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

CRIMINAL APPEAL NO.AAU 116 of 2020
[In the High Court at Lautoka Case No. HAC 06 of 2016]

BETWEEN	:	**AMITESH VIKASH CHAND**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. S. Dutt for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**24 August 2022**
Date of Ruling	:	**26 August 2022**

RULING

[1] The appellant had been charged in the High Court at Suva with one count of rape contrary to section 207(1) and (2) (b) of the Crimes Act, 2009, one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act, 2009 and one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009 committed on AK (name withheld) on 07 December 2015 at Sigatoka in the Western Division.

[2] The assessors had unanimously opined that the appellant was not guilty of rape and the majority had opined that he was not guilty of the other two counts as well. The learned High Court judge had disagreed with them and convicted the appellant on all three counts. He had been sentenced on 07 August 2020 to an aggregate sentence of 10 years and 11 months imprisonment for all counts with a non-parole period of 09 years.

[3] The appellant's appeal against conviction and sentence is timely. He has also made an application for bail pending appeal. Both parties had tendered written submissions for the leave to appeal hearing.

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

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact in finding the appellant guilty on the charges of one count each of rape, sexual assault and indecent assault in spite of the fact there were so many inconsistencies, discrepancies and contradictions in the evidence of the complainant.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in facts when he did not consider the fact that the complainant was forced by her work colleagues to report the matter when she did not want to do, thus denoting that if anything had happened between the parties, it must have happened by consent.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in facts when he failed to consider the fact that the act of sucking the breast of the complainant, kissing and biting her stomach were all done by her consent.*

Ground 4

THAT the Learned Trial Judge erred in law and in facts when he did not give cogent reasons of his findings why he overturned the unanimous not guilty verdict of all 3 assessors.

Ground 5

THAT the Learned Trial Judge erred in law and in facts when he found the appellant guilty of rape when no medical evidence was produced to show any injuries or probable penetration of the vagina and not even the doctor was called to testify on any probabilities of vaginal penetration.

Ground 6

THAT the Learned Trial Judge erred in law and in facts that the appellant had denied lifting her skirt and penetrating his finger in the complainant's vagina and if he had done so, that would have left some injuries on her vaginal area and would have been supported by medical evidence.

Ground 7

THAT the Learned Trial Judge erred in law and in fact when the conviction against the appellant, taken as a whole, was unsafe and untenable given that the evidence adduced did not prove beyond reasonable doubts the guilty of the appellant in respect of all the charges.

Ground 8

THAT the Learned Trial Judge erred in law and in fact in convicting the appellant on the charges of rape when the testimony of the complainant was not credible against the appellant.

Ground 9

THAT the Learned Trial Judge erred in law and in fact when he failed to appropriately observe the demeanour of the complainant in that she was very evasive in her answers and was not cooperating throughout the trial.

Ground 10

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the allegations of rape only arose after the complainant was confronted by her work colleagues who were suspicious after arriving into the office from some errands.

Ground 11

THAT the Learned Trial Judge erred in law and in fact in not finding the accused evidence credible but did not give reasons for his findings.

Ground 12

THAT the Learned Trial Judge erred in law when he failed to consider the fact that the burden of proof always remained with the prosecution and never shifts to the defence.

Ground 13

THAT the sentence of 10 years is harsh and excessive in all the circumstances.

[6] The learned trial judge has summarized the evidence of the sole witness for the prosecution namely the complainant (AK) in the sentencing order as follows:

> '*2. The brief facts were as follows:*
>
> *On 7th December, 2015 the victim was at work at the Fiji Revenue and Customs Authority, Sigatoka Branch with the accused and two other officers Shelly and Neli.*
>
> *3. At around 9am, Shelly and Neli left the office to do banking leaving the victim and the accused in the office. After the tax payers left the accused grabbed the victim's hand and pulled her inside the office from the main door where the victim was standing.*
>
> *4. The accused held the victim tightly, started kissing her neck, came in front kissed her lips and chest as well. The victim tried to push the accused but she could not. Thereafter the accused lifted the victim's top and bra, sucked her breast and made a love bite on her stomach.*
>
> *5. While the accused was doing all this, the victim kept on telling the accused to stop and that she will report the matter to the police. The accused did not stop, he lifted the skirt of the victim and from on top of her tights and panty forcefully penetrated the vagina of the victim with his fingers. The victim felt the accused fingers in her vagina she tried to push the accused away and remove his hand but she could not. When she started to cry the accused left her, the victim did not consent to what the accused had done to her.*
>
> *6. The victim was crying when Shelly and Neli came into the office, the victim relayed to Shelly what the accused had done to her. The matter was reported to the police the accused was arrested, caution interviewed and charged.*

[7] The appellant had given evidence and taken up the defense of 'consent' regarding the 02nd and 03rd charges while completely denying the rape allegation on the 01st count. According to him the rape allegation was a fabrication. He too had not called any other evidence.

