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

CRIMINAL APPEAL NO. AAU 060 of 2017
[In the High Court at Lautoka Case No. HAC 06 of 2014]

BETWEEN	**:**	**ERONI CEVAMACA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	**:**	**Mr. M. Fesaitu and Ms. N. Sharma for the Appellant** **Ms. R. Uce and Mr. T. Tuenuku for the Respondent**
Date of Hearing	**:**	**09 November 2022**
Date of Judgment	**:**	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Nawana, JA and agree with reasons and the decision to dismiss the appeal.

Gamalath, JA

[2] I have read the judgment in draft and the conclusion of Nawana, JA and I agree.

Nawana, JA

[3] This is an appeal by the appellant against his conviction after trial before High Court of Lautoka. The appellant stood indicted on one count of rape punishable under section 207 (1) and (2) of the Crimes Act, 2009.

[4] Section 207 of the Crimes Act, which constitutes the offence of rape, states:

> *"207 (1) Any person who rapes another person commits an indictable offence.*
>
> *Penalty– Imprisonment for life.*
>
> *(2) A person rapes another person if-*
>
> *(a) the person has carnal knowledge with or of the other person without the other person's consent; or*
> *(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or,*
> *(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*
>
> *(3) For this section, a child under the age of 13 years is incapable of giving consent."*

[5] The statement and the particulars of the offence, in terms of the information submitted by the Director of Public Prosecutions (DPP) dated 13 March 2014, were as follows:

> *"**COUNT ONE***
> ***Statement of Offence***
>
> ***RAPE**: Contrary to Section 207 (1 and (2) (a) of the Crimes Decree, 2009.*
>
> ***Particulars of Offence***
>
> ***ERONI CEVAMACA,** on the 11th day of January 2014, at Lautoka in the Western Division, inserted his penis into the vagina of LITIA LEWAIRAVU, without her consent."*

[6] The prosecution led the evidence of the complainant, on whom the offence was alleged to have been committed; and, one Jone Namakadre, another person who was in the company of the complainant at the time of the incident complained of.

[7] The appellant himself gave evidence and called the doctor, who examined the complainant, in his defence. The appellant, while admitting the act of sexual intercourse with the complainant, took-up the position in his evidence that he had the complainant's consent.

[8] After trial, the assessors were unanimous in their opinions that the appellant was not guilty. The learned trial judge did not agree with the unanimous opinions of the assessors and found the appellant guilty of the offence with which he stood charged. The learned judge adduced reasons for his decision in his written judgment dated 15 December 2016.

[9] The appellant was sentenced to a term of imprisonment for 8 years and 11 months with a non-parole period of 7 years in terms of the sentencing ruling dated 29 December 2016.

[10] The appellant filed timely application for leave to appeal against his conviction and the sentence. The application for leave to appeal against the sentence was subsequently abandoned. The application for leave to appeal against the conviction was pursued on four grounds. They were:

> *"Ground 1:*
>
> *THE Learned trial Judge did not provide cogent reasons when overturning the unanimous opinions of the assessors that the Appellant was not guilty for the charge.*
>
> *Ground 2:*
>
> *THE Learned trial Judge erred in law and in fact by not directing himself and the assessors on how to approach and assess the omissions arising from the prosecution witness' evidences on oath with their police statements.*

Ground 3:

THE Learned trial Judge erred in law and in fact by misdirecting himself to conclude that the evidence of the inconsistencies of the prosecution witnesses is due to:

i) The passage of time can affect one's accuracy of memory;

ii) The inconsistencies are not significant which affects the reliability and credibility of the complainant and other prosecution witness.

Ground 4:

THE Learned trial Judge in his judgment erred in law and in fact by misdirecting himself to reasonably base his conclusion that the blood seen by the doctor on his examination gloves is the result of force used whereas his Lordship had not considered that:

(i) It is the doctor's evidence that he is unable to conclusively state that rape had occurred per his finding;

(ii) It is the doctor's evidence that the blood on the examination gloves is either from penetrative injuries or the patient having her menses;

(iii) It is not disputed issue in trial on the element of penetration;

(iv) There is no evidence adduced from the complainant that she received injuries as a result of the sexual intercourse."

[11] The single Justice of Appeal, by his ruling dated 22 September 2020, granted leave to appeal against the conviction and reserved for the full court to decide whether all four grounds should be considered together for determination of the appeal since the matters raised in other grounds are interconnected to the first ground of appeal.

[12] The matter, as reserved by the single Justice of Appeal, as well as the overall issue on the need to have cogent reasons in overturning the opinions of assessors, need to be considered in the context of applicable statutory provisions under section 237 of the Criminal Procedure Act, 2009 (CPA). Section 237 states:

237. (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the

assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, ***but in doing so shall not be bound to conform to the opinions of the assessors.***

(3) Notwithstanding the provisions of section 142(1) and subject to sub-section (2), where the judge's summing up of the evidence under the provisions of subsection (1)is on record, it shall not be necessary for any judgment(other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) —

(a) to be written down; or
(b) to follow any of the procedure laid down in section 141;or
(c) to contain or include any of the matters prescribed by section 142.

(4) ***When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion****, which shall be —*

(a) written down; and
(b) pronounced in open court.

(5) ***In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes****.*

(6) If the accused person is convicted, the judge shall proceed to pass sentence according to law.

...

(My emphasis)

[13] In terms of section 237 of the CPA, it is the trial judge who makes the final decision in regard to the guilt or otherwise of an accused person in a criminal trial on receipt of the opinions of the assessors. The summing-up, together with the reasons for the decision taken collectively, shall be deemed to be the ultimate judgment of court in terms of section 237 of the CPA.

[14] Upon consideration of the statutory provisions in section 237 of the CPA, I am of the view that it is expedient for this court to consider all grounds in a consolidated form for it is necessary for court to consider the cogency of the reasoning in light of the learned judge's summing-up and the judgment.

[15] The duty imposed on a trial judge in terms of section 237 of the CPA has been considered in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009). The authoritative pronouncement of the Supreme Court is instructive necessitating the incorporation of some of its holdings for completeness of this judgment. The Supreme Court held:

> *"[…] law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses:* ***Ram Bali*** *v* ***Regina*** *[1960] 7 FLR 80 at 83 (Fiji CA), affirmed* ***Ram Bali*** *v* ***The Queen*** *(Privy Council Appeal No. 18 of 1961, 6 June 1962);* ***Shiu Prasad*** *v* ***Reginam*** *[1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in* ***Setevano*** *v* ***The State*** *[1991] FJA 3 at 5, the reasons of a trial judge:*
>
> > *must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.*
>
> *…*
>
> *Secondly, although a judge is entitled to differ from even the unanimous opinion of the assessors, he or she must comply with the requirement of [s.237] of the CPC to pronounce his or her reasons in open court. It was not disputed by the State that a failure to comply with the statutory requirement, whether because the reasons are inadequate or because they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors.*
>
> *The third point is related to the other two. A person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone: Court of Appeal Act, Cap.12, s.21(a)(a). The convicted person may appeal to the Court of Appeal on any question of fact, provided he or she obtains the leave of the Court of Appeal or a certificate from the trial judge: s.21(1)(b). An appeal to the*

Court of Appeal (whether as of right or after a grant of leave or of a certificate) is by way of rehearing: ***Setevano*** *v* ***State*** *at 14. Thus, a decision by a trial Judge to disagree with the assessors' opinion that the accused should be acquitted is subject to an appeal (albeit by leave) in the nature of a rehearing.*

It follows that the reasons of the trial Judge in such a case will be scrutinised closely on appeal. It is important to appreciate that one of the principal rationales for requiring trial courts sitting without juries to give reasons for their decisions is "to enable the case properly and sufficiently to be laid before the ... appellate court": ***Pettit*** *v* ***Dunkley*** *[1971] 1 NSWLR 376 at 388. The reasons must be sufficient to fulfil that purpose.*

The qualifications to the power and authority of a trial judge to override the opinion of assessors are closely related because an appeal by way of rehearing on a question of fact presupposes that the judge's reasons expose the reasoning process by which he or she has concluded that the case against the accused has been proved beyond reasonable doubt. Unless this is done, the Court of Appeal may not be able to determine whether the judge erred in reaching that conclusion, much less whether he or she had "cogent reasons" for depriving the accused on the benefit of the assessors' opinion. Further, in the absence of a cogent reasoning process in the judgment, the accused will not know precisely why the assessors' opinion in his or her favour was not allowed to stand.

In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence."

[16] In the case of **Singh v The State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020), the Supreme Court considered the duty of the High Court under section 237 of the CPA vis-à-vis the powers of an appellate court in expounding the depth of section 237 in the context of the need to give cogent reasons in a case where a trial judge

overturns the opinions of the assessors. The Supreme Court, citing the decision in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), ruled on the role of a trial judge as well as the supervisory function of an appellate court:

> *A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.*
>
> *It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. Unlike in Ram v State, where this Court quashed the conviction and acquitted the accused on the basis that on the whole of the evidence led in that case, "it was not open for a judge sitting with assessors to be satisfied beyond reasonable doubt that the accused was guilty of murder", in the instant case, this Court is confronted with the difficulty that the learned trial judge has not dealt with some material questions that arise in the case with sufficient cogency, particularly in regard to the matters already discussed in this judgment pertaining to (1) the voluntariness of the petitioner's confession and (2) the reliability of the testimony of Sunita Devi, and a few other matters highlighted by Stock, J. under the headings "hearsay and recent complaint and "Intent. In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.*
>
> *I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate*

their demeanour, it is evident on the available evidence that the trial judge had failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.

(Footnotes omitted)

[17] Whilst being conscious of the duty cast on this court in a matter such as this, I observe that the learned trial judge, too, had dealt with the facts and the law in his summing-up and the judgment by way of a written ruling disagreeing with the assessors. The reasoning, in my view, justifiably resulted in finding the appellant guilty.

[18] The compliance with the requirements of section 237 as expounded by the Supreme Court, as observed above, could be deduced be referring to the learned judge's reasoning. The learned judge in his judgment dated 15 December 2016 stated that:

"11. During the trial both the prosecution witnesses were referred to their police statements given to the Police on the day of the alleged incident with the evidence they gave in court. Both the witnesses agreed that there was a difference between the version they had told the Police when everything was fresh in their mind and the version they had told the court.

12. I take into consideration that passage of time can affect one's accuracy of memory and I note that the alleged incident happened some two years ago. I would have been surprised if there weren't any inconsistencies and the witnesses would have told the court everything in accordance with what they told the Police in their police statements. I find that the inconsistencies were not significant which had adversely affected the reliability and credibility of the complainant and the other prosecution witness in respect of what had happened at the house of the accused.

13. I find that the complainant had told the truth in the court and I accept the evidence of the complainant as reliable and truthful. She was forthright in her evidence and was able to withstand cross examination. Her demeanour is consistent with her honesty.

> *14. I find that the accused did not tell the truth which has led me to doubt he had sexual intercourse with the complainant with her consent as stated by him. I do not accept that he invited the complainant to come to his house with the view to having sexual intercourse with her and that she had agreed. I am surprised that the accused who knows the complainant by face only would have approached the complainant and asked her for sex when he had just met her. Thereafter he took everyone to his house, if the intention was to have sex with the complainant, then why take everyone home?*
>
> *15. I have no doubts in my mind that the complainant told the truth in court. I also note that the complainant had promptly reported the matter to the Police and that the accused had not raised any motive on the part of the complainant to implicate him."*

[19] The complaint of the appellant that there was no cogent reasoning for the overturning of the opinions of the assessors, as urged in the sole ground of appeal, has to be viewed in light of the above reasons given by the learned judge. The learned judge, after dealing with the law on the evaluation of evidence, has specifically reasoned-out that the inconsistencies were not significant so as to adversely affect the reliability and the credibility of the complainant and the other prosecution witness in respect of what had happened at the house of the appellant. This position is very clear when the learned judge's summing-up and the reasons for differing with the assessors are collectively taken as the judgment for consideration by this court as required by section 237 (5) of CPA.

[20] Learned counsel for the appellant, at the hearing into this appeal, referred this court to some instances of deviations of the testimony in court from the contents of the police statements of the two prosecution witnesses. The learned judge, while attributing such discrepancies to the possible loss of memory of witnesses with the passage of time, came to cogent findings of facts that he had believed the evidence of the complainant and her witness over that of the appellant and concluded that the complainant had not consented to the act of sexual intercourse committed on the complainant.

[21] This court, in light of the learned counsel's submissions, examined the evidence presented at the trial in order to apprise itself of cogency in trial judge's reasoning.

[22] Evidence of the prosecution case revealed that the complainant and her friends had met the appellant and his friends at a nightclub in Lautoka in the early hours of 11 January 2014. Later, they got into a seven-seater van to go to the house of the appellant to have more drinks. On arrival at the appellant's house, Tomu and Lesi, being two others in the group who were in a relationship, got into a bedroom in the house while the appellant went into another bedroom. The complainant and her associate, Jone, were in the sitting room waiting for drinks. After a while, the complainant encountered the appellant, who was standing on the doorway of his bedroom, when she was returning from the washroom. At this point, the complainant was invited by the appellant to have sexual intercourse, which was refused by the complainant.

[23] The appellant, thereupon, forcefully took the complainant into the bedroom, which was resisted by the complainant and the witness, Jone, unsuccessfully. While Jone was pulling the complainant's hand in resistance, the appellant had punched Jone. The complainant was, thereafter, pulled inside the bedroom and pushed on to the bed where she started struggling with the appellant. The complainant, who was wearing leggings and a top, said in in her own words that '*the appellant was all over her*'. The appellant removed one side of her leggings and inserted his penis into the complainant's vagina and had sexual intercourse. She said that the appellant did not have her consent.

[24] Jone Namakadre, who witnessed the incident, said that the complainant was trying to defend herself by getting hold of the door frame. The appellant, however, succeeded in pulling the complainant inside the bedroom, closing the door and locking it. Jone's attempts to prevent the complainant being taken inside the room and opening the door was not successful. He heard the complainant's screaming inside the bedroom.

[25] The learned trial judge then referred to the evidence of the appellant, who took-up completely a different position stating that he had come to his house after inviting the complainant to have sex with him. The learned trial judge, having analyzed the evidence with the benefit of demeanour and deportment of all witnesses, rightly posed the question, if there was such an agreement why had he taken all of them to his home.

[26] A close scrutiny of the cross-examination of the two witnesses for the prosecution reveals that it refers to some insignificant discrepancies. More importantly, most of the questions serve to show that the two witnesses had confirmed the material points presented by the prosecution to establish that the appellant had had sexual intercourse with the appellant without the complainant's consent.

[27] In the result, the learned judge did not accept the evidence of the appellant as truthful.

[28] The learned trial judge, in the circumstances, did not find a reasonable doubt to displace the prosecution case. Hence, he rejected the opinions of the assessors and found the appellant guilty of the offence of rape. On an examination of the evidence in the transcript, I am of the view that the learned trial judge was correct in his holding that he could believe the evidence of the complainant as supported by witness, Jone; and, his reasoning was cogent.

[29] It is clear that the learned trial judge has set-out clearly items of evidence in determining the key elements of the case (**Lautabui v State** [2009] FJSC; CAV0024.2008 (6 February 2009). The learned trial judge has discharged his duty in compliance with the statutory mandate under section 237 of the CPA as the opinions of the assessors were not decisive in the final judgment of the case before the trial court within the meaning of section 237 of the CPA.

[30] An appellate court will not set-aside a verdict of lower court unless the verdict is unreasonable, or cannot be supported having regard to the evidence or on any ground of miscarriage of justice. This is not one of those cases where I find the verdict is falling into any of those categories provided under section 23 (1) (a) of the Court of Appeal Act. In the circumstances, I am of the view that this appeal is not entitled to succeed on the sole ground urged by the appellant. I would, accordingly, proceed to dismiss the appeal of the appellant.

Orders of the Court:

(i) Appeal dismissed; and

(ii) Conviction affirmed.

.....

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

.....

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....

Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL