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

CRIMINAL APPEAL NO. AAU 148 of 2020
[In the High Court at Lautoka case No. HAC 45 of 2019]

BETWEEN	:	**SIMISEI QOLI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**28 July 2022**
Date of Ruling	:	**29 July 2022**

RULING

[1] The appellant had been charged in the High Court at Lautoka with two counts of sexual assault contrary to section 210 (1) of the Crimes Act No. 44 of 2009 and one count of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 committed on TV (name withheld) on 23 February 2019 at Vatukoula in the Western Division.

[2] The appellant had pleaded guilty to one count of sexual assault and opted for trial in respect of the rest of the charges. The assessors' unanimous opinion was that the appellant was guilty of sexual assault and rape. The learned High Court judge had disagreed with them and acquitted the appellant of the sexual assault charge but agreed with the assessors and convicted him of rape. He had been sentenced on 15

October 2020 to an aggregated term of 14 years, 04 months and 10 days of imprisonment with a non-parole period of 12 years.

[3] The appellant's appeal in person against conviction and sentence could be treated as timely. However, the Legal Aid Commission is perusing only the conviction appeal at this stage and therefore, the LAC is directed to file Form 03 to abandon his sentence appeal. Both parties had tendered written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and 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) that will 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)].

[5] The sole ground of appeal urged on behalf of the appellant against conviction is as follows:

Conviction

1. *That the learned trial Judge has misdirected himself and the assessors by treating what the complainant had relayed to her aunt (PW3) as recent complaint.*

[6] The facts of the case could be summarised as follows. According to TV, 08 years old at the time, on 25 February 2019 she was living with her grandmother at Veiquwawa Settlement, Vatukoula, and the appellant was their neighbor. When TV was at home in late afternoon the appellant called her to his house. After telling stories, he while going inside had pulled TV's hand and it was painful. He had then closed the door, laid her on

the bed, removed her panty, laid on top of her and was pushing himself. He then started poking her vagina with his hand and TV felt pain and poking inside her vagina. The appellant had told her not to tell anyone about what he had done to her and given her 50 cents. After she left the appellant's house aunt Bui called her and asked her what was in her hand. She had told the aunt that the appellant had given her 50 cents. Upon further questioning she told her aunt Bui about what the appellant had done to her. The complainant was taken to the Vatukoula Police Station and then to the hospital for medical examination.

[7] Dr. Menisha Nand's findings of the examination of TV at about 11pm on the same day were that her hymen was not intact which could be either torn or broken and she noted no other signs of force or injuries or bleeding. She was unable to comment on the age of the injury.

[8] Adi Litia Asivino Vulilatabua whom TV calls aunt Bui had seen a light in the appellant's house with the door kept opened and the complainant coming out. She had called out TV and asked her what was in her hand and was told that it was 50 cents. When she asked who gave TV the money she was quiet and started crying and told that the appellant gave it to her. The witness had then gone to the house of the appellant and confronted him and when she said that she will report the matter to the police the complainant had started crying. The witness had then brought the kindergarten teacher Ms. Aloesi. In the presence of the witness, Aloesi had questioned TV who stated that the appellant had put his hand and touched her vagina. The witness took the complainant to report the matter to the police.

[9] The appellant had made an admission in his cautioned interview led in evidence by the prosecution that he inserted his finger into TV's vagina.

> '*Q.39: When she was lying on your bed, what did you do?*
>
> *Ans: I pulled up her dress and undo her panty.*
>
> *Q.41: I put to you that you inserted your finger inside her vagina. What can you say about it?*

Ans: Yes I do inserted my finger.'

[10] The appellant had admitted in evidence at the trial having touched TV's vagina on 25 February 2019 but denied that he inserted his finger into the complainant's vagina.

01st ground of appeal

[11] The argument of the appellant is that TV had not told any material and relevant sexual acts on the part of the appellant to Adi Litia Asivino Vulilatabua *alias* aunt Bui but it was to the kindergarten teacher Ms. Aloesi to whom TV had narrated as to what the appellant done to her. Ms. Aloesi was not called as a witness to testify at the trial. Therefore, it is argued that the trial judge had erred in directing the assessors at paragraph 56 of the summing-up to treat aunt Bui's evidence of what TV allegedly told her about what the appellant had done to her as recent complaint evidence.

[12] The appellant relies on the proposition of law that procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint [vide **Raj v State** [2014] FJSC 12; CAV0003 of 2014 (20 August 2014)] to buttress this argument.

[13] However, it appears from paragraph 58 of the summing-up that the complainant had opened up to Adi Litia after Ms. Aloesi had questioned her and the prosecution had asked the assessors to consider that TV did relay relevant and important information to Adi Litia about what the appellant had done to her. Thus, TV had narrated the relevant sexual acts committed by the appellant in the presence of both Adi Litia and Ms. Aloesi. It can be further ascertained from paragraph 59 of the summing-up that according to the defense, in the first instance TV had not divulged anything relating to sexual conduct on the part of the appellant to aunt Bui but when Ms. Aloesi questioned TV she had indeed told Ms. Aloesi and aunt Bui that the appellant had put his hand and touched her vagina. What is stated at paragraph 39 and 40 of the summing-up demonstrate that even in the first instance TV had told aunt Bui in the absence of Ms. Aloesi that the appellant had done bad things to her which prompted aunt Bui to take

TV to his house and confronted him with the allegation that *'you know very well what you did was wrong but you did it'*.

[14] Therefore, in my view, recent complaint evidence through aunt Bui had been properly admitted and considered by the assessors as directed by the trial judge. I do not think that there is any reasonable prospect of success in this argument in appeal.

[15] In my view, even without recent complaint evidence, on the material available it was open to the assessors and the trial judge to find the appellant guilty of rape (see **Kumar v State** [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12 and **M v The Queen** (1994) 181 CLR 487, 494) and thus, the verdict is reasonable and could be supported by the evidence.

[16] I am further convinced that, even without recent complaint evidence, conviction appears to be inevitable and therefore, there has not been a substantial miscarriage of justice [**Naduva v State** (supra)] by the admission of recent complaint evidence from Adi Litia without calling Ms. Aloesi.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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