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

CRIMINAL APPEAL NO.AAU 007 of 2019
[In the High Court at Suva Case No. HAC 142 of 2018]

BETWEEN	:	MAIKELI FREYER NAWAITABU
		Appellant
AND	:	THE STATE
		Respondent
Coram	:	Prematilaka, JA
Counsel	:	Mr. Fesaitu for the Appellant
	:	Mr. S. Tivao for the Respondent
Date of Hearing	:	12 May 2020
Date of Ruling	:	15 May 2020

RULING

[1] The appellant had been indicted in the High Court of Suva on three counts of rape, one count of attempted rape and 04 counts of sexual assault under the Crimes Decree, 2009 committed between the 01 January, 2015 and 31 December, 2015 at Nasinu in the Central Division.

[2] The information consisted of the following counts.

COUNT ONE

Statement of Offence

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

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2014 and 31st day of December, 2014 at Nasinu in the Central Division penetrated the vagina of* ***GN*** *with your fingers without her consent.*

COUNT TWO

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) of the Crimes Act of 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division penetrated the mouth of* ***MN*** *with your penis without his consent.*

COUNT THREE

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) and (3) of the Crimes Act of 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division penetrated the mouth of* ***JR****, a child under 13 years of age with your penis*

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division attempted to have carnal knowledge of* ***GN*** *without her consent.*

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured GN to witness an act of gross indecency by displaying your penis to the said* ***GN****.*

COUNT SIX

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured MN to witness an act of gross indecency by displaying your penis to the said* ***MN****.*

COUNT SEVEN

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(i) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured MN to commit an act of gross indecency by forcing the said MN to hold your penis*

COUNT EIGHT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER ***NAWAITABU*** *between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured JR to witness an act of gross indecency by displaying your penis to the said* ***JR****.*

[3] The victim in the first count of digital rape had been one GN, the victim in the second count of penile rape (an act of fellatio) had been one MN and the victim in the third count of penile rape (an act of fellatio) had been a child (under 13 years of age) named JR. The actual names of the victims had been suppressed.

[4] Attempted rape had been committed against GN while sexual assaults had been carried out against GN, MN and JR.

[5] After full trial, the assessors had expressed an opinion of guilty against the appellant on all counts on 28 November 2018. The learned High Court judge had agreed with the assessors and convicted the appellant of all charges in his judgment on 29 November 2018. He was sentenced on 13 December 2018 to 11 years and 09 months and 15 days of imprisonment with a non-parole period of 07 years, 09 months and 15 days.

[6] The appellant being dissatisfied with the conviction imposed had filed a timely notice of appeal on 09 January 2019 containing eight grounds of appeal. Subsequently, the Legal Aid Commission had filed an amended notice of appeal on 20 April 2020 seeking leave to appeal on 04 grounds of appeal along with written submissions. The respondent's submissions had been filed on 11 May 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 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87. This threshold is the same with timely leave to appeal applications against sentence as well

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

Ground 1

The Learned Trial Judge erred in law and in facts when convicting the Appellant on counts 1 and 2 of rape, when the totality of evidence does not support the charges that the Appellant is guilty beyond a reasonable doubt.

Ground 2

The Learned Trial Judge erred in law and in facts when convicting the Appellant on count 4 of attempted rape, when the evidence does not support the charge that the Appellant is guilty beyond a reasonable doubt.

Ground 3

The Learned Trial Judge erred in law by misdirecting the assessors and himself on the elements relating to the offence of sexual assault to which the Appellant is indicted for and that the totality of the evidence does not support the charges of sexual assault for counts 5, 6 and 7.

Ground 4

The Appellant is prejudiced by the learned Trial Judge directing himself and the assessors at paragraph 26 of the summing up that the Court being satisfied that prosecution has adduced sufficient evidence to call for a defence.

[9] The learned High Court judge had summarized the evidence of JR, GN and MN in the summing-up as follows.

*'20. The 1st witness for the prosecution was **JR**. A summary of his evidence is that;*

i. He was born on 12th of January 2004. (A copy of his certificate of birth is marked and produced as PE1)

ii. The witness and the accused are from the same neighborhood and has seen & known him but has not spoken to him until the alleged incidents.

iii. One day in November 2015, he has come home after school and gone to the playground with his father's permission. He has seen Maikeli (the accused) and the accused has started a conversation with him saying 'Hello'. The accused has allegedly said that he is cold and asked the witness to scratch his penis. The witness has said 'no' and at that moment a relation having called him the witness has gone home.

iv. Thereafter at holidays in December, when the witness is at Pena's house the accused has come there and asked him to go down & get a wire from the spare room, which was at the basement (bottom) of the Pena's house. The witness having found the wire, when turned to come back has seen the accused behind, with his pants lowered down to his knees. The accused has asked the witness to give him a 'blow job'. The witness understood it to have meant to 'suck his penis'. When the witness said 'no' the accused has grabbed his arms and tried to pull him. The witness has managed to escape and run out. When JR went back to Pena's house, the accused also come up and has asked him to take the wire to the back of the Church.

v. When JR took the wire to the Church, the accused has followed him behind. At the back of the Church, the accused has grabbed the arms of the witness, tightly and asked him to suck the accused's penis. The accused has made the witness to go down on his knees and suck the accused's penis. When the witness was sucking his penis,

the accused had said some words in Fiji (I-Taukei), which the witness had not understood. After a while the accused has ejaculated in the mouth of the witness, which the witness has spat out. Having done so, the accused has gone away asking the witness also to go. The witness has stayed there for about 10 to 15 minutes and cried, feeling weak, helpless and like committing suicide. Thereafter JR has gone home cried some more, and slept.

vi. *After a couple of weeks JR has told these incidents to Mitieli, Grace and Elanoa. He has told them when he heard their stories, only. Until then he has not told anyone because he was feeling shy and scared. At that time Grace has told him that the accused has locked her in a room and showing her his penis had wanted her to do a 'blow-job'. Further, as for the witness, Grace has told that she has seen the witness giving a 'blow-job' to the accused. Then Elanoa advised them to tell their parents.*

vii. *Thereafter, his parents has come to know of it and gone and complained to the Nakasi Police Station. The Police has recorded his statement at about 9 – 10 in the night.*

viii. *In cross examination, the witness states that he has been there in Davuilevu housing for 6 years since 2012, and by 2015, he is familiar with the neighborhood. He has seen Maikeli (the accused) only at the playground before. When asked that he had the opportunity of running away if he felt scared after the 1st incident at the bottom of the Pena's house, the witness while conceding that he had the opportunity, states that he did not run away.*

ix. *When confronted with his statement to the police and queried of the place of the 2nd incident, the witness states that he is sure that it happened outside the Church and attributes the discrepancy to the sleepiness he had when he gave the statement to the police, late at night.*

x. *When suggested that this was a story invented, to take revenge from the accused, the witness denies, stating that the Grace's issue regarding an Indian boy took place much later and the accused had no involvement with it.*

21. The 2nd witness was ***GN****. The summary of her evidence is that;*

i. *She was born on the 13th of November 2000. (A copy of her certificate of birth is marked and produced as PE2)*

ii. *She has been living in the Davuilevu housing which is also known as Cargill Street Squatters, since 2007.*

iii. *The accused is an uncle of hers, as the accused's mother is a younger sister of her maternal Grandmother's.*

iv. *In 2014, when once she went to the accused's house to clean the accused's mother's room, Maikeli (the accused) entered the room, pulling his pants down, showed his penis to the witness and asked her to suck it & satisfy him. The witness has refused and gone home.*

iv. *After about 3 days later, when the witness has gone again to the accused's house on his mother's request to clean her room, the accused has come there with a bottle of oil and wanted the witness to play with his penis. The accused has shown his penis to the witness, there. The witness having refused it has gone home.*

v. *At about a week, thereafter the witness has gone back to the house of the accused, & while cleaning his mother's room, the accused has come there and tried to pull down the Sulu she was wearing and poked his finger into her vagina. Further, as for the witness, the accused has scratched her vagina and his hand has gone into her vagina*

at that moment. The witness has pushed away the accused has run straight home. That has been painful to the witness and she has not agreed with the accused to commit such an act.

vi. *Thereafter, one day the accused having pulled Cassava, has asked her to come and get it. When the witness is picking the Cassava, the accused has pushed her down and pulling his pants down has tried to pull the witnesses Sulu, down. When she has fallen on the ground the accused has knelt down and tried to lie down on top of her. At that moment, the witness had screamed and ran home pushing the accused away.*

vii. *She has not informed any of these incidents to the mother of the accused as she was scared. However, she is said to have informed of these incidents to her Friends JR and Elanoa. The witness further admits that JR told her of certain incidents alleged to have done by the accused to JR; however, she did not witness any such being done.*

viii. *In cross examination, the witness admits that there are four rooms in the accused's house, the living area being in the middle and two each on the sides. She also admits that there are many people living in the accused's house. The witness further admits that she maintains a close friendship with JR and MN and known them since 2012.*

ix. *When shown her statement to the police and queried upon the witness concedes that she did not describe the first two incidents which happened at the accused's house to the police in detail. She further admits that there were many people in the living room when the alleged third incident happened at the accused's house. However, they could not have seen it as the curtains were down at the time of the said incident. The witness also states that though she could have screamed, she did not do so, as she was shy and did not want the others to know about it.*

x. *It was suggested that the witness was having an affair with an Indian boy and her father having found it out queried her. The witness denies it, on two grounds. Firstly that she never had an affair and secondly that her father never queried her on any such. When it was suggested that she has made this up, the witness promptly denies it.*

22. *The PW3 was **MN**. The summary of his evidence is that;*

i. *He was born on 25th of March 2002. (A copy of his certificate of birth is marked and produced as PE3)*

ii. *He has been living in the Davuilevu Housing, which is also known as Cargill Street Squatters, since birth.*

iii. *Somewhere in 2015, once when he was going by the accused's house, the accused has called him from the window. He was shocked to hear someone calling and when he turned he has seen the accused inside his mother's room touching his penis. The witness has clearly seen the penis of the accused and the accused while holding it, has said that it is itching.*

iv. *After a while, the accused has come around and asked the witness to help him to carry a wood to the Pena's house. While inside the basement or the tool room of the Pena's house, the accused has closed the door and has asked the witness to suck his penis. The witness says that he was scared and frightened and therefore, sucked the penis of the accused, there. Having sucked the penis of the accused for few minutes the witness has told to the accused that he wants to go home. At that moment the accused has offered to suck the penis of the witness, which the witness has refused. The stance of the witness is that he did not suck the penis of the accused willingly; he did it because he was scared and frightened. Thereafter, the accused has opened the*

door, peeped around to see whether any one was around, and seen no one around, has let the witness go.

v. *When queried why he didn't run away at the first time, the witness replies that he never expected it to end up in such a way.*

vi. *Few weeks afterwards, once when the witness was returning after playing, he has seen the accused on the sea wall. The accused has called him and when gone, the accused has taken the hand of the witness and put it inside his underwear. The hand of the witness has touched the penis of the accused and the witness has pulled his hand out. The witness further testifies that he has not been agreeable to such an act and the accused knew it.*

vii. *The witness says that he has told of these incidents to JR and Elanoa after a few weeks. When he told JR, JR told him that he also has sucked the penis of the accused. The witness further says that he told these to JR and Elanoa because they share secrets.*

viii. *In cross examination witness says that he and JR are cousins as his mother and JR's mother are sisters. When suggested that the accused chases children home when it's getting dark, the witness denies. When referred to the statement made by the witness to the police, he states that the order of events was incorrectly recorded by the police. The witness further admits that certain events were also incorrectly recorded by the police.*

ix. *The witness states that he did not inform the first incident of seeing the accused touching his penis to the police as the witness got scared when the police suddenly came and asked him to come to the police station to record a statement.*

x. *When confronted with his statement, the witness admits that it differs from what he has said in evidence, about the incident alleged to have happened at the sea wall. Later, the witness says that these were two separate incidents. According to the witness, on second time the accused has come behind him while he was in the church yard and taken his hand and put it inside his underwear. However, witness contradicts his earlier stance of once accused taking his hand and putting it inside his underwear by stating that such an incident having happened twice.*

xi. *In re-examination, the witness clarifies that he, JR and GN did not like the accused not for anything else but for the alleged incidents. Further it was pointed out that the statement of the witness was recorded very late at night (commencing from 10.50pm) and was hurriedly recorded with in a very short time spam (20 minutes).*

01 ground of appeal

[10] Under the first ground of appeal the appellant argues that the prosecution had not adduced evidence from GN and MN that the appellant had committed the acts complained of by force, threats, intimidation or bodily harm to cause fear in them. In other words according to the appellant there was no evidence to say that the consent was not given freely and voluntarily due to the absence of the factors outlined in section 206(2) of the Crimes Act.

[11] 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.

[12] 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) .....

[13] 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.

[14] 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. Neither does sub-section (2) override sub-section (1). This is the same with submission without physical resistance which alone would not amount to consent.

[15] The evidence clearly shows that the appellant had committed the acts of rape without the consent of GN and MN. There is no ambiguity in that regard.

02nd ground of appeal

[16] The appellant's complaint is that it was not open to safely arrive at a verdict of attempted rape on GN on the evidence available. In **Bulimaiwai v The State** [2005] FJHC 261; HAA0068J.2005S (2 September 2005) the elements of attempted rape was set out as follows in the light of section 380 of the Penal Code [there does not seem to be a similar provision in the Crimes Act, 2009 except section 44(2) excluding a mere preparatory act] and ruled out a mere indecent assault on the evidence led.

> *'The elements of the offence of attempted rape are first that the accused intended to have carnal knowledge without consent, and second that he did some overt act to put his intention into execution. Often the intent to rape is implied from the nature of the overt act. A touching of the breasts may only constitute an indecent assault. An attempt to take off underclothes together with a touching of the breasts may constitute a sufficient overt act. A great deal depends on the circumstances of each case.*
>
> *The "overt acts" in this case were the holding of the complainant's hand, the pulling of the complainant towards the porch, the holding of the complainant against the wall, the pulling up of her skirt, the touching of her private parts, the pushing of the complainant to the floor, and the Appellant's act of bending down and unbuttoning of his trousers. Together with these acts, he told her to keep her mouth shut and "to come here" and to shut her mouth or he would punch her. He only desisted when she threatened to tell the father of her daughter, a fellow police officer. All that was left for the Appellant to do, was to attempt a penetration. His aggressive conduct makes it clear that he was doing what he was doing despite her lack of consent to that conduct.*
>
> *In **Hari Chand v. State** Crim. App. 03 of 2005LAB, I found that where the Appellant pushed the victim onto a bed, lifted up her dress, pulled down his own trousers and put his hand over her mouth when she struggled, accompanied by a request for sexual intercourse, there was sufficient evidence to prove both the overt acts and the intention to rape. It is essentially a question of fact whether the offender's acts are sufficiently overt or proximate (**R v. Patnaik** [2000] 3 Archbold News 2).*

[17] In **Raj v State** [2009] FJHC 31; HAA108J.2008 (6 February 2009) the evidence that *"He pushed me to the ground. He lay on top of me. He took his penis and tried to insert it into my vagina. I tried to shout. He closed my mouth, by putting his hand on my mouth."*, was held to prove attempted rape. In **Epironi Levukaiciwa & Alifereti**

Tokona v. State [2002] HAA 087/01S (28 March 2002) , an act of lying on top of the victim with the intention of having sexual intercourse was held to be an overt act sufficient to prove an attempt. In **Tiare Bobo v. The State** [1999] HAA 0049/99B (23 August 1999), Fatiaki J held that where the accused undressed himself, the only irresistible conclusion to be reached was that he intended to have sexual intercourse with the victim who was struggling.

[18] The evidence of GN is that when she was picking Cassava, the accused had pushed her down and pulling his pants down had tried to pull her Sulu down. When she had fallen on the ground the accused knelt down and tried to lie down on top of her. At that moment, the victim had screamed and ran home pushing the accused away. There is clearly an attempt to commit rape. Her evidence on attempted rape should be considered also in the light of her own evidence on the appellant's act of rape earlier committed. He could not have intended to do anything other than committing an act of rape on GN.

03 ground of appeal

[19] The appellant challenges the convictions on charges 5, 6 and 7 relating to sexual assault on the basis that the trial judge had misdirected the assessors in paragraph 19 of the summing-up to the extent that the directions were on section 210(1)(a) whereas the information laid the charges under section 219(1)(b)(ii) of the Crimes Act, on the elements of the offence of sexual assault and the evidence did not support the convictions on those charges.

[20] It is true that the directions had been on the elements of sexual assault as described section 210(1)(a) of the Crimes Act. While recognizing the error, the crucial question would be whether there was evidence to sustain the charges under section 219(1)(b)(ii) of the Crimes Act, for otherwise the misdirection cannot be said to have caused a miscarriage of justice. The evidence was clearly enough to uphold the charge under section 219(1)(b)(ii) of the Crimes Act.

[21] The counsel for the appellant seems to admit in his written submissions that there is evidence to support the charges in counts 8, 5 and 7 and I agree with his position. However, he argues that the evidence does not prove count 07 which is based on the evidence of MN which was as follows

> *'The accused has called him and when gone, the accused has taken the hand of the witness and put it inside his underwear. The hand of the witness has touched the penis of the accused and the witness has pulled his hand out. The witness further testifies that he has not been agreeable to such an act and the accused knew it'*

[22] The counsel's argument appears to be that there is no witnessing an act of gross decency by MN. Instead, MN had been subjected to an act of gross decency by the appellant which is clearly an indecent assault on MN by the appellant contrary to section 210(1)(a) of the crimes Decree.

[23] Thus, the appellant could have been convicted for sexual assault under section 210(1)(a) of the Crimes Decree, where consent of the victim is immaterial, and section 210(1)(a) also carries the same sentence as for an offence under section 219(1)(b)(ii) of the Crimes Act. Therefore, the learned trial judge's error has not caused a miscarriage of justice and there is no reasonable prospect of success of his appeal on this ground before the Full Court.

4th ground of appeal

[24] The appellant challenges the learned High Court judge's direction in paragraph 26 of the summing-up on the premise that the trial judge ought to have refrained from such a direction.

> *'26.With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, called for a defense explaining the rights of the accused'.*

[25] I agree with the appellant's counsel's submission that the trial judge would have desirably refrained from using the phrase *'the Court being satisfied that the prosecution has adduced sufficient evidence'* lest it might be construed by the assessors that the trial judge had been already satisfied with the prosecution evidence

and therefore they would have to follow suit or at least there might be a risk that the assessors may do so. Judges should always be mindful to avoid similar expressions in the summing-up. Yet, it cannot *per se* vitiate the validity of the verdict of guilty or the legitimacy of the trial as held in **Raqio v State** [2020] FJCA 6; AAU61 of 2015 (27 February 2020).

[26] Further, the assessors are not deciders of fact in Fiji and their role is that of rendering assistance to the trial judge on facts. In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court held on the role of assessors and the judge as follows.

> *'58. 'In Noa Maya v. The State* [2015] FJSC 30; *CAV 009, 2015 (23 October 2015] his Lordship Sir Keith, J said at paragraph 21:*
>
> *"...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*

[27] Therefore, when the judge has independently considered the cases against the appellant and agreed with assessors and viewed in the light of the above legal position the complaint of the appellant pales into insignificance.

[28] Therefore, there is no reasonable prospect of success in the appellant's appeal against conviction.

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