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

CRIMINAL APPEAL NO.AAU 047 of 2019
[In the High Court at Suva Case No. HAC 276 of 2016]

BETWEEN	:	**KITIONE VAKADRANU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. U. M. Tamanikaiyaroi for the Respondent**
Date of Hearing	:	**16 August 2021**
Date of Ruling	:	**20 August 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of criminal trespass contrary to Section 387 (1) (a) of the Crimes Act, 2009 committed at Cunningham, Suva in the Central Division on 19 July 2016.

[2] The information read as follows:

COUNT ONE

Statement of Offence

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

Particulars of Offence

KITIONE VAKADRANU *on the 19th day of July, 2016 at Cunningham, Suva in the Central Division penetrated the vagina of* ***INDRA MANI*** *with his penis, without her consent.*

COUNT TWO

Statement of Offence

CRIMINAL TRESPASS*: Contrary to Section 387 (1) (a) of the Crimes Decree 2009.*

Particulars of Offence

KITIONE VAKADRANU *on the 19th day of July, 2016 at Cunningham, Suva in the Central Division, entered into the property in the possession of* ***INDRA MANI*** *with intent to commit an offence.*

[3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of both counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of rape and sentenced him on 18 March 2019 to an imprisonment of 11 years and 10 months with a non-parole period of 09 years and 10 months and 06 months of imprisonment for criminal trespass; both sentences to run concurrently.

[4] The appellant had appealed in person against conviction and sentence in a timely manner. Thereafter, the Legal Aid Commission had tendered amended notice of appeal against conviction and sentence along with written submission on 29 December 2020. The state had tendered its written submissions on 27 January 2021. Both parties made oral submissions *via* Skype in addition to the written submissions already filed.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and

State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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) and they are whether the sentencing judge had:

> *(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.*

[7] The grounds of appeal urged on behalf of the appellant are as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and fact when he misdirected the assessors on the evidence of recent complaint.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and fact when he did not give a fair and balanced Summing Up to the assessors causing a substantial miscarriage of justice.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and fact when he failed to properly assess and evaluate the evidence pertaining to identification and that such evidence raised reasonable doubt in the State's case.*

Sentence

Ground 4

THAT the Learned Sentencing Judge erred in law and in fact when he considered facts that was not adduced by the complainant in evidence resulting in a harsh and excessive sentence.'

[8] The trial judge had summarized the prosecution and defense cases in the judgment as follows:

> *5. The prosecution alleges that the accused broke into the house of the complainant while the complainant was sleeping in the house, during the early hours in the morning of 19th of July 2016. He had then threatened her, by holding a knife to her throat, that he would kill her if she shouted. Thereafter, he forcefully had sexual intercourse with her without her consent. Afterwards, he had threatened her that he would kill her as she would tell others about this incident. The complainant had then requested the accused that he can come and have sexual intercourse with her whenever he wants, therefore, not to kill her.*
>
> *6. The accused relies on the defence of alibi, stating that he was sleeping at his home during the time material to this matter. In order to establish his defence of alibi, the accused gave evidence and also called his father and elder brother to give evidence.*
>
> *7. The main contention of the defence is that the complainant had mistaken in her identification/recognition of the perpetrator as the defence relies on the defence of alibi. Accordingly, the case against the accused mainly depends on the correctness of the identification of the perpetrator by the complainant.*

01st ground of appeal

[9] The appellant's counsel submits that the trial judge had misdirected the assessors on recent complaint evidence in as much as the evidence of PW2 Amith Kumar and PW3 Sumitra Naidu could not be treated as recent complaint evidence because according to them the complainant had only told then that she was raped without any other details (see paragraphs 29 & 30 of the summing-up).

[10] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court had set down the law regarding recent complaint evidence as follows:

> *'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*
>
> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
>
> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'*

[11] The appellant's argument is that the complainant had only told PW2 and PW3 that she was raped but not anything relevant to unlawful sexual conduct to demonstrate lack of consent.

[12] Rape is unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will (vide https://www.merriam-webster.com/dictionary/rape).

[13] Rape is to force someone to have sex when they are unwilling, using violence or threatening behaviour. (vide https://dictionary.cambridge.org/dictionary/english/rape)

[14] If someone is raped, they are forced to have sex, usually by violence or threats of violence (vide https://www.collinsdictionary.com/dictionary/english/rape)

[15] Thus, it is clear that when an ordinary person, particularly a woman such as the complainant who is the victim of rape uses the word 'rape' the elements of unlawfulness of the sexual conduct/intercourse accompanied by force, threat of injury/violence and unwillingness and lack of consent are inbuilt in it.

[16] Therefore, in the light of paragraph [39] in **Raj v State** (supra) I do not see anything objectionable in what the trial judge had stated to the assessors at paragraphs 29, 30, 73, 74 and 75 of the summing-up regarding recent complaint evidence. This ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[17] The appellant submits that the summing-up is not fair and balanced in that the trial judge failed to give a fair account of the defence case but impressed upon the assessors only the prosecution case. One complaint is regarding the judge not highlighting specific inconsistencies raised by the defence despite referring at paragraphs 76 and 77 to the defence counsel's suggestion to the assessors to consider the inconsistencies. Another complaint relates to the trial judge having gone to minute details at paragraph 8 and 9 of the judgment to disbelieve the *alibi*. Similar complaint is made of the DNA Testing Report on the basis that the directions to the assessors had been couched more in favour of the state rather than the defence probably because the trial judge had seen and been persuaded by the results of the DNA Report though it had been ruled out at the *voir dire* stage.

[18] The problem with the issue regarding inconsistencies is that the appellant's counsel had not stated what those inconsistencies were. The respondent submits that while the trial judge should give the assessors/jury a fair picture of the defence, he need not point out the details or comment on every argument used or remind them of the whole of evidence (vide **R v Clayton** (1948) 33 Cr. App R 22).

[19] It appears from the summing-up that the trial judge at paragraphs 47-51 and then at paragraphs 76 & 77 had explained to the assessors how they should deal with inconsistencies. Though, he had stated at paragraph 48 that he would appraise the assessors of the inconsistencies later, I do not find that the trial judge had referred to any such inconstancies subsequently. Nor is there any indication of alleged inconsistencies in the judgment. The trial judge seems to have left whatever the inconsistencies that were there with the assessors as they had heard of them during the trial and also through the defence counsel for them to consider the same in the light of the law that he had set out.

[20] The Court of Appeal very recently dealt with how inconsistencies should be approached in **Ram v State** [2021] FJCA; AAU 024 .2016 (02 July 2021) where the court considered **Singh v The State** [2006] FJSC 15] CAV0007U.05S (19 October 2006), **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and reiterated the principles expressed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) that the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. Further, that no hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. The appellant's counsel has not demonstrated that the alleged inconsistencies, if any, were so material as to affect the whole foundation of the prosecution case.

[21] On the concern expressed on *alibi* defence, it appears that the trial judge had addressed the assessors from paragraphs 32-39 manly dealing with the defence of *alibi*. The trial judge had also devoted paragraphs 52-63 to the defence of alibi *inter alia* directing the assessors very fairly how they should approach *alibi* evidence at paragraph 57 and 70. Therefore, I do not think that there is a great deal of substance in this complaint.

[22] As admitted by the appellant's counsel, the trial judge had ruled out DNA evidence. I do not find any reference either at the summing-up or the judgment about DNA report or DNA evidence. There is no basis or tangible reason to guess that the trial judge had addressed the assessors the way he did because of the DNA report he may have seen or he had been influenced by its contents. It is a mere conjecture.

[23] Accordingly, I see no reason to grant leave to appeal on the 02nd ground of appeal.

03rd ground of appeal

[24] The appellant's counsel submits that the trial judge had failed to properly assess and evaluate identification evidence.

[25] I find that the trial judge had addressed the assessors on the identification evidence at paragraphs 25-28 & 40 of the summing-up and particularly at paragraphs 64-69 which collectively is a detailed account of the question of identification including. The trial judge had administered Turnbul guidelines too on the assessors. In the judgment also the trial judge had given his mind to the same issue at paragraphs 5, 7, 14, 15 and 16.

[26] Since the trial judge had agreed with the assessors he need not have gone into a detailed analysis but he had in fact given his mind fully to the issue of identification in the judgment in sufficient detail. This complaint involves the role of the trial judge when he agrees with the assessors. In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021), the Court of Appeal stated on the trial judge's function as follows:

> *'[23] 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 trial 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] In my view, in either situation the judgment of a trial judge cannot 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.'

[27] Therefore, considering the trial judge's detailed discourse in the summing-up and the judgment on the matter of identification and viewed in the light of the fact that the appellant was known to the complainant, him having visited her house on many a occasion before and spent time there, I do not think that there is merit or a reasonable prospect of success in this ground of appeal.

[28] Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked the parties to seek re-directions and they do not and subsequently raise the issue in the appellate courts then in the absence of any cogent reasons, it should be held against that party as having employed a deliberate tactic to find an appeal point. The appellant has not given any reasons why any re-directions were not sought. The complaint that he has suffered a miscarriage of justice is therefore unacceptable [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Ismail v State** [2021] FJCA 109; AAU0113.2014 (29 April 2021)].

[29] The appellant had been represented by a counsel at the trial and she had not sought any redirections on the alleged inadequacies (in the form of misdirection, non-

directions or omissions) in the summing-up on any of the points now raised by the appellant. Therefore, the appellant is not even entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

04th ground of appeal

[30] The counsel for the appellant submits that the trial judge had considered an injury on the complainant's arm in imposing the sentence when the prosecution had not led such evidence from the complainant. However, the medical evidence had revealed a superficial laceration on the neck of the complainant and also a bite mark on the left arm of the complainant. Given that the injuries were fresh and could have occurred a few hours before the examination it is reasonably possible that they were caused during the complainant's encounter with the appellant.

[31] There is no reference to the injuries in the complainant's evidence as narrated in the summing-up though it is possible that she may have referred to them in her evidence at the trial:

> *'8. I have considered the amount of violence used in committing this crime in order to determine the level of culpability. I now take into consideration the injuries that you have caused on the complainant in order to determine the aggravating factors. You have caused injuries on her neck and left arm while committing this crime. The complainant was 51 years of old elderly woman and you were 21 years old at the time of this offence took place. Therefore, I find the age difference between the complainant and you are substantially high. The complainant had to sell her house and relocate to the house of her son after this incident. I find these factors as aggravating factors in this matter.'*

[32] In any event it is clear that the trial judge had enhanced the sentence by 02 years on account of several aggravating factors and only one of them related to the injuries.

[33] However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be

considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[34] Despite having some doubt as to whether the complainant had stated that the injuries on her body had been caused by the appellant, viewed in the light of other aggravating factors one cannot say that there is a sentencing error in the head sentence of 12 years or it is harsh, excessive and disproportionately severe requiring the intervention of the Court of Appeal. The sentence imposed lies within the permissible range. The Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) took the tariff for adult rape to be between 07 and 15 years of imprisonment.

[35] Thus, there is no reasonable prospect of success in the sentence appeal.

Orders

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL