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

CRIMINAL APPEAL NO.AAU 053 of 2019
[In the High Court at Labasa Case No. HAC 81 of 2018]

BETWEEN	:	**KASIANO NACANIELI ASOA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. A. Vavadakua for the Respondent**
Date of Hearing	:	**02 August 2022**
Date of Ruling	:	**03 August 2022**

RULING

[1] The appellant had been charged in the High Court at Labasa with a single count of digital rape of his 5 year old daughter contrary to section 207(1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009.

[2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was guilty of rape. The learned High Court judge had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 26 March 2019 to 16 years and 06 months of imprisonment with a non-parole period of 14 years.

[3] The appellant's appeal against conviction and sentence in person is late by about one month but the delay could be excused. I shall consider this as a timely appeal. The

state has failed to tender written submissions in respect of the amended grounds of appeal and written submissions filed by the appellant as directed by this court. However, the respondent's counsel made some oral submissions on some of those grounds of appeal at the leave to appeal hearing. The court was informed that the directive for written submissions had been taken by a different counsel. At the hearing the appellant stated that he wished to abandon his sentence appeal and accordingly a Form 03 was filed. His written submissions had dealt only with the conviction appeal.

[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 grounds of appeal urged on behalf of the appellant against conviction are as follows:

> ***Ground 1***
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> *THAT the Learned Trial Judge did not consider that the investigation in my matter was not conducted in a proper procedure.*
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> ***Ground 2***
>
> *THAT the Learned Trial Judge did not consider the inducement produced by the Prosecution to incriminate me on this charge of Rape.*

Ground 3

THAT the Learned Trial Judge have failed in accepting the unreliable evidence produce by the Prosecution as a foundation of his decision.

Ground 4

THAT the Learned Trial Judge is so unfair in his summing up the case.

Ground 5

THAT I suffer injustice because of my counsel.

[6] According to the judgment, the prosecution had called three witnesses at trial. The victim, aged 05, had spent a night with her father, the appellant, in late October 2018. According to her he did something to her that caused her a lot of pain. She had demonstrated the use of a forefinger and used the word 'poke'. The grandmother's evidence is that she was the main caregiver of the child and that her daughter, the child's mother had separated from the appellant, the child's father. The child lived with her, but on occasions she would visit and stay with the appellant who lived nearby. On the day after the overnight stay at the time in question, the girl returned to her care but was crying and complaining of pain in her genital area. Her inspection revealed injuries and blood. The grandmother took the child to the Police who arranged for her to be examined at a hospital. A medical officer had found that the child's hymen had been broken and that her labia were inflamed. Her professional opinion was that she had been penetrated by blunt force, which was consistent with the child's complaint. The appellant had remained silent and not called any witnesses.

Ground 1

[7] The appellant complains that the police had not conducted the investigation properly into the case in that they had failed to go through a re-construction of the crime scene, failed to produce photographic evidence of the same, produced no voice recording to prove what the victim had told the police, offered no evidence of exact time of the crime etc.

[8] The respondent submitted that the appellant and the respondent had agreed at the trial that on the day in question the child slept with the appellant at his house which he confirmed at this hearing too. It does not appear from the summing-up and the judgment that any of these maters had been raised at the trial. They do not seem to be material and relevant to the matters in issue either.

Ground 2

[9] The appellant seems to suggest that the grandmother somehow induced the child victim to falsely implicate him. He also seems to contend that nothing untoward happened to the child when she was with him but everything had happened when she was in the custody of the grandmother on the following day.

[10] Needless to say that these propositions are mere conjecture, for none of them seems to have been raised as trial issues when the grandmother gave evidence.

Ground 3

[11] The appellant's argument is that the evidence of the child victim is unreliable, for no neighbor had seen the incident of alleged rape and the child was playing with other children as if nothing happened before the allegation of rape was made. He also submits that he was away during the following day when the child was with the grandmother and came up with the allegation of rape.

[12] According to the appellant the trial judge also should have warned the assessors to the danger of relying on grandmother's evidence but there is no such requirement in law.

[13] Once again, these are trial issues not canvassed at the trial. No improper motive appears to have been even suggested to the grandmother when she was in the witness box. In any event, the trial judge had looked at the evidence carefully before convicting the appellant. In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact (and law) in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who

ultimately decides whether the accused is guilty or not [see **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

Ground 4

[14] The appellant cites paragraphs 9 and 15 as examples of the unfair summing-up where the trial judge had stated that penetration does not have to be full penetration but it can be partial or slight to be enough for rape and that the examining doctor told court that her examination revealed a broken hymen and injuries consistent with blunt force trauma which could include penetration with a finger. I do not see anything unfair or wrong in either of these statements in law or evidence.

[15] In my view, country to the appellant's submissions there had been overwhelming evidence to prove all elements of the offending.

Ground 5

[16] The appellant complains against his trial counsel on the basis that the latter advised him to remain silent and did not produce his cautioned statement in his defense.

[17] The Court of Appeal in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) [and followed in in **Nasilasila v State** [2021] FJCA 138; AAU156.2019 (3 September 2021)] laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal. The appellant had not complied with those procedural steps and therefore this ground cannot be even entertained and should be dismissed.

[18] In general a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice. It may only have contributed to the conviction of the guilty [**Silatolu v State** [2008] FJSC 48; CAV0002.2006 (29 February 2008)].

[19] **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) the Supreme Court said:

> *''[21]..... It is not for a court to inquire into the advice tendered by counsel to his client..... But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client.....'*

[20] Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681 said:

> *'48. It follows, almost inevitably, that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently, will not provide any ground for appeal, any more than if such decision had been made by the defendant personally. Nor will other forms of mere error of judgment.*
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> *49. Nevertheless, the courts have recognised that in some exceptional instances, an error of sufficient proportion and consequence will enable the court to intervene and avert a miscarriage of justice. To describe this ground, the expression "flagrant incompetence" has generally been used ....' (emphasis added).'*

[21] I any event, I do not see any evidence of 'flagrant incompetence' on the part of the appellant's trial counsel in this instance.

[22] If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[23] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere.

[24] 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, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence [**Kumar v State** [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and **Balak v State** [2021]; AAU 132.2015 (03 June 2021)].

[25] In my view, in this case it was quite open to the assessors and 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). Similarly, I find that the on the evidence available the conviction is inevitable and therefore, there has not been a substantial miscarriage of justice either [see **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)].

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