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

CRIMINAL APPEAL NO.AAU 0008 of 2018
[In the High Court at Suva Case No. HAC 99 of 2016]

BETWEEN	:	**ENESHWAR RAJ**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. L J. Burney for the Respondent**
Date of Hearing	:	**15 December 2020**
Date of Ruling	:	**16 December 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on four counts of rape committed at Nasinu in the Central Division contrary to section 207(1) and (2) (a) and 207(1) and (2) (b) of the Crimes Act, 2009 respectively.

[2] The information read as follows.

COUNT 1

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ *between the 30th day of November 2015 and the 4th day of January 2016 at Nasinu in the Central Division had carnal knowledge of* ***RENUKA DEVI NARAYAN,*** *without her consent.*

COUNT 2

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ *between the 1st and 31st day of December 2015 at Nasinu in the Central Division penetrated the vagina of* ***RENUKA DEVI NARAYAN,*** *with an eggplant without her consent.*

COUNT 3

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ *on the 5th day of January 2016 at Nasinu in the Central Division had carnal knowledge of* ***RENUKA DEVI NARAYAN,*** *without her consent.*

COUNT 4

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ *on the 5th day of January 2016 at Nasinu in the Central Division penetrated the vagina of* ***RENUKA DEVI NARAYAN,*** *with his finger without her consent.*

[3] The sole witness for the prosecution had been the complainant, Renuka Devi Narayan. The appellant, Eneshwar Raj, had given evidence on his own behalf. It had been admitted that the appellant and the complainant have been husband and wife for 10 years and have a 09 year old daughter of their marriage. The prosecution had alleged that it was a case of marital rape. During the period of 30 November 2015 to 05 January 2016, the complainant and the accused were married to each other. The trial judge had summarized the complainant's evidence as follows in the judgment.

'Between 30 November 2015 to 4 January 2016, she testified that the relationship between herself and her husband was not too good. This was due to small conflicts and arguments. During this period, they always had arguments and her husband forced her to have sex with him every night. She stated "if I deny him he always used to force me to have sex with him every night. If I deny he always pulls my clothes off and he always makes love bites on my neck. And he won't listen to me. He used to always have sex with me."

Renuka explained that by sex she meant the accused inserting his penis inside her vagina. Although the accused was legally married to her, she did not want to have sex with him, and didn't consent to have sex with him. She had told the accused that she didn't want to have sex with him. However, the accused would not listen to her and would forcefully have sex with her. She said she felt unhappy about this.

Between 30 November 2015 to 4 January 2016, nearly every night the accused would forcefully have sex with her.

On one occasion during this period, the accused had inserted an eggplant into her vagina. Renuka explained further. After returning home from work, it was night time and they were sleeping. She and her husband had arguments again. She didn't want to have sex but the accused had forced her. He had sexual intercourse with her 2 times and after that in an aggressive manner he had inserted an eggplant into her vagina. She states that she felt something different in her vagina. She felt something hard. Different to a penis. When she got up to go to the washroom to wash herself, she had put on the lights. She had then seen the eggplant. Only at that time did she realise that her husband had inserted an eggplant in her vagina.

Renuka testified that actually she didn't know that the accused would do such a thing as he was legally married to her. Although she had felt very bad about this incident, she didn't want to argue with the accused as she was afraid of him. She was afraid that he would punch her. So she kept it to herself.

The complainant testified further as to the events which took place on 5 January 2016. She said it was a Tuesday. She had returned from work around 5.00-5.30 in the evening. They had their dinner and had arguments. The accused had forcefully had sexual intercourse with her and thereafter, had forcefully inserted his fingers into her vagina and kept her awake until morning. He had not let her sleep.

She testified that on this day she refused to have sexual intercourse with the accused. However, he had forcefully pulled her clothes off and started having sex with her. Renuka again explained that by sex she meant the accused inserting his penis inside her vagina. Thereafter, the accused had forcefully inserted two of his fingers into her vagina.

Renuka testified that after these incidents of 5 January 2016, she had been fed up with his behaviour. Therefore, she had made a complaint to the Police.

[4] The appellant under oath had denied that he raped his wife Renuka at any point of time. He had testified that all the acts of sexual intercourse relating to the first count with her during the period 30 November 2015 to 05 January 2016 were consensual. He also had denied that he inserted an eggplant into Renuka's vagina. He had denied having inserted his fingers into her vagina or had sexual intercourse with her against her consent on 05 January 2016. He had alleged that his wife was cheating on him.

[5] At the end of the summing-up on 03 October 2017 the assessors had unanimously opined that the appellant was not guilty of count 01 but guilty of counts 03 and 04. The majority of the assessors had opined that the appellant was guilty of count 02. The learned trial judge had disagreed with the unanimous opinion of the assessors on count 01 and agreed with them on other counts in his judgment delivered on 05 October 2017, convicted the appellant on all counts and sentenced him on 03 November 2017 to 08 years and 04 months of imprisonment each on all four counts to run concurrently with a non-parole period of 06 years and 04 months.

