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

CRIMINAL APPEAL NO.AAU 119 of 2019
[In the High Court at Lautoka Case No. HAC 73 of 2017]

BETWEEN	:	**MUNESHWAR REDDY**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. A. Singh for the Respondent**
Date of Hearing	:	**24 November 2021**
Date of Ruling	:	**29 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) (a) of the Crimes Act, 2009 and another count of rape contrary to section 207(1) and (2) (c) of the Crimes Act, 2009 committed at Nadi in the Western Division on 03 March 2017.

[2] The information read as follows:

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

MUNESHWAR REDDY, *on the 3rd March, 2017 at Nadi in the Western Division, penetrated the vagina of* ***ANGEL NARAYAN SCHMEKEL****, with his penis, without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MUNESHWAR REDDY, *on the 3rd March, 2017 at Nadi in the Western Division, penetrated the mouth of* ***ANGEL NARAYAN SCHMEKEL****, with his penis, without her consent.'*

[3] At the end of the summing-up, the assessors had opined that the appellant was guilty of both counts of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 23 April 2019 to an aggregate sentence of 11 years, 11 months and 15 days of imprisonment (after the remand period was deducted) with a non- parole period of 10 years.

[4] The appellant's appeal against conviction and sentence (15 August 2019) is out of time but within 03 months after the lapse of the appealable period. Therefore, the respondent waived the requirement for enlargement of time and accordingly, the Legal Aid Commission had tendered amended grounds of appeal against conviction and sentence and written submission on 27 January 2021. The state had tendered its written submissions on 23 November 2021.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

> *(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.*

[7] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows:

> ***'Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and fact when he accepted the evidence of the State's credible, truthful and reliable when the State's case had a lot of reasonable doubts which in turn could not have supported a conviction.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and fact when he failed to properly consider the evidence of the recent complaint from PW2 – Sarojni Devi which prejudiced the appellant case.*

Ground 3

THAT the Learned Trial Judge erred in law and fact when he did not direct the assessors and himself on the Liberato directions and shifted the burden of proof to the defence thus prejudicing the appellant.

Sentence

Ground 4

THAT the Learned Trial Judge erred in law and fact when he sentenced the appellant to a sentence that is harsh and excessive.

[8] The trial judge in the sentencing order had summarized the prosecution evidence against the appellant as follows:

'2.The brief facts were as follows:

> *The victim Angel Narayan Schmekel a foreign national in August, 2015 came to Fiji with a view to start a business. It was during this visit she met the accused, as days went by a boyfriend and girlfriend relationship developed between the two.*

3. *However, the victim had broken up with the accused in 2016 after about 4 months in the relationship.*

4. *On 3rd March, 2017 the accused went to the victim's house at Nawaicoba, Nadi when she was alone at home. The accused told the victim that he only came to talk to her and invited her to sit in his car.*

5. *As soon as the victim sat in the vehicle, the accused punched her and drove the car so fast that the victim could not escape. Whenever the victim tried to escape by opening the car door, the accused used to pull the door and punch her. The punches were directed to the victim's face, head, arms, back, stomach and he also slapped the victim many times. The accused told the victim that he will teach her a lesson by killing her then chop her body into pieces, put it in sack and dump it in the ocean.*

6. *The accused took the victim to his house at Sonaisali, Nadi. He dragged the victim out of the car and took her to the living room. The accused again punched and slapped the victim and with all those beatings she felt weak. The accused then pushed her on the bed in the living room and tied her legs with a cotton material.*

7. *The accused then removed her clothes and took pictures of her while removing her clothes and when she was naked. The accused then removed his clothes and forcefully put his penis into her mouth without her consent. The victim saw*

urine dripping from his penis. The accused said she deserved a dirty penis he then forcefully inserted his penis into her vagina without her consent and penetrated her for about 3 to 4 minutes.

8. *Every time the victim screamed for help, the accused suffocated her with a cushion and she felt helpless. After this, the accused threatened the victim that he will kill her and her family if she reports him to the police. The victim persuaded the accused that she will not tell anyone and she will not report the matter to police but leave the country. The complainant did not tell her mother straight away because she was frightened of the accused and his threats. On 13th of March, 2017 about 10 days later the complainant told her mother that she had been assaulted and raped by the accused.*

9. *The matter was subsequently reported to the police and the victim was medically examined*.'

[9] In addition to the complainant, her mother and two doctors had given evidence.

[10] The appellant in his evidence had denied penetrating the mouth and the vagina of the complainant with his penis but in the rest of his evidence as to the events that unfolded that day there were lots of similarities with that of the complainant such as travelling in the car with the complainant, having physical contacts with her inside the car, the side of her forehead getting swollen, taking a photograph of her inside his house and her covering her face, going to Dr. Fong with her etc. According to the appellant the complainant became aggressive and she wanted to have sex with him but he refused saying that she was hurt and asked her to just take it easy.

01st ground of appeal

[11] The appellant submits that the trial judge was wrong to have accepted the prosecution evidence as credible, truthful and reliable when the state's case had a lot of doubts.

[12] 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)].

[13] Firstly, the appellant raises in support of his contention the evidence of Dr. Fong (PW4) whom the complainant had seen on 03 March 2017 where PW4 had said that he did not see any injuries particularly the cut on her lower lip and her front teeth getting cracked.

[14] However, the totality of PW4's evidence shows that the complainant came to his clinic looking very upset and distressed and in the 02 minutes the doctor had spent with her he was unable to make any assessment of her face as her hair was down covering most of her face. PW4 had further said that during her short stay the complainant had informed the doctor that her life was in danger but could not reveal anything more as the appellant had entered the consultation room and acted aggressively by pulling her by hand when told by PW4 that they should go to Nadi hospital as she needed medical attention.

[15] This evidence has to be considered in the context of the complainant's evidence that the appellant had threatened her not to report anything to anyone including the police as nothing will come out of such a complaint and if she did he would kill her and her family. It is also relevant that the complainant had seen a knife tucked inside his car and she had got scared of him.

[16] The appellant also questions as to how PW4 missed seeing any injuries when her mother (PW2) had seen injuries on the complainant's face near the Prince Charles Park and at home though she too had not observed a lower lip cut or the cracked front teeth. There is evidence from PW2 that upon seeing her daughter she had asked lots of

questions from the appellant and particularly whether he had assaulted her. PW2 had seen injuries on the complainant. I think the above discussion is equally applicable to this point and needs no further elaboration.

[17] The appellant also draws the attention of this court to the evidence of Dr. Shalvin Chand who had seen the complainant on 15 March 2017 but reported no conclusive evidence of rape. He, however, had observed bruises on the complainant which could also have been caused by a blunt trauma such as a fall on a hard surface but he had not seen any lower lip cut or cracked front teeth on the complainant. It is the doctor's evidence that after 12 days of the incident there is a high possibility of the injuries being less visible or getting healed with the passage of time.

[18] The appellant also complains that the complainant had invented most of her evidence in court which, of course, is primarily a trial issue and the appellant was expected to canvass it fully at the trial.

[19] There is no complaint by the appellant that the trial judge had not placed the entity of evidence *i.e.* both prosecution and defense before the assessors including the matters which form the appellant's above grievances. In fact it is a well-balanced, objective and fair summing-up running into 32 pages and 160 paragraphs where the trial judge had *inter alia* directed the assessors:

> *'155. 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. 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.*
>
> *156. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.'*

[20] In my view, the trial judge had discharged his legal obligation in agreeing with the assessors in a detailed judgment of 84 pages and discussed a lot more evidential maters of relevance than the appellant had highlighted including the demeanor of

witnesses. As I have already stated the issues raised by the appellant above could be well explained having regard to the totality of evidence.

[21] Therefore, I do not think that there is a reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[22] The appellant argues that the trial judge had not properly considered the recent complaint evidence coming from the complainant's mother (PW2). The directions at paragraphs 83-87 of the summing-up on PW2's recent complaint evidence is in consonance with guidance provided in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) and **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017). The appellant does not complain of misdirection therein. Any perceived inadequacy of directions on this point should have been addressed by way of redirections 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) and the deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[23] A trial judge is not expected to repeat everything he had stated in the summing-up in his judgment as the summing-up is part and parcel of the judgment [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]. The trial judge had directed himself according to the summing-up. I do not find that the trial judge had specifically relied on the recent complaint evidence in upholding the assessors' opinion in his judgment except to state that the late complaint to PW2 by PW1 was understandable in the circumstances of the case including heavy pressure exerted and outright death threats issued by the appellant on the complainant.

[24] In addition, the appellant complains about some discrepancies between the complainant (PW1) and her mother (PW2). 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 [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)].

[25] I do not think there are such material discrepancies or inconsistencies between the evidence of PW1and PW2 as to render their testimonies incredible.

[26] Thus, I do not see any reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[27] The appellant argues that the trial judge has not given Liberato directions to the assessors and shifted the burden of proof to the defense.

[28] In the first place, this is not simply a case of the complainant's word against the appellant's word or where the case turned on a conflict between the evidence of a prosecution witness and the evidence of a defense witness as in Liberato. Therefore, strict Liberato directions were not required. Liberato directions are not called for merely because or every time the defense leads evidence in opposition to prosecution evidence.

[29] 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] HCA 26; (2002) 211 CLR 193 at 213 [57] per Gummow and Hayne JJ,). Surveying the summing-up, I do not come across any evidence of the trial judge having committed this kind of error.

[30] The currently preferred view is in fact 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) and **Waqatairewa v State** [2021] FJCA 145; AAU0095.2019 (10 September 2021)].

[31] 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.

[32] The trial judge had not shifted the burden of proof on the appellant at all in the summing-up (see paragraphs 7, 155 and 156). His directions at paragraphs 151-154 do not alter the burden of proof but they deal with how to evaluate the evidence of both sides.

[33] In my view, upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of guilt beyond reasonable doubt and I cannot say that they must as distinct from might, have entertained a reasonable doubt about the appellant's guilt or that it was *"not reasonably open"* to the them to be satisfied beyond reasonable doubt of the commission of the offence. (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).

[34] Thus, I do not see any reasonable prospect of success in this ground of appeal.

04th ground of appeal (sentence)

[35] The appellant's ground of appeal is that the sentence is disproportionate, harsh or excessive. However, it has not been elaborated in written submissions.

[36] The tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338. Thus, the starting point of 08 years selected by the trial judge is almost at the lower end of the tariff and the trial judge has followed this sentencing tariff.

[37] Having taken 08 years as the starting point, the trial judge had added 05 years for aggravating factors and reduced 06 months for mitigating features [though they were personal circumstances carrying little migratory value – vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Given the discount of remand period, the final sentence is 11 years, 11 months and 15 days within the range of sentences for adult rape. I do not see any sentencing error in the process.

[38] 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). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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)].

[39] I see no reasonable prospect of success in the appellant's appeal against sentence which cannot be called disproportionate, harsh or excessive. Quantum of the sentence can rarely be a ground for the intervention by the appellate court [vide **Raj v State** (supra)]

[40] Thus, I do not think that as a whole the appeal has a reasonable prospect of success against conviction and sentence [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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