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

**CRIMINAL APPEAL NO.AAU 0080 of 2018**
**[In the High Court at Labasa Case No. HAC 41 of 2016]**

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| **BETWEEN** | : | **MOHAMMED RASHEED** |
| | | ***Appellant*** |
| **AND** | : | **STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, ARJA** |
| **Counsel** | : | **Mr. J. Reddy for the Appellant** |
| | : | **Dr. A. Jack for the Respondent** |
| **Date of Hearing** | : | **01 September 2021** |
| **Date of Ruling** | : | **03 September 2021** |

# RULING

[1] The appellant had been indicted in the High Court at Suva with three representative counts of rape of a child under 13 years of age contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009 committed in Labasa, in the Northern Division committed in 2013, 2014 and 2015.

[2] The information read as follows:

***FIRST COUNT***
***(REPRESENTATIVE COUNT)***

***Statement of Offence***

***RAPE****: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Decree No. 44 of 2009.*

***Particulars of Offence***

***MOHAMMED RASHEED**, between the 1st day of November 2012 and the 31st day of December 2012, in Labasa, in the Northern Division, had carnal knowledge of **A.**, a child under the age of 13 years.*

***SECOND COUNT***
***(REPRESENTATIVE COUNT)***

***Statement of Offence***

***RAPE**: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Decree No. 44 of 2009.*

***Particulars of Offence***

***MOHAMMED RASHEED**, between the 1st day of December 2014 and the 31st day of December 2014, in Labasa, in the Northern Division, had carnal knowledge of **A.**, a child under the age of 13 years.*

***THIRD COUNT***
***(REPRESENTATIVE COUNT)***

***Statement of Offence***

***RAPE**: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Decree No. 44 of 2009.*

***Particulars of Offence***

***MOHAMMED RASHEED**, between the 1st day of January 2015 and the 30th day of April 2015, in Labasa, in the Northern Division, had carnal knowledge of **A.**, a child under the age of 13 years.*

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors, convicted the appellant of both counts of rape and on 27 July 2018 sentenced him to a sentence of 15 years with a non-parole period of 12 years in respect of all three counts.

[4] The appellant's solicitors had lodged an appeal against conviction and sentence in a timely manner. Subsequently, his new solicitors had tendered an amended notice of appeal only against sentence informing court that the appeal will be confined only to

the sentence. Both parties had filed written submission as well. The Resident Justice of Appeal had refused leave to appeal against sentence by the ruling dated 27 November 2019 and ordered the appellant to file an abandonment notice regarding the conviction appeal under Rule 39 of the Court of Appeal Rules.

[5] However, instead of filing an abandonment notice, the appellant once again had changed his solicitors and they had filed an amended notice of appeal against conviction and written submissions on 25 February 2021. The state had respondent by its written submissions. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.

[6] 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 in a timely appeal for leave to appeal against conviction 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)].

[7] The grounds of appeal urged against conviction are as follows:

1. *'THAT the Learned Trial Judge erred in law and fact when the Learned Trial Judge gave reasons in his Ruling (voir dire) at paragraph (11) stating as;*

   *"…**The record shows the frank answers of a suspect freely admitting to the sexual activity he was accused of. Were he telling lies as he claimed, he would not have gone into the great detail of the sexual activity recorded in the statement.",** which was a statement made by the Learned Trial Judge where he failed to give directions to the*

*Assessors regarding the voluntariness evidence and to its weight and probative value as matters for the Assessors to consider, enabling them to give clear and independent verdict.*

2. *THAT the Learned Trial Judge erred in law and fact when the Learned Trial Judge gave reasons in his Summing Up at paragraph (31) stating as **"**...**You might wish to take into account the explicit detail given of the sexual acts. Would he go into such detail if he was telling lies? It is however a matter for you to decided.",** which was a statement made by the Learned Trial Judge which sabotaged the minds of the Assessors to give a clear and independent verdict.*

3. *THAT the Learned Trial Judge erred in law and fact when the Learned Trial Judge gave reasons in his Summing Up at paragraph (32) stating as **"**...**The Accused called no witnesses",** which was a statement made by the Learned Trial Judge where he failed to give cogent reasons and directions to the Assessors with regards to the evidence before the Court and the prosecutions need to prove a case beyond reasonable doubt and that there is no onus for the accused to prove his case.*

4. *THAT the Learned Trial Judge erred in law and fact when the Learned Trial Judge gave reasons in his Summing Up at paragraph 33 stating as and further went to say "(33) **You have very little to decide in this case"** which was a statement made by the Learned Trial Judge where he failed to give cogent reasons for the same and directions to the Assessors with regards to the evidence before the Court, thus sabotaging the minds of the Assessors to give a clear and independent verdict.*

5. *THAT the Learned Trial Judge erred in law and fact when the Learned Trial Judge gave reasons in his Judgment at paragraph (9) stating as **"…the evidence of the interview under caution, which I found to be voluntary and fair, was additional evidence to find the State's case proved."**, displacing the fairness and justice and the fundamental rights of the Accused.*

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

*'3. The evidence adduced by the State was that the victim of these rapes was the 12 year old niece of the accused who told the Court she was raped several times by the accused, starting in December 2013 and ending in early 2015, when she was found to be pregnant.*

*4. The young girl gave consistent and confident evidence of these rapes and it was evidence that was unshaken in cross- examination.*

*5. A record of interview was produced in evidence (subsequent to a separate voire dire hearing) in which the accused admits in unnecessary detail the sexual abuse and rape of the girl.*

*6. The accused gave evidence in his defence. He told the Court that the girl was mistaken and that it was not him that raped her and made her pregnant.*

*7. He further said that the answers that he gave in the interview under caution were all untrue and he told lies because he had been threatened by the officers recording his answers.'*

***01st ground of appeal***

[9] The following are the directions given to the assessors by the trial judge in relation to the cautioned interview:

*'20. I now direct you how to approach that piece of evidence.*

*21. The accused says that it is all lies or rather that the confessions to having sex with Alima is untrue because it never happened.*

*22. You must first decide whether the answers attributed to him are true or not. If you think they are not his answers then you are to discard the interview and not use it as evidence*

*23. Secondly if you think that he was assaulted or mistreated in such a way that he was saying things he might not ordinarily have said, then you also to discard the interview and forget about it.*

*24. Finally if you think that the answers are true and are his answers and that they were given quite voluntarily by him without anything improper done to him to put him in fear, then you may rely on the confessions and give them the weight that you think fit.*

*29. The Police came and arrested him in June 2015. It was Ramadan and he was fasting. He was taken to Labasa Police station to be interviewed and the Police told him: "you know why you are here – tell the truth". The next day he told the Police that he did nothing to the girl so they punched him and told him to do 100 push-ups.*

*30. He admitted that the answers in the interview came from him but they are lies and untrue. He never had sex with Alima.*

*31. Well assessors, it is for you to decide whether those answers are true or not. You might wish to take into account the explicit detail given of the*

*sexual acts. Would he go into such detail if he was telling lies? It is however a matter for you to decide.*

*34. If you believe the girl, then it is unnecessary for you to go on to consider the interview; however you may wish to use it as alternative evidence for the case. There is no need for there to be corroboration of her evidence. Her evidence is enough for you to make a finding of guilty or not guilty on, depending on the weight you put on it but looking at the interview might well assist you in coming to your opinions. Remember if you think the answers are true and they were voluntarily given by the accused without threat or assault or any pressure whatsoever, then you may rely on that interview as evidence.'*

[10] Thus, the trial judge had clearly addressed the assessors on truthfulness, weight and even voluntariness of the cautioned interview though the trial judge at the *voir dire* inquiry had already decided on voluntariness and the assessors were to consider voluntariness not for admissibility but only in terms of the weight (probative value) to be attached to it [see for a detailed discussion **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017)].

[11] As for the complaint that the trial judge's comments had sabotaged the minds of the assessors, firstly, having examined the *voir dire* ruling I do not find any offensive remarks made against the appellant by the trial judge other than a legitimate analysis. Secondly, the assessors did not get to hear the *voir dire* ruling other than the cautioned interview at the trial as the *voir dire* was conducted and ruling delivered in the absence of assessors.

[12] Therefore, there is no merit at all in this ground of appeal.

***02nd ground of appeal***

[13] The appellant joins issue with the following statement of the trial judge in the summing-up (paragraph 31) and argues that it had sabotaged the assessors' mind:

*"…You might wish to take into account the explicit detail given of the sexual acts. Would he go into such detail if he was telling lies? It is however a matter for you to decided."*

[14] Paragraph 31 in full is as follows:

> *'31. Well assessors, it is for you to decide whether those answers are true or not. You might wish to take into account the explicit detail given of the sexual acts. Would he go into such detail if he was telling lies? It is however a matter for you to decide.'*

[15] I find nothing wrong in the above comments by the trial judge as he was entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It was appropriate for him to put to the assessors clearly any defects he saw in either case in a way that was fair, objective and balanced. I am convinced that the independent judgment of the assessors had not been prejudiced and they were not made to follow the view expressed by the Judge [see for a detailed discussion **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017)]. In fact one of ways in which the truthfulness of a cautioned statement could be assessed is to look at its contents. No amount of fabrication would have come up with so many vivid details the appellant had disclosed.

[16] Therefore, there is no merit at all of this ground of appeal.

***03rd ground of appeal***

[17] The appellant complains that at paragraph 32 of the summing-up the trial judge had stated *'…The Accused called no witnesses'* thereby shifting the burden of proof to the appellant.

[18] This court has time and again warned counsel against selectively picking a sentence or two from the summing-up or the judgment and criticise the trial judge based on them.

[19] The trial judge had in the preceding paragraphs (29-31) highlighted the appellants' evidence and simply pointed out at paragraph 32 as a fact that he called no witnesses. The trial judge had at paragraph 6 and 25 had clearly directed the assessors on the burden of proof and standard of proof.

[20] Therefore, there is no merit at all in this ground of appeal.

***04th ground of appeal***

[21] The appellant's counsel not for the first time had picked a portion of paragraph 33 for his complaint *i.e.* '……..*you have very little to decide in this case'*. The complete paragraph is as follows:

> *'33. You have very little to decide in this case. First you must decide if Alima is telling the truth about the acts that she says the accused did to her. You don't need to think about consent. Even if you think that Alima might have been a willing partner in this affair it makes no difference. It is a crime in Fiji for a man to have sex with a girl under 13.'*

[22] Then at paragraphs 34 and 35 the judge states as follows:

> *'34. If you believe the girl, then it is unnecessary for you to go on to consider the interview; however you may wish to use it as alternative evidence for the case. There is no need for there to be corroboration of her evidence. Her evidence is enough for you to make a finding of guilty or not guilty on, depending on the weight you put on it but looking at the interview might well assist you in coming to your opinions. Remember if you think the answers are true and they were voluntarily given by the accused without threat or assault or any pressure whatsoever, then you may rely on that interview as evidence.*
>
> *35. Remember too that it is the accused's case that she has mistaken him for somebody else. That she is just blaming him for it because he is a convenient suspect. He had no sex with her.'*

[23] In the light of paragraphs 33-35 taken together one can hardly say that '……..*you have very little to decide in this case'* had sabotaged the minds of the assessors.

[24] Therefore, there is no merit at all of this ground of appeal.

***05th ground of appeal***

[25] This time the appellants' counsel had selected a portion of paragraph 9 of the judgment for criticism i.e. *the evidence of the interview under caution, which I found*

*to be voluntary and fair, was additional evidence to find the State's case proved'.* The complete paragraph is as follows:

> *'9. I found that the accused said nothing to make me doubt the prosecution case. The credible evidence of the young girl was enough in itself to find the accused guilty. Although there is no need for corroboration, the evidence of the interview under caution, which I found to be voluntary and fair, was additional evidence to find the State's case proved.'*

[26] The trial judge was simply saying that the child victim's evidence alone was sufficient to convict the appellant thought he had before him the appellant's cautioned interview as additional evidence.

[27] Since the trial judge had agreed with the assessors he need not have gone into a detailed analysis other then what he had stated in the judgment. 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)]*
>
> *[26] 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)].'*

[28] There is nothing wrong with what the trial judge had stated being the ultimate fact finder and the sole authority on law.

[29] This ground of appeal has no merits.

[30] As far as the summing-up goes, the trial judge had addressed the assessors on all relevant aspects of the prosecution and defence cases in detail. Had the defence counsel wanted the trial judge to address the assessors differently on these matters he should have sought redirections at the end of the summing-up.

[31] 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)].

[32] The appellant had been represented by a counsel at the trial and he had not sought any redirections on any of the matters complained of in the first four grounds of appeal. 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)].

[33] I have also considered whether the verdict is unreasonable and cannot be supported by evidence. Upon examining the summing-up and the judgment, I am of the view that upon the whole of the evidence it was quite open to the assessors and the trial judge to

be satisfied and have found the appellant guilty of all acts of rape beyond reasonable doubt. I cannot by any means say that the assessors and the trial judge 'must' have entertained a reasonable doubt about the appellant's guilt on the counts of rape [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[34] The conviction seems inevitable when the assessors and the trial judge decided to act on the evidence of the complainant coupled with his cautioned interview and rejected the appellant's version. Therefore, I cannot conclude that there has been a substantial miscarriage of justice either [see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157 and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)].

**Order**

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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