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

CRIMINAL APPEAL NO.AAU 0095 of 2019
[In the High Court at Suva No. HAC 328 of 2016]

BETWEEN	**:**	**KERESONI WAQATAIREWA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. E. A. Rice for the Respondent**
Date of Hearing	**:**	**09 September 2021**
Date of Ruling	**:**	**10 September 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with three counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and one count of assault causing actual bodily harm contrary to section 275 of the Crimes Act, 2009 committed at Nabua in the Central Division on 31 August 2016.

[2] The information read as follows:

COUNT 1

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, had carnal knowledge of* ***IL*** *without her consent.*

COUNT 2

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of* ***IL*** *without her consent.*

COUNT 3

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1 and Count 2, had carnal knowledge of* ***IL*** *without her consent.*

COUNT 4

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM*: Contrary to Section 275 of the Crimes Act 2009.*

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, assaulted* ***IL*** *causing her actual bodily harm.*

[3] The appellant had pleaded guilty to the fourth count. At the end of the summing-up, the assessors had unanimously opined that the appellant was not guilty of the first count but by a majority had found the appellant guilty of the second and third counts. The learned trial judge had agreed with the assessors, convicted the appellant of the second, third and fourth (upon his own guilty plea) counts and on 19 June 2019

sentenced him to 10 years of imprisonment each on the second and third counts and 12 months of imprisonment on the fourth count; all sentences to run concurrently subject to a non-parole period of 08 years.

[4] The appellant had lodged a timely appeal against conviction (15 July 2019). Since then the appellant had filed amended and additional grounds of appeal against conviction and sentence from time to time. However, he has sought to abandon his sentence appeal by filing an abandonment notice in Form 3 under Rule 39 of the Court of Appeal Rules on 16 September 2020. He had submitted amended grounds of appeal against conviction on 18 November 2020 and informed court that he would abandon all other grounds previously lodged. His written submissions had been tendered on 31 December 2020. The state had filed its written submissions on 14 January 2021. The appellant and the counsel for the respondent appeared *via* Skype at the hearing into leave to appeal.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test 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)].

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

> ***'Conviction***
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact when stating "You must look at all the evidence and decide where the truth lies' in his summing up therefore caused a miscarriage of justice.*

Ground 2

THAT the Learned Trial Judge erred in law and in fact when he convicted the Appellant when the Prosecution has failed to prove their case beyond reasonable doubt therefore caused a substantial miscarriage of justice.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he left the issue of consent to the assessors without any further direction rendered the conviction unsafe and a grave miscarriage of justice.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he directed the assessors to find the Appellant guilty or not guilty considering whose evidence they believe by doing so the assessors have been misdirected with regard to the burden of proof and therefore caused a miscarriage of justice.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he failed to direct the assessors on recent complaint therefore caused a substantial miscarriage of justice.

Ground 6

THAT the Learned Trial Judge erred in fact and in law when he failed to direct the assessors and also bear in mind the danger of convicting on uncorroborated evidence of the complainant failure to give such a direction therefore has caused a substantial miscarriage of justice.

Ground 7

THAT the Learned Trial Judge erred in law and in fact when he failed to draw the attention of the assessors that the complainant had reasons to implicate the appellant and the failure to give proper and adequate direction on the assessors has rendered the conviction unsafe and therefore cause a grave miscarriage of justice.'

[7] The trial judge had summarized the case as follows in the sentencing order. The appellant had given evidence and taken up the position of consensual sexual intercourse three times on 31 August 2016.

> *'**[11]** It is an admitted fact that you and the complainant were in a de-facto relationship at the time of the alleged offences. It is also admitted that*

the complainant used to reside with you at the Nabua Muslim League, for 11 years, with your four children. It is also admitted that at the time of the alleged offences, you had carnal knowledge of the complainant or that you admit to having sexual intercourse with her.

[12] *It was proved during the trial that, on the 31st day of August 2016, at Nabua, in the Central Division, on an occasion other than that mentioned in the first count, that you raped the complainant, by penetrating her vagina, with your penis, without her consent (Count 2).*

[13] *It was also proved during the trial that, on the 31st day of August 2016, at Nabua, in the Central Division, on an occasion other than that mentioned in the first and second count, that you raped the complainant, by penetrating her vagina, with your penis, without her consent (Count 3).*

[14] *It has also been proved that, on the 31st day of August 2016, at Nabua, in the Central Division, you assaulted the complainant causing her actual bodily harm (Count 4).*

[15] *You and your de-facto partner, had been living together for 11 years. The two of you had 4 children together, which should have made both of you proud. From the testimony of the complainant it is evident that you had kept her in virtual captivity in your home after you indulged in sexual intercourse with her the first time. You have made 'love making' between you and your de-facto partner, which should have been a pleasurable act, a dreadful and outrageous act, merely to fulfil your carnal desires further.*

[16] *Furthermore, you cut the complainant's hair in patches and also hit her left knee with a rolling pin when she attempted to leave you.'*

<u>01st and 04th grounds of appeal</u>

[8] These two grounds of appeal could be dealt with together. The appellant's complaint under the 01st ground of appeal lies in paragraph 71 of the summing-up:

*'**[71]** In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.*

[9] The appellant argues that by the above direction the trial judge had implied that the appellant must prove his innocence and the assessors could have got the impression that they had to make a finding either to believe the complainant or the appellant.

[10] 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 drawing 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.

[11] The trial judge had first directed the assessors on the burden of proof and standard of proof clearly at paragraphs 26-30, 43-45 and 55-58. There is nothing wrong with those standard directions. However, since the case against the appellant depended on the testimony of the complainant on the issue of consent the law required the trial judge to give further directions as it was the complainant's word against the appellant's word on the issue of consent.

[12] This aspect of the law had been dealt with previously in a number of decisions including **Rokovesa v State** [2020] FJCA 188; AAU094.2016 (5 October 2020) where I discussed the decisions in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017), **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 and **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019).

[13] It is never appropriate for a trial judge to frame the issue for the assessors' determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt (vide **Murray v The Queen** (2002) 211 CLR 193 at 213 [57] per Gummow and Hayne JJ,)

[14] Therefore, the currently preferred view is based on the modified ***Liberato*** direction that in a word against word situation the trial judge should ordinarily tell the assessors that **(i)** if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; **(ii)** if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and **(iii)** if you do not believe the accused's evidence (if you do not believe the accused's account

in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt? (vide **Anderson** (2001) 127 A Crim R 116 at 121 [26], **Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021), **Qaro v State** [2021] FJCA 78; AAU126.2018 (22 March 2021) and **Tuinaserau v State** [2021] FJCA 79; AAU169.2019 (24 March 2021)]

[15] However, in **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) the majority in the High Court took up the position that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."*. As a result, it was held that a *"Liberato direction"* need only be given in cases where the trial judge perceives a real risk that the jury might view their role in this way, regardless of whether the accused's version of events is on oath or in the form of answers given in a record of police interview.

[16] The trial judge had correctly told the assessors that the main issue for their determination is the issue of consent (see paragraphs 73 & 74 of the summing-up). The judge had also informed the assessors that if they find the evidence placed by the prosecution both truthful and reliable, then they must proceed to consider whether by that evidence the prosecution had proved the elements of the offences of rape beyond any reasonable doubt (see paragraphs 75 of the summing-up).

[17] Thereafter, the trial judge had proceeded to administer near perfect directions required in a case of 'word against word' at paragraphs 76, 77, 78 and 80 as follows:

> *'**[76]** ……. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of all three charges of Rape, since the prosecution has failed to prove its case.*
>
> ***[77]** If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then*

accrue in favour of the accused and he should be found not guilty of the charges of Rape.

[78] *However, I must caution you that even if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.*

[80] *In summary and before I conclude my summing up let me repeat some important points in following form:*

i. If you believe the evidence of the accused, then you must find the accused not guilty of the three charges of Rape;
ii. If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the three charges of Rape;
iii. If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;
iv. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the three charges of Rape;
v. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Rape has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.'

[18] In the circumstances, these two grounds have no reasonable prospect of success in appeal.

02nd ground of appeal

[19] The appellant argues in general that the trial judge had erred in convicting the appellant when the case against him had not been proved beyond reasonable doubt. He had placed emphasis on the standard and burden of proof.

[20] As already pointed out the trial judge had given complete directions on standard and burden of proof in the summing-up. He had in his judgment directed himself in accordance with the summing-up including the directions on both. He had addressed his mind to the burden of proof and standard of proof on the prosecution at paragraphs 8, 9 and 10 of the judgment. Then the trial judge had devoted his time to consider the

issue of consent at length at paragraphs 17-32. Finally, the trial judge had determined as follows.

> *'**[33]** Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences set out in Counts 2 and 3 with which the accused is charged.*
>
> ***[34]** In the circumstances, I find the accused Keresoni Waqatairewa not guilty of Count 1; but guilty of Counts 2 and 3 as charged.'*

[21] Therefore, there is no merit in this ground of appeal.

03rd ground of appeal

[22] The appellant seems to complain that the trial judge had simply left the issue of consent to be decided by the assessors without further elaborating on the fault element of the offence. He has cited **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017). The Supreme Court upheld the Court of Appeal judgment in **Tukainiu v State** [2018] FJSC 19; CAV0006.2018 (30 August 2018) and cited the law relating to the fault element as formulated by the Court of Appeal.

[23] **Tukainiu** laid down the law relating to the fault element of rape as follows:

> *'[34] ……..Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape.'*

[24] The trial judge had addressed the assessors on the fault element at paragraphs 44 (v) & (vii), 52 and 73. In between the trial judge had narrated the evidence placed by the prosecution and defence before the assessors at great length. The fact that the assessors found the appellant not guilty of the first count of rape but found guilty of the second and third counts of rape demonstrates that they had related the directions

on law relating to the fault element to the facts. The trial judge too had agreed with the assessors on their opinion of the first count of rape for the reasons given in the judgment, particularly at paragraph 27 of the judgment.

[25] Thus, there is no reasonable prospect of success in appeal as far as this ground is concerned.

05th ground of appeal

[26] The appellant's criticism is aimed at the alleged failure regarding directions on recent complaint evidence. In submissions he had combined this with delay in reporting and lack of corroboration as well.

[27] It is clear that the prosecution had not relied on recent complaint evidence at the trial but only the evidence of the complainant and the doctor. I cannot see from the summing-up or the judgment that any delay in reporting had been canvassed as a trial issue. In any event, the complainant had reported the matter to the police on the following day *i.e.* 01 September 2016 which explains why the defence counsel had not taken the delay up at the trial as an issue to impeach the credibility of the complainant. The 'totality of circumstances' test regarding how to assess complaint of delay suggested in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) does not come into play here and even if it is applied the result would have done nothing to adversely affect the complainant's credibility.

[28] The appellant's counsel has understandably not sought redirections in respect of the complaints now being made on the summing-up and the deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[29] Thus, there is no reasonable prospect of success in appeal as far as this ground of appeal is concerned.

06th ground of appeal

[30] The appellant complains that the trial judge had failed to direct the assessors of the danger of convicting on uncorroborated testimony of the complainant. Quoting from several foreign judicial decisions he adds that it is dangerous to convict on the evidence of a woman or a girl alone and uncorroborated evidence is not sufficient to secure a conviction. The rule earlier prevalent was that it is always the duty of the tribunal in offences of sexual nature to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of accused [see for example **R –v- Henry and Manning** (1969) 53 CrAppR 150, per Lord Justice Salmon at page 153, **R v Wilson Iroi** (Unrep. Criminal Case No. 17 of 1991) Muria J, **R v Gere** [1980 – 81] SILR 145 Daly CJ, **R v Selwyn Sisiolo** (Unrep. Criminal Case No. 5 of 1998) Lungole – Awich J, **Lanemua v R** (Unrep. Criminal Case No. 27 of 1992) Palmer J and **R –v- Gammon** (1959) 43 CrAppR 155].

[31] However, this is not the law in Fiji. In **Nalawa v State** [2008] FJCA 107; AAU0031.2007 (25 April 2008) the Court of Appeal said:

> *'[11] Firstly the law of corroboration in sexual cases has now undergone change. It is no longer required of judges and magistrates to warn themselves (or the assessors) of the need to look for corroboration of the complainant's evidence. The rule was abolished because it was based on a belief that victims of sexual assault were inherently unreliable. That belief was an example of unfair gender discrimination and was abolished by this court, to be replaced by a general judicial discretion to administer a warning in all cases where a witness might be considered to be unreliable because he or she has an improper motive. Such witnesses are not necessarily victims of sexual assault, nor are they women.*
>
> *[12] The rule has properly been abandoned. There was no need for the trial magistrate to look for corroboration. Indeed, reading the court record the complainant's evidence was coherent and articulate. No improper motive was alleged by the appellant at the trial. There was no error of law in relation to corroboration.'*

[32] It is trite law that by section 129 of the Criminal Procedure Act, 2009 the common law requirement of corroboration in sexual cases was unequivocally abolished.

[33] This ground of appal has no merits at all.

07th ground of appeal

[34] The appellant argues that the trial judge had erred in failing to draw the attention of the assessors that the complainant had reason to implicate the appellant. He cites what is stated at paragraph 63 (vi) of the summing-up as revealing the said reason:

> '*63 (vi) She stated that she was not staying together with the accused at the time as they had an argument a few days prior to 30 August 2016. She testified that when she came back from work that day (few days prior to 30 August 2016), her son had informed her that he had seen his father sitting on top of the bed using a bottle to smoke something. She had asked the accused about it and a heated argument had taken place. She had told the accused that she doesn't like what he was doing in front of their son. Because of the heated argument, the accused had told her to go away from the house. The complainant had then gone to her aunt's place in Samabula. Later, she had taken her children to Tailevu.'*

[35] There is nothing to indicate in the summing-up or the judgment that this incident had been suggested as the basis for the improper motive for the complainant to falsely implicate the appellant. Thus, there was no basis for the trial judge to have given a warning using his general judicial discretion to the assessors [see **Nalawa v State** (supra)]. The appellant's complaint appears to be an afterthought.

[36] There is no reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is refused.

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