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

CRIMINAL APPEAL NO.AAU 0081 of 2018
[In the High Court at Labasa Case No. HAC 66 of 2017]

BETWEEN	:	**SETAREKI VUKICANAGAUNA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**18 November 2020**
Date of Ruling	:	**19 November 2020**

RULING

[1] The appellant had been indicted in the High Court of Labasa on a representative count of rape contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009 committed between 26 December 2015 and 08 January 2016 at Lekutu in the Western Division.

[2] After the summing-up on 06 June 2018 the majority of assessors had unanimously opined that the appellant was guilty of the charge of rape. In the judgment delivered on the same day the learned trial judge had agreed with the assessors and convicted him as charged. On 07 June 2018 the appellant had been sentenced to 10 years and 09 months of imprisonment with no non-parole period.

[3] The appellant in person had signed a notice of appeal within the appealable period on 25 June 2018 against conviction and sentence (received by the CA registry on 20 August 2018). He had filed additional grounds of appeal against conviction on 12 June 2019. The appellant had tendered an abandonment notice regarding his sentence appeal on 28 August 2020 and filed written submissions on 27 September 2019. The state had responded by its written submission on 15 October 2020.

[4] 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.

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

> *'Ground 1 - That the learned trial Judge erred in law and in fact when he failed to consider in his Judgment the inconsistent evidence of the complainant and the significant Medical evidence in determining any unlawful sexual intercourse.*
>
> *Ground 2 That the learned Trial Judge has erred in law and in fact when he unfairly ignored the presence of the Medical expert that would have assisted the Assessors in determining the credibility of the complainant.*
>
> *Ground 3 - The Learned Trial Judge has erred in law and in fact by misdirecting the Assessors with regard to the burden of proof and thereby caused a miscarriage of justice.*
>
> *Ground 4 - The Learned Trial Judge erred in law and in fact to adequately evaluate the evidence, resulting in a verdict which was unsafe, unsatisfactorily and unsupported by the evidence as a whole.*

[6] The summary of the evidence led by the prosecution is as follows. The appellant is the cousin brother of the victim. The victim was raped when she went to their farmhouse in Lekutu with her parents and siblings during the Christmas break in 2015. She was 12 years old and a primary school student at the material time. The victim gave evidence that between 26 December 2015 and 08 January 2016, the appellant had sexual intercourse with her on two occasions at his farmhouse in Lekutu. The appellant had lured the victim into his house next to the farmhouse after exposing his private genitals to her when she went to wash dishes at a tap outside his house. When she entered the house, he performed oral sex on her and then had sexual intercourse with her. She did not report the incident to anyone until nine months later when she confided in her school teacher about what her cousin had done to her. Her teacher gave evidence of the complaint that the complainant had made to her. The complainant's father gave evidence of a traditional apology presented to his family by the appellant's family in which the appellant was present and crying.

[7] The appellant remained silent but led evidence from two of his cousins, Jale Valetino and Pita Koroi, who said that the appellant was with them at Namukalau Village between 25 December 2015 and 31 January 2016 attending a function.

01st and 02nd grounds of appeal

[8] The appellant has dealt with both grounds of appeal together in his written submissions. He complains that the learned trial judge had not addressed the assessors or himself on the significance of medical evidence. The state has submitted that the prosecution did not lead any medical evidence or produced any medical report at all though the medical report was part of the disclosures provided to the appellant.

[9] The appellant has cited **Davie v Magistrates of Edinburgh** 1953 SLT 54; 1953 SC 34 in support of his grounds of appeal where the Court rejected a submission that, where no counter evidence on the science in question had been adduced for the pursuer, the Court was bound to accept the conclusions of an expert witness for the defenders, saying that this view was 'contrary to the principles in accordance with which expert opinion evidence is admitted'. These principles are that:

'Expert witnesses however skilled or eminent can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court. Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'

[10] In **Regina v Turner (Terence)** [1975] QB 834, (1974) 60 Cr App R 80, [1975] 1 All ER 70, [1975] 2 WLR 56, (1975) 60 Cr App R 834 cited by the appellant it was held that the law jealously guards the role of the jury, or the court where it is the trier of the facts, as the judge of human nature, of the behaviour of normal people and of situations which are within the experience of ordinary persons or are capable of being understood by them. Expert medical evidence based upon observation of a witness can only be admitted if that evidence showed a recognised mental illness. Lawton LJ further said

'An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is just out of the scientific jargon, it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves . . Jurors did not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.' and 'A man's personality and mental make-up do have a bearing upon his conduct. A quick-tempered man will react more aggressively to an unpleasing situation than a placid one. Anyone having a florid imagination or a tendency to exaggerate is less likely to be a reliable witness than one who is precise and careful. These are matters of ordinary human experience. Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgments.'

... And 'Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless.'

[11] Unfortunately, none of the above decisions could buttress the appellant's arguments and they are in fact not even relevant in this case though they had set down sound principles relating to expert evidence. The appellant defended by lawyers could have led medical evidence in defence if it was favourable to his case. Therefore, there was no basis at all for the trial judge to have directed the assessors or himself on non-existent medical evidence.

[12] There two grounds of appeal have reasonable prospect of success.

03rd and 04th grounds of appeal

[13] The appellant submits that the trial judge had misdirected the assessors with regard to burden of proof. However, I find that in paragraphs 4 and 5 of the summing-up the judge had correctly addressed the assessors on burden of proof and standard of proof.

[14] It is also argued by the appellant that the verdict was unsafe and unsatisfactory and unsupported by evidence and the trial judge had not adequately evaluated the evidence.

[15] One of the matters the appellant has highlighted in support of his above contention is that the prosecution has failed to show that at least one of the acts complained of must have happened during the period mentioned in the information. In paragraph 17 of the summing-up the trial judge had described what a representative count means which is that the prosecution must prove beyond reasonable doubt that one of the incidents of the alleged rape occurred between 26 December 2015 and 08 January 2016. This direction is in line with **Mataunitoga v State** [2015] FJCA 70; AAU125.2013 (28 May 2015) where it was held that the effect of a representative count is that the offender is convicted of only one incident of the alleged sexual acts and not multiple offences. A representative count is permitted by section 70(3) of the Criminal Procedure Act, 2009.

[16] According to paragraph 19 of the summing-up, the complainant had stated in her evidence that both incidents had happened on consecutive days immediately after Christmas in 2015. Therefore, the appellant's argument has no factual basis.

[17] The appellant also argues that the trial judge had not adequately addressed the assessors on the elements of rape. Once again I find that the trial judge had directed the assessors in paragraph 18 of the summing-up that the prosecution must prove that the appellant penetrated the complainant's vagina using his penis; even slightest penetration to be adequate. As the complainant was proved by her birth certificate to be under 13 years of age at the time of the commission of the offence, her consent was not material and therefore, this was quite a sufficient description as to the elements of the charge that the prosecution had to prove in the context of the case. It is a direction tailor-made to the facts of the case.

[18] The appellant also seems to suggest that the complainant may have consented to have sexual intercourse by arguing that the evidence had shown that she on her own freewill entered the house after the appellant had exposed his private parts to her when she could have walked away or shouted.

[19] The appellant, unfortunately for him, had not realised that even if he had engaged in consensual sex with the complainant, her consent would not free him from criminal liability as she was less than 13 years of age at the time the sexual intercourse took place.

[20] Another complaint of the appellant is that the trial judge had not put his defence fairly and accurately and cites the decision in **Prasad v State** [2017] FJCA 112; AAU105.2013 (14 September 2017) in support of his argument. His defence was one of *alibi* at the trial and not consent. The law relating to *alibi* evidence is set out in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) and **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020).

[21] The learned trial judge had dealt with the appellant's *alibi* defense in paragraph 23 of the summing-up and directed the assessors that the prosecution must disprove the *alibi* and even if it is false that by itself would not entitle the assessors to convict the appellant. Thus, the assessors had been told that even if they were to reject the *alibi* evidence they must decide the guilt of the appellant on the evidence led by the prosecution and if they believed that the appellant was at Namukalau at the material time he could not have been in Lekutu to commit the offence. This is quite an adequate direction on alibi defense of the appellant in terms of ***Ram*** and ***Mateni***.

[22] The state has countered the appellant's several argument by stating that his counsel should have sought redirections in respect of those alleged inadequate directions, misdirections or non-directions as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[23] Finally, the appellant argues that the trial judge had not made an independent assessment of the evidence in his judgment when agreeing with the majority of the assessors. This is a misconception of the trial judge's role in a case where he agrees with the assessors.

[24] The trial judge had 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] As for the appellant's submission that the verdict is unsafe and unreasonable it has been held in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) that the test of a verdict being unsafe and unreasonable does not apply in Fiji.

[26] In **Sahib v State** (supra) 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.'*

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

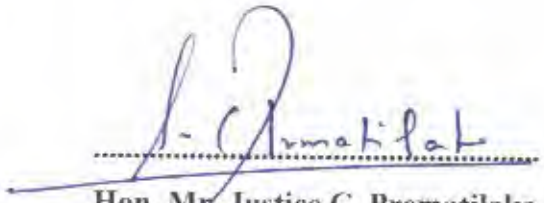
[28] In **Kaivum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict is challenged on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA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

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

[30] Therefore, there is no reasonable prospect of success in these two grounds of appeal.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL