law suit is depending on ‘contradictions’ or ‘omissions’ to assail the trustworthiness of the evidence of any witness, it is necessary not only to highlight the ‘contradictions’ or ‘omissions’, but also to prove them at trial, so that the court could consider the effect of them according to the criterion laid down in the decided decisions referred above.

[12] Whenever it appears in the proceedings of a trial that the witness's evidence is tainted with certain contradictions and/or omissions, opportunity should be given to such witness to explain the basis for such infirmities. If the explanation is plausible that would have a direct impact on the credibility issue.

[13] In the case of **Sri Cruz Pedro Pacheco v. State of Maharashtra**, 1998 (5) Bom. L.R. 521-1998 Crim.L.J.4628, it was decided that; (an Indian Decision)

*“Credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or unsatisfactory. Then only the Court will be in a position to consider whether or how far the credibility of that witness is affected in that court. It is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself.”*

[33] The third Ground of Appeal against conviction is that the Learned Trial Magistrate erred in law and in fact when she found the Complainant to be credible when in fact there is no reasoning given how she arrived at that decision as she did not have the privilege to witness the demeanour of the said witness.

[34] The Learned Magistrate has acknowledged the fact that the testimony of the Complainant, M.H., and her mother, Nazreen Farzana Ali, were taken before another Resident Magistrate, prior to her presiding over the case. As such, she did not have the benefit of seeing or hearing of the Complainant's testimony or observing her demeanour. However, from an analysis of all the evidence she found the testimony of the Complainant to be convincing and unshaken under cross-examination. She has deemed the Complainant to be a credible witness and accepted her version of the events as true.

[35] Section 139 of the Criminal Procedure Act which deals with *conviction or commitment on evidence partly recorded by one magistrate and partly by another* is reproduced below:

*(1) Subject to sub-sections (1) and (2), whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeeded (whether by virtue of an order of transfer under the provisions of this Decree or otherwise), by another magistrate, the second magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by second magistrate, or the second magistrate may re-summon the witnesses and recommence the proceeding or trial.*

*(2) In any such trial the accused person may, when the second magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned and reheard and shall be informed of such right by the second magistrate when he or she commences the proceedings.*

*(3) The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had, if it is of opinion that the accused has been materially prejudiced, and may order a new trial.*

[36] It is evident from a reading of Section 139 (1) of the Criminal Procedure Act that the said provision permits a Magistrate who is succeeding another Magistrate or taking over the case from another Magistrate to act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by the succeeding

Magistrate. The succeeding Magistrate has the option to re-summon the witnesses and recommence the proceeding or trial (a trial de-novo).

[37] In terms of Section 139 (2) of the Criminal Procedure Act when the succeeding Magistrate commences the proceedings, the Accused has the right to demand that the witnesses or any of them be re-summoned and reheard. The Section also stipulates that the Accused shall be informed of such right by the succeeding Magistrate when he or she commences the proceedings.

[38] Having agreed to the matter to be continued before the Learned Resident Magistrate Ms. Seini Puamau, with effect from 22 July 2024, it is now not justified for the Appellant to raise issue that the Learned Magistrate did not have the opportunity to witness the demeanour of the prosecution witnesses.

[39] The fifth Ground of Appeal against conviction is that the Learned Trial Magistrate erred in law and in fact when she failed to consider the fact that the Complainant's version about love bites on her breasts were not in any way supported by a medical report or even some evidence from an independent witness.

[40] Although the Learned Magistrate has not specifically referred to this fact in her Judgment, in terms of Section 129 of the Criminal Procedure Act, it is stated that no corroboration of the Complainant's evidence is necessary to prove an offence of a sexual nature. Sexual Assault and even Indecent Assault can obviously be considered as offences of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[41] The seventh Ground of Appeal against conviction was that the Learned Magistrate erred in law and in fact in not considering the fact that this was a late complaint, and no reasonable explanation was provided for the same. However, the Learned Magistrate has made reference to the testimony of the Complainant's mother, Nazreen Farzana Ali, who clearly explains the reasons for the delay in reporting the incident to the Police.

- [42] In this regard, the Learned Magistrate has stated as follows: *“She (Nazreen Farzana Ali) testified that her daughter had not gone to school on the 16<sup>th</sup> (of September 2015). Her daughter had mentioned that she had spoken to Mrs. Sujata so she called Mrs. Sujata herself. Mrs. Sujata had wanted her to go over to her place to talk to them first. The witness said that they did not lodge a report then because her daughter said that she still wanted to go to school. [It is worth noting that the Appellant’s wife and sister (Mrs. Sujata) both taught in that school]. However, the witness grew even more concerned when she noticed that her daughter missed school over successive days after that and so she felt that she needed to make a complaint because of the fear her daughter was experiencing.”*
- [43] The fourth Ground of Appeal against conviction was that the Learned Magistrate erred in law and in fact in failing to consider the fact that in this case the Police did not lay charges against the Appellant until 6 January 2017, which was almost 16 months after the commissioning of the offence. I concede that the Learned Magistrate has not made specific reference to this fact. However, this cannot be considered as a crucial fact which would go to the root of the prosecution case. What is more important is the fact that the Learned Magistrate has provided a reasonable explanation as to why the Complainant and her mother had delayed in reporting the matter to the Police. As to the reason the Police delayed in instituting proceedings in this case is another issue, which is beyond the control of any judicial officer.
- [44] Furthermore, the Learned Trial Magistrate has duly summarized the evidence given by the Appellant during the trial and has gone on to reject the Appellant’s version of the events in relation to the charge of Indecent Assault. The transcripts of the evidence (proceedings) given by the Appellant is found from pages 77 to 85 of the Magistrate’s Court Record.
- [45] Accordingly, the Learned Magistrate has found the Appellant not guilty and acquitted him of the first count of Abduction of a Young Person. However, she has found him guilty and convicted him of the second count of Indecent Assault.

[46] The Learned Magistrate has gone on to explain that it is clear from the evidence that the offence of Abduction is not made out. She has stated that offering a neighbour a lift and having that offer accepted does not in itself constitute an act of Abduction.

[47] The Learned Magistrate has further held: *“However, it is equally clear from the evidence that despite her (Complainant’s) rejection of your verbal advances, you had forcefully pulled her towards you and you had kissed her on the neck, you pulled the neckline of her uniform dress down and then you kissed and then sucked her left breast. She found your acts painful and shameful. She had struggled to get away from you but you held her tight.”*

[48] For the aforesaid reasons, I find that the Grounds of Appeal against the conviction are all without merit and should be rejected.

#### **Appeals against Sentence**

[49] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

*“...It is well established law that before this Court can disturb the sentence, the Appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (***House v. The King*** [1936] HCA 40; [1936] 55 CLR 499).”*

[50] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

*“It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in ***House v. The King*** [1936] HCA 40; [1936] 55 CLR 499; and adopted in ***Kim Nam Bae v The State*** Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (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.”*

[51] Therefore, it is well established law that before this Court can interfere with the sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

- (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.

[52] In *Sharma v. State* [2015] FJCA 178; AAU48.2011 (3 December 2015) the Fiji Court of Appeal discussed the approach to be taken by an appellate court when called upon to review the sentence imposed by a lower court. The Court of Appeal held as follows:

*"[39] It is appropriate to comment briefly on the approach to sentencing that has been adopted by sentencing courts in Fiji. The approach is regulated by the Sentencing and Penalties Decree 2009 (the Sentencing Decree). Section 4(2) of that Decree sets out the factors that a court must have regard to when sentencing an offender. The process that has been adopted by the courts is that recommended by the Sentencing Guidelines Council (UK). In England there is a statutory duty to have regard to the guidelines issued by the Council (R –v- Lee Oosthuizen [2006] 1 Cr. App. R.(S.) 73). However no such duty has been imposed on the courts in Fiji under the Sentencing Decree. The present process followed by the courts in Fiji emanated from the decision of this Court in *Naikelekelevesi –v- The State* (AAU 61 of 2007; 27 June 2008). As the Supreme Court noted in *Qurai –v- The State* (CAV 24 of 2014; 20 August 2015) at paragraph 48:*

*"The Sentencing and Penalties Decree does not provide specific guidelines as to what methodology should be adopted by the sentencing court in computing the sentence and subject to the current sentencing practice and terms of any applicable guideline judgment, leaves the sentencing judge with a degree of flexibility as to the sentencing methodology, which might often depend on the complexity or otherwise of every case."*

*[40] In the same decision the Supreme Court at paragraph 49 then briefly described the methodology that is currently used in the courts in Fiji:*

*"In Fiji, the courts by and large adopt a two-tiered process of reasoning where the (court) first considers the objective circumstances of the offence (factors going to the gravity of the crime itself) in order to gauge an appreciation of the seriousness of the offence (tier one) and then considers all the subjective circumstances of the offender (often a bundle of*

*aggravating and mitigating factors relating to the offender rather than the offence) (tier two) before deriving the sentence to be imposed."*

[41] *The Supreme Court then observed in paragraph 51 that:*

*"The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability \_ \_ \_."*

[42] *To a certain extent the two-tiered approach is suggestive of a mechanical process resembling a mathematical exercise involving the application of a formula. However that approach does not fetter the trial judge's sentencing discretion. The approach does no more than provide effective guidance to ensure that in exercising his sentencing discretion the judge considers all the factors that are required to be considered under the various provisions of the Sentencing Decree.*

.....

[45] *In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court 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. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."*

### **The Grounds of Appeal against Sentence**

[53] There are two main Grounds of Appeal against sentence raised by the Appellant.

1. That the sentence is manifestly harsh and excessive and wrong in principles in all circumstances of the case in view of the foregoing grounds: That the Appellant was a 1<sup>st</sup> offender; that the Appellant had a good character generally and that the Appellant was remorseful for his actions.

2. That the Learned Magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances in view of the fact that this case has been hanging over the Appellant's head for almost 10 years.

[54] The Sentence imposed by the Learned Magistrate is found from pages 5 to 7 of the Magistrate's Court Record.

[55] The first Ground of Appeal against sentence is that the sentence is manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

[56] As per Section 212 of the Crimes Act the maximum penalty for the offence of Indecent Assault is 5 years imprisonment. The Learned Magistrate has noted that the tariff for the offence ranges from 12 months to 4 years imprisonment. She has stated that Indecent Assaults on small children, penetrative assaults, the use of gratuitous violence, the use of weapons or other implements, and the length of time over which the assault or assaults were perpetrated are significant aggravating factors.

[57] Accordingly, considering the objective seriousness of the offending in this case, the Learned Magistrate has taken a starting point of 12 months imprisonment. She has duly considered the aggravating factors (Namely that the Appellant had committed this act in breach of the trust of a child 16 years old, that the Appellant's behaviour was predatory and that he took advantage of the Complainant's youth and trust and that he sexually assaulted her for her own personal gratification) and increased the sentence by a further 3 years.

[58] As mitigating factors the Learned Magistrate has considered the personal circumstances of the Appellant including the fact that his left eye is damaged and that he is 90% blind in that eye and will need surgery soon. She has also considered the fact that the Appellant was a first offender and that he was remorseful for his actions. She has also considered in mitigation the delay in bringing the case to its conclusion since 2017. For all the aforesaid mitigating factors, the Learned Magistrate has given a discount of 2 years and 6 months. Accordingly, she has arrived at a sentence of 1 year and 6 months imprisonment.

[59] The Learned Magistrate had reduced the above sentence by a further 2 months for the time the Appellant had spent in remand custody and arrived at a final sentence of 1 year and 4 months imprisonment.

[60] In the circumstances, it cannot be said that the sentence imposed by the Learned Magistrate was manifestly harsh and excessive and wrong in principal. Therefore, I find the said Ground of Appeal against sentence without merit.

[61] The second Ground of Appeal against sentence is that the Learned Magistrate erred in law in imposing an immediate custodial sentence when a suspended sentence would have been more appropriate in all the circumstances of the case.

[62] Section 26 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

*(a) does not exceed 3 years in the case of the High Court; or*

*(b) does not exceed 2 years in the case of the Magistrate's Court.*

[63] From a reading of the above Section it is manifest that imposing a suspended sentence is purely at the discretion of the sentencing Court. If Court is satisfied that it is appropriate to do so in the circumstances, the Court can suspend the whole of the sentence or part of the sentence.

[64] The Learned Magistrate in deciding whether to suspend the sentence against the Appellant or not has duly considered the above provisions. In her Sentence the Learned Magistrate states as follows: *"I now pause to consider whether I should suspend your sentence. I see no special circumstance warranting that measure. The crime you are charged with is objectively serious and your level of culpability very high. Moreover,*

*there is significant public interest in protecting our children from the predations of adults like you. In my view, specific and general deterrence are the pre-eminent considerations here. I decline to suspend your sentence."*

[65] As stated previously, the fact that this case has been hanging over the Appellant's head for almost 10 years has already been considered by the Learned Magistrate as a mitigating factor. Therefore, there was no necessity for the Learned Magistrate to consider this factor once again in determining whether to impose a custodial sentence or a non- custodial sentence on the Appellant.

[66] That said, it is clear when examining the proceedings in this case, that the delay in concluding this matter was systematic and not purely attributable to the delay of the prosecution or the administrative issues facing the Court, primarily due to transfers or promotions of the judicial officers in carriage of the matter.

[67] It is apparent from the proceedings that the Appellant himself had contributed to the delay on certain occasions. One such instance was when he was not present in Court on 16 July 2018, when the matter was first set down for trial and once again on 19 July 2018, when the matter was taken up for Trial in Absentia. It must be reiterated that these instances arose at a very early stage of the proceedings in this matter.

[68] Considering the aforesaid, I am of the opinion that the said Ground of Appeal against sentence is also without merit and should be rejected.

### **Conclusion**

[69] Accordingly, I conclude that this Appeal should stand dismissed and the conviction and sentence be affirmed.

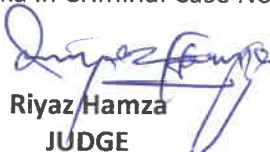
### **FINAL ORDERS**

[70] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.

2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Lautoka in Criminal Case No. 19 of 2017 is affirmed.



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

**Solicitors for the Appellant:** Messers Jiten Reddy Lawyers, Barristers & Solicitors, Nakasi.  
**Solicitors for the Respondent:** Office of the Director of Public Prosecutions, Lautoka.