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

CRIMINAL APPEAL NO.AAU 85 of 2018
[In the High Court at Lautoka Case No. HAC 133 of 2014]

BETWEEN	:	**AMINIO VUKICIGAU SAROGO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**06 October 2020**
Date of Ruling	:	**09 November 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 15 October 2014 at Sigatoka in the Western Division.

[2] The information read as follows.

'***Statement of Offence***

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 2009.*

Particulars of Offence

AMINIO VUKICIGAU *on the 15th day of October 2014 at Sigatoka in the Western Division had carnal knowledge of* ***ADI LUSIA DONATO****, without her consent.*

[3] After the summing-up on 15 March 2018 the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on 16 March 2018 the learned trial judge had agreed with them and convicted the appellant as charged. On 23 March 2018 the appellant had been sentenced to 06 years and 09 months of imprisonment with a non-parole period of 06 years.

[4] The appellant in person had signed an untimely notice of appeal against conviction and sentence on 02 July 2018 (received by the CA registry on 03 August 2018). The delay is about 02 months and 02 weeks. The Legal Aid Commission had subsequently filed a notice of motion seeking an extension of time to appeal, an affidavit, amended grounds of appeal and written submissions on 10 and 07 July 2020. The state had responded by its written submission on 18 August 2020. The appellant tendered an application to abandon his appeal against sentence in Form 3 on 06 November 2020.

[5] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 3 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In **Julien Miller v The State** AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.*

[6] Therefore, I would treat this as a timely appeal against conviction and consider only the merits of the matter to determine the question of leave to appeal. 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.

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

> *(i) 'That the learned trial Judge erred in law and in fact when he stated in Judgment that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force in order to bring about a rape conviction.*
>
> *(ii) That the learned trial Judge erred in law and in fact when he in his Judgment considered facts that was not led in evidence which led to erroneously convicting the Appellant.*
>
> *(iii) That the learned trial Judge erred in law and in fact when he failed to properly and judiciously consider the material doubts in the State's case which would have led to the acquittal of the Appellant.*

[8] Both parties had agreed that the appellant and the complainant had engaged in sexual intercourse and the only trial issue had been whether the sexual intercourse was consensual or not. The appellant's position had been that it was consensual but he had remained silent and called two witnesses. The trial judge had summarised the evidence in the sentencing order as follows.

> *'3. You are complainant's cousin from her father's side. Complainant boarded the minivan in which you and your friends were traveling to go to the nearby club. On the way, you and your colleagues went to a black market and bought two cartons of beer and started drinking till midnight with the complainant in an isolated place where the van was parked. Then you all went to the night club. Complainant went straight to the bar and had a nip of rum. She then felt dizzy and went straight outside near the poolside to vomit. While she was vomiting, you approached her. You pulled her hand and forced her to go inside the van that was parked near the poolside. Then you pushed her down and undressed her. You did bite her neck and inserted your penis into her vagina and had sexual intercourse for about 10 minutes without her consent.'*

01st ground of appeal

[9] The impugned statement attributed to the trial judge under the first ground of appeal is at paragraph 12 of the judgment which is as follows.

> *11. Complainant's evidence that her t-shirt, shorts and panty were forcibly removed by the Accused was supported by the evidence of Alivereti when he said that Complainant was covering herself only with a sulu when she boarded his car. Alivereti also said that the panty and t-shirt he found on the road were later recognised by the Complainant to be the cloths she was wearing in that night. Complainant further said that she was not in a position to stop at Korolevu Police Post on her way to Namatakula because she was not properly attired. Alivereti also confirmed that he had to drive Complainant home so that she could properly dress up before going to the police post to lodge the complaint. Loqorio and Bolo admitted that they were drunk at the night club. Under these circumstances, Complainant's thinking that it was not proper for her to relay the incident to his cousin and Bolo is logical. She complained to her uncle soon thereafter. Complainant's explanation is logical and therefore acceptable.*
>
> *12 Complainant's evidence that she struggled, banged the van and screamed is consistent with lack of consent on her part. It is possible that a rape victim may not have received injuries at the encounter. Presence of injuries on victim's body is not crucial to prove lack of consent. The offence of rape may or may not be accompanied by violence, force or the threat of force. <u>It is no part of the Prosecution's obligation to prove that the Accused used force or the threat of force in order to bring about a rape conviction.'</u>*
>
> *13. The alleged rape took place inside a van near a night club. <u>It is possible that no one heard when she screamed and banged the van.</u>*
>
> *14. The so called contradictions highlighted by the Defence Counsel are not significant or material so as to discredit the version of the Prosecution.'*

[10] The appellant relies on the decision in **<u>Kaiyum v State</u>** [2014] FJCA 35; AAU0071.2012 (14 March 2014) in support of his argument that the prosecution has a duty to prove that the accused used force or the threat of force in order to bring about a rape conviction. In my view the remarks in ***<u>Kaiyum</u>*** must be taken in the factual context of the case where there had been a paucity of evidence on the issue of consent and the trial judge had not properly analysed the evidence in its totality on that issue. Having examined the evidence the Court of Appeal had entertained a reasonable doubt as to lack of consent and set aside the conviction. ***<u>Kaiyum</u>*** cannot be applied to the facts of the present case.

[11] Similar argument to the one advanced by the appellant was taken up **State v Nawaitabu** [2020] FJCA 54; AAU123.2016 (15 May 2020) and I dealt with it as follows

> *'[9] This argument presupposes that there is a burden on the prosecution to prove the absence of all factors set out under section 206(2) to prove lack of consent or to negate the element of consent required in the offence of rape. In my view, this is a wrong construction of the law. All what the prosecution has to prove is absence of consent on the part of the victim. This is denoted by the phrase 'without the other person's consent' in section 207(2)(a) of the Crimes Act.*
>
> *[10] Section 206 states that*
>
> *'In this Part —*
>
> *(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.'*
>
> *(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained —*
>
> *(a) ……..*
>
> *[11] Thus 'without consent' could be either patent lack of consent or consent (even if present outwardly) not given freely and voluntarily by a person, with the necessary mental capacity to give the consent. The prosecution may prove either of them or both. For example there can be initial physical resistance and subsequent submission in the same transaction due to any of the reasons set out in section 206(2) or some other reason inconsistent with the consent.*
>
> *[12] However, the prosecution does not have to rule out one or more or all instances outlined under section 206(2) to prove the element of 'without consent' in a charge of rape. Sub-section (2) only elaborates without limiting sub-section (1) instances where consent is not regarded as freely and voluntarily given. Sub-section (2) does not override sub-section (1). This is the same with submission without physical resistance which alone would not amount to consent.*

[12] On the contrary in this appeal the trial judge had directed the assessors on the matter of consent in paragraphs 17-19, then placed all the evidence led in the case from paragraphs 35-49 (prosecution evidence), 50-57 (defence evidence) and analysed both positions in paragraphs 58-72 of the summing-up.

[13] In agreeing with the assessors the High Court judge had considered in great detail the only contentious issue at the trial namely 'consent' from paragraphs 5-19 and concluded that he was satisfied that the sexual intercourse had taken place without the complainant's consent in paragraph 20.

[14] In addition to the complainant's own evidence of lack of consent, Alivereti's evidence whom she had made a prompt complaint soon after the incident and who had seen the complainant covering herself only with a sulu without her the panty and t-shirt which were later found on the road, had lent enough credibility on the issue of lack of consent to be believed by the assessors and the trial judge.

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

02nd ground of appeal

[16] The appellant argues that in paragraph 13 of the judgment the trial judge had considered that *'it is possible that no one heard when the victim screamed and banged the van'* thereby using evidence not led in the case.

[17] According to paragraph 38 and 65 of the summing-up the complainant had given evidence that she screamed and banged the side of the van but no one came to assist her.

[18] Therefore, in the totality of evidence including the above evidence of the complainant the trial judge is justified in stating in the judgment that *'it is possible that no one heard when the victim screamed and banged the van'*

[19] This ground of appeal has no merits.

03rd ground of appeal

[20] The appellant raises a general argument that the trial judge had failed to consider properly and judiciously the material doubts in the prosecution case which would have led to the acquittal of the appellant.

[21] I have already pointed out how the trial judge had dealt with all the evidence led by the prosecution and the challenge mounted by the defence in the summing-up. Particular mention has been made by the appellant regarding lack of consideration of

the layout of the van and whether there were windows in it and he argues that had she screamed it would have been heard and seen by others. It does not appear from the summing-up or the judgment that those factual matters had been probed by the defence at the trial.

[22] It is not the function of the prosecution to elicit evidence not essential to prove its case but favourable to the defence but it is for the defence to probe matters and if possible, obtain helpful answers from the state witnesses. Had such questions not been asked there would have been a reason for that and no hypothetical possibilities could be floated at the appeal stage based on what had been elicited in evidence.

[23] The trial judge had delivered a fair, objective and well-balanced summing-up covering both the state and defence cases (see **Tamaibeka v State** [1999] FJCA 1; AAU0015u of 2017s (08 January 1999). He had also analysed the defence of consent again in relation to the evidence of both sides in the judgment. The assessors had accepted the state's version beyond reasonable doubt and the trial judge for sound reasons had agreed with them.

[24] Thus, 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)]

[25] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take in this kind of scenario under section 23(1)(a) of the Court of Appeal Act.

> *'……..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.'*

[26] A more elaborate discussion on this aspect can be found in **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[27] Therefore, there is no 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