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

CRIMINAL APPEAL NO.AAU 0090 of 2018
[In the High Court at Suva Case No. HAC 69 of 2017]

BETWEEN	:	**ILAI RAVULOWA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. B. Qioniwasa for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**29 June 2020**
Date of Ruling	:	**01 July 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on five counts of rape, contrary to section 207(1) and (2) (a) and (3) of the Crimes Decree, 2009.

[2] The information consisted of the following counts.

'FIRST COUNT
Representative Count
Statement of Offence
Rape: Contrary to Section 207(1) and (2) (a) and 3 of the Crimes Act of 2009.
Particulars of Offence
ILAI RAVULOWA between the 1st day of January 2013 and 31st day of December 2013, at Yalalevu, Ba in the Western Division had carnal knowledge of Suliana Nute without her consent.

SECOND COUNT
Representative Count
Statement of Offence
Rape: Contrary to Section 207(1) and (2) (a) and (3) of the Crimes Act of 2009.

Particulars of Offence
ILAI RAVULOWA between the 1st day of January 2013 and 31st day of December 2013, on an occasion different from Count 1, at Yalalevu, Ba in the Western Division had carnal knowledge of Suliana Nute without her consent.

THIRD COUNT
Representative Count
Statement of Offence
Rape: Contrary to Section 207(1) and (2) (a) and (3) of the Crimes Act of 2009.

Particulars of Offence
ILAI RAVULOWA between the 1st day of January 2013 and 31st day of December 2013, on an occasion different from Count 1 and Count 2, at Yalalevu, Ba in the Western Division had carnal knowledge of Suliana Nute without her consent.

FOURTH COUNT
Representative Count
Statement of Offence
Rape: Contrary to Section 207(1) and (2) (a) and (3) of the Crimes Act of 2009.

Particulars of Offence
ILAI RAVULOWA between the 1st day of October 2014 and 31st day of December 2014 at Riverside Hotel, Nausori in the Eastern Division had carnal knowledge of Suliana Nute without her consent.

FIFTH COUNT
Representative Count
Statement of Offence
Rape: Contrary to Section 207(1) and (2) (a) and (3) of the Crimes Act of 2009.

Particulars of Offence
ILAI RAVULOWA between the 1st day of October 2016 and 26th day of October 2016 at Vunuku Village, Rewa in the Eastern Division had carnal knowledge of Suliana Nute without her consent'.

[3] At the close of the prosecution case, the learned High Court judge had found no evidence on the third count and a finding of not guilty had been entered. After the conclusion of the full trial, on 10 August 2018 the assessors had expressed a unanimous opinion that the appellant was guilty of the first, second and fifth counts but not guilty of the forth count. The learned High Court judge had agreed with the assessors' opinion on the first, second and fifth counts but disagreed with them on their opinion on the forth count and convicted the appellant of all counts (except the third count) in his judgment on 10 August 2018. He was sentenced on 17 August 2018

to 15 years and 09 months of imprisonment with a non-parole period of 12 years and 09 months.

[4] The appellant's solicitors had filed a timely notice of appeal on 14 September 2018 containing four grounds of appeal against conviction and a single ground of appeal against sentence and written submissions on 26 July 2019. The state had tendered its written submissions on 30 September 2019.

[5] In terms of section 21(1)(b) and (c) 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.

> *1. THAT the Learned Trial Judge erred in law and in fact and misdirected the assessors in regard to the evidence of particularly the 2nd prosecution witness by commending her evidence as to the date the complainant returned to Vunuku while also rejecting her evidence in in its entirety in his judgment on conviction dated 10th August 2018.*
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> *2. THAT the Learned Trial Judge erred in law and in fact and misdirected the assessors by not fully directing the assessors on many inconsistencies between the complainant's evidence in Court and her Police statement made quite close to the time of the allegation.*
>
> *3. THAT the Learned Trial Judge erred in law and in fact in dismissing all evidence other than the Complainant's without any proper analysis as to why he had rejected it.*
>
> *4. THAT the Learned Trial Judge erred in law and in fact by overturning the assessor's unanimous opinion of not guilty with regard to count 4 based only on his dismissal of all evidence of witnesses other than that of the*

complainant without any proper analysis as to why he disbelieved the other witness, of whom there were 6.

5. THE learned trial judge imposed a sentence that was harsh and excessive in all circumstances of the matter.

[7] The learned High Court judge had summarized the prosecution case and the appellant's position in the summing-up and the brief facts are as follows. As at 2013, the victim's father had been serving a life sentence and her mother had left the victim. After the victim's grandfather who was looking after her passed away, her father had spoken to the appellant's son-in-law who was also a serving prisoner at that time and had entrusted the victim to the care of the appellant's daughter who was in Australia and to the son-in-law. The victim had come to the appellant's house at Yalalevu, Ba according to that arrangement. Finally, the ultimately responsibility of looking after the victim had fallen on the appellant and his wife.

[8] A few months after her arrival while being in that position of trust and authority over the victim, who was 11 years old at that time, the appellant had raped her in his own house while the other adults in the house including his wife were away. Thereafter, in the same year he had raped the victim at a cassava patch near his house after he went with her with and a few other children to fetch firewood. The appellant had made sure that the others were not around when he violated her. Again, the appellant had taken the victim to a hotel in Nausori and raped her in 2014 when she was 12 years old. Thereafter, the appellant had raped the victim when she was living with his family at Vunuku, Rewa in October 2016 and the victim had been 14 years old at that time. Upon examination done on 25 October 2016, medical evidence had revealed healed lacerations on the victim's hymen at 3 o'clock, 5 o'clock, 6 o'clock and 9 o'clock positions suggesting a blunt object having passed through her vaginal opening. The age of the lacerations had been determined to be from 02 weeks to 03 years prior to the examination. The appellant had completely denied all allegations of sexual abuse and claimed that the victim had implicated him falsely at the instance of PW2. The age difference between the appellant and the victim was 50 years.

[9] Before attempting to consider the appeal grounds, I wish to place on record that the appellant's written submissions have not substantiated them at all. The written submissions are totally unhelpful to this court to decide the matters at hand. Regrettably, only the following paragraphs are found in the written submission in support of the grounds of appeal and they are of no assistance to this court.

> *4. The Appellant submits that his grounds of appeal involve questions of law and fact therefore leave should be given to file Appeal against conviction. In respect of the sentence the ground raises the issue of a wrong principle being applied as the sentence is one of the higher sentences imposed for the offence of rape within Fiji in recent years and such wrong principles can be inferred from the length of the sentence.*
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> *5. In view of the matters raised above we submit that the grounds and submissions raise questions of law and fact which would constitute arguable grounds therefore leave should be granted.*
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> *6.We submit with respect that the appellant has raised several misdirection and errors of law by the Learned Trial Judge and as such the leave to appeal ought to be granted as the proposed grounds of appeal that have been presented are properly arguable and the application meets the threshold for leave.*

01 ground of appeal

[10] The appellant's complaint under the first ground of appeal is that the learned trial judge had misdirected the assessors regarding the evidence of PW2 by commending her evidence about the date of the complainant's arrival at Vunuku while at the same time rejecting her evidence in its entirety in the judgment. I think the appellant's counsel has misunderstood or misinterpreted the sentence in paragraph 6 of the judgment *'I did not find the entire account given by the second prosecution witness to be credible and reliable...'*

[11] To my mind, what the learned trial judge had stated is that he did not find all what the second prosecution witness said credible and reliable but only believed some parts of it, and not that he disbelieved everything that she said. In other words, the learned trial judge had believed parts of her evidence and treated the rest as not credible and reliable. One such part of her evidence believed by the learned trial judge was her

evidence on the date of the complainant's arrival at Vunuku. Therefore, this ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[12] The appellant contends that the learned trial judge had not addressed the assessors on the inconsistencies in the victim's evidence with her police statement. There is no elaboration as to what these inconsistencies are. Upon a perusal of the summing-up, I find that the learned judge had addressed the assessors on how to evaluate inconsistencies in paragraphs 11, 12 and 13 and while narrating the complainant's evidence in paragraph 35 of the summing-up, the trial judge had referred to the areas where the alleged inconsistencies were found. However, they were still part of the narrative and not taken out and specifically brought to the notice of the assessors. Thereafter, in paragraph 57 of the summing-up the judge had reminded the assessors that the defense had pointed out many inconsistencies without specifying what they were in the victim's evidence and directed them to deal with them according to the directions already given.

[13] I am of the view that though it is always more than desirable for trial judges to specifically point out to the assessors the material inconsistencies and explanations, if any, rather than allowing them to remain in the midst of a very long narration of the evidence, the failure to do so in this instance by itself may not secure the appellant a reasonable prospect of success of his appeal.

03rd ground of appeal

[14] The appellant argues that the learned trial judge erred in law and in fact in dismissing all evidence other than the victim's without proper analysis as to why he had rejected it. This complaint relates to the judgment. In the first place, it is not factually correct to say that the learned trial judge had rejected all evidence other than that of the victim. He had clearly accepted part of the evidence of the second prosecution witness and that of the third prosecution witness fully (medical evidence). He had not treated the appellant or his witnesses as credible and reliable. Secondly, a trial judge need not give elaborate reasons when agreeing with the assessors or the majority of them. It is

only when he disagrees with the majority opinion that the trial judge is expected to provide cogent written reasons (see **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009). Accordingly, the learned trial judge had given cogent reasons in paragraph 10 of the judgment as to why he disagreed with the assessors and convicted the appellant on count 4 as well.

[15] I have addressed similar complaints in earlier rulings as well. They often arise due to a wrong assumption that in every case a trial judge is bound to give elaborate reasons in agreeing with the opinion of assessors in what is commonly called the 'judgment' as if the accused has been tried only before the judge. 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. I reiterated those sentiments in **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020) and **Lasarusa Tikoigiladi v State** AAU 138 of 2016 (23 June 2020). They are as follows.

> *'[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.'*

[16] The trial judge had placed a very detailed account of all the evidence led in the case before the assessors and allowed them to evaluate, accept or reject such evidence in the light of directions in paragraphs 34 and 56 – 65 of the summing up with guidance in paragraph 66 as to how *inter alia* they should act in case they are neither sure nor unsure of the appellant's version by using the phrase *'well what he says might be true'* and directing them to find him not guilty if that be the case. This ground of appeal has no reasonable prospect of success.

04th ground of appeal

[17] This is connected to or an extension of ground of appeal 03. I have already pointed out that the learned trial judge had given reasons for disagreeing with the assessors and convicting the appellant on the forth count in paragraph 10 of the judgment. He had addressed the assessors specifically on court 4 in paragraph 61 of the summing-up. Without the benefit of the full appeal record, I cannot assess whether the reasons given by the judge to convict the appellant is cogent enough or whether the trial judge had erred in any of the conclusions in paragraph 10. At the same time, I cannot forget that in Fiji the trial judge is the sole judge of facts as now well-established.

[18] In **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held that

> *"...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..."*

[19] **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] Keith, J reiterated:

> *"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".*

[20] In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court again 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:*
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> *"...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".*

[21] However, the full court could consider the appellant's argument in the light of ***Lautabui*** where the Court of Appeal said

> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[22] The decision in **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) too would also be helpful in this regard where the Supreme Court stated

> *'[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-*
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> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court*

unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."(emphasis added)

05th ground of appeal

[23] Neither the appellant nor the state had made any submissions on the sentence. The appellant had raised his last ground of appeal on the basis that the sentence was harsh and excessive. I have examined his complaint in the light of guidelines in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

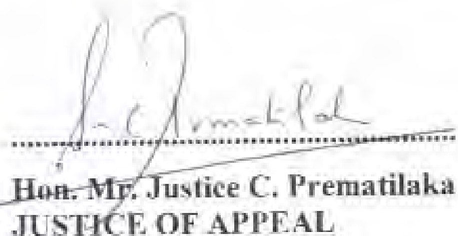
(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[24] Having perused the sentencing order, I do not find that the learned trial judge had committed any sentencing error in the process of sentencing or the ultimate sentence. Neither has the appellant pointed out any such error.

[25] Thus, there is no reasonable prospect of success in the appellant's appeal against conviction and sentence.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL