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

CRIMINAL APPEAL NO.AAU 102 of 2015
[In the Magistrates' Court at Suva Case No. 1008 of 2010]
[High Court No. HAC 304 of 2014 (sentence)]

BETWEEN	**:**	**RICHARD KASHMIR KUMAR**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Temo, JA**
Counsel	**:**	**Ms. S. Ratu for the Appellant**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	**:**	**12 April 2021**
Date of Judgment	**:**	**29 April 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been charged in the Magistrates' Court at Suva with one representative count of rape contrary to section 149 and 150 of the Penal Code, an alternative count of defilement of a girl under 13 years of age contrary to section 155(1) of the Penal Code and another representative count of indecent assault contrary to section 154(1) of the Penal Code committed at Nabua in the Central Division between 01 June 2009 to 30 June 2009.

[2] At the end of the trial, the learned Magistrate had convicted the appellant on the charge of rape and transferred the case to the High Court for sentence where on 30 January 2015 the appellant had been given a sentence of 14 years of imprisonment with a non-parole period of 12 years. The Magistrate had not made any finding

regarding the charge of indecent assault in his judgment despite the fact that it was not an alternative charge and the High Court had noted this omission in the sentence order and seems to have sent the case back to the Magistrate to deal with the charge of indecent assault.

[3] The appellant's appeal against conviction had been timely. The private counsel appearing for the appellant at the leave to appeal stage had canvassed three grounds of appeal with one of the grounds being abandoned and the single Judge had refused leave to appeal on all three grounds on 22 March 2017.

[4] The Legal Aid Commission on behalf of the appellant has renewed the application for leave to appeal before the full court with one ground of appeal not canvased before the single Judge. The counsel for the appellant described the single ground of appeal as an abridged version of all initial grounds of appeal:

> ***Ground 1***
>
> *The Learned Trial Magistrate erred in law and in fact when he failed to adequately direct his mind on the compound improbabilities that emanated from the totality of evidence thus raising doubt on the evidence and prejudicing the appellant on his right to a fair trial.*

Summary of facts

[5] The facts of the case are that the victim was 12 years old at the time of the incidents and living with her family next door to the appellant who lived with his wife and two children. The two dwelling houses were in a crowded estate and only meters apart. On a day in June 2009, victim's brother fell ill and her mother and the appellant's wife took him to the hospital leaving the victim and her sister alone because their father was away. The victim's mother made arrangements to have her and her sister go to the appellant's house to sleep for the night under the care of the appellant. The victim went to sleep in one of the bedrooms when she was awoken by the appellant touching her and telling her that he wanted to have sex with her. She said "No". She went back to sleep but again was woken by the appellant who dragged her into the sitting room, asking her again for sex. She again said "No" and when she went back to the bedroom

to sleep for the third time she was awoken by finding the accused on top of her and undressing her. He then proceeded to have sexual intercourse with her for about 10 to 15 minutes. He held his hand over her mouth. He told the victim that if his wife came back unexpectedly she was to say nothing. The appellant's wife did return and he told his wife to stay with the victim's mother because she should not be alone. So the appellant's wife left and went next door for the night. On another occasion victim's mother told her to go to the appellant's house with their benzene light. Afraid to go in, she stayed at the entrance but the appellant came and squeezed her breasts and touched her genitals. On another occasion the victim went to the appellant's house at the request of her mother to get their radio fixed. After arriving at the appellant's house she remained at the doorway. The appellant came, pulled her inside and had sexual intercourse with her. The victim had been medically examined after about a year and the results had indicated '*sexual assault victim with obvious signs of vaginal penetration- hymen not intact'.*

[6] The appellant had given evidence at the trial and admitted that the victim and her sister were sleeping in his house in the night relating to the first allegation but denied having sexually abused her. He had also admitted fixing the benzene light and the radio for the victim but denied any wrongdoing. He had further said that his wife had told the girls to lock their room from inside. As a result, according to him, he could not go into the room. However, this position had not been even suggested to the victim and there is absolutely nothing to indicate that the room where the victim and her sister were sleeping was locked from inside.

[7] 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 for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) 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 and

Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

01st ground of appeal

[8] The main argument of the appellant's counsel is that the 'compound improbabilities' in the prosecution evidence render the conviction doubtful and relies on **Pell v The Queen** [2020] HCA 12 (07 April 2020) to support her contention.

[9] On a perusal of the judgment of High Court of Australia in ***Pell*** it appears that Pell had obtained leave to appeal on the single ground that the verdicts were unreasonable and could not be supported by the evidence from the Court of Appeal of the Supreme Court of Victoria but his appeal had been eventually dismissed. Pell then applied to and obtained special leave to appeal from the High Court of Australia on two grounds.

[10] In ***Pell*** the High Court of Australia while acknowledging the advantage in seeing and hearing the witnesses by the jury remarked in reference to section 276(1)(a) of the Criminal Procedure Act 2009(Vic) which is similar to the first limb of section 23 (1) of the Court of Appeal Act (Fiji) in the following terms:

> *'38….The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury…..'*
>
> *'39. The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable**. The court examines the record to see whether, notwithstanding that assessment – either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.'*** *(emphasis added)*

[11] Section 276 of Criminal Procedure Act 2009(Vic) states as follows:

> *(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—*

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

[12] The High Court in the course of the judgment approved the reference to **M v The Queen** (1994) 181 CLR 487 at 493 and **Libke v The Queen** (2007) 230 CLR 559 at 596-587[113] by the Court of Appeal on the approach to be taken in appeal on 'unreasonableness ground' as follows:

*'43. At the commencement of their reasons the Court of Appeal majority correctly noted that the approach that an appellate court must take when addressing "the unreasonableness ground" was authoritatively stated in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ in M. The court must ask itself: **"whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".***

*44. The Court of Appeal majority went on to note that in Libke v The Queen, Hayne J (with whom Gleeson CJ and Heydon J agreed) elucidated the M test in these terms22: **"But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must as distinct from might, have entertained a doubt about the appellant's guilt."** (footnote omitted; emphasis in original)*

45. As their Honours observed, to say that a jury "must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. Libke did not depart from M.'

(emphasis added)

[13] Finally the High Court concluded that:

'118. It may be accepted that the Court of Appeal majority did not err in holding that A's evidence of the first incident did not contain

discrepancies, or display inadequacies, of such a character as to require the jury to have entertained a doubt as to guilt…..'

119. Upon the assumption that the jury assessed A's evidence as thoroughly credible and reliable, the issue for the Court of Appeal was whether the compounding improbabilities caused by the unchallenged evidence summarised in (i), (ii) and (iii) above nonetheless required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt. Plainly they did. Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to charges one to four that an innocent person has been convicted.'

127. It was evidence which ought to have caused the jury, acting rationally, to entertain a doubt as to the applicant's guilt of the offence charged in the second incident. In relation to charge five, again making full allowance for the jury's advantage, there is a significant possibility that an innocent person has been convicted.

[14] The compound improbabilities referred to in the judgment *inter alia* are (i) the applicant's movements after the Mass (ii) the applicant was always accompanied within the Cathedral and (iii) the timing of the assaults and the "hive of activity" and the High court stated that:

'58. It suffices to refer to the evidence concerning (i), (ii) and (iii) to demonstrate that, notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was not capable of excluding a reasonable doubt as to the applicant's guilt.'

[15] Section 4 of the Criminal Appeal Act 1907 (UK) which is similar to section 23(1) of the Court of Appeal Act (Fiji) had been interpreted narrowly by using the terms such as '*we are not here to re-try the case', 'the jury are the judges of fact. The Act was never meant to substitute another form of trial for trial by jury', 'We are not authorised to retry the case'* and *'Court sits only to determine whether justice has been done and not for the retrial of criminal cases'* [see **R v Williamson** (1908) 1 Cr. App. R 3, **R v Simpson** (1909) 2 Cr. App. R 129, **R v Graham** (1910) 4 Cr. App. R. 218 and **R v Cotton** (1921) 15 Cr. App. R. 142]. In 1949 in the case of **R v McGrath** (1949) 2 All ER 495 at 496 the then Lord Chief Justice, Lord Goddard said that the Court was:

'Frequently asked to reverse verdicts in cases in which a jury has rejected an alibi, but this court cannot interfere in those cases in the ordinary way, because to do so would be to usurp the function of the jury. Where there is

evidence on which a jury can act and there has been a proper direction to the jury this court cannot substitute itself for the jury and re-try the case. That is not our function.'

[16] In **R v Cooper** (1969) 53 Cr.App.R. 82 Lord Widgery described pre-1968 situation as follows: (the test whether a verdict of guilty was 'unsafe or unsatisfactory' was adopted with the passing of Criminal Appeal Act 1968):

> *'……it is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 it was almost unheard of for this Court to interfere in such a case.'*

[17] In the U.K. the Court's decision to quash the convictions of the Birmingham Six and the Guildford Four finally led to the reforms in the 1995 Criminal Appeal Act. The new statutory test for quashing convictions was set out in s.2 of the Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995 which stated that the Court of Appeal (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case. The proviso was now repealed as it was not considered necessary under the amended test.

[18] In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) the Court of Appeal adverted to these changes as follows:

> *'[54] In attempting to obtain guidance on the application of section 23(1) of the Court of Appeal Act from the English decisions, reliance can only be placed on those decisions prior to 1968. Section 23(1) is in virtually identical terms to section 4(1) of the Criminal Appeal Act 1907 (UK) which remained in force until 1966. From 1968 the bases upon which the English Court of Appeal must allow an appeal have changed in substance to the point where since 1995 the only test to be applied is whether the conviction is unsafe. This is not the law in Fiji. In addition since 1995 in England there is no longer any provision for the application of the proviso. As a court created by statute the powers of the Court of Appeal in criminal appeals are derived from and are confined to those given in Part IV of the Court of Appeal Act Cap 12. The Court of Appeal does not have an inherent jurisdiction in relation to criminal appeals since the appeal itself is a creation of statute: (See **R –v- Jeffries** [1969] 1 QB 120 and **R –v- Collins** [1970] 1 QB 710).*

[19] However, it appears that in other jurisdictions such as Australia provisions [similar to section 4 of the Criminal Appeal Act 1907 (UK)] that are similar to section 23(1) of the Court of Appeal Act (Fiji) are still prevalent and they have been subjected to wider and more purposive interpretations as reflected in ***Pell*** allowing for greater scrutiny by the appellate courts the verdicts of lower courts challenged on the grounds of '*unreasonableness'* or *'cannot be supported by having regard to the evidence'*.

[20] In Fiji the Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based…… Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice…. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.'*

[21] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see also **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[22] Therefore, I see no reason why Fiji should lag behind those developments in other jurisdictions when it comes to interpretation of section 23 of the Court of Appeal Act *vis-à-vis* the powers of the Court of Appeal.

[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the

appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied *mutatis mutandis* to a trial only by a judge or Magistrate without assessors.

[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges 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]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.

[25] The Magistrate had thoroughly ventilated all the evidence led by the prosecution at the trial. He had also fully considered the appellant's evidence. The Magistrate had been satisfied that the victim was truthful in her evidence.

[26] It is clear from the reading of the record of evidence that the appellant had craftily planned to sexually abuse the victim on the first day in question and created the perfect opportunity by asking his wife to accompany the victim's mother and brother to hospital when the mother's request was for him to go with them. Even when his wife returned from hospital he persuaded her to spend the night with the victim's mother rather than sending the victim and her sister to her mother. He had been relentless in his pursuit in the face of resistance by the victim until he finally satisfied

his unbridled lust at the expense of the 12 year old victim who was helpless in the appellant's house in the night.

[27] The victim had not told anyone of what happened as the appellant threatened to kill her *'if she opens her mouth'* and she was *'scared'* and *'lost'*. It appears from her evidence that even her own mother had been very strict and used to hit her. In addition she had also thought that her parents would harm the appellant. It is also clear from her evidence that she was clearly reluctant to go to the appellant's house after the first incident but the mother being quite oblivious to her plight had sent her to his house on at least two more occasions. It is evident that the relationship between the two families had strained over time and the matter had come to light when one day in the course of an argument the appellant's wife had shouted at the victim's mother that *'my husband had finished your daughter'* and *'the daughter is a bitch'*.

[28] Thereafter, the mother had taken the victim to the police station on 06 June 2010 but the victim had still not come out with any allegation of sexual abuse by the appellant. She had said that she was still afraid of her mom beating her and the police even advised the mother not to hit her. When a female police officer had visited home still the victim had ignored her. Finally, the victim's father had discussed the matter with her and she had come out with everything. It appears from evidence that the incidents of sexual abuse had happened in June 2009 and the doctor had examined the victim on 22 June 2010. It appears to be around 27 May 2010 that the dispute between the families had resulted in a flare-up where for the first time any hint of sexual abuse of the victim by the appellant had come to light through the appellant's wife. The complaint of sexual abuse appears to have been disclosed by the victim finally in May/June 2010. In the light of the evidence it is clear why it had taken about a year for the victim to come out with the sexual abuse allegations and the law is not certainly against the victim's belated complaint. In ***Pell*** the delay was 20 years but it was not even taken up as an appeal point.

[29] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test" (vide **State v Serelevu** [2018] FJCA

163; AAU141.2014 (4 October 2018). In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-

> *'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is* ***whether the complaint was made at the first suitable opportunity within a reasonable time*** *or* ***whether there was an explanation for the delay.'***

[30] In **Jonkers v Police** (1996) 67 SASR 401 at 407 Matheson J shed some insight as to how delay in sexual abuse complaints should be looked at:

> *'The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to who she might have complained but did not do so. It is enough if it is the first reasonable opportunity….*
>
> *We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family.'*

[31] There is nothing to indicate that the victim's sister though sleeping in the same room in the first night was aware of the appellant's moves and it explains why she had not been a witness to the incident. The victim did not and could not raise cries as the appellant had firmly covered her mouth and after the event had threatened her with death if she was to divulge it to anyone. At one point of time the appellant had threatened to 'sleep with' her sister if she was not going to 'sleep with' him.

[32] The Magistrate had analysed in detail as to why the victim had looked normal the day after the incident according to the mother. He had correctly concluded that given her fear of the appellant on the one hand and her own mother on the other it was not unusual that outwardly she may have looked normal. However, she was reluctant to

step into the appellant's house though the mother not being sensitive to her hesitancy had asked her to go there at least two more times.

[33] In total contrast she had shown distress whilst giving evidence at the trial. The Magistrate had observed her distressed posture and seen the pain and trauma on her face and he was convinced that she was not feigning such feelings but they were her natural emotions in trying to narrate the past incidents of sexual abuse. It appears that the Magistrate could have considered her demeanour as distress evidence as per **Soqonaivi v State** (Majority Judgment) [1998] FJCA 64; AAU0008U.97S (13 November 1998) and **Balelala v State** [2004] FJCA 49; AAU0003 of 2004S (11 November 2004) but he had chosen not to do so which had been to the appellant's benefit. In **The Queen v BZ** [2017] NICA 2 Morgan LCJ, Weir LJ and Stephens J in the Court of Appeal in Northern Ireland stated *inter alia* that:

> '*If the jury is sure that distress at the time is not feigned then the complainant's appearance or state of mind could be considered by the jury to be consistent with the incident.*

[34] Therefore, I do not find that there are any improbabilities in the victim's testimony or in the testimony of any other witness for the prosecution that are capable of creating a reasonable doubt as to the appellant's guilt. In my view, upon the whole of the evidence it was open to the Magistrate to be satisfied of the appellant's guilt beyond reasonable doubt. On an examination of the record, I do not find any inconsistencies, discrepancies, omissions, or other inadequacies of the victim's evidence or in other evidence upon which this court can be satisfied that the Magistrate acting rationally, ought to have entertained a reasonable doubt as to proof of guilt.

[35] In the circumstances, leave to appeal is refused and the appellant's appeal must stand dismissed.

Bandara, JA

[36] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusions.

Temo, JA

[37] I have read the draft in the above matter. I agree with the reasons and conclusions of Hon. Prematilaka JA in the above draft judgment.

Orders

1. Leave to appeal is refused.
2. Appeal is dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL