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

CRIMINAL APPEAL NO.AAU 102 of 2017
[In the High Court at Lautoka Case No. HAC 142 of 2013]

BETWEEN	:	**ILIESA RAGIGIA**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, ARJA**	
Counsel	:	**Ms. S. Ratu for the Appellant**	
	:	**Mr. S. Babitu for the Respondent**	
Date of Hearing	:	**17 November 2021**	
Date of Ruling	:	**18 November 2021**	

RULING

[1] The appellant had been indicted in the High Court at Lautoka with one count of rape contrary to section 207(1) and (2) (c) of the Crimes Act, 2009 and another count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division on 01 July 2013.

[2] The information read as follows:

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

ILIESA RAGIGIA*, on the 1st day of July, 2013, at* ***NADI*** *in the* ***WESTERN DIVISION,*** *used his penis to penetrate the mouth of* ***TEMALESI BULIVOU,*** *without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ILIESA RAGIGIA, *on the 1st day of July, 2013 at* ***NADI*** *in the* ***WESTERN DIVISION,*** *used his penis to penetrate the vagina of* ***TEMALESI BULIVOU,*** *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' opinion, convicted the appellant of both counts and sentenced him on 15 June 2017 to an aggregate sentence of 08 years and 10 months of imprisonment (after the remand period was deducted) with a non- parole period of 07 years.

[4] The appellant had appealed in person against conviction in a timely manner (13 July 2017) followed by additional grounds of appeal including a few on the sentence. Thereafter, the Legal Aid Commission had filed amended grounds of appeal and written submission on 10 June 2021 only against conviction. The state had tendered its written submissions on 16 November 2021. Form 03 under Rule 39 abandoning the sentence appeal was tendered to court on 17 November 2021.

[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 sentence 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 on behalf of the appellant against conviction are as follows:

> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in convicting the appellant as the paucity of evidence shows doubt on the issue of consent.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in his analysis of evidence and in convicting the appellant when the evidence in totality does not support the charge of Rape.*

[7] The trial judge in the summing-up had summarized the complainant's evidence against the appellant as follows:

> *'[2] The brief facts were as follows:*
>
> > *The complainant was a tenant of the accused living next door to the house of the accused. The complainant was asked by the wife of the accused to look after her children in her absence. The complainant felt sorry for the children and was helping them.*
>
> *[3] On 1st July, 2013 at about 1pm after hanging the accused children's clothes to dry the complainant saw the accused standing near his bathroom wearing a blue and white stripe towel without a t-shirt.*
>
> *[4] The accused pulled the complainant into the bathroom, she begged the accused by saying in the Itaukei language "tau kerekere" meaning for the accused to stop what he was doing.*
>
> *[5] In the bathroom the accused opened his towel and forced his penis into the complainant's mouth for 10 minutes. At this time the complainant was*

struggling with the accused, crying and the accused was pushing her hands away.

[6] The complainant did not shout because she was frightened and afraid that the accused would do something to her. Again the complainant begged the accused to stop after which the accused opened the bathroom door.

[7] The accused after putting on his towel dragged the complainant to his bedroom by holding her hand tightly. There was no one around the complainant was crying and afraid but she did not shout since she was feeling weak.

[8] In the bedroom the accused locked the door and told the complainant not to shout, the accused pulled the complainant towards him and then pushed her to the floor. The accused was trying to take out her top, the complainant was struggling to push the accused away but he kept on pulling her hand. The accused managed to pull her top up the complainant kept on crying begging him to stop. To cover her body the complainant sat on the floor with her legs crossed. The accused was able to remove the complainant's long pants and top.

[9] The accused then forced himself on her when she struggled to push him away he held her tightly. The accused then forced his penis into the complainant's vagina for 30 minutes.

[10] The complainant did not consent to what the accused had done to her. After this the accused stood up put on his towel and went away. The complainant ran outside the house crying, at her house she informed her cousin brother Pajilai Bale and thereafter the matter was reported to Police.'

[8] The appellant on the other hand had remained silent but called his neighbor (DW1) and the doctor (DW2) as defense witnesses. The appellant had admitted in agreed facts that he had penetrated the mouth and the vagina of the complainant with his penis. Thus, the main issue in the case was 'consent' which the appellant had obliquely pursued.

<u>01st ground of appeal</u>

[9] The challenge is based on alleged paucity of evidence casting doubt on the issue of consent. One of the two points highlighted by the appellant in this connection is the complainant's evidence that the appellant had chased his daughter away before pulling her into the bathroom (where oral penetration took place) which was not

corroborated by the said daughter who was called as a prosecution witness (PW2). The second point is that according to the complainant after the appellant had committed penile rape inside his bedroom he simply went away and she ran outside crying and met his daughter whereas the appellant's daughter had said that after the complainant came out of the bedroom, of course crying, she served food to everyone and sat beside the appellant before going away.

[10] The respective evidence of the complainant and PW2 (AB) had been clearly placed before the assessors by the trial judge in the summing-up. Thus, the assessors must have observed the aforesaid inconsistencies between the evidence of the complainant and PW2. In addition, the trial judge had explained to the assessors the evidence of both defence witnesses in detail. However, the assessors having had the benefit of seeing the demeanour of all witnesses had not entertained any reasonable doubt of the absence of consent on the part of the complainant.

[11] 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), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) and **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[12] The trial judge despite his limited obligation as discussed above, had in fact considered all the evidence independently in the judgment and drawn his attention to the complainant's evidence and that of PW3 as follows:

'[23] I accept the evidence of the complainant as truthful and reliable. The complainant was able to recall what had happened to her and was forthright in her evidence. The complainant was also able to withstand cross examination. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty.'

[24] The fact that the complainant did not shout or scream for help or tell the daughter of the accused anything whilst coming out of the accused's bedroom does not in any way affect the reliability of the complainant's evidence. The circumstances that prevailed at that time was in my view consistent with the complainant's reaction.

[27] The final witness for the prosecution Pajilai Bale was also a truthful and reliable witness. He saw the complainant crying and had also seen red marks on the arm of the complainant.

[28] The fact that Pajilai did not tell the Police about red marks on the arm of the complainant when he gave his police statement was insignificant to cast any doubt on his evidence.'

[13] The trial judge's observations on PW2, the appellant's daughter is as follows:

'[26] I accept the evidence of "AB" to the extent that this witness saw the complainant and her father coming out of the bedroom and that "AB" had asked the complainant what had happened when she saw the complainant crying. I reject the evidence of "AB" thereafter as unreliable which was tailored to protect the accused, this was very obvious to me from her demeanour in court.'

[14] The judge had also considered the evidence of the doctor's and DW2 and stated:

'[29] I also accept the Professional Opinion of the Doctor that there was a history of sexual assault and rape which was consistent with the history narrated by the victim.

[30] I reject the evidence of defence witness Solomoni Cavu Lotawa as unreliable in respect of his observations and suspicion that the complainant and the accused were in a relationship. It was obvious to me from the demeanour of this witness that he was trying to save his friend.'

[15] What is clear from PW2's evidence is that when the complainant and her father, the appellant came out of the bedroom the complainant was crying. PW2 had even

questioned the complainant what had happened but she kept on crying. Even when PW3 met the complainant soon after the alleged incident she was still crying and she had shown red marks on her hand caused by the appellant's pulling her into his house. If there had been consensual sex there was no reason for the complainant to behave the way she did. Her prompt complaint to PW3 and the police adds to her credibility. PW2's evidence that the complainant stayed back, served food and sat beside the appellant after she came out of the room with the appellant crying cannot be believed in the light of the totality of evidence.

[16] Therefore, I see no reasonable prospect of success in the first ground of appeal.

<u>02nd ground of appeal</u>

[17] The second ground of appeal is fashioned on the basis of the verdict being *'unreasonable or cannot be supported having regard to the evidence'.*

[18] At a trial by the judge assisted by assessors the test has been formulated as follows. 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 jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **<u>Kumar v State</u>** AAU 102 of 2015 (29 April 2021), **<u>Naduva v State</u>** AAU 0125 of 2015 (27 May 2021), **<u>Balak v State</u>** [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).

[19] The appellant submits that the absence of injuries observed by the doctor in the vaginal area and other parts of the body upon his examination on the 02 July 2013 cast doubts of forceful sexual intercourse. However, the doctor had clarified that if the victim of rape has been sexually active no injuries or bruises can be found in the vaginal area of such victims. The complainant was living with her de facto partner at the time of the incident. The doctor had further stated that since he examined the complainant after 29 or 30 hours after the alleged incident, it is possible that any red marks on the victim would not have been visible unlike in the case of blood clots which would have been visible.

[20] The trial judge had considered PW3's failure to mention about him having seen red marks on the complainant's hands to the police and concluded that it was insignificant to cast doubt on his credibility.

[21] The appellant also complains of the failure of the prosecution not to call the appellant's wife to confirm or deny whether she had asked the complainant to look after her children in her absence. If the appellant thought that the appellant's wife was such a material witness to the issue of consent (I do not think she was) there was no bar for him to call her as one of his witnesses. The state was under no obligation to call any other witnesses on the issue of consent when it had elicited direct evidence of the complainant on lack of consent.

[22] The complainant had explained why she answered 'yes' to the appellant's queries whether she had reached climax during the sexual intercourse by saying that all what she wanted was for him to leave her. I think that this is a plausible explanation given the situation she was placed.

[23] Therefore, in my view upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of appellant's guilt beyond reasonable doubt. I do not think that the assessors and the trial judge must, as distinct from might, have

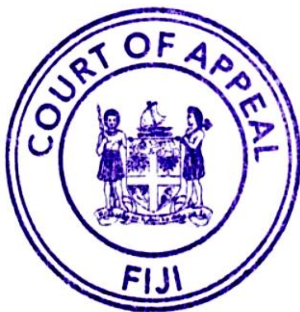
entertained a reasonable doubt about the appellant's guilt or that it was *"not reasonably open"* to the assessors and the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

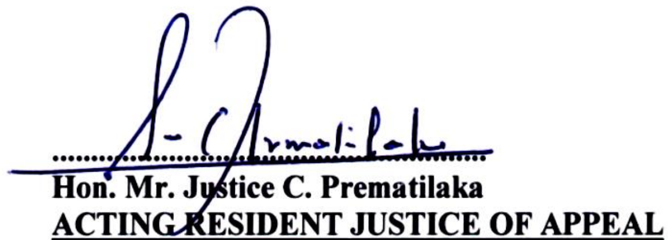
[24] Thus, there is no reasonable prospect of success on the second ground of appeal.

[25] In my view, as a whole the appeal has no reasonable prospect of success [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

Order

1. Leave to appeal against conviction is refused.





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