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

CRIMINAL APPEAL NO.AAU 169 of 2017
[In the High Court at Suva Case No. HAC 116 of 2016S]

BETWEEN : **EPINERI SAURARA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. N. Tuifagalele for the Appellant**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **05 February 2021**

Date of Ruling : **08 February 2021**

RULING

[1] The appellant (with 04 others) had been indicted in the High Court of Suva on one count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 committed in Nausori, in the Central Division between 01 January 2016 and 19 January 2016.

[2] The count against the appellant in the information read as follows.

'Third Count

(Representative Count)

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crime Act 2009.*

Particulars of Offence

> ***EPINERI SAURARA*** *between the 1st day of January 2016 and the 19th day of January 2016, in Nausori, in the Central Division, penetrated the anus of* ***W. W*** *who is a child under the age of 13 years old, with his penis.*

[3] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

> *'2. ……….. The male complainant (PW1) was 12 years old at the time of the offences. Ilisoni Tiko was 39 years old and single. Adriu Rogomuri was 35 years old, married with a young daughter. Epineri Saurara was 52 years, married with four children. In count no. 1, Ilisoni Tiko enticed PW1 to his village kitchen and thereafter forcefully sodomised him. In count no. 2, Adriu Rogomuri enticed PW1 to near his pig pen and thereafter forcefully sodomised him. In count no. 3, while PW1 was in Bu Tere's house, Epineri Saurara forcefully sodomised him. The complainant was a 12 year old child at the time, and was thus incapable of giving his consent to the above. Further, the accused were deemed in law to know that PW1 was incapable of giving his consent to the incidents mentioned above. All the accused were PW1's uncle. They all lived in the same village or near to PW1's residence.'*

[4] At the end of the summing-up on 06 November 2017 the assessors had unanimously opined that the appellant was guilty of the charge. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on the same day, convicted the appellant and sentenced him on 07 November 2017 to 14 years of imprisonment with a non-parole period of 12 years.

[5] The solicitors for the appellant had filed a petition of appeal on 13 December 2017 on five grounds of appeal against conviction (though leave to appeal against sentence had been sought without raising any grounds of appeal) which is out of time by 06 days. However, the state had considered the appeal as timely. The appellant's written submissions had been tendered on 18 June 2020 only on conviction. The state had tendered its written submissions on 26 November 2020.

[6] 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 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.

[7] 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.

[8] Grounds of appeal urged on behalf of the appellant are as follows.

Conviction

Ground 1

The Learned Trial Judge erred in law and fact in failing to consider that the petitioner had constructed the house where the alleged offence was said to have taken place in on or around July 2015 and he did not return to that house until the end of January 2016.

Ground 2

The Learned Trial Judge erred in law and in fact in failing to consider the petitioner's diary that confirmed that he was on in Daku village on or around July 2015 and end of January 2016 rather than the prescribed time of the alleged offence as between January 1 and 19, 2016.

Ground 3

The Learned Trial Judge erred in law and in fact to failing to consider in his sum up that the petitioner was selling fish at Daku beach on 1 January 2016 and he did not come to the village area.

Ground 4

The Learned Trial Judge erred in law and in fact by misdirecting the assessors in his summing up that the petitioner went into the bedroom, turned the complainant around, took of his trousers and penetrated his anus with his penis and whilst doing this, the petitioner was holding the complainant's hands up.

Ground 5

The Learned Trial Judge erred in law and in fact in failing to consider that if supposedly the complainant was telling the truth, the alleged incident took place in a public place (village), the complainant relayed in his evidence that he ran out of the room to drink water before the petitioner took off his trousers and he failed to run away, shout or alert anybody as he did to the other two accused.

01st 02nd and 03rd grounds of appeal

[9] Contrary to the appellant's contention, the trial judge had addressed the assessors specifically on his position that he came to the village only on 01 January 2016 after constructing his house in July 2015 and on no other dates in January at paragraphs 25 and 43 of the summing-up. There is a specific reference to the diary marked exhibit 1 at paragraph 43 but it had shown that the appellant had been to the village even on 28 January 2016 casting doubt on the testimony of the appellant. The charge against him was that he had committed one or more acts of rape on the victim between 01 January and 19 January 2016. The victim's allegation had been that the appellant committed the offence charged between 01 and 19 January 2016 as shown by paragraph 21 and 33 of the summing-up.

[10] Although the trial judge had made no reference to the evidence (if available) that the appellant was selling fish at Daku beach on 01 January 2016 it would not have constituted an *alibi* because the victim's evidence according to paragraph 21 and 33 of the summing-up had been that the appellant had committed the act of rape on him between 01 and 19 January 2016 in Bu Tere's house while he was lying on the bed.

[11] The trial judge had directed the assessors at paragraph 47 of the summing-up to consider all the evidence including any other evidence he had missed out. He had directed himself according to the summing-up in the judgment at paragraph 5 and rejected the appellant's denial at paragraph 10 of the judgment.

[12] I observed on the interplay between the summing-up and the judgment *vis-à-vis* a trial judge's role as follows in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159; AAU0142 of 2017 (10 September 2020), **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and a few other rulings. I do not intend the repeat the same exercise here. However, my conclusions were subsequently summarized in **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020) and **Tui v State** AAU129 of 2019 (29 January 2021) as follows.

> *[13] What could be ascertained as common ground 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 a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written 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 a 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)].*
>
> *[15] ………. a judgment of a trial judge cannot not 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.*

[16] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge 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).'*

[13] Therefore, there is no reasonable prospect of success of the above grounds of appeal.

04th ground of appeal

[14] It appears that what the trial judge had stated at paragraph 21 and 33 is the evidence of the victim and left it to the assessors to decide whether they were going to accept that evidence in terms of credibility beyond reasonable doubt (vide paragraph 1 and 47 & 48 of the summing-up). The assessors in turn had clearly believed the victim' description of how the appellant had invaded his body. The trial judge too, according to the judgment, had believed him.

[15] Therefore, the appellant's submission that he could not have committed the act of anal rape and other acts while holding the victim's hands would not only lack merits but also would cut across his denial. The evidence suggests that the appellant was holding the victim's both hands only when committing the act of rape.

[16] Therefore, there is no reasonable prospect of success of the above ground of appeal.

05th ground of appeal

[17] The evidence as summarized by the trial judge at paragraph 21 and 33 have not referred to the evidence mentioned by the appellant under this ground of appeal. Assuming that the victim had in fact given evidence on the line captured by the ground of appeal and the appellant's submissions as to why the victim did not run away when he had the chance to do so or altered the others, it might suggest that the victim may have been a willing party to the act of anal rape. However, that would not help the appellant as by the time the act of rape took place as stated in the charge against the appellant the victim was still under 13 years of age.

[18] If the appellant's endeavor is to raise the question whether the victim's version is improbable given his behavior of running out of the room to drink water but still not running away from the appellant then, the state has submitted that all these matters were fully ventilated at the trial and were before assessors. Despite that, having had the benefit of seeing the demeanor and deportment of the witness the assessors had accepted the victim's evidence and the trial judge also had concurred with them.

[19] Therefore, there is no reasonable prospect of success of the above ground of appeal.

[20] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should in a situation where the assessors or majority of them finds the accused guilty and the trial judge also agrees with them in entering a conviction.

> *'That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?*
>
> *Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal -*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."*
>
> *The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.*
>
> *It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.*
>
> *Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of*

this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

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.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

The appeal is dismissed.'

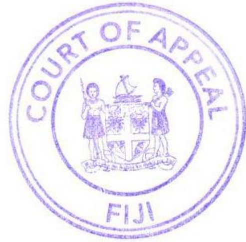
[21] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be based [see for a detailed discussion **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

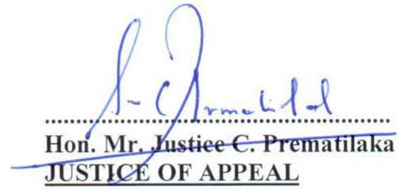
[22] Though the appellant's petition of appeal has prayed for leave to appeal against sentence the body of the petition does not contain any grounds of appeal against sentence and the appellant's submissions also are silent on the matter of sentence. In other words, the appellant has not demonstrated any sentencing error.

[23] In the circumstances, leave to appeal against sentence is refused.

Order

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





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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL