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

CRIMINAL APPEAL NO.AAU 123 of 2016
[In the High Court at Suva Case No. HAC 23 of 2013]

BETWEEN	:	**EPI NAVAKASILIMI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**08 July 2020**
Date of Ruling	:	**13 July 2020**

RULING

[1] The appellant had been indicted with four others (three of them are appellants in AAU121/2016, AAU 122/2016 and AAU131/2016 and the other is supposed to be dead) in the High Court of Lautoka on one count of rape [Count 2] allegedly committed at Ra in the Western Division contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.

[2] The information consisted of the following counts.

COUNT 1

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA *on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of* ***LV****, without her consent.*

COUNT 2

Statement of Offence

RAPE: *Contrary to Section 44 (2) and 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA *(as a secondary principal participant) and* ***EPI VAKASILIMI*** *(as the primary principal participant), on the 23rd day of January 2013 at Ra in the Western Division inserted his penis into the vagina of* ***LV****, without her consent.*

COUNT 3

Statement of Offence

RAPE: *Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA *(as a secondary principal participant) and* ***MECIU NACAUCAULEVU*** *(as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of* ***LV****, without her consent.*

COUNT 4

Statement of Offence

RAPE: *Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA *(as a secondary principal participant) and* ***WAISEA VULI*** *(as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of* ***LV****, without her consent.*

COUNT 5

Statement of Offence

RAPE: *Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA *(as a secondary principal participant) and* ***JOPE SERUKALOU*** *(as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of* ***LV****, without her consent.*

[3] At the conclusion of the trial on 23 May 2016 the assessors' opinion was unanimous that the appellant was not guilty of the 02nd count against him. The learned trial judge had disagreed with the assessors in his judgment delivered on 27 May 2016, convicted him accordingly and on 10 June 2016 sentenced the appellant to 08 years and 06 months of imprisonment with a period of 06 years of non-parole.

[4] The appellant's timely notice of appeal only against conviction had been filed in person on 06 June 2016. Thereafter, the appellant had filed amended grounds of appeal against conviction and sentence on 21 November 2017 with no enlargement of time application against sentence. Legal Aid Commission had filed an amended notice of appeal only against conviction on 20 March 2019 along with written submissions. The state had tendered its written submissions on 04 June 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

> *Ground 1 - The Learned Trial Judge erred in law and in fact when he implied the assessors reason for their verdict resulting in the unfair conviction of the Appellants which is against their right to a fair trial.*
>
> *Ground 2 – The Learned trial Judge erred in law and in fact when he refused the further questioning of one Amani depriving the Appellants of their right to a fair trial which gives rise to a miscarriage of justice.*
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> *Ground 3 - The Learned trial Judge's conviction of the Appellants is unreasonable because it is not supported by the totality of evidence.*

[7] The summarized facts relating to the charges against the appellants could be gathered from the summing-up as follows.

> *29. Prosecution called the Complainant, LV, as their first witness. She is originally from Batiki, Lomaiviti. She was visiting her aunt in Nakorovou village with Jokaveti. First they arrive at Rokovuaka with two men, namely Junior and Robert and Junior's wife. Then her aunt Nani comes to pick her up at Junior's place. On Tuesday the 22nd of January 2013, She comes to Jokaveti's sister, aunty Nani's place in Nakorovou settlement.*
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> *30. On 22nd, leaving their two daughters (Kinisi and Mereisi) and son, Meciu (who is also known as Tubuna) behind in their house, aunty Nani and her husband leave for Nausori around 9 a.m. for marketing. After her uncle and aunty had left, around 3 p.m., LV was about to leave the house with her two cousins. Meciu asks her if he could drink grog with her. She agrees and starts drinking grog with Ilisoni Waqa, Meciu, Vuli, Manu, Suka, Jone and Epi. They come to know each other at the grog session on the same day.*
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> *31. After having grog, Manu and Sukaleave the house to catch bat. LV goes to sleep between 1 and 2 a.m. in that same small house but a little bit on top, far from the others, while the grog session was still in progress. Whilst she was lying down, Ilisoni Waqa comes, and asks her if he could have a talk with him. He then joins the other boys. In a short while, he comes back to her and calls the other boys. Ilisoni sits on her legs, holds on to her and ties her hands and legs. She tries to scream but Meciu blocks her mouth. Ilisoni undresses her. All of them undress themselves, take their penises, penetrate her vagina, taking turns. Ilisoni Waqa inserts his penis into her vagina first followed by Vuli, Meciu, Epi, and Jone whilst she was crying.*
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> *32. They used a lantern to light the grog session. Meciu turned it off and the house turned dark. There was, however, light coming from the moon and Meciu was lighting the match. They were having sexual intercourse with her for 1 – 2 hours. Each of them taking turns not that long.*

33. Whilst she was crying aunty, Jokaveti's son, Tomu, arrived after 7 a.m., and saw her crying. He asked her, what is wrong? She did not reply. Jone, Vuli, Epi had already left while Ilisoni Waqa and Meciu were still with her when Tomu arrived.

34. She left the house in the morning and was staying with one family in a nearby house. On the 23rd January, 2013, the Village Headman came to that house. The lady of the house informed the Village Headman about the incident. Then she reported the matter to the Village Headman, crying. He then called the Police.

[8] The appellant had totally denied having had sexual intercourse with the appellant but is said to have made in his cautioned interview certain admissions regarding the alleged incident. However, the summing-up and the judgment do not make it clear what those admissions were. He had also taken up a defense of *alibi*.

01st grounds of appeal

[9] The appellant's complaint is based on paragraph 28 of the judgment (erroneously referred to as the summing-up in his written submission) which reads as follows.

> *'Time has come for me to reverse the injustice caused to the Complainant. Assessors, despite my direction in the summing up, no doubt drew a negative inference as to Complainant's previous sexual relationship in coming to their conclusion when they heard Amani saying that he had sexual intercourse with her. There was a danger of assessors coming to the conclusion that she is a 'kind of person' who would be more likely to consent to the act of sexual intercourse.*

[10] The appellant seems to argue that it was wrong for the learned trial judge to have second guessed why the assessors had found him not guilty, for the assessors were not expected to give reasons for their opinion. Neither counsel has brought to my attention where the trial judge had in fact given directions in the summing-up on the same aspect as stated by him in paragraph 28 of the judgment.

[11] While I agree that the learned trial judge should not have probed into the possible reason for the opinion of the assessors and suggested that the assessors may have concluded that the complainant was the kind of person who was likely to consent to acts of sexual intercourse with the appellants given the evidence of Amani, it is clear that his decision to overturn the assessors' opinion of not guilty was not based on that.

The learned judge had given detailed and cogent reasons for disagreeing with the assessors.

[12] One must not forget that the judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up because in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court (vide **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020), **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Lasarusa Tikoigiladi v State** AAU 138 of 2016 (23 June 2020), **Ravulowa v State** [2020] FJCA 93; AAU0090.2018 (1 July 2020)] and **Prasad & 03 others v State** AAU 125.2016 (10 July 2020).

[13] Therefore, when I examine the summing-up and the judgment I cannot say that the learned trial judge in his decision to disagree with the assessors and convict the appellant had acted contrary to the principles highlighted in paragraphs 19-25 of the Supreme Court decision on the same aspect in **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020).

[14] Thus, this ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[15] The background to the appellant's complaint under the second grounds of appeal could be found in paragraphs 23-25 of the judgment and paragraph 39 and 101 of the summing-up. Paragraphs 23-25 of the judgment are given below.

> *23. Defense Counsel repeatedly cross examined the Complainant, surprisingly without any objection from the Prosecution, on the basis that she went a further step forward and kissed Amani and had sexual intercourse with him. Complainant having accepted that she slept with Amani denied that she had sexual intercourse with him. She displayed her honesty by admitting that she slept with Amani. She had every right to deny that she had sex with Amani. She is not bound to answer in public about her past sexual relationships with people other than the accused in this case. It would have been better if the State Counsel, in the interest of justice, watched not only the interest of the State but also that of the Complainant before it is too late.*

> *24. Amani was called by the Defence, again without any objection, to prove that the Complainant not only slept with him but also had sexual intercourse with her. Court had to intervene to stop Amani from exposing his sexual experience with the Complainant any further as it had nothing to do with the issue at hand in this case.*
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> *25. Contention of the Defence Counsel that Complainant's past sexual experience with Amani is relevant to the issue at hand and his application to further question Amani on that basis were refused by this Court in the interest of justice. Even for the purpose of impeaching the credibility of the Complainant, her previous sexual experience with a third person is immaterial in this case as she was entitled in law to suppress her previous sexual experience with others in court whether it predates or postdates the charge.*

[16] From paragraph 23 it appears that the defence counsel had in deed cross-examined the complainant repeatedly on her having slept with Amani the day after the incident of rape and suggested that she had kissed and had sexual intercourse with him too. The learned trial judge claims to have intervened when Amani as a defence witness was examined on the same. However, the extent to which Amani had already given evidence when the trial judge stopped him cannot be ascertained without the full appeal record though there is some indication in paragraph 28 of the judgment that Amani had said in evidence that he had indulged in sexual intercourse with the complainant. Therefore, the appellant's real complaint appears to be on the learned trial judge's intervention when Amani gave evidence.

[17] The State argues that section 130 of the Criminal Procedure Code prohibits any evidence of past sexual experience history without leave of court and the trial judge's refusal to grant such leave is justified [see section 130(2)]. The trial judge had refused leave to further question Amani as *'it had nothing to with the issue at hand'* and seems to have thought that therefore it was not in the interests of justice either to permit Amani to come out with his alleged sexual experience with the complainant [see section 130(3)]. The trial judge had been of the view that even to impeach the credibility of the complainant Amani's evidence was not material.

[18] On an analysis of section 130, it appears that the court's discretion to allow (or to grant leave) evidence or put questions to a witness relevant directly or indirectly to the sexual experience of the complainant with a third party other than the accused or the reputation of the complainant under section 130(2), is governed by considerations set

out in section 130(3) read with section 130(4) of the Criminal Procedure Code. Therefore, evidence even as to the general disposition or propensity of the complainant in sexual matters would not be considered as being directly relevant and allowed unless such evidence is of direct relevance to the facts in issue or the issue of appropriate sentence and exclusion of it would be contrary to the interests of justice [vide sections 130(3) read with section 130(4)]. However, in terms of section 130(5)(a) leave under section 130(2) is not required *inter alia* for the purpose of giving evidence or putting questions for the purpose contradicting or rebutting the evidence given by a witness relevant directly or indirectly to the sexual experience of the complainant with any other person other than the accused (third party) or the reputation of the complainant in sexual matters. Section 150(5) appears to contemplate a situation after leave is granted where evidence is led or questions are put under section 130(2) [read with sections 130(3) and 130(4)] of past sexual history of the complainant.

[19] I think what the defense counsel had attempted to do in this case was to have an inference drawn as to the general disposition or propensity of the complainant in sexual matters by cross-examining her and leading Amani's evidence on his alleged sexual experience with her the following day, for it certainly was not relevant to any facts in issue (*i.e.* whether the appellant had indulged in an act of sexual intercourse with her) in the light of the appellant's defense of having had no sexual intercourse at all with the complainant. Thus, the trial judge seems to have correctly disallowed such evidence to be elicited from Amani.

[20] Therefore, I see no prospect of the second ground of appeal succeeding in appeal.

03rd ground of appeal

[21] This ground of appeal, though couched very widely with a typical scatter gun approach to drafting an appeal notice as stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018), it had been narrowed down in written submissions to a complaint of the admissibility of the cautioned interview. Particular attention has been drawn to paragraphs 19 and 63 of the *voir dire* ruling and the last sentence of

paragraph 19 which states that *'If they had any injury, station orderly would have noticed and taken them to the hospital.'*

[22] The appellant submits that the above sentence in paragraph 19 shows that there had been another person present at the recording of the cautioned interview contrary to what the interviewing officer had stated that there was no one else during the interview. The state has submitted that the station orderly is the first point of contact at a police station and is different from the witnessing officer.

[23] In any event, from the summing-up and the judgment it does not appear that a great deal of reliance had been placed by the learned trial judge on the appellant's cautioned interview in disagreeing with the assessors and convicting him other than to state that he had made certain admissions without specifying what they were.

[24] Other alleged numerous inconsistencies which have not been highlighted in the written submissions except one on the sketch of the layout of the police station, could only be examined with the benefit of the full appeal record.

[25] The trial judge had summarized the issue of inconsistency of the complainant's evidence from paragraphs 14-17 of the judgment.

> *14. Defence Counsel contended that Complainant' sown previous statements are contradictory to her evidence and, in view of those contradictions, her evidence should be rejected. Their main focus was on the so called contradiction in her previous statement to police, and also to the doctor, where she is alleged to have stated that she was raped by seven people. In Court, she denied having stated to police that she was raped by seven people.*
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> *15. Director of Public Prosecution has filed the information only against five people. His Counsel says that police had made a mistake in recording her statement.*
> *16. Complainant had mentioned Epi's name to police but his name is recorded as 'Levi'. Another name 'Osea' that appears in her statement to police was never transpired at the trial. She stated that names of Manu and Suka were mentioned to police as they also participated in the grog session and not as the ones who raped her. Meciu confirmed that Suka was also arrested by police at his house along with him. But Suka was not charged. Therefore, possibility of making mistakes in recording the police statement cannot be ruled out. What is important here is that she had mentioned the names of the accused to police soon after the incident.*

17. The conditions under which Complainant may have given her previous statements to police and to the doctor are quite understandable. I do not consider those contradictions material so as to affect the credibility of her evidence.

[26] On a perusal of the summing-up, I find that the trial judge had directed the assessors on how the complainant had responded under cross-examination in paragraphs 36-48 and specifically asked them to consider the issue of inconsistency in paragraphs 115 and 116 and directed himself also accordingly. He had also drawn their attention to the evidence of PW3 (Tomu Senidave) and PW4 (Saula Madraiyawa). I also find references in the summing-up to most matters of alleged inconsistencies and therefore they are part of the judgment too.

[27] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal commented on inconsistencies as follows

> *'The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

[28] In the circumstances, the appellant has not demonstrated that he has a reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL