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

CRIMINAL APPEAL NO.AAU 83 of 2019
[In the High Court at Suva Case No. HAC 377 of 2016]

BETWEEN	:	**AVINESH KUMAR**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. A. K. Singh for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**11 July 2022**
Date of Ruling	:	**14 July 2022**

RULING

[1] The appellant had been charged in the High Court at Suva with two counts of rape contrary to section 207(1) and (2) (a) of the Crimes Act No. 44 of 2009 committed on NB (name withheld) on 12 February 2019 and 13 February 2019 respectively at Suva in the Central Division.

[2] The assessors had expressed a unanimous opinion that the appellant was not guilty of rape. The learned High Court judge had disagreed with them and convicted the appellant on both counts. He had been sentenced on 17 June 2019 to 11 years' imprisonment on each count to be served concurrently with a non-parole period of 08 years.

[3] The appellant's appeal against conviction and sentence is timely. Both parties had tendered written submissions for the leave to appeal hearing and requested this court to deliver the Ruling only on written submissions.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. 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 guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). For a ground of appeal timely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a reasonable prospect of its success in appeal.

[6] The grounds of appeal urged on behalf of the appellant against conviction and sentence are as follows.

CONVICTION

(i) That the learned Trial Judge erred in law and in fact by overturning the unanimous not guilty opinion of all three assessors and found the appellant guilty on both charges laid against the appellant without providing any cogent reason significant to defer from the said opinions when the same was not perverse.

(ii) That the learned Judge erred in law and in fact by overruling the assessors unanimous opinion of "not guilty" contrary to his own summing up which allowed them to form such opinion and when the same was in accordance with his summing up/directions.

(iii) That the learned Judge erred in law and in fact when he stated that he will give the assessor's opinion the greatest weight when he delivers the judgment but failed to do so thereby contradicting his own summing up.

(iv) That the learned trial Judge erred in law and in fact when the conviction against the appellant, taken as a whole, was unsafe was untenable given that the evidence adduced did not proved beyond reasonable doubt the guilt of the appellant in respect of both counts.

(v) That the learned Trial Judge erred in law and in fact in failing to take into consideration the overall conduct of the complainant and in particular she had made a similar complaint in Labasa whereby the appellant was charged but later such charges were dismissed as the victim had not given a truthful account of the event constituting a charge of rape.

(vi) That the learned Trial Judge erred in law and in fact failing to take into consideration the overall conduct of the victim in particular her attire, grooming and dinning when dealing with the issue of duress when such consideration if given proper weight should have amounted to a verdict of not guilty.

(vii) That the learned Trial Judge erred in law and fact in holding that there was a existence of a video recording of promiscuous relationship exhibiting nudity when such video in centre on controversy was never in possession of the appellant.

SENTENCE

(viii) That the sentence is wrong in principle, harsh and excess in the circumstances of the case.

[7] The facts of the case have been succinctly stated by the trial judge in the sentencing order as follows.

4. The facts proved in court should be succinctly stated. You were the agriculture teacher of the complainant for nearly three years. The complainant was a minor when you first met her at the school. You are married and a mature father of two children. Your wife was also teaching in the same school with you.

5. You, in a subtle manner, used your authority in school to influence the complainant to be your girlfriend. She submitted herself to your demands and agreed to have an intimate relationship with you. Within this relationship you maintained a possessive attitude towards the complainant. You placed restrictions in her dealings with other friends. You threatened to punish her, if she did not listen to you. You gave assignments in the classroom unbecoming of a teacher and asked her to write love letters as part of her classroom 'assignments'. You used those letters to blackmail her. The day she turned 18, you took her to a hotel in Labasa on the pretense of celebrating her birthday and you had sex with her. That was the beginning of 20 odd sexual encounters you admitted in your evidence.

6. When the complainant was determined to move to Suva for her tertiary education you became furious. When she wanted to stop the relationship, you got angry and by distributing the love letters amongst her neighbours, you threatened to make the affair public. Before she left for Suva, you secretly made a sex video of you having sex with her. You used the sex video to keep her under your control by blackmailing her.

7. Those are your ante offence conducts. However, you have not been charged for any of those conducts and will not be punished for maintaining a sexual relationship with the complainant who is your former student, although it is morally blameworthy. You will be punished for crimes you committed on the 12th and 13th of February, 2016, for which you were convicted of.

8. When the complainant moved to Suva in January, 2016, you sent her screenshots taken from the sex video via Facebook Messenger. You threatened to post the sex video on social media, if she did not agree to be with you. You came to Suva on the guise that you are going to hand over the sex video to the complainant and you took her to a hotel in Suva on the 12th February 2016. In the hotel room, you had sexual intercourse with her several times. After having sex, you intimidated her to secure her attendance at the same hotel on the following day. You took the complainant again to the same hotel on the 13th February, 2016, and had sexual intercourse with her several times. You sucked her breasts, licked her vagina and made her to sit on your penis. The complainant agreed to come to the hotel because you threatened her. She agreed to have sex with you because she feared that you will post the sex video on social media. You also punched and slapped her on both of these days.'

[8] The appellant had given evidence at the trial and his defence had been that sexual encounters with NF were consensual. He had also claimed that the complainant had blackmailed him with a sex-tape covertly made by her to compel him to continue to engage in sex with her.

01st, 02nd and 03rd grounds of appeal

[9] The appellant argues that the trial judge had erred in overturning the assessors' unanimous opinion contrary to or against his own summing-up where he promised to give greatest weight to the assessor' opinion and the judge had also not given cogent reasons to do so particularly when their opinion was not perverse.

[10] These arguments are misconceived. In Fiji, the assessors were not the sole judges of facts. The judge was and is the sole judge of fact (and law) in respect of guilt, and the assessors were there only to offer their opinions, based on their views of the facts and it was the judge who ultimately decided whether the accused was guilty or not [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[11] At the same time, when the trial judge disagreed with the majority of assessors he had to embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Fraser v State** (supra)].

[12] Having examined the judgment, I agree with the respondent's submission that the trial judge's reasons for disagreeing with the assessors and why he was convicting the appellant were exemplary. The impugned judgment is beyond reproach when evaluated against the judicial pronouncements and passes easily the prescribed judicial scrutiny by the appellate court.

[13] I must also reiterate that for a trial judge to disagree or overturn the assessors' opinion such opinion need not necessarily be perverse. Needless to say that a trial judge is most likely to overturn a perverse opinion but 'perversity' is not a prerequisite or a condition precedent to the trial judge to disagree and overturn the assessors' opinion [vide paragraph [75] in **Bavesi v The State** [2022] FJCA 2; AAU044.2015 (3 March 2022)].

04th ground of appeal

[14] I shall now deal with the complaint that the conviction is unsafe and untenable, for the evidence adduced did not allegedly prove beyond reasonable doubt the guilt of the appellant.

[15] Under section 23(1) of the Court of Appeal Act the test is not whether the conviction is unsafe though in the UK since 1995 the only test to be applied has been whether the conviction is unsafe. However, that is not the law in Fiji [vide paragraph [54] in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. The question under section 23(1) is whether the verdict is unreasonable and cannot be supported having regard to the evidence or whether there has been a miscarriage of justice.

[16] In considering whether a verdict is unreasonable or cannot be supported having regard to the evidence, the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt **[Kumar v State** [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)]. The same test could apply to the trial judge's verdict when he disagrees with the assessors.

[17] In my view, in this case it was quite open to the trial judge on the material available to find the appellant guilty of rape (see **Pell v The Queen** [2020] HCA 12 and **M v The Queen** (1994) 181 CLR 487, 494).

[18] When a trial judge overturns the opinion of the assessors and convicts (or acquits) an accused it is similar to a situation where the judge tries the accused alone and delivers the verdict. When a question of fact has been tried by a judge without a jury/assessors and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion,

because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved [vide **Ralivanawa v State** AAU 077 of 2016 (26 May 2022)].

[19] Given the comprehensive and incisive analysis undertaken in the judgment by the trial judge, I see no merits in this ground of appeal.

05th ground of appeal

[20] The appellant's argument relates to dropping of charges by the DPP in respect of a rape complaint made in Labasa by NB against the appellant.

[21] This aspect had been dealt with by the trial judge at paragraphs 69 and 70 of the judgment. I do not think that undue weight could and should be attached to the manner in which the DPP had exercised its prerogative in withdrawing earlier charges and filing a fresh information.

06th ground of appeal

[22] The counsel's argument is that the fact that NB was dressed nicely, well groomed and dined with the appellant shows that she consensually engaged in sex with him.

[23] This appears to be an argument based on gender stereotyping *i.e.* ascribing to an individual woman (or a man) specific attributes, characteristics, or roles by reason only of her being a woman (or a man) for *e.g.* women are expected to be thin and graceful, while men are expected to be tall and muscular or men and women are also expected to dress and groom in ways that are stereotypical to their gender (men wearing pants and short hairstyles, women wearing dresses and make-up).

[24] **Aparna Bhat v. the State of Madhya Pradesh** (2021) SCC 230 is an enlightening judgment on judicial man-centric or stereotypical thoughts about women and their place in the public eye. Justice Bhat referred to the Bangalore Principles of Judicial Conduct, 2002 and said that conversation about the dress, conduct, or ethics of the prosecutrix ought not to enter the decision of a Court. This judgment has many remarks useful to the legal practitioners which they should be mindful of before drafting grounds of appeal based on gender stereotyping.

07th ground of appeal

[25] The appellant's criticism of the trial judge on this ground of appeal has no basis in as much as the video tape recording of consensual sexual conduct between the appellant and NB was played during the trial at the instance of the appellant himself. However, the recording had been done at a time prior to the time of offending in the information. The trial judge was satisfied that it had been made by the appellant without the knowledge of NB.

08th ground of appeal (sentence)

[26] The Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) took the tariff for adult rape to be between 07 and 15 years of imprisonment.

[27] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[28] There is no identifiable sentencing error in the sentencing order. It is not harsh and excessive and within tariff.

Orders

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

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