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

CRIMINAL APPEAL NO.AAU 0065 of 2018
[In the High Court at Suva Case No. HAC 155 of 2015]

BETWEEN	:	**GANGA RAM**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Mr. T. Lee for the Appellant**	
	:	**Mr. R. Kumar for the Respondent**	
Date of Hearing	:	**01 March 2021**	
Date of Ruling	:	**02 March 2021**	

RULING

[1] The appellant had been indicted in the High Court of Suva on a representative count of rape committed between July 2010 and December 2010 contrary to section 207(1) and (2) (a) of the Crimes Act, 2009.

[2] The complainant had been a student under 18 years of age (who turned 18 in December) during the time the alleged acts of rape occurred and the appellant had been one of her uncles (father's cousin brother) and of twice her age. According to the complainant, the appellant had forced her to have sexual intercourse during the time mentioned in the information on six occasions. In May 2011 she was found to be pregnant and the matter was reported to the police. He had admitted that he was responsible for her pregnancy. Later she had given birth to a child and started raising the child as a single parent.

[3] The appellant had given evidence at the trial and admitted having consensual sexual intercourse with the complainant once in January 2011 but denied having any kind of similar relationships in 2010 except that he had admittedly hugged the complainant in December 2010.

[4] The trial judge had summarized the evidence of the complainant and the appellant in the sentencing order as follows.

> *'[2] The incident occurred between July 2010 and December 2010. The victim was in high school at the material time. She was going to turn 18 years old in December of that year. The facts are as follows. The victim is your niece. Her father is your first cousin. You and the victim lived in the same settlement in Namata, Sigatoka. She lived with her parents and three other siblings. She is the eldest. Her home was a walking distance from your home. You had arranged with her father to allow her to do chores at your home after school, in the weekends and school holidays. In return you were going to compensate her with school bus fares. The victim could not recall the details of each incident but she said that between July 2010 and December 2010 you forced her to have sexual intercourse with you. You threatened her that you would kill her if she reported the incident to anyone. She did not report to anyone until May 2011 when a neighbour prodded out of her whether she was pregnant. She implicated you. Her family came to know about it and the matter was reported to police.*
>
> *[3] In your evidence, you gave the Court an impression that you consider yourself the victim. You were seduced by her and you fell into temptation to have sexual relationship after she turned 18 in December 2010. You admitted having intercourse with her once in January 2011. You admitted you were responsible for her pregnancy.....'.*

[5] At the end of the summing-up on 22 May 2018 the assessors had by a majority opined that the appellant was guilty of rape. The learned trial judge had agreed with the unanimous opinion of the assessors on the same day and convicted the appellant as charged and sentenced him on 24 May 2018 to 13 years of imprisonment with a non-parole period of 10 years.

[6] The appellant had penned a petition containing additional grounds of appeal against conviction on 23 June 2018 (received on 28 June 2018) but no notice of appeal had been received by the CA registry earlier. He had filed further submissions against conviction and sentence on 20 February 2019. The Legal Aid Commission had tendered an amended notice of appeal only against conviction and written

submissions on 30 October 2020. The state had tendered its written submissions on 04 December 2020.

[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. This threshold is the same with leave to appeal applications against sentence as well.

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

> *1. That the learned trial judge erred in law and in fact when he convicted the appellant when the evidence adduced by the State was not proven beyond reasonable doubt and the same could not have supported the conviction.*

01st ground of appeal

[9] The appellant's complaint seems to have two components. One is to canvass the trial judge's decision to convict him and the second is to challenge the verdict of guilty based on alleged lack of evidence.

[10] I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal regarding the trial judge's role in trial proceedings with assessors 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) followed by a few other rulings. My conclusions were subsequently summarized in **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and several other rulings. They are as follows.

*"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 is supported by evidence 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)]."*

"..... 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."

*"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)."*

[11] I have no doubt that the trial judge had fairly and objectively presented the cases of the complainant and the appellant to the assessors in the summing-up. The trial judge at paragraph 23 had particularly alerted the assessors to the inconsistency of the complainant's position in her police statement where she had mentioned only one incident of rape on 22 January 2011 but said in evidence that she could not recall that incident but had adverted to six incidents of rape that occurred between July 2010 and December 2010 at the trial. The judge had warned the assessors to treat her account with considerable care. The trial judge had also informed the assessors that little assistance could be derived for the prosecution from the evidence of PW2 (neighbor) and PW3 (appellant's father) to whom she had told in May 2011 that the appellant

was responsible for her pregnancy but not told them that he had forced her to have sexual intercourse with him (see paragraphs 25-27). What the complainant had told PW2 and PW3 had correctly not been treated as recent complaint evidence.

[12] The trial judge had clearly put before the assessors the appellant's evidence at paragraph 28 and 29 of the summing-up and directed them as follows

> *"[28] The Accused gave evidence although he was not obliged to give evidence. He does not have to prove his innocence. He does not have to prove anything. However, he has chosen to give evidence and you must take what he has said into account when considering the issues of fact which you have to determine. It is for you to decide whether you believe the evidence of the Accused or whether it may be true. Even if you do not believe his evidence that does not mean that he is guilty. You must be satisfied of guilt based on the evidence led by the prosecution.'*
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> *[29] The account given by the Accused is different to what the complainant has said in her evidence. His evidence is that he only had sexual intercourse once with the complainant in January 2011, and that was consensual. His evidence is that he did not have any sexual relationship with the complainant between July 2010 and December 2010, except on one occasion in December when she hugged him. He developed feelings for her afterwards and in January 2011, he had sex with her. They got undressed themselves and she willingly had sex with him. He admits he is the father of her child but he denies having sexual intercourse with the complainant using force and without her consent between July 2010 and December 2010."*

[13] This being a case of 'word against word', the assessors' opinion of guilty would obviously have been based on believing the complainant's evidence and rejecting the appellant's version of total denial of any acts of sexual intercourse with the complainant in 2010.

[14] The above directions at paragraph 28 are in line with the prescribed directions when there is a 'word against word' conflict between prosecution and defence as expressed in **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017).

[15] The trial judge having directed himself according to the summing-up had gone onto state in the judgment as follows.

'[3] The resolution of the charge depends upon whether the complainant's account that the Accused forced her to have sexual intercourse is true. She said the incidents of rape were repeated between July 2010 and December 2010. The incidents occurred while she went to the Accused's house to do chores in return for bus fare money to go to school. She was in high school and was going to turn 18 years in December of that year. She did not complain to anyone because she was afraid of the consequences of her reporting the incident. She went back to his home after the first incident because she trusted him. He was his uncle (dad's cousin) and twice her age. She became pregnant and when a neighbour prodded she revealed the Accused made her pregnant.

[4] The complainant struck me as an honest and reliable witness. Her reluctance to diverge in detail the extent of her abuse to police by a person who was a relative is understandable. The Accused in his evidence gave an impression that he was the victim and the complainant is the one who seduced him to have sexual intercourse with her after she turned 18 years old. The Accused was twice the complainant's age and her uncle. I don't believe his evidence that it was the complainant who seduced him to have consensual sexual intercourse with her. I believe the complainant's account in court that the Accused forced her to have sexual intercourse with him. I feel sure that the Accused had used force to obtain the complainant's consent and he knew she had not consented to sexual intercourse.

[16] Thus, the trial judge had not merely agreed with the assessors but reflected on the credibility of the complainant's evidence as opposed to that of the appellant which had eventually been rejected by the trial judge. The trial judge has done more than required by law in the judgment when he agreed with the assessors.

[17] The second limb of the appellant's argument is that the verdict of guilty could not be supported by the evidence adduced by the prosecution. 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 take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act. The test is as follows.

> *'.....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.*

[18] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

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

[20] There was sufficient evidence coming from the complainant to prove the charge against the appellant beyond reasonable doubt and the only issue was whether her evidence was to be believed or not and whether the appellant's evidence could cast a reasonable doubt in her evidence.

[21] Both the assessors and the trial judge had answered those questions in favour of the prosecution and in my view both the assessors and the trial judge were entitled to do so given the evidence of the complainant. The appellant court is not in a better position than the assessors and the trial judge to decide matters of credibility and demeanor.

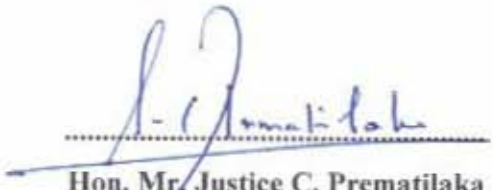
[22] Though the appellant's written submissions had touched on a letter of withdrawal of the complaint against him supposedly tendered to the DPP by the complainant it has not found any space in the summing-up or the judgment. The only inference that could be drawn is that it may not have been part of the trial proceedings and cannot now be the basis of an appeal point.

[23] **Longman v The Queen** (1989) 168 Clr 79 cited by the appellant has no bearing on the outcome of the trial against the appellant given the facts of this case and ***Longman*** had been decided in a different statutory context too.

[24] Therefore, the sole ground of appeal urged by the appellant has no reasonable prospect of success in appeal.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL