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

CRIMINAL APPEAL NO.AAU 0118 of 2016
[In the High Court at Suva Case No. HAC 172 of 2015]

BETWEEN	:	**LORIMA VASU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**10 August 2020**
Date of Ruling	:	**11 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of rape contrary to section 207(1) and (2) (b) of the Crimes Decree, 2009 one count of indecent assault contrary to section 212(1) of the Crimes Decree, 2009 allegedly committed at Nataveya Village, Naitasiri in the Central Division on 15 April 2015.

[2] The information against the appellant read as follows.

'FIRST COUNT

Statement of offence

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

Particulars of the Offence

LORIMA VASU *on the 15th day of April 2015 at Nataveya Village, Naitasiri, in the Central Division, penetrated the vagina of* ***TIMALETI***

RANADIRUA with his finger, without the consent of the said ***TIMALETI RANADIRUA.***

SECOND COUNT

Statement of Offence

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

Particulars of Offence

LORIMA VASU *on the 15th day of April 2015 at Nataveya Village, Naitasiri, in the Central Division, unlawfully and indecently assaulted* ***TIMALETI RANADIRUA*** *by fondling her breasts.*

[3] At the conclusion of the summing-up on 29 July 2016 the assessors' opinion was unanimous that the appellant was guilty of both counts. The learned trial judge had agreed with the assessors in his judgment delivered on 01 August 2016, convicted the appellant and sentenced him on 05 August 2016 to 11 years, 09 months and 02 weeks of imprisonment on the charge of rape and 02 years of imprisonment on the charge of indecent assault; both sentences to run concurrently with a non-parole period of 08 years and 09 months and 02 weeks of imprisonment.

[4] The appellant's timely leave to appeal application only against conviction had been signed by the appellant on 17 August 2016 (received by the CA registry on 06 September 2016). On 08 September 2016 the CA registry had received an application for leave to appeal against conviction and sentence signed by the appellant on 30 August 2016. The appellant had filed amended grounds of appeal only against conviction on 18 November 2019 along with submissions and he had tendered additional submissions on 11 March 2020. The appellant had also tendered a letter on 06 January 2020 for bail pending appeal. The state had tendered its written submissions on 06 July 2020. The appellant confirmed at the leave to appeal hearing that he would rely only on four amended grounds of appeal against conviction received by the CA registry on 18 November 2019 and submissions thereon. He did not pursue his application for bail pending appeal and therefore submissions of both parties, understandably, have not dealt with it either.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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 Judge erred in law and in fact in convicting the appellant/accused when the prosecution failed to prove the act of penetration, an element of the offence the appellant was charged and convicted for.*
>
> *Ground 2 - The learned trial Judge erred in law and in fact when he failed to recognize the weakness of the expert witness opinion during his judgment. In doing so caused a grave miscarriage of justice.*
>
> *Ground 3 - The learned trial Judge erred in law and in fact in accepting the prosecution evidence as truthful and reliable without considering the series of UNEXPLAINED inconsistent statement made by the same prosecution witness. In doing so caused a substantial miscarriage of justice.*
>
> *Ground 4 - The learned Trial Judge erred in law when he failed to make careful independent assessment on all the evidence before convicting the appellant/accused. In doing so caused a substantial and grave miscarriage of justice.*

[7] The evidence of the prosecution had been summarized by the learned trial judge in the judgment as follows.

> *[5] Prosecution case was based primarily on the evidence of the 14 year old complainant. According to her, the accused is a fellow villager to whom she treated as a brother. On the evening of 15th April 2015, at about 7.00 pm*

to 8.00 pm she was tasked by her father to look for her younger brother. It was suspected he may have gone to see the truck that had arrived to their village that evening, in order to transport cargo of the villagers to the Suva Market.

[6] The complainant went in the direction, in which the truck was parked and had met the accused on a foot path. He invited her to a nearby empty shop. She declined his invitation and told him as to why she was there. When the accused repeated his invitation for the second time, she followed him into this empty shop, thinking he is going to tell her stories.

[7] Thereafter, whilst inside the empty shop, the accused had touched her breasts and also touched inside of her vagina by using a finger. Her attempt to go away was prevented by the accused. After about 10 minutes she was allowed to go. When they came out of the empty shop, they were seen by the witness Nacanieli Liti (referred to by the complainant as "Naca"), who conveyed what he saw to her father. The complainant was scared of the reaction of her father and she was physically assaulted by Naca.

[8] Witness Nacanieli Liti, in his evidence stated that he saw the accused and the complainant coming out of the empty shop and he became worried about his sister. He then informed her father. He also said that he recognised them at a distance about 10 meters and there was light coming from a neighbour's house.

[9] The medical witness, upon examination of the external genitalia of the complainant on the following day at the hospital, did not observe any injury. When clarified by the prosecution, she opined that there is a possibility that penetration could occur, without leaving tell-tale marks.'

[8] The appellant's case had been narrated by the trial judge as follows.

'[10] The accused in his evidence pleaded total denial to the allegation. However he said in evidence he loaded cargo to the truck during 7.00 pm to 8.00 pm that evening and had thereafter did his routine physical training for about 5 minutes in that empty shop. He also said that he saw the complainant went past the empty shop. He then went home and started cooking dinner. At that time the complainant father came in search of him and wanted to know his whereabouts. The accused told him where he was but his visitor was angry. The accused then went over to the complainant's house to know as to why the complainant's father was angry. The accused learnt that the complainant's father was told that the accused and the complainant were seen together in the empty shop.

[11] The two witnesses called by the accused testified to the fact that the accused loaded cargo into the truck that evening and he was regularly seen at home.'

01st ground of appeal

[9] The appellant argues that the prosecution had failed to prove that there had been penetration, being one of the elements of the offence of rape. On a perusal of the summing-up, I find the following directions by the trial judge on the issue of penetration in paragraph 47(iii).

> *'(iii) When they were inside the shop, the accused started to touch her breasts. Then he started to touch inside of her vagina with his finger for about 10 minutes, even though the complainant did not allow the accused to do what he did. The complainant said that she wanted to come out, but the accused stopped her from leaving. She felt uncomfortable. The accused also told her not to scream or to say a word. Then he told her to go back home.'*

[10] The appellant's contention is that the complainant had stated in evidence that the appellant had inserted his finger in the vagina and it was very painful (I do not see any reference to this type of evidence in the summing-up or in the judgment) and therefore, there should have been some evidence of such an intrusion of her vagina to be traced by the doctor who had examined her. He argues that in the absence of any medical evidence to support such vaginal penetration, the complainant must be taken to have given false evidence. He had argued that the complaint had falsely implicated him due to the beating with a stick she got from prosecution witness Nacanieli Liti *alias* Naca soon after Nica saw the appellant and the complainant coming out of the empty shop.

[11] Nevertheless, Dr. Violetta while not observing any injuries on the external genitalia including the vaginal opening had not excluded the possibility of penetration by finger without leaving tell-tale marks. It is not clear whether the doctor had examined the complainant's vagina.

[12] The trial judge had been absolutely fair in presenting the prosecution case as well as the defense case to the assessors in an objective and well-balanced manner and drawn their attention to the relative probability of versions of the prosecution in paragraphs 66-72 and that of the defense in paragraphs 74-75 of the summing-up. At the same time, the trial judge had cautioned the assessors in paragraph 73 and 76 of the

summing-up not to lose track of the burden of proof carried by the prosecution throughout the case.

[13] Finally, the assessors had accepted the prosecution evidence and obviously rejected the appellant's version. In agreeing with the assessors the trial judge had given his mind to the evidence of both parties and remarked in paragraph 12 and 13 of the judgment as follows.

> *'[12] The assessors have found the evidence of prosecution as truthful and reliable, as they unanimously found the accused guilty to the count of Rape and also to the count of Indecent Assault. They were directed in the summing up to evaluate the probabilities of the version of events as presented by the parties. The inconsistencies of the prosecution were also highlighted with suitable directions. The accused challenged the claim of identity by witness "Naca". The assessors were, therefore directed on Turnbul principles and warned of dangers of a mistaken identity. The three assessors have obviously rejected the denial of the accused, indirectly suggesting that this allegation is a fabrication by the complainant, due to fear of physical assault. It was a question of believing whom.*
>
> *[13] In my view, the assessor's opinion was not perverse. It was open for them to reach such conclusion on the available evidence. Although legally not required, her version of events was well supported by the evidence of "Naca". The accused too admits that his name was implicated that very evening, the complainant was seen close to the empty shop and he was in the empty house at some point of time. I concur with the opinion of the assessors.*
>
> *[14] Considering the nature of all the evidence before the Court, it is my considered opinion that the prosecution has proved it's the case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences with which the accused is charged.*
>
> *[15] In the circumstances, I convict the accused, Lorima Vasu, to the count of digital Rape. I also find him guilty to the count of Indecent assault.'*

[14] In **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) the Court of Appeal stated that the medical distinction between vulva and vagina becomes immaterial in the light of section 207(2)(b) and any penetration of vulva, vagina or anus is sufficient to constitute the *actus reus* of the offence of rape. In ***Volau*** it was held

> *'[13] ..... It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body.*

The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina..... It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape..... Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established.....'.

[15] Cox J in the Court of Appeal of South Australia said in **Glen Thomas Randall** (1991) 53 ACrimR 380 that *'In fact, it would appear that, at least for the last 150 years, the common law, for obvious practical reasons, had made no attempt to distinguish for this purpose between penetration of the vulva, as denoted by the labia majora, or outer lips, and penetration of the vagina itself.'*

[16] In the light of the above discussion, I do not think that there is any reasonable prospect of success of the appellant's appeal on this ground of appeal.

02nd ground of appeal

[17] The appellant's complaint is that the trial judge had not recognized the weakness of the expert evidence and her opinion in his judgment. He places emphasis of the medical report where the complainant had been quoted as having told the doctor that

'it was very painful'. Medical evidence is not conclusive of an act of penetration. Similarly, pain does not necessarily mean injuries. The appellant's counsel does not appear to have cross-examined the complainant or the doctor on this aspect to enable both of them to offer an explanation, if possible, why no external injuries had been present despite the appellant's act having caused pain to the complainant. On the other hand the trial judge had addressed the assessors on medical evidence in paragraphs 49 and 68-71 in detail and considered the same in paragraph 9 of the judgment. Therefore, I do not think that this is a valid criticism and this ground of appeal has no reasonable prospect of success.

03rd ground of appeal

[18] The appellant's complaint under this ground of appeal is that several inconsistent statements of the complainant should have affected her credibility. In that context the appellant submits that the trial judge had erred in stating in paragraph 14 of the judgment *inter alia* that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence. However, when probed further by this court, the appellant stated that the complainant had not been confronted with those so-called inconsistent statements, brought up now for the first time in appeal, she is supposed to have made to the police in cross-examination thereby affording an opportunity for her to explain such inconsistencies, if possible.

[19] In any event the trial judge had addressed the assessors on the issue of consistency of a witness *vis-à-vis* the credibility in paragraphs 17, 18 and 57 – 64 of the summing-up. Whatever the inconsistencies highlighted by the defense at the trial had been brought to the attention of the assessors by the trial judge.

[20] Therefore, there is no reasonable prospect of success of the appellant's appeal on this ground of appeal.

04th ground of appeal

[21] The appellant's concern here is that the trial judge had not independently assessed all the evidence in the judgment before convicting him. This complaint should be looked

at in terms of the duty of a trial judge in agreeing with the assessors as in this case which is different to a situation where he disagrees with the majority of assessors.

[22] I made the following observations on section 237(3) and (5) of the Criminal Procedure Act, 2009 in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) where I had the occasion to deal with section 237 of the Criminal Procedure Act. I reiterated those sentiments in **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Tikoigiladi v State** [2020] FJCA 86; AAU138.2016 (23 June 2020), **Kumar v State** AAU185 of 2016 (22 July 2020), **Raitekiteki v State** AAU 011 of 2017 (29 July 2010) and **Qio v State** [2020] FJCA 119; AAU057.2016 (31 July 2020)

> *'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for 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. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use).*

[23] It was stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal

> *'[4] ..... Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under **section 237(3) of the Criminal Procedure Act** 2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed –v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[24] On an examination of the judgment, it is clear that the trial judge had still considered all the evidence in the case and material issues in a nutshell that arose in the course of the trial and given reasons why he was agreeing with the assessors.

[25] Therefore, this ground of appeal too does not have a reasonable prospect of success.

[26] The trial court has considerable advantage of having seen and heard the witnesses and was in a better position to assess credibility and weight and the appellate court should not lightly interfere [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[27] It is always necessary to bear in mind that the function of the Supreme Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature [vide **Ram v The State** (1960) 7 FLR 80 and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]. 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 is not perverse (vide **Ram v The State** (1960) 7 FLR 80). The trial judge in this case had been satisfied that the assessors' verdict was not perverse and it was open for them to reach that conclusion against the appellant on the available evidence. The appellant has not convinced me otherwise.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL