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

CRIMINAL APPEAL NO.AAU 131 of 2017
[In the High Court at Suva Case No. HAC 88 of 2013]

BETWEEN	:	**AMINIASI MASEI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**29 October 2020**
Date of Ruling	:	**30 October 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on a single count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed on 06 March 2013 at Lautoka in the Western Division.

[2] The information read as follows.

'FIRST COUNT

Statement of offence

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

Particulars of offence

Aminiasi Masei on the 6th of March 2013 at Lautoka in the Western Division, inserted his penis into the anus of AB, without the consent of the said AB

[3] After the summing-up on 14 July 2016 the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on 15 July 2016 the learned trial judge had agreed with them and convicted the appellant as charged. On 19 July 2016 the appellant had been sentenced to 12 years of imprisonment with a non-parole period of 09 years.

[4] The appellant in person had signed a notice of appeal against conviction. The Legal Aid Commission had subsequently filed amended grounds of appeal and written submissions on 11 Aug 2020. The state had responded by its written submission on 01 September 2020.

[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.

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

*(i) **THAT** the learned Trial Judge may have fallen into an error in fact and law to provide a fair: balance and objective Summing Up.*

*(ii) **THAT** the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence of trial, in particular, to the following:*

(a) Accepting that the evidence given by the victim is credible, probable and reliable, in particular, to the identification of the perpetrator who spoke [forcefully] to the victim to remove his pants.

(b) Erring in law and fact that 'the defence has failed to create any reasonable doubt about the case of the prosecution' since the standard of proof is with the State and that accused has nothing to poof or create for the State.

(c) Erring in fact and law that 'the delay of informing his parent of this incident has not adversely affected the credibility and reliability of the evidence given by the victim'.

[7] The trial judge had summarised the evidence of the complainant, a 15 year old boy at the time of the commission of the offence and his mother as follows

30. The first witness of the prosecution is AB. He is the victim of this matter. The victim in his evidence stated that he was staying with his parent at Naviyago in 2013. He was fifteen years old in 2013. He is the only child of the family. He recalls that on 6th of March 2013, he went to see one of his friends at his house. The friend's name is Angelo. He stayed at his friend's house for few minutes and then came out to nature's call. He went to nearby sugar cane field to nature's call. When he was coming back from the sugar cane field, he met the accused. The victim knows the accused as he has seen him before. The accused pulled the victim inside the sugar cane field by his collar. The accused then told him to pull down his pants. The victim stated that the voice of the accused was rough and he was really frightened. The victim pulled down his pants. The accused then inserted his penis into the anus of the victim. The victim in his evidence said that he knew that the accused inserted his penis into his anus. The victim was frightened. In few minutes time, the accused pulled out his penis and told the victim to put his pants on. He then told the victim to go home.'

38. 'The second witness of the prosecution is Keiyasi Kuruiqara. She is the mother of the victim. She in her evidence stated that she found her son was still staying on the settee after the early morning session of prayer devotion. She asked him why he was not going to sleep. When she asked him first time he did not give any reply. She asked him again. The victim then told his mother that something had happened to him. He then told his mother about this incident. Mrs. Kuruiqara then waited till the morning and went to the police station to report this incident.'

[8] The appellant had given evidence and denied the commission of the offence completely.

01st ground of appeal

[9] The appellant complains that the trial judge may have erred in failing to present a fair, balanced and objective summing-up. He relies on **Tamaibeka v State** [1999] FJCA 1; AAU0015u of 2017s (08 January 1999). The basis of his complaint is that the judge had devoted 11 paragraphs (30- 40) to the prosecution case whereas he had spent only 02 paragraphs (42 & 43) of the summing-up to the defence case. Although, the appellant states that the trial judge should have elaborated the defence case more he had not pointed out in what respects the trial judge could have done so.

[10] It is clear from the summing-up that the trial judge was dealing with the evidence of three prosecution whiteness whereas he had to deal with only the evidence of the appellant.

[11] Unfortunately, the appellant had not submitted what more the trial judge could have elaborated on his evidence because his defence was a simple denial.

[12] However, in analysing the evidence the trial judge in the summing-up had highlighted the aspect of recognition of the appellant by the complainant in the context where both parties had agreed that the appellant and the complainant were known to each other (paragraphs 45 – 50), the fact that the complainant had brought the incident to the notice of his mother after four weeks (paragraphs 56 & 57) and some inconsistencies found in the complainant's evidence with that of his police statement (paragraphs 59-62). These are all matters that could affect the prosecution case adversely and if held in favour of the appellant, they could have cast a reasonable doubt in the prosecution case.

[13] Therefore I find no basis for the appellant's criticism of the summing-up as not being fair, balanced and objective.

[14] This ground of appeal has no merits and no reasonable prospect of success at all.

02nd ground of appeal – 2(a)

[15] The appellant comes up with the argument that due to the fact that the appellant could not speak in Bauan dialect because he was conversant only with Navosa dialect of iTaukei language, the complainant could not have understood the alleged command to him that he should pull down his pants and therefore the perpetrator should have been some other person who spoke in Bauan dialect.

[16] The appellant cites the *voir dire* ruling in support of his contention where the trial judge had ruled the cautioned interview out on the basis that the appellant may have difficulties in speaking and understanding Bauan dialect and therefore, conducting the cautioned interview in Bauan dialect rendered it unreliable.

[17] What the trial judge had found at the *voir dire* inquiry was that the appellant was not fluent in Bauan dialect and the appellant had stated at the inquiry that he could not properly and fluently understand Bauan dialect but speak and understand only Navosa dialect. Nevertheless, the incident had happened not in the appellant's village but inside a sugar cane field at Naviyago where people speak Bauan dialect. The appellant had admitted under cross-examination that he was staying in Naviyago at the relevant time. The counsel for the appellant also stated in oral submissions that the appellant had come to Naviyago for work in sugar cane fields in the area.

[18] The summing-up and the judgment do not reveal that the trial counsel for the appellant had cross-examined the complainant on the basis that the appellant could speak only Navosa dialect and the complainant therefore could not have understood any command given in Navosa dialect. Had he been confronted with that proposition the complainant would have had to offer an explanation as to what dialect the appellant used to command him to pull down his pants and to threaten him not to reveal the incident to anyone. It is unthinkable that the appellant's counsel would have inadvertently failed to do so as it is the trial counsel who had appeared at the *voir dire* inquiry as well and she was obviously aware of the ruling thereof. It does not appear that the appellant in his evidence also had propagated this point of contention to impeach the credibility of the complainant's identification.

[19] On the other hand what appears is that though the appellant may not have been fluent in Bauan dialect it could not be totally ruled out that he could not give a simple command to the complainant such as pulling down the pants and not to tell any one of the incident in Bauan dialect, particularly given the fact that he had been working in sugar cane fields where people speak Bauan dialect and he was known to the complainant.

[20] In any event, the appellant's proposition based on the language barrier has to be considered in the context of the admission by both parties that the appellant and the complainant were known to each other. It looks as if this argument is now taken up more as an appeal point based on the *voir dire* ruling than what transpired at the trial. Under cross-examination the complainant had stood his ground that it was none other than the appellant who had committed the act of sexual abuse on him leaving no room for any doubt on his recognition of the appellant.

[21] Therefore, I do not see any reasonable prospect of success in this ground of appeal.

02nd ground of appeal – 2(b)

[22] The appellant's contention here is that the trial judge had shifted the burden of proof to the defence. The basis of this criticism is what the trial judge had stated in paragraph 12 of the judgment which is as follows.

> *'12. 'Having considered the forgoing reasons, I find the evidence given by the victim is credible, probable and reliable. Hence, I accept the evidence of the victim as truth. Accordingly I find the evidence given by the accused and his complete denial of the allegation is untrue. Hence, I do not accept the evidence of the accused person. Furthermore, I find that that the defence has failed to create any reasonable doubt about the case of the prosecution.'*

[23] The judgment of the trial cannot be considered in isolation. It has to be considered along with the summing-up and the trial judge's role in agreeing with the assessors.

[24] In my view, whether the trial judge agrees or disagrees with the assessors, 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. In both situations, a trial judge 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).

[25] The judge had correctly dealt with the burden of proof and standard of proof in paragraphs 12 – 14 of the summing-up and even in the judgment in paragraph 13 he had accepted that the prosecution had proved its case beyond reasonable doubt. What the trial judge had said paragraph 12 of the judgment is that the appellant's evidence had not been able to create a reasonable doubt in the prosecution case as an addendum. It certainly is not an attempt to transfer the burden of proof. Therefore, there is no substance in the appellant's complaint.

[26] On the other hand the trial judge had more than adequately performed his role in agreeing with the assessors in the judgment. 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)]

[27] Therefore, there are no merits and any reasonable prospect of success in this ground of appeal.

02nd ground of appeal – 2(c)

[28] The appellant's complaint is that the trial judge should not have made the remarks that he made in paragraphs 7 and 8 of the judgment without expert evidence to support. His grievance really relates to paragraph 8.

> *'7. The learned counsel for the defence suggested that the lateness in complaining this matter to the parents by the victim makes it less likely that the complaint that he eventually made was true. The evidence adduced by the victim and his mother reveal that the victim had informed his mother about this incident after about four weeks of the incident. The victim in his evidence stated that the accused told him not to tell anyone. He further stated that he started to have troubles in his sleeping as this incident regularly came to his mind. He then decided to tell his mother.*
>
> *8. I am mindful of the fact that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the nearest person they see. Others, who react with shame or fear or shock or confusion, or perhaps due to cultural taboos, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. A late complaint does not necessarily constitute a false complaint. The victim was a 15 years old boy at the time of this alleged incident took place. It is obvious that this incident has brought a terrifying experience into the life of the victim. Having considered the post-incident behaviors of the victim as explained in his evidence, it is my opinion that the delay of informing his parent of this incident has not adversely affected the credibility and reliability of the evidence given by the victim.'*

[29] I do not agree. There are enough and more judicial pronouncements of the appellate and original courts in Fiji containing similar sentiments. They are matters of collective human and judicial experience over a long period of time and needs no expert evidence in support thereof. In any event the operative part of the trial judge's remarks in paragraph 8 is based on the evidence of the complainant as stated in paragraph 7 as to why he waited 04 weeks to come out with the incident sexual abuse at the hands of the appellant.

[30] The trial judge had adequately directed the assessors on the delay in the complainant's complaint to his mother in paragraphs 31, 36 and 38 and analysed them from paragraphs 56 to 58. Therefore, his remarks in paragraph 8 of the judgment are only an extension of his summing-up as I have already mentioned in the previous ground of appeal because the trial judge was agreeing with the assessors.

[31] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In applying the totality of circumstances test, what should be examined is whether (i) the complaint was made at the first suitable opportunity within a reasonable time or (ii) if not, whether there was an explanation for the delay. Prosecution must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, and human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case [vide **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018)].

[32] Applying the above tests, I am convinced that the delay of 04 weeks in the complainant's reporting to his mother had been satisfactorily explained. It is only if the substratum of the evidence given by the complainant is found to be unreliable, the prosecution's case has to be rejected in its entirety. The complainant's evidence, in my view, does not suffer from such a crucial infirmity.

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

[34] No doubt that this is a case where there were two versions before the assessors as recognised by the judge in paragraph 45 of the summing –up.

[35] What is required of a trial judge when there is a 'word against word' conflict between the prosecution and defence had been dealt with in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507.

[36] In **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 High Court of Australia held:

> *'11. When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the*

defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. ***The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue….***'

[37] In ***Prasad*** the Court of Appeal said as follows.

> *'[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:*
>
> > *(i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.*
> >
> > *(ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.*
> >
> > *(iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.*
> >
> > *(iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.*
> >
> > *(v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.*
> >
> > *(vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own merits. Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's*

version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.

[38] On a perusal of the summing-up, I find that the trial judge had addressed the assessors on the burden of proof and standard of proof as an inalienable obligation of the prosecution in paragraphs 12 – 14 and that they should consider not only what he had highlighted but every item of evidence (*i.e.* the whole of the evidence) in paragraph 44. He had also addressed the assessors on how they should deal with the appellant's evidence if they believe or neither believe nor disbelieve or do not believe in paragraph 64-66 of the summing-up.

> *64. You heard the evidence presented by the accused, where he denied this allegation. If you accepted the version of the accused as reliable and truthful, then the case of the prosecution fails. You must then acquit the accused from this charge.*
>
> *65. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.*
>
> *66. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.*

[39] Thus, no substantial complaint could be made regarding the trial judge's summing-up on the *'complainant's version'* against *'appellant's version'* scenario.

[40] The approach that should be taken by the appellate court in a situation such as this is, in my view, illustrated in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) where the Court of Appeal stated that

> *'That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?*
>
> *Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal -*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot*

be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."

The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.

It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.

Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

The appeal is dismissed.

[41] In my view, it was reasonably open to the assessors to bring the verdict they brought against the appellant on the complainant's evidence alone and for the trial judge to agree with them. Having considered the evidence against the appellant as a whole, one cannot say that the verdict was unreasonable. There was clearly evidence on which the verdict could be based.

Order

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL