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

CRIMINAL APPEAL NO.AAU 0022 of 2017
[High Court Suva Criminal Case No. HAC 101 of 2016]

BETWEEN : **IANE RUPETI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **09 October 2020**

Date of Ruling : **12 October 2020**

RULING

[1] The appellant had been charged in the High Court of Suva on four counts of rape committed at Rotuma in the Eastern Division contrary to section 207(1) and (2)(a) of the Crimes Act No.44 of 2009. The particulars of the offence were that;

'FIRST COUNT

Representative Counts

Statement of Offence

> ***RAPE:*** *contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

IANE RUPETI *between the 1st day of June and 30th day of December 2011 at Rotuma in the Eastern Division had carnal knowledge of ES without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

IANE RUPETI *on the 31st day of December 2011, at Rotuma in the Eastern Division, had carnal knowledge of ES, without her consent.*

THIRD COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

IANE RUPETI *between the 1st January 2015 and 15th May 2015 at Rotuma in the Eastern Division had carnal knowledge of ES, without her consent.*

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

IANE RUPETI *on 16th of May 2015 at Rotuma in the Eastern Division had carnal knowledge of ES, without her consent.*

[2] After the summing-up, on 03 February 2017 the majority of assessors had expressed an opinion that the appellant was guilty of all counts of rape. One assessor had opined that the accused was not guilty of the first count but guilty of the alternative offence of defilement; not guilty of the second count but guilty of the alternative offence of defilement; and not guilty of the third and fourth counts. The learned High Court

judge in the judgment dated 06 February 2017 had agreed with the majority of the assessors with regard to their opinion on the first to third counts and convicted the appellant of all of them but disagreed with their opinion on the fourth count and acquitted the appellant of that count of rape. He had been sentenced on 08 February 2017 to an aggregate sentence of 13 years and 09 months imprisonment with a non-parole period of 10 years and 09 months.

[3] A timely notice of appeal against conviction and sentence had been tendered by the appellant on 20 February 2017. Additional grounds of appeal had been tendered on 18 August 2017. Thereafter, the appellant had made an application to abandon the sentence appeal in Form 3 on 02 April 2020. The Legal Aid Commission had tendered amended grounds of appeal against conviction along with written submissions on 23 June 2020. The state had responded on 23 June 2020.

[4] The prosecution case against the appellant had been summarised by the learned trial judge in the sentencing order as follows.

> *2. You and your wife were the guardians of the victim since she was 6 years old. In June 2011, your wife came to Fiji for the delivery of the second child leaving the victim under your care and protection. Thereafter, you approached the 13-year-old victim one night while she was asleep and then you raped her after you told her not to make a noise. You threatened her that the family bond will be over if she complains to anyone. After that first incident, you had raped her on several occasions in 2011 and then in 2015.*
>
> *3. The age difference between you and the victim is 45 years. You were her father figure during the time you raped her. The victim looked up to you for her care and protection. You were in a position of authority and trust and you have abused that position. As the victim said in her evidence, you have ruined her life.'*

[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.

[6] **Grounds of Appeal**

Against conviction

(1) 'The verdict is not supported by the totality of the evidence.

(2) The learned trial judge's verdict is unreasonable in that:

(i) There is serious doubt arising from the complainant's evidence when cross-examined; and

(ii) There is serious doubt in the evidence of prosecution witnesses.

01st ground of appeal

[7] The appellant argues that there is a paucity of evidence in proving beyond reasonable doubt the fault element of all counts. He contends based on paragraphs 40-46 of the summing-up and in particular paragraphs 7, 11, 15 and 16 of the judgment that the trial judge had found the appellant to be reckless in respect of the first three counts of which he was convicted but the evidence did not prove the same beyond reasonable doubt.

[8] The appellant cites the decision in **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) where the Court of Appeal stated as to the fault element of rape as follows.

> *'[32] …………Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21 (1).'*
>
> *'[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the*

three fault elements would be sufficient to prove the fault element of the offence of rape'

[9] When an accused is charged with several acts of rape, it is not necessary that he should entertain the same fault element across all physical acts. For one act it could be intention, for another it could be knowledge and for yet another it could be recklessness. It is a matter of inferring the relevant fault element from all the circumstances available. Fault element is not discovered through a scientific tool but inferred through human experience.

[10] I find from paragraphs 7, 11, 15 and 16 of the judgment that the trial judge had determined the fault element to be knowledge in respect of the acts of rape relating to the first and second counts and recklessness regarding the act of rape on the third count.

[11] I have examined the totality of the evidence and circumstances as set out in the summing-up and the judgment and I have no doubt that the prosecution had proved both the physical elements and the fault elements for each and every act of rape beyond reasonable doubt, be it knowledge or recklessness. Thus, the verdict is sustainable on the evidence led at the trial.

[12] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[13] The appellant contends that the verdict is unreasonable having regard to the complainant's evidence under cross-examination which creates a serious doubt in her evidence. He specifically refers to an answer given by the complainant under cross-examination as highlighted in paragraph 31 and other inconsistencies highlighted in paragraphs 69-73 of the summing-up.

[14] The relevant portion of paragraph 31 is as follows, and it should be read with paragraph 33.

'31. .....Finally, when it was suggested to her that she made up the allegations that the accused was having sexual intercourse with her in 2011 and 2015 without her consent, because she hated the accused for treating her as a slave, making her work all the time and for being strict on her from leaving the house at night; she said 'yes'.

'33. She said she did not make up the allegations. She said the accused was planning to send her over to Fiji so that she could not take the matter to the police and that is why she refused to go to Fiji.'

[15] It is clear from the suggestion in paragraph 31 that it had been a loaded or trick question and there were several assumptions in it that the complainant could agree and some she would disagree. When the complainant had said 'yes' to the said suggestion she may well have agreed with one or more things in it such as the fact that the appellant had sexual intercourse without her consent in 2011 and 2015 and he had treated her like a slave, made her work all day and he having been strict on her but not agreed with the fact that she had made up the allegations against him due to above reasons. From her denial of such fabrication of allegations of rape against the appellant as stated in paragraph 33 this scenario appears to have been the case. The prosecuting consul should have objected to such a complex suggestion and alerted the trial judge who may well have overruled it, if objected. Therefore, I am not inclined to accept the appellant's argument that the complainant's affirmative answer to the said suggestion amounted to an admission that she had fabricated rape charges against the appellant.

[16] As for other inconstancies highlighted by the appellant it is clear that the trial judge had admittedly directed the assessors on them in paragraphs 69-73 of the summing-up. The complaint is that the judge had not analyzed and placed any weight on them in the judgment.

[17] This contention flows from a fundamental misunderstanding of the trial judge's role in agreeing with the majority of assessors. What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence

and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

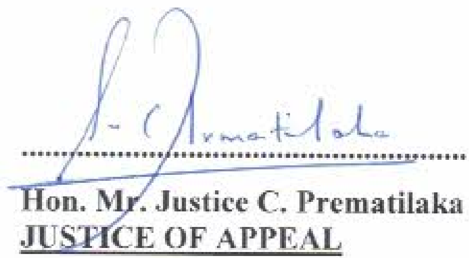
[18] A judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as 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) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

[19] In the judgment the trial judge had directed himself according to his summing-up and given fairly detailed written reasons why he agreed with the majority of assessors on their opinion on the first, second and third counts but disagreed with them on the fourth count and accordingly acquitted the appellant of the forth charge of rape. The only inference that can be drawn is that the trial judge had obviously not considered the inconsistencies which he had highlighted and directed the assessors on in paragraphs 69-73 of the summing-up to be having a decisive bearing on the complainant's credibility as not to believe her as far as the 1st to 3rd counts are concerned.

[20] Therefore, there is no reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL