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

CRIMINAL APPEAL NO.AAU 0019 of 2019
[In the High Court at Lautoka No. HAC 32 of 2015]

BETWEEN	:	**APAKUKI SAUDROMU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**02 September 2021**
Date of Ruling	:	**10 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Lautoka in the Western Division in 2014.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

INDECENT ASSAULT*: Contrary to section 212(1) of the Crimes Act 2009.*

Particulars of Offence

APAKUKI SAUDROMU *between the 1st day of January, 2014 and the 31st day of January, 2014 at Lautoka in the Western Division, unlawfully and indecently assaulted* ***"MB".***

SECOND COUNT

Statement of Offence

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

Particulars of Offence

APAKUKI SAUDROMU *between the 1st day of September, 2014 and the 30th day of September, 2014 at Yasawa in the Western Division, penetrated the vagina of* ***"MB"*** *with his penis, without the consent of* ***"MB".***

[3] At the end of the summing-up, the assessors had unanimously opined that the appellant was not guilty of both counts. The learned trial judge had disagreed with the assessors, convicted the appellant of both counts and on 08 November 2018 sentenced him to an aggregate sentence of 14 years, 10 months and 15 days imprisonment with a non-parole period of 12 years.

[4] The appellant had lodged an appeal against conviction a little less than 02 months out of time (04 February 2019). Since then the appellant had filed amended grounds of appeal from time to time against conviction and canvassed the sentence for the first time on 26 April 2019 which was about 04 ½ months out of time. These grounds of appeal were first submitted to the registry on 03 June 2019 (signed on 26 April 2019). He had lodged an application for bail pending appeal signed on 17 June 2020 (received on 15 July 2020). He informed court on 19 August 2020 that he would rely only on amended grounds of appeal contained in the written submissions signed on 17 June 2020 (received on 15 July 2020) which are the same as those submitted on 03 June 2019 and abandon all other grounds of appeal. He confirmed his position on 30 December 2020 as well. State had filed its written submissions on 18 November 2020 and 31 August 2021. The appellant and counsel for the respondent appeared *via* Skype at the hearing into leave to appeal.

[5] The appellants' appeal lodged in person against conviction would be considered timely as it was within 03 months of the sentence and his sentence appeal would be considered as an application for enlargement of time.

[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] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[8] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[9] The delay of the sentence appeal (being about 04 ½ months late) is not very substantial. The appellant has attributed the delay to the misplacement of the appeal notice which he had given to the reception officer at Naboro Maximum Correction Centre. After his transfer to Pre-Release Correction Centre at Naboro in December 2019 he had checked with CA registry only to learn that his appeal had not been received and then he had sent another notice of appeal which the registry had received on 20 February 2020 where the appellant had canvassed only the conviction but not the sentence. Although, there seems to be some merit in his explanation for the delay until 20 February 2020 he has not explained why he delayed appealing his sentence until 26 April 2019.Thus, there is no explanation for the delay in the sentence appeal. Nevertheless, I would see whether there is a real prospect of success for belated grounds of appeal against sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent had not averred any prejudice that would be caused by an enlargement of time.

[10] 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.*

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

> ***'Conviction (17 June 2020)***
>
> i. *THAT the Learned Trial Judge erred in law when His Lordship stated in (Para 161) of the summing up that, "...whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case…? When in fact the onus was on the prosecution to prove their case beyond reasonable doubt.*

ii. *THAT the Learned Trial Judge erred in law when his Lordship stated (Para 81) of the judgment that, "...on the totality of the evidence, the defence has not been able to create a reasonable doubt...", thus implying that the burden was on the defence when in fact it was the Prosecutions who beared the burden of proving their case beyond reasonable doubt.*

iii. *THAT the Learned Trial Judge verdict was preserve that the accused is guilty on the charge of indecent assault and rape.*

iv. *THAT the Learned Trial Judge erred in fact when his Lordship accepted the evidence of the complainant as credible when in fact her evidence was vague thus creating doubt to her evidence credibility.*

v. *Incompetent Advocacy.*

vi. *Conviction unsafe and unsatisfactory.*

Sentence (17 June 2020)

vii. *THAT the sentence is harsh and excessive in the circumstance of the case.*

viii. *THAT the learned erred in not according an appropriate discount as in regards to the accused's mitigation.'*

[12] The trial judge had summarized the evidence of the prosecution as follows in the judgment. The appellant had given evidence, called witnesses and totally denied the charges.

2. *'The brief facts were as follows:*

   The victim in the year 2014 was 17 years of age and a Form 5 student her father died when she was in class three and her mother remarried. The accused is the paternal uncle of the victim. In January, 2014 the accused after seeking permission from the victim's grandfather took the victim to his house so that he could support her education.

3. *After the school started the victim had a boil on her right breast, as a result at night the victim did not wear any top and slept wearing her skirt only. One night whilst sleeping the victim felt someone sucking her breast, when she woke she saw it was the accused her uncle. When the victim saw her uncle she was scared and nervous he sat on the bed and told her not to tell anyone about what he had done.*

4. *The next day the victim told Niko son of the accused and Sivo the baby sitter but they did not do anything. The victim left the house of the accused and went home.*

5. *In September the same year the accused came to the house of the victim and asked the permission of the victim's grandfather so that he could take the victim to Yasawa. The victim's grandfather agreed so the victim accompanied the accused to Yasawa. At Waya Island the victim saw that a hotel was under construction, there were two quarters, in one of them the victim and the accused slept.*

6. *The accused slept on the bed while the victim slept on the mattress on the floor. While sleeping the victim felt someone sitting beside her. When she woke up she saw her uncle. At this time he pushed her down on the mattress and told her to take off her pants.*

7. *The victim took off her pants and so did the accused, who then inserted his penis into the victim's vagina for about three minutes. The victim did not consent to have sexual intercourse with the accused. After having forceful sexual intercourse with the victim the accused went to sleep but the victim did not she cried over what the accused had done to her. The next morning she went home.*

8. *In November of the same year the accused and the victim were at the house of the victim's cousin Inoke, during the night the victim's mother came looking for the victim and took her to the Police Station where the victim told the police everything the accused had done to her. The accused was arrested and charged.*

01st and 02nd grounds of appeal

[13] These grounds of appeal are based on paragraph 161 of the summing-up and paragraph 81 of the judgment and could be dealt with together. The appellant has also referred to paragraph 83 of the judgment:

'161. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.'

81. On the totality of the evidence the defence has not been able to create a reasonable doubt in the prosecution case.'

83. Furthermore, this court is also satisfied that the accused between the 1st day of September, 2014 and the 30th day of September, 2014

penetrated the vagina of the complainant with his penis without her consent. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.'

[14] The appellant complains that the trial judge had shifted the burden of proof to the appellant when the burden of proof was on the prosecution.

[15] No summing-up or judgment could and should be compartmentalised but should be considered *in toto*. More often the appellants are in the habit of criticising trial judges based on one or two paragraphs or sentences in the summing-up or judgment and draw adverse inferences therefrom against the summing-up or judgment. Time and again, the appellate courts have frown upon this practice indulged in both by some lawyers and appellants who appear in person.

[16] From paragraphs 8, 9, 31, 162 and 163 of the summing-up, it is clear that the trial judge had not shifted the burden of proof to the defence at all.

> *162. 'If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt for all the counts. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
>
> *163. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*

[17] The trial judge had commenced the judgment by directing himself in accordance with the summing up. Therefore, all directions at paragraphs 8, 9, 31, 162 and 163 of the summing-up are applicable to the judgment as well. The trial judge had further said at paragraph 82 of the judgment as follows:

> *82. This court is satisfied <u>beyond reasonable doubt</u> that for the count of indecent assault the accused between the 1st day of January, 2014 and the 31st day of January, 2014 unlawfully and indecently assaulted the complainant by sucking her breast.*

[18] Thus, when the trial judge had referred to *'satisfaction'* at paragraph 83 of the judgment he obviously had meant *'satisfaction beyond reasonable doubt'* of rape charge as well which means 'proof beyond reasonable doubt'.

[19] In any event, the assessors had found the appellant not guilty of both counts.

[20] This ground of appeal has no reasonable prospect of success in appeal.

03rd ground of appeal

[21] The appellant complains that the trial judge's verdict of guilty on both counts is perverse based on paragraph 161 of the summing-up.

[22] When the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[23] 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 [vide **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[24] Having examined the summing-up and the judgment it is clear that the trial judge had fulfilled his task of carrying out an independent assessment and evaluation of the evidence and giving 'cogent reasons' when overturning the assessors' opinion. I cannot say that it was not open to the trial judge to have convicted the appellant on the evidence available.

[25] This ground of appeal has no reasonable prospect of success in appeal.

04th ground of appeal

[26] The appellant's argument is that the trial judge had erred when accepting the complainant's evidence as credible when it was vague creating a reasonable doubt about her credibility. He points out specifically to her evidence at paragraph 38 of the summing-up (see paragraph 6 of the judgment too) in examination-in-chief and her answer under cross-examination at paragraph 60 of the summing-up as an example of her lack of credibility:

> *38. After the school started she had a boil on her right breast, as a result of this boil during night time she did not wear any top and slept wearing her skirt only. One night whilst sleeping she felt someone was sucking her breast. When she woke up she saw it was the accused her uncle, at this time* ***she was alone*** *in the bedroom. When the complainant saw her uncle she was scared and nervous, he sat on the bed and told her not to tell anyone about what he had done.*
>
> *60. When it was put to the complainant that never in any given night she had slept alone in the bedroom because it was always occupied by her, Kelera and Paulini the complainant agreed. The complainant stated that she told the truth that the accused had come into the night and sucked her breast. She also denied it was Niko her boyfriend who had sucked her breast.'*

[27] It appears from paragraph 57 of the summing-up that the complainant had agreed that she slept in one bedroom with Kelera Adikula and Paulini and from paragraph 59 of the summing-up it appears that she had said that there was one bed in the bedroom and sometimes she slept with Kelera while Paulini slept in the sitting room and the complainant had denied that on the night of the alleged incident Paulini and Kelera were sleeping in the bedroom. According to paragraph 7 of the judgment the complainant had shared the bedroom with the daughter of the appellant who on that night was sleeping in the sitting room. Thus, there was no unequivocal admission by the complainant that when the indecent assault happened Kelera or Paulini was in the bedroom or on the bed with the complainant. Having analysed all the evidence the trial judge had said as follows:

> *'68. After considering the evidence of the prosecution and the defence witnesses I accept the evidence of the complainant as truthful and reliable I have no doubt in my mind that she told the truth in court, her demeanour was consistent with her honesty. The complainant was able to recall what the accused had done to her some 4 years ago and was able to describe what the accused had done to her. The complainant was able to withstand vigorous cross examination and was not discredited she was forthright in her answers and not evasive.'*

[28] The status of the trial judge at a trial with assessors in Fiji is that 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) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[29] This ground of appeal has no reasonable prospect of success in appeal.

05th ground of appeal

[30] The appellant complains of incompetent advocacy on the part of his trial counsel in not suggesting to the complainant under cross-examination the allegation of stealing money by her belonging to the aunt of the appellant (see paragraph 102 of the summing-up) and her having been reprimanded by the appellant as the motive for false implication. He alleges that there were other instances of failure to put the defence case but not elaborated them.

[31] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground of appeal cannot be even entertained at this stage.

[32] In any event, it is noteworthy that the appellant had not made any allegation against his trial counsel in his initial petition of appeal but later written to the Judicial Service Commission on 02 May 2019 a complaint against the counsel *inter alia* stating that he had failed to put the defence case to the complainant to demonstrate a motive for the complainant to falsely implicate him as she had stolen money from his house. It appears that the defence witnesses had however spoken to the alleged motive. According to the appellant the reason why the complainant left his house was that one evening when he came home he saw his aunt crying and he was told that the complainant had taken her card to withdraw money. He had scolded the complainant who had left his house because she had stolen his aunt's money. However he had admitted that he did not report this to the police or to the complainant's grandfather (see paragraph 87 of the summing-up). The complainant and the appellant were in good terms when the complainant was staying at his house and there were no problems between the two (see paragraph 88 of the summing-up). Further, the appellant had said that he did not know why the complainant had made such serious allegations against him because the relationship between him and the complainant was good even after the allegation of stealing (see paragraph 89 of the summing-up).

[33] It is clear that the gits of all criticisms/allegations is the incompetence of the trial counsel and therefore to succeed in appeal the appellant must convince the appellate court that either the alleged incompetence of trial counsel (such as not presenting his defence to court) caused a miscarriage of justice in that it affected the outcome of the trial in such a way as to cause the appellant squander a reasonable prospect of acquittal in the light of the totality of evidence [see for example paragraph [12] and [24] of **Nudd v The Queen** (2006) HAC 9 and **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) or the alleged conduct of trial counsel otherwise deprived him of due process of law or a fair trial [see paragraphs [87], [99] & [100] of ***Nudd;*** **Anderson v HM Advocate** HCJ 1996/1996 JC 29**].** I do not think that the appellant's complaint taken at its best reaches this threshold.

[34] I have dealt with a similar ground in great detail in **Nasilasila v State** AAU 156 of 2019 (03 September 2021). However, in ***Nasilasila*** the appellant had fully complied with procedural guidelines set down in **Chand v State** (supra) and this court could consider the ground of appeal based on incompetence of trial counsel.

[35] Thus, there is no reasonable prospect of success in this ground of appeal.

06th ground of appeal

[36] The appellant argues that the conviction is unsafe and unsatisfactory. He has based his argument on paragraphs 81 *('On the totality of the evidence the defence has not been able to create a reasonable doubt in the prosecution case.')* and 83 of the judgment and he has contrasted paragraph 83 with paragraph 82. His concern is whether the trial judge had looked to see if the defence had created a reasonable doubt instead of satisfying himself that the prosecution had proved the case to the criminal standard of proof *i.e*. beyond reasonable doubt.

[37] I have already dealt with these aspects under the 01st and 02nd grounds of appeal and I am convinced that the trial judge had not erred in terms of the burden or standard of proof.

[38] 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 trial judge to be satisfied and have found the appellant guilty of both counts beyond reasonable doubt. I cannot by any means say that the trial judge 'must' have entertained a reasonable doubt about the appellant's guilt on the two counts [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)].

[39] Therefore, there is no reasonable prospect of success in this ground of appeal.

07th ground of appeal (sentence)

[40] The appellant submits that the sentence is harsh and excessive. He had been sentenced according to the sentencing tariff given in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) where the Supreme Court said:

> *'[25] The tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.'*

[41] The approach taken by the appellate court 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)]. The aggregate sentence of 14 years, 10 months and 15 days imprisonment with a non-parole period of 12 years is well within ***Aitcheson*** tariff range.

08th ground of appeal

[42] The appellant submits that the trial judge had not given sufficient discount for his mitigation.

[43] The trial judge had indeed given a discount of 02 years for the appellant's good character as that was the only mitigating factor the trial judge had before him. He had considered the rest as personal circumstances as per **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014.

[44] 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). Thus, there is no sentencing error or a real prospect of success in the appellant's sentence appeal.

Bail pending appeal

[45] This court has set down in a number of decisions (for e.g. **Lal v State** [2021] FJCA 29; AAU015.2018 (5 February 2021) the law relating to bail pending appeal as follows:

> *[32] ……., the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.*
>
> *[33] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.*
>
> *[34] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal , the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to*

warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[46] Since the appellant has no reasonable prospect of success in his appeal against conviction and no real prospect of success in the appeal against sentence he cannot reach the requirement of 'very high likelihood of success'. He has not shown other exceptional circumstances either.

[47] Therefore, his application for bail pending appeal fails.

Orders

1. Leave to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.
3. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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