

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

CRIMINAL APPEAL NO.AAU 164 of 2017
[In the High Court at Labasa Case No. HAC 16 of 2016]

BETWEEN : **KOAE BARERE** *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Ratu for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **11 November 2020**

Date of Ruling : **12 November 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa on a single count of rape contrary to section 207 (1) and (2) (b) of the Crimes Act, 2009 committed on 01 February 2016 at Savusavu in the Northern Division.

[2] The particulars of the offence were as follows.

“Koe Barere, between the 1st day of February, 2016 and the 29th day of February 2016, at Savusavu in the Northern Division, penetrated the vagina of AB with his tongue, without the consent of the said AB”

[3] After the summing-up on 12 October 2017 the assessors had unanimously opined that the appellant was guilty of the charge and in the judgment delivered on the same day the learned trial judge had agreed with them and convicted the appellant of rape. On 13

October 2017 the appellant had been sentenced to 11 years and 06 months of imprisonment with a non-parole period of 09 years.

- [4] The appellant in person had signed a timely notice of leave to appeal against conviction and sentence on 17 October 2017 (received by the CA registry on 07 November 2017). Although the appellant had also filed an application for bail pending appeal it had not been pursued subsequently. He had filed some additional grounds of appeal in person on 09 July 2020. The Legal Aid Commission had filed amended grounds of appeal only against conviction and written submissions on 13 August 2020 and the appellant had tendered an application on the same day to abandon his sentence appeal. The state had responded by its written submission on 09 September 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 **Caucou 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) *‘THE learned trial judge had erred in law and in facts having directed the assessors on recent complainant evidence that had no basis on the evidence led at trial.*
 - (ii) *THE verdict in unreasonable in that the account of the complainant to the incident is improbable and unreliable in light of the evidence of her mother PW2.*

[7] The appellant is the complainant's biological father and she was 14 years of age when the incident happened. The trial judge had summarised the evidence of the complainant and the appellant's evidence as follows in the summing-up.

Evidence of the Prosecution

'27. The complainant in her evidence said that she went to sleep with her sister on the mattress in that particular night where this incident took place. They were covered by a mosquito net. Her mother and two brothers were sleeping on the other mattress beside them. She did not know when the accused approached and removed her shorts and undergarment. She then felt that someone was leaking her vagina. She felt that he was using his tongue to leak inside her vagina. She was scared. At that point of time, her mother switched on the torch and directed it towards her. She then found that it was her father, the accused, who had leaked her vagina. He tried to pretend that he was sleeping inside her mosquito net when the mother put the torch on. The complainant said that she did not know that it was her father, until her mother switched on the torch. Once the torch was on, she found that it was the accused who was leaking her vagina with his tongue. She had observed him for about one and half minute from the light came from the torch and her vision was not disturbed by anything else. The mother of the complainant then asked the accused what was he doing inside the mosquito net, for which the accused had answered saying that he went into the wrong mosquito net. Thereafter, the complainant did not do anything as she was scared of the accused. She was scared of him because he is her father.

28. The complainant in her evidence said that she told her mother about this incident two days after incident. Her mother had then confronted him, asking about it, which he denied.

29. You have heard evidence of the mother of the complainant, where she said that the complainant told her about this incident about two weeks after it took place. The complainant had not told her mother anything about this incident in that particular night.

30. The mother in her evidence explained that she went to sleep with her children in that particular night. In the night, she saw the accused was lying beside the legs of the complainant when she woke up and switched the torch on. She then called and told the accused that was the wrong mosquito net. The accused then came and slept beside her. During the cross examination, she said that nothing unusual happened when she switched on the torch.

Evidence of the Defence

31. The accused in his evidence said that he drank grog at his neighbour's place from 3p.m to 11p.m. He then came home and consumed eight cans of beer mixed with rum at the porch of the house. He then went and slept. According to his evidence, nothing had happened after he went to sleep. When the learned

counsel for the defence asked him about this allegation, the accused said that he does not know anything about it. He further explained that he went to sleep and woke up in the following morning. His family was happy and nothing happened in the following morning. If something happened in the night, they should have told him in the following morning. He said that if he did such a thing in the night, his wife would have chased him away from the house. He cannot remember whether his wife switched on the torch in the night.

01st ground of appeal

- [8] The appellant complains that the trial judge in paragraph 41 and 42 had addressed the assessors on recent complaint evidence when there was no basis to do so.

‘41. You have heard the evidence that the complainant said that she told her mother about this incident two days after it took place. The mother in her evidence said that the complainant told her about this incident about two weeks after this incident took place. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Mother of the complainant did not actually see what happened between the complainant and the accused. Apart from the evidence of recent complaint, the mother in her evidence further said that when she switched the torch on, she saw the accused was lying beside the legs of the complainant.

42. You are entitled to consider the evidence of recent complaint in order to decide whether or not complainant has told the truth. It is for you to decide whether the evidence of recent complain helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the accused and the complainant. It therefore cannot of itself prove that the complaint is true.’

- [9] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court set down the law regarding recent complaint evidence as follows.

*‘[33] In any case evidence of recent complaint was never capable of corroborating the complainant’s account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant’s conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*

*[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*

[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.

[10] In this case both the complainant and her mother had given evidence to the complaint of the incident. Thus, procedurally the complainant's complaint to the mother had been properly led. The question is how recent it was, as according to the complainant she informed the mother within two days of the incident but as per the mother's evidence it was after two weeks since the incident. The difference in the two versions had been clearly put before the assessors by the trial judge in paragraphs 28, 29 and 41.

[11] Therefore, there was a legal basis for the trial judge to direct the assessors on recent complaint evidence and they were left to decide how recent it was and how they should make use of it and what evidentiary value to be attached. The counsel for the respondent confirmed that the prosecution was relying on recent complaint evidence at the trial. In the circumstances, there would have been a danger that the assessors would have misused the evidence of the recent complaint in any other way other than demonstrating consistency of the complainant's version and consequently her credibility and reliability, if no directions had been given by the trial judge. The directions given are not obnoxious to principles set down in Raj.

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

02nd ground of appeal

[13] The appellant argues that the complainant's account is improbable and unreliable in the light of the evidence of the complainant's mother and therefore the verdict is unreasonable. His position is that the mother had not seen anything unusual when she saw the appellant lying beside the complainant's legs. The appellant seems to contend that it was improbable for her not to have seen the sexual act by him or seen that the complainant was without her shorts and undergarments.

- [14] In the summing-up, it is not mentioned how far the complainant's shorts and undergarments had been lowered when she felt someone licking inside her vagina using the tongue. Secondly, what the mother had said was that when she switched on the torch nothing unusual happened at that moment. She does not appear to have been questioned in detail as to whether she saw the full length of the body of the complainant at that time with the help of the torch light to see whether she was naked or not; if so, fully or partially. The complainant had said that when the mother switched on the torch and turned it towards her, the appellant was pretending to be asleep inside the mosquito net. Thus, the mother obviously could not have seen him licking the complainant's vagina.
- [15] Therefore, one cannot conclude that the complainant's version is improbable. The appellant's counsel should have probed it further and if she had not done so, she may not have done it for a good reason. Perhaps, further questioning may have elicited more unfavourable answers. A strategic decision by the trial counsel cannot be made an appeal point now.
- [16] 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 trial 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)]

[17] 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 when it is complained that the verdict is unreasonable or cannot be supported by evidence 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.’

[18] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagalaloea v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[19] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)).

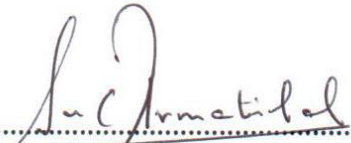
[20] Having considered the summing-up and the judgment, I cannot say that the verdict is unreasonable and the evidence of the complainant and her mother was sufficient to base the verdict. The trial judge could have reasonably convicted the appellant on the evidence before him.

[21] 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