[8] It is useful to remind ourselves of the principles of law relevant when a trial judge disagrees with the assessors. In **Fraser v State** [2021] FJCA 185; AAU128.2014 (05 May 2021), the Court of Appeal remarked:

> '*[24] When the trial judge disagrees with the majority of assessors he should 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 **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]*

[25] In my view, ……. the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.

*[26] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact 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 [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].'*

01 ground of appeal

[9] The complaint is that the trial judge should not have convicted the appellant given the inconsistencies, discrepancies and contradictions in the evidence of the complainant. The one and only such item, which was in fact an omission, highlighted is that AK in her evidence had said that she told the appellant that she will report the matter to the police or if he was willing to marry her after what he had done because he was the first person to have touched her without her consent. However, she had failed to state the fact that she asked the appellant if he was willing to marry her in her police statement.

[10] The trial judge had dealt with how the assessors should approach inconsistencies at paragraphs 77-79 of the summing-up and the appellant has no complaint of those directions. The trial judge had directed himself in the judgment as per his summing-up. At paragraph 76 of the summing-up the trial judge had referred to the above inconsistency and when he referred to 'the inconsistency' at paragraph 27 of the judgment the trial judge must have referred to that inconsistency/omission. The judge had considered it to be insignificant and one that did not adversely affect her credibility. The appellant himself does not appear to have testified to such a statement made by AK in his evidence. Nor had he spoken to any idea of marriage between the two at any stage. Since the victim had not stated anything to that effect in her police statement she need not have come out with it in evidence either. Thus, it appears that she had simply been truthful when she testified under oath to that statement made by her in the immediate aftermath of the incident. Thus, the trial judge's dismissal it as being insignificant to her credibility is not erroneous.

[11] The broad guideline is that discrepancies in the form of inconsistences, contradictions and omissions which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance [**Nadim v State** [2015] FJCA 130; AAU0080.2011 (02 October 2015)]. The only such omission highlighted by the appellant is not so significant as to affect the very foundation of AK's evidence.

02nd and 03rd grounds of appeal

[12] The appellant rests his submission on the complainant's evidence that her work colleagues particularly Shelly forced her to make a complaint to the police. He construes this as evidence of consent on her part to sexual acts.

[13] However, this piece of evidence cannot be taken in isolation. What happened was that when Shelly and Neli arrived, AK was still crying. The appellant told them that taxpayers had scolded her in order to explain her crying. He admits in his evidence having told as much to Shelly and Neli to avoid embarrassment to her. AK then told the appellant to tell the truth that he had done something to her and at that time he left the office. AK then narrated the entire incident to Shelly who wanted the matter to be

reported to the police but the complainant hesitated since she was only an Attaché in the office and this was the first week of her attachment. AK also did not want to report the matter to police because she did not want her parents to know of it, as this was her first employment and she needed money to support her family and if her parents came to know the incident they would ask her to stay home. Next day Shelly took the complainant to the Sigatoka Police Station to report the matter.

[14] Thus, when one considers the totality of the context in which AK had made the complaint to police it could be understood why she was initially hesitant to report the incident to the police but Shelly's taking her to the police station left her with no choice but to complain. That does not mean that her complaint was the result of force exerted by Shelly or it was untrue. Her initial decision not to report was certainly not due to her having consented to sexual misdemeanors of the appellant.

[15] There was no bad blood between the appellant and Shelly and Neli before the date of the incident. Neither has the appellant suggested any sinister motive for AK to falsely implicate him in the sexual acts.

[16] There is another aspect I like to comment upon at this stage. The prosecutors for reasons best known to them, had not called either Shelly or Neli to speak to what AK had told them within hours, if not in minutes which could have enhanced the credibility of AK and strengthened the prosecution case greatly with recent complaint evidence and distress evidence. Shelly also could have dispelled the theory of him having 'forced' AK to make the police complaint. Thus, the prosecutors had starved their case of this valuable piece of evidence. The state at this stage is unable to explain why either Shelly or Neli was not called to give evidence. However, this omission would not make AK's evidence less reliable or less credible.

[17] As to the appellant's complaint that the trial judge had not considered that acts of breast sucking, kissing, stomach biting were consensual, it is obvious that this was the assertion of the appellant but the trial judge had not believed him. According to AK these acts were done without her consent and the trial judge believed her version.

04th ground of appeal

[18] The appellant complains that the trial judge had not given cogent reasons for overturning the assessors' opinion.

[19] The appellant had picked two paragraphs namely 33 and 34 to support his contention. However, the trial judge had closely examined and independently evaluated and assessed the totality of evidence reflecting on the credibility of AK and the appellant in a judgment spanning 38 paragraphs. When taken in conjunction with the summing-up, the judgment satisfies the requirement of law including 'cogent reasons' summarized in **Fraser v State** (supra) for overturning the assessors.

05th and 06th grounds of appeal

[20] The appellant argues that in the absence of medical evidence of any injuries in AK's vagina the prosecution had not proved penetration and the trial judge was wrong to have convicted him for digital rape.

[21] This contention is based on a misconceived notion that any type of penetration including a slight penetration should necessarily result in injuries and without injuries no penetration could be proved. This is not the law. AK never said that she suffered injuries in her vaginal area after the act of penetration. It appears from her evidence that the appellant had inserted his finger inside her vagina over her tights and panty. Thus, this may have clearly reduced, if not eliminated any chances of causing injuries inside her vagina. But, penetration could still have occurred and indeed occurred according to the complainant.

[22] In any event, section 129 of the Criminal Procedure Act, 2009 states that where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration. This includes corroboration in the form of medical evidence as well.

07th ground of appeal

[23] The appellant summits that the verdict of guilty is unsafe and untenable given the evidence led at the trial. The test of the verdict being 'unsafe' or 'dangerous' is not applicable in Fiji [**Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. The proper ground of appeal is whether the verdict is unreasonable or cannot be supported having regard to the evidence. The threshold test in Fiji is whether it was open to the trial judge on the material available to find the appellant guilty [see **Pell v The Queen** [2020] HCA 12 and **M v The Queen** (1994) 181 CLR 487, 494)].

[24] 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.

[25] The appellant has not demonstrated that it was not open to the trial judge to find him guilty on the totality of evidence. I disagree. In my view, applying the test aforesaid formulated in **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), it cannot be said that the verdict is unreasonable or cannot be supported having regard to the evidence.

08th and 11th grounds of appeal

[26] The appellant complains that that the testimony of AK was not credible and the trial judge had not given reasons for disbelieving the appellant.

[27] The trial judge has clearly explained why he believed AK and did not accept the appellant's version as seen from paragraphs 27-33 in the judgment.

[28] In addition, it is impossible to believe the appellant's version that he had hugged and kissed AK several times before the alleged acts took place on 07 December 2015 within the first week of her attachment itself. It is not the position of the appellant that he had any romantic relationship with AK before she assumed work at FRCA. She flatly denies any such relationship at any stage. She had admittedly only to have inquired about her application over the phone or *via* text massages after handing over the application to him. Moreover, would she have been in a mood to consent to him doing all the sexual intrusions if she was crying and in distress soon after being growled by tax payers because on his own admission, the appellant had engaged in all the sexual acts after the tax payers just left their workplace.

[29] Moreover, the appellant admittedly lied to Shelly or Neli that tax payers had growled at AK and that is why she was crying which was immediately refuted by AK asking him to tell the truth. He also admittedly lied in order to save her from embarrassment of being seen crying by Shelly or Neli. If the appellant knew that there was no such growling by tax payers the question is what made AK crying. The appellant had not explained it when only two of them were inside the office at the material time. Why did the appellant offer money to AK? The trial judge had rejected his denial. The appellant had told the police that he indeed touched AK's private part. The trial judge did not also believe that his admission was not voluntary.

09th ground of appeal

[30] The appellant submits that AK was an evasive witnesses and the trial judge had failed to draw adverse inferences from their demeanor. However, what the trial judge has said in the judgment is that having considered evidence and observed the demeanor of AK, he decided to accept the evidence of the victim as being honest, truthful and reliable and held accordingly that the prosecution had proved the alleged charges beyond reasonable doubt. When it comes to the demeanor of a witness what matters is not what the appellant thinks of him but what impression the witness had created in the minds of the trial judge.

10th ground of appeal

[31] The appellant submits that the trial judge had not considered that allegation of rape arose only after AK's work colleagues arrived at the office and realized that something was amiss. It was only when she was caught that allegations were made.

[32] However, it is AK's evidence that she told the appellant while he was in the act of sexually violating her that she would report him to the police. She had earlier pushed him and told him to stop but the appellant went ahead regardless. Therefore, there is no basis for the contention that AK turned otherwise consensual acts into forceful sexual abuses upon seeing her work colleagues.

12th ground of appeal

[33] The appellant's contention is based on alleged want of consideration for standard of proof and burden of proof by the trial judge. I see no merits in this assertion as when the judgment is considered along with the summing-up, it is abundantly clear that the trial judge had fully directed himself on both aspects before considering the facts of the case.

[34] Therefore, none of the grounds of appeal raised by the appellant has a reasonable prospect of success.

13th ground of appeal (sentence)

[35] The grounds 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.

[36] 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. The appellant's sentence is well within this range. Given the totality of circumstances involved, I do not consider the sentence to be harsh and excessive.

[37] The appellant has not demonstrated any sentencing error in the aggregate sentence because 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 [**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)].

Bail pending appeal

[38] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances

when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[39] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[40] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[41] Since I have already held that that none of the grounds of appeal has a reasonable prospect of success, the appellant's appeal cannot be said to be having a 'very high likelihood of success' which is the higher threshold to pass for a bail pending appeal application to succeed.

[42] Therefore, bail pending appeal application is refused.

Orders

1. Leave to appeal against conviction and sentence is refused.
2. Bail pending appeal is refused.

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