[6] The appellant's untimely notice of appeal against conviction and sentence preferred in person had been signed on 19 January 2018 (received on 25 January 2018). The delay is less than 02 months and the appeal had been considered as timely on the first mention date in the Court of Appeal. The appellant had tendered an application to abandon his sentence appeal in Form 3 on 31 August 2020. The Legal Aid Commission had tendered an amended notice of appeal only against conviction and written submissions on 13 October 2020. The state had tendered its written submissions on 20 October 2020.

[7] 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. This threshold is the same with leave to appeal applications against sentence as well.

[8] Grounds of appeal urged on behalf of the appellant are as follows.

> *1. That the learned trial judge erred in law and in fact when he failed to give cogent reasons for overturning the assessor's majority opinion of not guilty.*
>
> *2. The conviction for the second , third and fourth counts of rape are unreasonable and not supported by the totality of the evidence.*

01st ground of appeal

[9] The appellant's complaint is based on paragraph 20 and 21 of the judgment. He alleges that the trial judge had failed to adduce cogent reasons why he was differing from the opinion of the assessors on count 01.

> *'**[20]** In this case the three Assessors were unanimous in finding the accused not guilty of count 1. Considering the totality of the evidence led at the trial. I am of the considered opinion that this is not justified. What the prosecution had to prove was just one incident of sexual intercourse, without the consent of the complainant, which took place within this period.*
>
> ***[21]** It is my view that the prosecution has proved the charge of Rape against the accused in Count 1, beyond any reasonable doubt.*

[10] The appellant relies on **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Baleilevuka v State** [2019] FJCA 209; AAU 58 of 2015 (03 October 2019) and **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and my earlier ruling in **Waininima v State** [2020] FJCA 159;AAU0142 of 2017 (10 September 2020) in support of his contention based on the duty of the trial judge when disagreeing with the majority of assessors.

[11] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal in the face of a similar ground of appeal in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159;AAU0142 of 2017 (10 September 2020) followed by a few other rulings. I

do not intend the repeat the same exercise here. However, my conclusions were subsequently summarized in **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and several other rulings. They are as follows.

[12] There still appears to be some gray areas flowing from the past judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.

[13] What could be ascertained as common ground 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 a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written 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 is supported by evidence so that a 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), **Kaivum 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)].

[14] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]

[15] In both situations, 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. 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.

[16] This stance is consistent with the position of the trial judge at a trial with assessors *i.e.* in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[17] Therefore, viewed in the light of the past decisions on this area of law, I am of the view that the learned trial judge's reasons in paragraphs 21 and 22 of the judgment had not measured up to the required standard when he overturned the assessors' opinion in respect of count 01. He had sufficiently narrated but does not seem to have undertaken an independent assessment and evaluation of the evidence and not given 'cogent reasons' founded on the weight of such evidence and most importantly failed to reflect as to the credibility of the complainant and the appellant on the issue of consent or lack of it in differing from the opinion of the assessors.

[18] This being a case of 'word against word', as conceded by the state, the assessors' opinion of not guilty in respect of count 01 would obviously have been based on disbelieving the complainant's evidence of lack of consent or at least not being sure of the aspect of want of consent, for the acts of sexual intercourse were not disputed by

the appellant. The trial judge had not stated why he thought that the complainant's version was credible as opposed to or contrary to what the assessors had thought.

[19] The state concedes that the reasons given by the trial judge fail to satisfy the 'cogency' test in respect of count 01 formulated in several decisions above cited but argues that the reasons could be readily inferred from the summing-up and the judgment. It also argues that the trial judge cannot anyway give reasons why he is disagreeing with the assessors as their reasons are not known but all what the trial judge could do is to provide his own independent reasons for concluding that he is either sure or not sue of guilt of the appellant. However, what section 237(4) of the criminal Procedure Act, 2009 requires the trial judge to do is to give reasons why he is disagreeing with the opinion of the assessors; not their reasons. In any event the trial judge had not given independent reasons of his own for his overturning the assessors' opinion.

[20] The trial judge at paragraphs 69 -71 had correctly directed the assessors in terms of how they should consider the appellant's evidence. These directions are in line with the prescribed directions when there is a 'word against word' conflict between prosecution and defence as expressed in **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017)

[21] When the assessors had expressed their opinion *inter alia* considering those directions that the appellant was not guilty of count 01, in my view it was incumbent upon the trial judge to have analyzed and evaluated both versions and set down his own reasons why he was deciding that the acts of sexual intercourse between spouses, as they were, had been against the consent of the complainant. The trial judge had unfortunately failed to do that.

[22] Therefore, I believe that the appellant has a reasonable prospect of success with his first ground of appeal irrespective of the final outcome of the appeal and therefore, he deserves leave to appeal. Even otherwise, the importance of the points of law raised by the state is a good enough reason to allow this matter to reach the full court.

[23] However, the state argues that the consequence of failure to give 'cogent' reasons would not necessarily guarantee success for the appellant in appeal, for this court can adequately discharge its appellant function independent of the said failure on the part of the trial judge. The argument goes further to state that section 237(4) is silent on the consequence of failure to adhere to the section by the trial judge *i.e.* to give reasons in differing with the assessors and that while such a failure may constitute an error of law it does not follow that such failure would necessarily amount to a miscarriage of justice. In other words, the state argues that lack of cogent reasons alone can never found a successful appeal unless there has been a miscarriage of justice.

[24] The appellate function is what is prescribed by section 23 of the Court of Appeal Act. In other words the state seems to suggest that irrespective of whether the trial judge had failed to give cogent reasons in the judgment in disagreeing with the assessors or for that matter despite any complaint regarding trial proceedings, still the Court of Appeal should independently assess evidence to determine whether there is any ground enumerated in section 23 Court of Appeal Act upon which the verdict should be set aside and if not, the verdict would not be disturbed. Whether the verdict is supported by evidence is one of them. Needless to state, that even if it is open to this court to do that, this task could be undertaken only by the full court after considering all the evidence led in the case and the appellant deserves leave to appeal to the full court for that reason alone.

[25] This approach, however, would create tension with the long held view of the function of the Court of Appeal under section 23 as articulated in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013), **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020) based on interpretations in the UK of a similar provision.

[26] In the same process, the state argues that it seems illogical not expect a similar duty of having to give 'cogent' reasons from the trial judge when he agrees with the assessors while such a requirement is insisted upon when he disagrees. The argument appears to

suggest that in both situations the trial judge should independently analyze and evaluate the evidence and come to his own conclusion and should give reasons for agreeing or disagreeing with the assessors. This is similar to the position that His Lordship Marsooof J adopted in **Ram v State** (supra). However, it was held to be *obiter* in **Kaiyum v State** (supra) which held *inter alia* that where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Act does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment. Justice Marsoof himself later explained in **Chandra v State** (supra) that in ***Ram***, the Supreme Court did not, and did not have to in the circumstances of that case, express any view in regard to whether reasons have to be provided by the trial judge for agreeing with the opinion of the assessors. His Lordship went on to state that under section 237 of the Criminal Procedure Act the trial judge is required to make an independent assessment of the evidence to be satisfied that the verdict of court is supported by the evidence and is not perverse noting that if the trial judge disagrees with the unanimous or majority opinion of the assessors, *"he shall give his reasons, which shall be written down and be pronounced in open court"*.

[27] His Lordship also drew a distinction between (1) the requirement of making an independent assessment of the evidence; and (2) giving reasons for disagreeing with the opinion of the assessors and said that in every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. Justice Marsoof explained that the judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors.

[28] Justice Marsoof agreed that an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered [as held in **Mohammed v State** (supra)] and recommended that it should become the practice in all trials in the High Court. His Lordship Justice Keith, while agreeing that since the trial judge is the ultimate

finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant, suggested that by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are and urged all judges to do that. However, His Lordship did not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

[29] However, the Supreme Court had not elaborated as to how the exercise of evaluating evidence and giving reasons could be so rigidly separated from each other in a practical sense, for within evaluation one may find reasons or evaluation may naturally and logically lead to reasons.

[30] The Court of Appeal in **Kumar v State** (supra) held that there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under section 237(3) of the Criminal Procedure Act 2009.

[31] In **Singh v State** (supra) where the trial judge had overturned the assessors' opinion Marsoof J stated that it is evident on the available evidence that the trial judge had failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors and that the Court of Appeal had in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree.

[32] The Supreme Court has not overruled **Kaiyum v State** (supra) or **Kumar v State** (supra) in any of its above decisions. Therefore, there is a need for the Supreme Court to unequivocally lay down the legal position *vis-à-vis* the trial judge's duty when agreeing with the assessors. One thing is clear; Section 237(4) compels a Judge to give reasons when disagreeing with the assessors but the legislature has not imposed a

similar obligation on the trial Judge when he agrees with the assessors. The legal position when the judge is disagreeing with the assessors is clearer.

[33] However, in this case the legal position of a trial judge when he agrees with the assessors does not arise. Therefore, I am not inclined to comment on that aspect any further and my above comments on that were made in fairness to the state counsel who made substantial oral submissions as well on this point of law.

02nd ground of appeal

[34] The appellant argues that the verdict in respect of counts 2-4 is unreasonable and not supported by evidence.

[35] 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.....'*

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

[37] 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)].

[38] The appellant's argument is that because the assessors had not believed the complainant on count 01 that had happened between 30 November 2015 and 04 January 2016 they could not have believed her on count 02 that had supposedly occurred during the same time period.

[39] The difference is that regarding the allegations in second, third and fourth counts the appellant's potion was one of total denial whereas he had accepted having had sexual intercourse as alleged in the first count but with consent. Therefore, it was not unreasonable for the assessors and the trial judge to have believed the complainant on 2-4 counts while rejecting the appellant's total denial. In other words the culpability of the appellant in respect of counts 2-4 did not depend on whether there was 'consent' or not but whether those incidents occurred or not. Contrary to the appellant's assertion, there was ample evidence to support the verdict on 2-4 counts.

[40] Therefore, this ground of appeal has no reasonable prospect of success in appeal.

Order

1. Leave to appeal against conviction is granted on the first ground of appeal.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL