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

CRIMINAL APPEAL NO. AAU 0089 of 2016
[In the High Court at Suva Case No. HAC 02 of 2016]

BETWEEN:

WAISEA ROVA LAVETA
Appellant

AND:

THE STATE
Respondent

Coram: Gamalath, JA
Prematilaka, JA
Dayaratne, JA

Counsel: Mr. M Yunus for the Appellant
Mr. M. Vosawale for the Respondent

Date of Hearing : 12 May 2022

Date of Ruling : 26 May 2022

JUDGMENT

Gamalath, JA

[1] I have read the judgment in draft form and the conclusions of Dayaratne, J and I agree with them.

Prematilaka, JA

[2] I too have read in draft the judgment of Dayaratne, J and I agree with his reasons and conclusions herein.

Dayaratne, JA

Charges against the Appellant in the High Court

[3] The appellant was charged in the High Court with one count of rape contrary to Section 207 (1) (2) (b) and another count of indecent assault contrary to Section 210 (1) (a) of the Crimes Act 2009. At the conclusion of the trial the assessors returned a unanimous opinion of guilty on both counts and the learned trial judge having concurred with the said opinion of the assessors, convicted the appellant on both counts. He was sentenced to twelve (12) years imprisonment with a non-parole period of eight (8) years and six (6) months.

Application for leave to appeal and subsequent applications

[4] A timely application for leave to appeal against both the conviction and sentence had been filed by the appellant which has subsequently been amended and had contained twelve (12) grounds of appeal pertaining to the conviction and three (3) grounds regarding the sentence. The single judge had refused the grant of leave in respect of the conviction. During the leave hearing, the appellant had moved to withdraw the leave application in respect of the sentence and that had been allowed.

[5] A renewal application has thereafter been filed in respect of the conviction which contained ten (10) of the grounds that had been set out in the leave application. Subsequently another amended petition to renew has been filed in respect of the conviction and that contains nine (9) grounds of appeal. This has been filed in the registry on 08 September 2020. Written Submissions too have been filed on the same day based on the said nine (9) grounds of appeal. Having compared these nine (9) grounds of appeal with the twelve (12) grounds of appeal that had originally been urged before the single judge, I find that these nine (9) grounds were in that original list of twelve (12) grounds.

[6] In view of the confusion regarding these different applications that had been filed by the appellant, clarification was sought from learned counsel for the appellant at the commencement of this hearing. He confirmed that the appellant will be relying on the nine (9) grounds of appeal contained in the amended petition to renew that has been filed on 08 September 2020. He also confirmed that there is no application before this court in respect of the sentence.

[7] Before dealing with the grounds of appeal and the submissions of counsel, I will briefly refer to the evidence that was led at the trial in the High Court.

Evidence led at the trial in the High Court

[8] The witnesses who testified at the trial for the prosecution were the complainant, her aunt, the doctor who had examined the complainant and the police officer who had recorded the caution interview of the appellant. The appellant also gave evidence.

[9] The complainant was 15 years old at the time of the incident (04 December 2015) and was the sister of the appellant's ex wife. At the time of the commission of the offence she was residing at the residence of an aunt having come there for the school vacation. The appellant was 32 years old and was also living at the same house. Her evidence was that she was folding clothes in one of the bedrooms when the appellant had asked her whether he can speak to her regarding what had happened between him and her sister. Whilst she suggested that they have the conversation there, he had suggested that they go to the bathroom. Once they were inside the bathroom, he had locked the door and had pushed her against the wall. He started to kiss her on the lips and had also touched her breasts. He had then pulled her skirt up and touched her vagina. Thereafter he had inserted three of his fingers in to her vagina. Since he had 'blocked her mouth' with one of his hands she could not scream and was unable to resist.

[10] This did not take too long and her aunt (who some times in the proceedings is referred to as 'the grand mother' and also as 'the owner of the house') had called out for her and at that time the appellant had taken off his hands from her mouth as well as the vagina. He had gone out of the bathroom followed by her and then she had started crying. The aunt had taken her to the bedroom and had inquired as to what had happened. There were blood stains on the shoulder area of her vest since the appellant had wiped his fingers after having touched her vagina (the vest was a production). The aunt had noticed blood stains on her vest and had inquired as to how that happened. She had later told her what the appellant had done.

[11] The aunt had taken her to the police station where she had made a statement and had later been examined by a doctor. During cross-examination it was suggested to her that she had consented to what the appellant had done and further that the appellant had only touched the vagina but not inserted his fingers into her vagina. It was also suggested that she was having her monthly mensus and that the blood stains on the vest was as a result of that. She denied that she was having her period. It must be noted that during cross-examination she had been questioned pointedly as to whether the appellant had inserted his fingers inside the vagina and she has answered in the affirmative.

[12] The next witness was her aunt. Since her grand daughter had said that the complainant was not to be seen, she had looked for the complainant. Since the appellant too was not to be seen, she had called out for him. He had come out of the bathroom followed by the complainant and she was crying. She had asked her as to what had happened. Initially the complainant had said that nothing had happened but later when she had noticed the blood stain and asked her as to whether she had sexual intercourse with the appellant she had nodded her head in agreement. However, when she was taken to the police station, a woman constable had inquired from her as to what had happened and the complainant had said that there had been no sexual intercourse and explained as to what had actually taken place.

[13] The doctor who examined the complainant was the other witness. She had noted a fresh abrasion on the left labia minora and a fresh contusion on the superior aspect of the introitus. There had been some dried blood and a small blood clot at the

opening of the vagina. She has gone on to express the opinion that her findings are consistent with the insertion of three fingers into the vagina.

[14] The police officer who conducted the caution interview of the appellant was the next witness and he had produced that statement to court.

[15] The appellant gave evidence and his position was that the complainant had willingly gone inside the toilet with him and that she had consented to his kissing her, touching the breasts as well as touching her vagina. He denies inserting any fingers into her vagina and has said that when he realized that the vaginal area had a liquid substance he took his hand out and wiped his fingers on the shoulder area of the vest she was wearing. Prior to the incident, which happened in the afternoon, he had been drinking beer at the neighbour's house.

Grounds of appeal

[16] The nine grounds of appeal will be referred to hereinafter when they are evaluated individually or collectively.

[17] At the commencement of his submissions before this court, the learned counsel for the appellant explained that his client's position at the trial was not a total denial. His contention had been that there was no penetration of the vagina of the complainant as described in the Information filed in the High Court. His client had maintained that he did not insert any fingers into the vagina of the complainant and but admitted that he touched her vagina. He submitted that the medical evidence did not conclusively establish penetration of the vagina and hence the appellant could not have been convicted for rape but only for the lesser offence of sexual assault. On that basis he indicated that he was relying on grounds of appeal 2, 3 and 4. However, since the other grounds have not been abandoned, it will be necessary for this court to deal with them as well.

Ground 1

[18] The first ground of appeal is as follows;

'The learned trial judge erred in law and in fact when despite the challenge by the accused through his counsel that the caution interview was not properly conducted, failed to stop the trial and hold a voire dire inquiry to determine the admissibility of the caution interview, as such causing substantial prejudice to the appellant'.

[19] Although the learned counsel stated at the hearing before us that he was not pursuing this ground, in his written submissions he has dealt with this ground and hence I am compelled to deal with it, albeit briefly.

[20] It has been submitted that he is not challenging the voluntariness of the caution interview but the challenge was on the failure to maintain procedural fairness. He says it is two fold. Firstly, that the cautionary words in the 'judge's rules' were not properly administered, thereby breaching his right to remain silent. Secondly, even

though he was given the option of choosing the language of his preference to record the interview, his rights were not properly upheld since he was interviewed in the i-taukei language but the recording was done in English. He therefore takes up the position that the record of the caution interview was tainted with procedural unfairness and must be excluded from evidence.

[21] He has taken up the position that according to the judge's rules, the caution should have been; *'You are not obliged to say anything unless you wish to do so but what you say <u>may</u> be put into writing and given in evidence'*. However, the police officer had used the word *'will'* instead of *'may'*

[22] In response to this ground of appeal, the learned counsel for the State submitted that the appellant was represented by counsel throughout the proceedings in the High Court and no application was made prior to the commencement of the trial a during the course of the trial, for the conduct of a voire dire inquiry and therefore the appellant was not entitled to subsequently complain.

[23] It is pertinent to note that the 'judge's rules' are guidelines for the use of police officers and whilst it is desirable that the caution be made strictly in terms of the rules, a minor deviation such as the one complained of in this instance certainly would not have any adverse impact on procedural fairness. The use of the word *'will'* instead of *'may'*, in my view, did not make any significant difference so as to affect the decision of the appellant to make the statement.

[24] The learned counsel for the appellant had relied on the dicta of the case of **<u>Beese and Anor v Governor of Asford Remand Centre</u>** [1973] 3 All ER 689 in support of his argument. However what Lord Diplock has said in this case would render his argument untenable. What has been said is; *'The judge's Rules are not rules of law. They are rules laid down by Judges of the Queen's Bench Division for the guidance of English police officers when taking and recording statements made by persons who are suspected of having committed criminal offences. Non-observance of the Rules by a police officer to whom a confession is made does not render it inadmissible at common law if it was made 'voluntarily', ie not made in consequence of an unlawful inducement or threat of a temporal nature held out or made by a person in authority. The only sanction for the observance of the Judge's Rules is that the judge before whom the case is tried may, if he thinks fit, refuse to admit in evidence a confession obtained in contravention of them. It lies within his own discretion which he must exercise judicially whether to admit the confession or not'.*

The counsel for the State has also cited the case of **<u>R v Bass</u> [1953]** 1 QB 680 where Byrne J had expressed similar views.

[25] The only non compliance complained of is wholly trivial and in any event since the appellant is not contesting the voluntariness of the caution interview, this ground becomes baseless. The caution interview has been admitted in evidence as prosecution exhibit No. 5. As pointed out by learned counsel for the State, no objection had been taken by the defence prior to the commencement of the trial or at the stage it was produced (at page 240 of the High Court proceedings – it is recorded *'Defence: No objection'*). The judge in his summing up and judgment has

dealt with the voluntariness and admissibility of the caution interview as well as what reliance can be placed in its contents (para 81-84 and 104 of summing up and para 11 of the judgment).

[26] With regard to the language in which it was recorded, the police officer has said that the appellant had agreed at the beginning to record the interview in English and whilst it was being recorded the appellant's answers in the i-taukei language had been translated to English. During the cross-examination of the appellant he has admitted that as a teacher, the mode of communication in school was English and that if i-taukei language is translated in to English, he understands it clearly (page 250 of the High Court proceedings). I do not find the admission of the caution interview at the trial to be in violation of any views expressed by the Court of Appeal in the case of **Chand v State** 2016 FJCA 61; AAU0015.2012.

[27] In view of the reasons as discussed by me above, I hold that there is no merit in this ground of appeal.

Ground 2

[28] The second ground of appeal is as follows;
'The learned trial judge erred in law and in fact when he did not adequately direct himself and the assessors that the opinion and evidence given by the doctor does not confirm penetration and or slight penetration in to the vagina'.

[29] The doctor had examined the complainant on the same day and her report has been produced in court as prosecution exhibit No.4. Her findings are that there had been a *'fresh abrasion on the left labia minora'* and she has gone on to explain that *'abrasion has been noted in the labia minora which means the abrasion is inside the vagina'.* The report also notes a *'fresh contusion noted on superior aspect of the introitus inferior to the clitoris extending down left side of the introitus'*. She has also noted *'slight blood stains and small blood clot in the introitus'* and has explained this in lay terms as being *'there was some dried blood and small blood clot at the opening of the vagina'*. She notes that *'hymen ring appears intact'* and explained that it meant that the *'hymen was unbroken'* (page 232 of the High Court proceedings).

[30] During her examination-in-chief, she was specifically asked as to whether her findings were consistent with three fingers having been inserted to the vagina and her answer was *'Yes. My findings are consistent of the insertion of 3 fingers into the vagina'.* The doctor has also stated that the complainant was not having her menses at the time (page 233 of the High Court proceedings).

[31] The doctor was cross-examined extensively and the thrust of the questioning was to demonstrate the appellant's position that there had been no penetration of the vagina. The following questions and answers would be of particular relevance;
' Q: so the injuries were not to the vagina but the external genitalia?
A: the injuries were in the inner portion of the external genitalia <u>including the vagina</u>
Q: It also means no penetration in the vagina. Inside the vagina?
A: It cannot be ruled out

Q: It cannot be conclusively said there was penetration?
A:Yes
Q: This is consistent with your findings that the hymen is intact?
A: It is possible to have penetration even though the hymen is intact'
(page 234 – 235 of the High Court proceedings)

[32] Then in re-examination she was asked; *'It was suggested to you that there were no penetration to the vagina'* and her answer was; *'The vagina is an elastic tissue. If three fingers were inserted, it would go back to its normal size and also is able to stretch to accommodate that size. It is a ring of tissue in the gagina so it will still be possible to have penetration into the vagina without breaking the hymen in causing injury to the vagina'* (page 236 of the High Court proceedings).

[33] Although it has not been given the prominence it deserved at the trial, the blood stains found on the shoulder area of the vest worn by the complainant is critical to the issue as to whether there was penetration. The appellant took up the position that when he found that her vaginal area was wet, he had taken his hand out and wiped his fingers on the vest worn by the complainant. He said that the complainant was having her menstruation that day and that the blood stains were due to that. However, the complainant has said that she was not menstruating that day and this has been confirmed by the doctor. If so, how was blood found in her vaginal area? Is that not clear and unequivocal evidence that there has been penetration? The doctor had observed *'some dried blood and small blood clot at the opening of the vagina'* and in answer to the question *'under what circumstances can blood be emitted?'* she had answered; *'when there is a force used'* (page 233 of the High Court proceedings). Infact, the prosecution cross-examined the appellant on this issue. The question was; *'The doctor medically examined Sera on that day. She stated she was not having her menses. So the blood you said Mr. Laveta, was from your penetration of the vagina?'* The answer of the appellant was *'No My Lord'* (at page 255 of the High Court proceedings).

[34] Paragraphs 75 – 80 of the learned trial judge's summing up is dedicated to the evidence of the doctor. He has outlined the evidence given by the doctor and had directed the assessors on how to consider her evidence and her opinion as an expert witness. In paragraph 99, the learned trial judge goes on to refer to the aspect of penetration and says *'What is in dispute is whether he had penetrated the vagina of the complainant with his three fingers without her consent……..You have heard two different versions of an incident which took place in private between the complainant and the accused'.* Then again at paragraph 103 he says that ; *'On the day of the incident, the complainant was medically examined by a doctor. The doctor testified that in her professional opinion there were fresh injuries to the external genitalia being abrasion and contusion which appears to have been sustained within the last few hours that is two (2) to three (3) hours before she was brought to the hospital. There was a fresh abrasion in towards the hymen and a fresh contusion on the opening of the vagina. She further said that the complainant was not menstruating and also forceful penetration in to the vagina could not be ruled out. Although the hymen ring was intact, it did not mean that there was no penetration'*.

[35] Considering the manner in which the offence had been described in the Information, it was necessary for the prosecution to establish that there had been penetration of the complainant's vagina. The complainant in her testimony had categorically stated that the appellant had inserted three of his fingers into her vagina. The appellant in his evidence admits to having touched her vagina but has denied that he inserted his fingers.

[36] It is important to bear in mind that the probative value of medical evidence is merely that of a corroborative nature. In view of Section 129 of the Criminal Procedure Act 2009, corroboration of the evidence of a complainant is not required to bring home a conviction in a case pertaining to a sexual offence. Therefore, it is not mandatory on the part of the prosecution to lead medical evidence or produce a medical report to corroborate the evidence of a complainant. Whilst the availability of medical evidence would be advantageous, its absence would not become fatal to the prosecution's case.

[37] In this case the doctor has testified and the medical report has been produced as an exhibit. I have referred to her evidence and she has clearly explained that penetration cannot be ruled out and that the injuries she observed are consistent with three fingers being inserted into the vagina.

[38] A doctor, who falls in to the category of an expert witness, is expected to express an opinion based on her findings consequent to an examination. The prosecution has placed before court the testimony of the complainant who has clearly described as to what the appellant had done. It then becomes the task of the assessors to consider the testimony of these two witnesses and arrive at a conclusion as to whether the act complained of has taken place. The judge as the final arbiter of facts and law had to on his own consider this aspect. The complainant has been unequivocal that the appellant inserted his fingers into her vagina. The medical evidence does not rule that out. In this case the assessors and the trial judge in finding the appellant guilty of the count of rape, have believed the testimony of the complainant which is not in conflict with the medical evidence.

[39] It was emphasized in the case of **Radhu v State of Madhya Pradesh**, 2007 CRI.L.J 4704, that what is important is the victim's testimony and not the presence or absence of medical evidence of sexual intercourse or rape. In **Deva v State of Karnataka** (2007) 12 SCC 122, the Indian Supreme Court observed that *'The plea that no marks or injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the Gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which if found to be cogent, reliable, convincing and trustworthy has to be accepted'.*

[40] Importantly, in the case of **State of Tamil Nadu v Raju Nehru** (2006) 10 SCC 534, it was observed that *'Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of*

recent sexual activity. Whether rape has occurred or not is a legal conclusion, not a medical one'.

[41] The observations of court in the case of **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017), would be of relevance to this case. The accused in that case had been charged on an identical count of rape and the issue of penetration of the vagina had come up for consideration. Prematilaka J had noted that *'Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of court though not specifically taken up at the hearing. There is no medical evidence to confirm that the appellant's finger had infact entered the vagina or not'.*

[42] He then went on to comment as follows; *'Therefore it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the appellant penetrated the vagina with his finger. The complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far the finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned'.*

[43] Having observed thus, Prematilaka J went on to examine and pronounce upon the ingredients of the offence which is identical to this case and said *'Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had infact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established'.*

[44] Although this case can be distinguished from **Volau** (supra) since the medical evidence here cannot be considered as inconclusive, the dicta of that case can be applied in this case in order to confirm that it is possible in law to maintain the count of rape as described in the Information. It is important to bear in mind that the slightest penetration would suffice to establish the commission of the offence.

[45] The second ground of appeal should therefore, fail.

Ground 3 and 4

[46] The third and fourth grounds of appeal are as follows;

'The learned trial judge erred in law and in fact when he failed to direct the assessors on the cross examination of the doctor, but he only directed on the examination in chief and re-examination, causing substantial prejudice to the Appellant'.

'The learned trial judge erred in law and in fact when he did not give a fair and balanced summing up to the assessors, causing substantial prejudice to the Appellant'

[47] These two grounds have been dealt with by both counsel together and I too will consider them together. It was submitted on behalf the appellant that the learned High Court Judge has in his summing up, only referred to what the doctor said in her evidence-in-chief and re-examination and not what she has said under cross-examination. Reference has been made to paragraphs 74, 75 and 76 of the summing up.

[48] A trial judge is not expected to break up the evidence of a witness and state what has been said during examination-in-chief, cross-examination and re-examination. What is expected in a summing up is to give a summary of the evidence. It is not necessary for the learned trial judge to go into every minute detail of the testimony of a witness. In this case the learned trial judge has taken great pains to explain the medical evidence. I observe that that the learned trial judge has dedicated not only three paragraphs but nine paragraphs to the doctor's evidence (para 74-80, 99 and 103). It is interesting to note that in cross-examination the defence has elicited clarifications from the doctor regarding penetration, which as a matter of fact, strengthens the case of the prosecution. I have already referred to all items of evidence when examining the second ground of appeal and hence will not repeat them here.

[49] Lord Hailsham in **R v Lawrence** [1981] 1 All ER 974 opined as follows; *'It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to the jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but important summary of the evidence of facts as to which a decision is required, a correct but concise summary of the evidence and argument of both sides, and a correct statement of the inferences which a jury are entitled to draw from their particular conclusions about the primary facts '.*

[50] The trial judge has made a detailed summing up and it cannot be said that it was not balanced. He has referred to and analyzed the evidence presented by the prosecution and the evidence of the appellant. The inferences that can be drawn from the testimony of the witnesses and the applicable legal principles have been set out with clarity. Therefore, I do not see any merit in these grounds of appeal and they must fail.

Ground 5

[51] The fifth ground of appeal is as follows;

'The learned trial judge erred in law and in fact when he failed to direct the assessors on an alternative count of indecent assault for the offence of rape despite the defence application for re-direction on the alternative count'.

[52] The contention of learned counsel for the appellant is that when the learned trial judge had asked as to whether any re-directions were required, the counsel for the appellant had suggested that an alternative direction on 'indecent assault' may be given. However, the learned judge had observed that there was no necessity to do so since the directions were sufficient having regard to the charge. It has been submitted on behalf of the appellant that had the learned trial judge *'re-directed the assessors on the alternative count of sexual assault or indecent assault, it was highly probable that they could have considered the same in the entirety of the evidence'.*

[53] In **R v Fairbanks** [1986] 1 WLR 1202 it has been stated that *'The judge in summing up is not obliged to direct the jury about the option of finding the accused guilty of an alternative offence, even if that option is available to them as a matter of law. If, however, the possibility that the accused is guilty only of a lesser offence has fairly arisen on the evidence and if directing the jury about it will not unnecessarily complicate the case, then the judge should, in the interests of justice, leave the alternative to them'.*

[54] It will be incumbent on the trial judge to make a direction regarding an alternative count, if in his opinion the evidence led at the trial has pointed towards a lesser offence rather than the one contained in the Information. However, in this instance the evidence led clearly satisfied the ingredients of the offence of rape and hence there was no plausible reason for the learned High Court Judge to re-direct the assessors on the lesser offence of sexual assault and he has very correctly observed that there was no necessity to do so. This ground therefore has no merit and has to fail.

Ground 6, 7, 8 and 9

[55] The sixth ground of appeal is as follows;
'The learned trial judge erred in law and in fact when he did not properly direct the assessors on how to approach the previous inconsistent statements of some witnesses'.

The seventh ground of appeal is as follows;
'The learned trial judge erred in law and in fact he when he failed to direct the assessors that other evidence of an inconsistent statement cannot be used to enhance the prosecution case, causing substantial prejudice to the Appellant'

The eighth ground of appeal is as follows;

'The learned trial judge erred in law to say in the judgment that inconsistencies were not significant, when in fact the inconsistencies were significant and touched the root of the matter'.

The ninth ground of appeal is as follows;
'The learned trial judge erred in law and in fact when he found the prosecution witnesses credible despite the significant inconsistencies per se and inter se in their evidence'.

[56] Since the seventh to ninth grounds of appeal pertain to the issue of inconsistencies, I will deal with all these grounds together. The appellant however has not dealt with ground 7 in his written submissions.

[57] In the written submissions filed on behalf of the Appellant it is stated that there were several inconsistencies between the complainant's police statement and evidence given at the trial as well as inconsistencies between her evidence and evidence of other witnesses. However, other than one inconsistency between the police statement and the evidence of the complainant, no other instances have been referred to.

[58] In light of the above, at the hearing, this court specifically inquired from learned counsel for the appellant as to what other inconsistencies he relied upon to support these grounds of appeal. Whilst pointing out only the above contradiction, he said that the written submissions deal with the others. However, a perusal of the written submissions reveals that other than repeatedly referring to the above contradiction, no other inconsistencies have been pointed out. Instead, a broad statement has been made that *'we believe that the inconsistencies highlighted were significant and touching the root of the matter'.*

[59] The contradiction that has been highlighted is that in the police statement the complainant had stated that she had gone to the toilet and when she was coming out, the appellant who was waiting outside had pushed her inside the toilet as opposed to her testimony in court that the two of them had gone inside the toilet at the request of the appellant.

[60] If inconsistencies exist in the testimony of witnesses, they have to be pointed out in order for court to determine the ultimate impact of such inconsistency on the testimony of a particular witness or on the prosecution case as a whole.

[61] It is pertinent to note the following statement in the written submissions of the appellant; *'even though some other witnesses to testify but the matter rested on the credibility of the evidence of "SS" as opposed to the evidence of the appellant. Since the assessors unanimously opined the appellant guilty for the charge in both counts, it can be deduced that they found the evidence of "SS" as credible and reliable for the charge in both counts and did not believed the evidence of the appellant'* (page 9 of the written submissions). This makes it clear that the appellant is relying on alleged inconsistencies per se the evidence of the complainant and not any inconsistencies inter se any other witness.

[62] The learned counsel for the appellant submitted that the learned High Court Judge has not made adequate reference to the inconsistencies in his summing up. It is therefore necessary to consider as to how the learned trial judge had addressed this issue in his summing up.

[63] A perusal of the summing up reveals that a detailed analysis has been made of the testimony of the complainant. In paragraphs 37 to 48, the evidence-in-chief of the complainant has been detailed whilst paragraphs 49 to 53 have dealt with her cross-examination. Then in paragraphs 54 to 61, he had pointed out the inconsistencies (the one as to how they entered the toilet and another whether he had touched both her breasts or only one) and explained in detail why such inconsistencies may occur and what effect they have on the testimony of the witness. The learned trial judge has then gone on to refer to and analyze the evidence of her aunt and has referred to why certain deficiencies may be prevalent in what the complainant is said to have told the aunt soon after the incident (from paragraphs 62 to 73).

[64] In support of his contention that the learned trial judge has failed to give adequate directions pertaining to inconsistencies, the learned counsel for the appellant drew our attention to paragraph 105 of his summing up. Paragraph 105 is as follows; *'There were some inconsistencies with the evidence the complainant had given at the trial. The defence says such inconsistencies affect her credibility and that she should not be believed. It is for you to* ***decide whether the inconsistencies were significant and*** **whether it** ***affects adversely the reliability and credibility of the complain*****ant'** (emphasis added). He has then gone on to explain what the appellant had said and invited the assessors to consider *'which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthwith and truthful and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanor in arriving at your opinions'.*

[65] Inconsistencies are bound to occur when witnesses recount a certain incident and more so when it relates to a sexual assault and the victim is a teenager. Thakkar J in the case of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (1983) SCC 217, has succinctly explained as to why inconsistencies are bound to occur in the testimony of witnesses and their effect. He stated: *'We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious'* and went on to identify them. He said *'The powers of observation differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder'. A witness though wholly truthful, is liable to be overawed by the court atmosphere*

and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment'.

Having said so, he held that *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important 'probabilities-factor' echoes in favour of the version narrated by the witnesses'* (at pages 222 and 223).

[66] Justice Suresh Chandra in **Koroitamana v The State** [2018] FJCA 89; AAU0119.2013 (5 June 2008) expressed views on the effect of inconsistencies. He said; *"as stated in Abhaya Raj's case (supra) the exact manner in which the accused acted need not be stated by the victim who had been the subject of the offence. There may sometimes be minor variations in the manner in which the victim describes the incident, but the question is whether such variation affects the credibility of the witness".*

[67] In the case of **Swadesh Kumar Singh v The State** [2006] FJSC 15, the Supreme Court discussed in detail the consequences of inconsistencies between previous sworn statements and evidence given in court and went on to stipulate guidelines to be followed by trial judges in dealing adequately on matters pertaining to inconsistencies in their summing up. Relying on this case as well as several other English authorities, the Supreme Court in **Praveen Ram v The State** [2012] FJSC 12; CAV0001.2011 (09 May 2012) spelt out the approach to be adopted when inconsistencies exist between a statement given to the police and testimony in court.

[68] The dicta in the above cases were applied by this Court in the cases of **Mohammed Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Krishna v The State** [2021] FJCA 51; AAU0028.2017(18 February 2021) and the impact of inconsistencies have been discussed in great detail. These decisions have in effect emphasized that the existence of inconsistencies by itself would not impeach the creditworthiness of a witness and that it would depend on how material they are. They also highlighted the requirement on the part of trial judges to adequately direct assessors as well as themselves on the impact of inconsistencies in arriving at a conclusion.

[69] As can be seen, this is one of many directions that the learned High Court judge has made. I do not think it is necessary for me to reproduce here all paragraphs of his summing up relevant to this issue since they are numerous. Hence the reason why I have only referred to the numbers of the paragraphs.

[70] As discussed hereinbefore, the inconsistency highlighted on behalf of the appellant is trivial in nature. The learned High Court Judge has infact adverted to certain other inconsistencies as well and has discussed their impact on the testimony of the complainant. He has also explained in detail, the position taken up by the appellant in his evidence and through the cross examination of the prosecution witnesses. It is a well balanced summing up covering all matters of fact and law. The assessors and the trial judge were in the best position to assess the evidence and decide their value. The inconsistencies are insignificant and they do not affect

the credibility of the complainant or have any impact whatsoever on the weight of her evidence. I am satisfied that they are of no consequence and that they do not go to the root of the matter so as to render her evidence unreliable. In effect, they have no bearing on the prosecution's case.

[71] The Court of Appeal in the case of **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) stated 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 was 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'.

[72] The above view has been oft repeated by this court in arriving at decisions to affirm convictions of the lower courts. Having taken into consideration the totality of the evidence led in this case at the High Court, I too am inclined to echo similar sentiments.

[73] There was clear evidence against the appellant to find him guilty of the two counts contained in the Information. There has been no miscarriage of justice as alleged by the appellant. I therefore refuse to grant leave to appeal. The appeal is dismissed.

The Orders of the Court:

1. Leave to appeal refused.
2. Appeal dismissed.
3. Conviction and sentence affirmed.

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice V. Dayaratne
JUSTICE OF APPEAL