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

CRIMINAL APPEAL NO.AAU 145 of 2015
[In the High Court at Suva Case No. HA032 of 2014]

BETWEEN	:	**RAKESH CHANDRA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. A. Khan for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**06 August 2021**
Date of Ruling	:	**13 August 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva with two counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Laucala Beach Estate, Suva in the Central Division committed on 01 January 2014.

[2] The information read as follows:

FIRST COUNT

Statement of Offence

Rape*- contrary to Section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009*

Particulars of the Offence

Rakesh Chandra on the 1st day of January 2014 at Laucala Beach Estate, Suva in the Central Division, had carnal knowledge of Kimberly Ragini Chris, without her consent.

SECOND COUNT

Statement of Offence

Rape*- contrary to Section 207(1) and (2)(b) of the Crimes Decree No. 44 of 2009*

Particulars of the Offence

Rakesh Chandra on the 1st day of January 2014 at Laucala Beach Estate, Suva in the Central Division, penetrated the vagina of Kimberly Ragini Chris, with his fingers without her consent.

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty of both counts. The learned trial judge had agreed with the assessors, convicted the appellant of both counts of rape and on 16 October 2015 sentenced him on each count to a sentence of 07 years and 11 months of imprisonment (both sentences to run concurrently) with a non-parole period of 06 years.

[4] The appellant's solicitors had lodged an appeal against conviction and sentence in a timely manner. Subsequently, his solicitors had tendered an amended notice of appeal against conviction and sentence and two sets of written submissions (07/03/2017 & 13/03/2020). The appellant had sought to abandon the appeal against sentence by filing an abandonment notice in Form 3 under Rule 39 of the Court of Appeal Rules on 19 March 2019. In reply, the state too had tendered 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.

[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), **Chaudhry 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] Although the amended notice of appeal has listed 17 grounds of appeal against conviction the written submissions of the appellant do not deal with all of them. First set of written submissions (07 March 2017) does not elaborate any of the grounds in particular but contains only some submissions in general on the basis that the verdict is unreasonable and cannot be supported by the totality of evidence. The second set of submissions (13 March 2020) has dealt with only 10 grounds of appeal which are not the same as listed in either of the original notice (09 grounds) or amended notice (17 grounds) of appeal. The appellant's counsel in the second set of written submissions have made submissions on what he has called consolidated grounds of all previous grounds submitted to court. The second written submission contains only 10 grounds of appeal. The respondent's submissions (06 January 2021) have dealt with those 10 grounds of appeal.

[7] Ten grounds of appeal contained in the written submissions are as follows:

> ***'Ground 1***
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> *THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment that the Complainant has a criminal record and the Complainant forwarded allegations of Rape or a case of the similar nature toward another person. Complainant had lost that case due to her lies and false allegations and the Complainant's credibility is an issue where, a substantial miscarriage of justice has occurred.*

Ground 2

THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment that the Police Medical Examination Form and evidence in High Court Trial Proceedings by the Doctor who commenced the examination that clearly the Medical Examination evidence is inconsistent to a victim of Rape and a substantial miscarriage of justice has occurred.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment the inconsistencies in the Complainant's allegation made with Police and inconsistencies in the Complainant's evidence given in High Court Trial Proceedings and a substantial miscarriage of justice has occurred.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he failed to include the mental element of a crime in his judgment and a substantial miscarriage of justice has occurred.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment that the Prosecution did not prove beyond reasonable doubt the element of the crime and a substantial miscarriage of justice has occurred.

Ground 6

THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment Prosecution did not prove beyond reasonable doubt: One Count of Rape and convicted the Appellant for Two Counts of Rape and therefore a substantial miscarriage of justice has occurred.

Ground 7

THAT the Learned Trial Judge erred in law and in fact when he failed to make an independent analysis of all evidence in it's entirely and a substantial miscarriage of justice has occurred.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he failed to facilitate all the evidence and violated the Appellant's right to a fair trial thus a substantial miscarriage of justice has occurred.

Ground 9

THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment the Prosecution did not prove beyond reasonable doubt that the Appellant forced the Complainant without consent and

proceeded to have intercourse and a substantial miscarriage of justice has occurred.

Ground 10

THAT the Learned Trial Judge erred in law and in fact when he failed to include in his judgment then Mandatory requirement of Section 155(1) of the Criminal Procedure Code and a substantial miscarriage of justice has occurred.'

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

> *'**[5]** Prosecution case was essentially based on the evidence of the complainant. The accused did not dispute having sexual intercourse with the complainant and also touching her vagina with his hand. His claim was that the complainant had consented to have sex with him. He had played with her vagina with his hand and thereafter had vaginal intercourse with the complainant, with her consent, inside his parked car.*
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> ***[6]** The complainant, in her evidence denied consensual sex with the accused. She was emotionally distressed due to an incident with her boyfriend. The accused posed as one of his friends and offered her dinner, when they met as seawall at Nasese, as she was without a meal. He had then taken her to two Night Clubs and thereafter taken her along Princess Road in his car to a cliff and said "if we can't live together we shall die together".*
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> ***[7]** He had threatened her with death and having taken her to a bush area at a dead-end of a road, forcibly inserted his hand into her vagina. He had then adjusted her passenger seat to a reclining position and then mounted on her. Thereafter, the accused having taken off her undergarment had penetrated her vagina with his penis. She begged him not to. He continued until ejaculation. He had subsequently dropped her off at her house on the same night.*
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> ***[8]** Although the accused claimed to have had consensual sex, he disputed the sequence of events as narrated by the complainant in her evidence. He had offered his own version of events. The assessors have opted to accept evidence of the complainant as the credible and reliable version and have obviously rejected his evidence. In her evidence, the complainant had satisfied the necessary elements of the two charges that are leveled against the accused, namely penetration and lack of consent.'*

[9] According to the summing-up, the appellant had elected give evidence and admitted that he and the complainant were kissing and he was touching her body. He had then asked whether to have sex, she was OK and they removed her panties and having

played her vagina with his hand the appellant had engaged in vaginal intercourse with her consent.

01st ground of appeal

[10] It is alleged that the prosecution had not disclosed the fact that the complainant was the complainant in another case of rape in Navua Magistrates' court against another person which had allegedly ended up in favour of that person.

[11] There is nothing to indicate that the complainant's credibility had been challenged at the trial by the appellant based on the outcome of the other rape case. It was no part of the prosecution to disclose to the defence, even if they knew of it, any other unrelated judicial proceedings. In any event another case of the same nature where the complainant happened to be the complainant does not make her having a 'criminal record'. Further, this had not been taken up as a trial issue at all.

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

02nd ground of appeal

[13] The appellant argues that the trial judge had failed to direct the assessors that medical evidence in the form of Medical Examination Form and oral testimony of the doctor are inconsistent with the victim of rape meaning that medical evidence does not support forcible sexual intercourse.

[14] The trial judge had addressed the assessors on medical evidence at paragraphs 46 of the summing-up which evidence (unchallenged at the trial) had revealed a slight aberration on the posterior wall of her vagina and presence of semen in the vaginal canal. The complainant was a mother of four children at the time of the incident and any physical evidence (or lack of it) of forcible penetration should be considered in that context. In any event, the crucial evidence of non-consensual sexual intercourse came not from medical examination but from the complainant whose evidence the trial judge had placed in sufficient detail before the assessors. Even if medical

evidence had been totally disregarded, had the assessors and the trial judge believed the complainant the charges of rape could have been upheld. Medical evidence had not certainly discounted forcible penetration of the complainant's vagina but had lent some support.

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

03rd ground of appeal

[16] The appellant submits that the trial judge had not included in the summing-up and his judgement the inconsistencies of the complainant's evidence in court with her police statement.

[17] The trial judge had directed how the assessors should evaluate inconsistencies at paragraphs 17–19 of the summing-up. He had detailed the evidence of the complainant and the appellant at paragraphs 45 – 49 and differences in the versions of the complainant and the appellant when he analysed the evidence of both of them in the summing-up at paragraphs 50-79.

[18] It does not appear from the summing-up that the defence had brought up any material inconsistencies between the complainant's testimony in court and her police statement at the trial for the trial judge to address the assessors on them. The defence should have raised them as trial issues if there were such inconsistencies, contradictions and omissions in her evidence. I do not see them from the summing-up. They cannot be raised as appeal points at this stage.

[19] The Court of Appeal very recently dealt with a similar complaint in **Ram v State** [2021] FJCA; AAU 024 .2016 (02 July 2021) where the court considered **Singh v The State** [2006] FJSC 15] CAV0007U.05S (19 October 2006), **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and reiterated the principles expressed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) that the

weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. Further, that no hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance.

[20] 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. This complaint involves the role of the trial judge when he agrees with the assessors. In **Fraser v State** [2021]; AAU 128.2014 (5 May 2021), the Court of Appeal stated on the trial judge's function as follows:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]*

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

04th to 07th grounds of appeal

[22] The appellant alleges that the trial judge had not addressed the fault element and other elements of rape in the judgment and failed to undertake an independent analysis as to whether the case had been proved beyond reasonable doubt.

[23] The judge had dealt with the fault element of rape at paragraph 37 of the summing-up. In **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) the Court of Appeal stated as to the fault element of rape as follows:

> *'[32] .....Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21 (1).'*
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> *'[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. 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 himself according to the summing-up and addressed his mind to proof beyond reasonable doubt at paragraphs 10 and 11 of the judgment and the important element of lack of consent at paragraphs 5- 9 of the judgment. He need not repeat everything he stated in the summing-up in the judgment. He has followed the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment. See **Fraser v State** (supra) where the Court of Appeal also stated:

> *'[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.'*

[25] These grounds of appeal have no reasonable prospect of success.

08th to 10th grounds of appeal

[26] 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 on any other matters he should have sought redirections at the end of the summing-up. The appellant cannot canvass matters which were essentially trial issues as appeal grounds.

[27] 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)].

[28] The appellant had been represented by a counsel at the trial and he had not sought any redirections on the alleged misdirection, non-directions or omissions in the summing-up on any of the points now raised by the appellant. Therefore, the appellant is not even entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[29] These grounds of appeal have no reasonable prospect of success.

[30] I have also considered the complaint that 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 open to the assessors and the trial judge to be satisfied and have found the appellant guilty of two acts of rape beyond reasonable doubt. I cannot say that the assessors and the trial judge 'must', as opposed

to 'might', not entertained a reasonable doubt about the appellant's guilt on two 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)].

[31] The conviction seems inevitable when the assessors and the trial judge decided to act on the evidence of the complainant 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