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

CRIMINAL APPEAL NO.AAU 138 of 2016
[In the High Court at Suva Case No. HAC 042 of 2014]

BETWEEN	**:**	**LASARUSA TIKOIGILADI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Mr. M. Fesaitu with Ms. P. Mataika for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**16 June 2020**
Date of Ruling	**:**	**23 June 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of rape, contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 between 01 January, 2014 and 31 January, 2014 at Taveuni in the Northern Division.

[2] The information consisted of the following counts.

FIRST COUNT
(Representative)
Statement of offence

Rape *– Contrary to Section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of the Offence

Lasarusa Tikoigiladi *on the 1st day of January 2014 to 31st day of January 2014 at Taveuni, in the Northern Division, penetrated the vagina of* ***S.N.M.*** *with penis without* ***S.N.M.****'s consent.*

[3] After full trial, the assessors had expressed a unanimous opinion of guilty against the appellant on 18 November 2015. The learned High Court judge had agreed with the assessors and convicted the appellant of the charge in his judgment on 19 November 2015. He was sentenced on 20 November 2015 to 10 years and 05 months of imprisonment with a non-parole period of 08 years.

[4] The appellant being dissatisfied with the conviction had filed a timely notice of appeal on 10 December 2015 containing a single ground of appeal. Subsequently, the Legal Aid Commission had filed an amended notice of appeal on 26 November 2019 seeking leave to appeal on two grounds of appeal only against conviction along with written submissions.

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

[6] Grounds of appeal 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 independently assess the evidence in totality given that denial as the defence.'

Ground 2

'The Learned Trial Judge erred in law and in fact when it swayed his mind to the fact that the complainant was mentally challenged without evidentiary proof confirming the same.'

[7] The learned High Court judge had summarized the prosecution case and the appellant's position in the summing-up as follows

> *'[5] Prosecution case was based primarily only on the evidence of the complainant. According to her, the accused is her mother's de facto partner and she was living in his house with her mother. In relation to the incident, she stated that in one morning, while her mother was in the adjacent kitchen, the accused had sex with her by using his penis "on" her vagina. She felt pain. By then he had already removed her sulu and undergarment. She did not complain to anyone of this incident.*
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> *[6] Towards latter part of January 2004, the accused has chased both mother and daughter away from his house. They were with her sister called Ana. In March 2014, noticing a change in the complainant, Ana probed for a reason and found out that the complainant was pregnant. When the complainant was asked whom she has had sex with, the complainant said it was "Lasa", the accused. She was examined by a Doctor in May 2014, when they complained about this incident to police. During medical examination it was revealed that the complainant was carrying a pregnancy for over four months.*
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> *[7] In cross-examination of the complainant, it was revealed that she had mentioned to police about three names in this regard including that of William. The person called William was also residing with the accused at the same time and he used to sleep in the sitting area of the accused's house with the complainant, but at different corners.*
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> *[8] However, in Court she clearly implicated the accused as the person who had sexual intercourse with her without consent. She consistently maintained her allegation against the accused during her cross examination.'*
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> *[9] The accused in his evidence said the allegation is not true and that it was Ana who had levelled this allegation and not the complainant. Ana was very angry with him since he stopped his wife from giving food to Anan's children and prevented them from coming to his house.'*

01 ground of appeal

[8] The appellant's complaint is that the learned trial judge had not independently assessed the evidence in totality given that denial was the defense. This entails a wrong assumption that in every case a trial judge has to pen reasons in agreeing with the opinion of the assessors in what is commonly called the 'judgment'. Section 237(4) does not apply to the situation at hand in this case. Section 237(3) and (5) do apply. I made the following observations in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) where I had the occasion to deal with section 237 of the Criminal Procedure

Act which I reiterated in **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020) and in **Valevesi v State** AAU 039/2016 (22 June 2020)

> *'[9] A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, 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). In fact, it was stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal*
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> > *'[4] The grounds of appeal against conviction are yet again another example of the scatter gun approach to drafting an appeal notice……. Furthermore 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. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed –v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[9] I have examined the summing-up and the judgment carefully and find that the learned trial judge had dealt with all contentious issues in the case meticulously particularly the fact that the complainant had implicated three others as the father of the child she was carrying, to the police in paragraphs 61, 62 and 73 to 75 and the delay in the first complaint which was not voluntary but prompted by Ana in paragraphs 58 and the sinister motive attributed to Ana who was allegedly instrumental in introducing the allegation of rape against him through the complainant in paragraphs 56, 57 and 64 of the summing-up.

[10] Thereafter, in his judgment the learned trial judge had referred to those matters in paragraphs 6, 7, 8 and 9 of the judgment.

[11] In the written submissions filed on behalf of the appellant it has been submitted that the gist of the complaint under the first ground of appeal is the failure on the part of the trial judge to have allowed a DNA test to verify paternity of the child. It appears that the counsel for the appellant having adopted the scatter gun approach had then gone on

an expedition in fishing for reasons to substantiate the ground of appeal and come up with a new complaint which is not even remotely related to the ground of appeal.

[12] Be that as it may, there is no material to show that there had been any formal application on the part of the appellant who was defended by a counsel for a DNA test at the appropriate stage of the proceedings against the appellant. The state submits that the trial counsel may have raised that as part of his closing address prompting the learned trial judge to address the assessors on that in paragraph 77 of the summing-up as follows.

> *'[77] On the question of identity of the accused, the accused invited you to consider the failure to prove the paternity of the child of the complainant, by way of a report on DNA analysis. The prosecution sought to explain that on the basis since the complainant knew who the father is there was no need for such a test and expressed the limitation posed as it is done only at a considerable cost. What weight you attach to the absence of a DNA test to prove the allegation will have to be considered by you in the light of the legal provision that says no corroboration is needed to prove this type of an allegation.'*

[13] In my view, the prosecution was under no duty to provide evidence of a DNA test to prove the allegation of rape, for the issue before assessors was not the paternity of the child but whether the appellant had engaged in sexual intercourse without the complainant's consent. According to section 129 of the Criminal Procedure Act, 2009 no corroboration of the complainant's evidence is required for the accused to be convicted and no warning to the assessors relating to the absence is also not required to be given by the trial judge. The case against the appellant was dependent on the credibility of the prosecution witnesses as against the appellant's testimony.

[14] Assuming that the complainant had performed consensual sexual intercourse with anyone other than the appellant still that would not have altered the appellant's criminal liability. Further, a DNA test cannot prove whether sexual intercourse resulting in pregnancy was consensual or otherwise. Hypothetically, a DNA test could have proved that the father of the child was not the appellant or it could have confirmed that he was in fact the father. Had the appellant been so sure of his innocence, he could have made an application for a DNA test at the very outset; not taken up as an appeal ground at this stage. Of course, according to the submission of the state in any event such a scientific procedure could have taken place only with the consent of the complainant.

[15] Therefore, the first ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[16] The appellant argues that the learned trial judge had erred in law and in fact when he swayed his mind to the fact that the complainant was mentally challenged without evidentiary proof confirming the same.

[17] I do not think that there is any justification for this complaint. What the judge had told the assessors is at paragraph 55 of the summing-up arising from the evidence of Ana and the complainant's mother that the appellant was a "weak" and "mentally slow" person due to her natural father's regular physical abuses in her formative years and then due to her own demeanor whilst giving evidence.

> *'[55] I also mentioned you that the manner of giving evidence is also an applicable consideration in evaluating witnesses for their truthfulness and reliability. You would have observed how the complainant has given evidence. She was slow to answer questions put to her and used only few words in describing the events. She spoke in almost inaudible voice and displayed an appearance of a timid person. None of us are qualified to make an accurate assessment of her personality based on the science of human psychiatry, but you may use what you observed with your common-sense to decide whether she is a truthful and reliable witness or not upon your observations on her manner of giving evidence. You have also observed how her mother and sister gave evidence. <u>These factors are mentioned because they are relevant to consider the evidence of the complainant in the proper light. It was not intended to generate sympathy or feeling of pity towards the complainant and thereby cloud your opinion in favour of the complainant</u>.'*

[18] The learned trial judge in his judgment has referred to this apparent lack of sharpness of mind of the complainant as follows.

> *'[10] The assessors have found her evidence is truthful and unreliable, as they unanimously found the accused guilty of rape. They were directed in the summing up to evaluate the demeanour of the complainant in giving evidence as she said to be a "mentally slow" person. They obviously rejected the position advanced by the accused that this allegation is a fabrication by Ana.'*

[19] Therefore, there is nothing to even suspect that the learned trial judge had been swayed by the complainant's lack of perceived mental sharpness in convicting the appellant.

[20] Thus, there is no reasonable prospect of success in the appellant's second ground of appeal against conviction either.

Order

1. Leave to appeal against conviction is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL