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

CRIMINAL APPEAL NO. AAU 180 of 2016
[In the High Court at Suva Case No. HAC 103 of 2016]

BETWEEN : **PANAPASA GANITA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Mr. Waqainabete S. & Ms Prakash for the Appellant**
Ms. Shameem for the Respondent

Date of Hearing : **4 July 2023**

Date of Judgment : **27 July 2023**

JUDGMENT

Prematilaka, RJA

[1] Having read in draft the judgment of Mataitoga, JA I agree that the appeal should be dismissed.

Mataitoga, JA

High Court

[2] The appellant had been indicted in the High Court at Suva on two counts of rape and five counts of sexual assault allegedly committed at Nasinu in the Central Division contrary to section 207(1) and (2) (a) and section 210 (1) (a) of the Crimes Decree, 2009 respectively.

[3] The indictment read as follows:

> '***FIRST COUNT***
>
> ***Statement of offence***
>
> ***RAPE:*** *Contrary to Section 207(1) and (and (2) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of offence***
>
> ***PANAPASA GANITA*** *on 19th February 2016 at Nasinu in the Central Division had carnal knowledge of EK without her consent.*
>
> **SECOND COUNT**
>
> ***Statement of offence***
>
> ***RAPE:*** *Contrary to Section 207(1) and (and (2) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of offence***
>
> ***PANAPASA GANITA*** *on the 26th February 2016 at Nasinu in the Central Division had carnal knowledge of EK without her consent.*
>
> ***THIRD COUNT***
>
> ***Statement of offence***
>
> ***SEXUAL ASSAULT****: Contrary to Section 210(1)(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *between the 1st day of November 2015 and 30th day of November 2015 at Nasinu in the Central Division unlawfully and indecently assaulted EK by fondling her breast.*

FOURTH COUNT

Statement of offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offnce

PANAPASA GANITA *between the 1st day of January 2016 and 26 February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by fondling her vagina.*

FIFTH COUNT

Statement of offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(a) ana) and (2) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *between 1st day of January 2016 and 18 January 2016 at Nasinu in the Central Division unlawfully and January 2016 indecently assaulted EK by licking her vagina.*

SIXTH COUNT

Statement of offence

SEXUAL ASSAULT: *Contrary to Section (1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *on the 26th February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by sucking her breast.*

SEVENTH COUNT

Statement of offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(a) and (2) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *on the 26th day of February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by licking her* ***vagina.*** *'*

[4] At the close of the prosecution case, the learned High Court judge held that there was no case to answer in respect of 3rd, 4th, 5th and 7th counts of sexual assault. At the conclusion of the trial on 28 October 2016 the assessors' opinion was unanimous that the appellant was guilty of the 1st, 2nd and 6th counts against him. The learned trial judge had agreed with the assessors in his judgment delivered on 1 November 2016, convicted the appellant and on 3 November 2016 sentenced him to 10 years and 04 months of imprisonment as an aggregate sentence with a non-parole period of 7 years and 04 months.

Court of Appeal

[5] The appellant's timely application for leave to appeal against conviction had been filed in person on 30 November 2016. Subsequently, the appellant had in person filed an application for bail pending appeal on 26 January 2017 but he did not pursue it thereafter. He had tendered written submissions on 31 October 2018. He had also filed an application to abandon his appeal against sentence (Form 3) on 01 March 2019 though it is not clear at what stage he had appealed against sentence. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction on 8 June 2020 along with written submissions. The state had tendered its written submissions on 17 April 2019 and 17 July 2020.

Judge Alone

[6] At the hearing of the application for Leave to appeal against conviction, before the Judge alone, the learned judge first referred to section 21(1)(b) of the Court of Appeal Act, which provides that the appellant may appeal against conviction only with leave of court. He then referred to the test for leave to appeal which is '**reasonable prospect of success'** and the caselaw he relied on in support, by reference to the following: **Caucau v State** [2018] FJCA 171, **Navuki v State** [2018] FJCA 172 and **State v**

Vakarau [2018] FJCA 173, **Sadrugu v The State** [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144.

[7] On the issue of how to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; **Chaudry v State** [2014] FJCA 106; and **Naisua v State** [2013] FJCA 14; from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[8] Grounds of appeal urged on behalf of the appellant, before the Judge alone, are as follows:

> *(i) THAT the Learned Trial Judge erred in law and fact when he failed to fully and properly consider the contradictions in the complainant's evidence in count 1, count 2 and count 6 where the complainant had first stated in her evidence that she said 'no' to the Appellant's request to have sex and later on in cross-examination, she stated that she was 'forced to say yes' and this in turn caused a reasonable doubt in the complainant's evidence.*
>
> *(ii) THAT the learned trial Judge erred in law and in fact when he stated in his Judgement that the complainant asked for money from the Appellant and the Appellant wanted the complainant to have sex with him first for him to give her money, this is not supported by evidence and caused a grave miscarriage of justice.*

[9] The learned Judge Alone, reviewed the evidence and the trial judge's summing up to the assessors regarding the matters raised in the 2 grounds of appeal. As regards ground 1, he concluded that '" though I cannot say that at this stage that the appellant has a reasonable prospect of success in his appeal against conviction, I am inclined to grant leave to appeal so as to enable the full court to *consider the appeal with the benefit of the complete appeal record.*

[10] On ground 2, the learned Judge Alone concluded that the appellant's complaint under this ground of appeal rests on paragraph 6 of the judgment. It is as follows.

> *'... ... The evidence revealed that the complainant asked money from the accused and the accused wanted the complainant to have sex with him first, for him to give her money....'*

[11] In assessing this ground of appeal, the judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing. 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: see **Lilo v State** [2020] FJCA 51; **Ferei v State** [2020] FJCA 77; **Valevesi v State** [2020]FJCA 88

[12] This statement appears to be based on paragraph 47 of the summing-up which state:

> *'The accused said in his evidence that he admits having sex with the complainant on 19/02/16, but he did not force her. He said that they had sex because of money. She asked for money and he asked to have sex with her. He said they both agreed.'*

[13] Thus, there had been evidence to support what the learned trial judge stated in paragraph 6 [copy record page 106] of the judgment.

[14] Therefore, this ground of appeal has no prospect of success and is dismissed. On that basis leave to appeal against conviction was granted on ground 1 only.

Full Court

[15] Before we consider the sole ground for this appeal against conviction, it is not in dispute that the appellant did have sexual intercourse with the victim. The only issue is consent. The appellant argues that the victim had agreed or at least did not object to having sex with him. The victim clearly states she did not consent to sexual intercourse with the appellant on 19 February 2016 subject of count 1 of the indictment or on 26 February 2016, subject of count 2.

[16] Before the court undertakes and assessment of the evidence, it needs to be pointed that if the court are of the opinion that the point raised in the appeal against conviction or against acquittal may be decided in favour of the appellant, it may still dismiss the appeal if they consider that no substantial miscarriage has occurred: proviso to section 23(1) Court of Appeal Act 1949.

[17] At the hearing on 4 July 2023, the appellant urged the one ground of appeal for which leave to appeal against conviction, was granted by the judge alone. That ground is:

> *"that the learned trial judge erred in law and fact when he failed to fully and properly consider the contradictions in the complainants evidence in count 1, count 2 and count 6, where the complainant's had first stated in her evidence that she said 'No' to the appellant's request for sex and later on in cross-examination, she stated that she was 'forced to say yes' and this in turn caused a reasonable doubt in the complainant's evidence."*

[18] The appellant's argument on this ground is that the trial judge failed to fully and properly consider the contradictions in the evidence of the complainant when she said 'No" in her evidence at the request by the appellant to have sex and later in cross-examination she said she was "forced to say yes". Before we review the summing up given by the trial judge on this issue, the court would like to state that normally "force to say yes' is a "no" in this context because it is gained under duress. In other words, there are no contradiction on the evidence relied upon to support this ground of appeal.

[19] The trial Judge's summing on this issue is set out in page 109 of the Court Record as follows:

> *"7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. I dealing with inconsistencies, first you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistence is material and relevant or insignificant and irrelevant. If you find the inconsistency to be material and relevant, then you must consider whether there is any explanation given by the witness in question with regard to the inconsistency. If there is no such explanation or if you not satisfied with the explanation, again you have two options. You may either conclude that that particular witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.*
>
> *8. On the other hand, if you consider the consistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witnesses reliable witness notwithstanding the inconsistency."*

[20] With regard to the specific issue raised by the appellant, the trial judge in his summing up said:

> *"39. Giving evidence on what happened on 19/02/16, she said that the accused forced her to say 'yes' for them to have sex. When she said 'no', the accused got hold of her and pulled her to lie down on the bed. He removed her clothes and his clothes and then penetrated his penis into her vagina. She said she could feel the pain and she cried. She was worried that she would get pregnant. She said she did not consent for him to penetrate her vagina with his penis. She said, on both 19th February and on 26th February, she said 'no' but the accused forced her to agree to have sex.*
>
> *40. During cross examination, she said she had sex with the accused three times. She said, apart from 19th February and 26th February they had sex on a Sunday. She said the accused forced her to say 'yes' to have sex. When she was asked whether she screamed she said 'no'.*
>
> *41. Based on the accused's version of events, the complainant was asked certain questions by the court because the accused was unrepresented. Accordingly, she was asked what she has to say about the accused's version that she asked money from the accused before they had sex on 19/02/16. She said she asked money for recharge and for her body spray. Then she was asked what she has to say about the accused's version that she agreed to have sexual intercourse after having a conversation. She said the accused forced her to say 'yes'. When she was asked how she was forced by the accused to say 'yes' to have sexual intercourse, she said the accused told her to have sex. She also said, "For him to give the money first, then to say 'yes' to have sex with him in the evening."*
>
> *42. When she was asked what she has to say about the accused's version that she asked for money from the accused before they had sex on 26/02/16, she admitted asking for money. When she was asked what she has to say about the accused's version that she consented to have sex on 26/02/16, she said that she told him 'no', but the accused forced her to sleep with him."*

[21] Turning to consider the evidence relating to count 1, the rape that took place on 26 February 2016, the complainant testified that she did not consent for the appellant to insert his penis into her vagina. At page 177 of the Copy Record in reference to the sexual intercourse on 26 February 2016 the complainant stated in examination in chief as follows:

"Q: We are still on 26/02/2016, did your uncle Panapasa Ganita have sexual intercourse with you?

A: Yes

Q: How did the sexual intercourse take place?

A: I was cleaning the room. He came and locked the door. Then I ask him why did you lock the door. When I came to open the door, he got hold of me. Then he pushed me on the top of the bed. Then he tried to take off my clothes. I pushed him. I struggled. I tried to scream. He told me not to scream after this then you go outside. I pushed him away. He tried to take off my panty, also his pants. He got hold of me, he lay on top of me, then licked me. He licked my neck, my mouth, and my breast. He lay on top of me, then forcefully open my legs to insert his penis in my vagina. He inserted his penis into my vagina. I was scared and frightened. I pushed him away and I came to open the door. I did not consent for him to insert his penis into my vagina. To show him that I did not consent, I told him that I did not like what he is doing to me."

Further when the trial judge assisted the unrepresented appellant in cross-examining the complainant at page 181, the following answers were given by her;

"Ct: Accused say before you had sex intercourse with you on 19/02/2016, you asked money from him. What have you to say about it?

A: Yes, I asked for money for my recharge card and body spray

Ct: Accused say that you two had a conversation thereafter and you agreed to have sex intercourse with him. What do you have to say?

A: My uncle Panapasa forced me to say yes

Ct: How did he force you to say yes?

A: He told me to have sex. Uncle Panapasa told me to have sex in the evening

Ct: what do you mean by force, when you say forced me to say yes?

A: [She does not answer the Q] For him to give me money first, then to say yes to sex with him in the evening

Ct: Did you say 'yes" to sexual intercourse with him?

A: I said No."

[22] It is clear from the above references to the evidence of the complainant on the issue of consent to the two counts of rape charge in this case, both in examination in chief and during cross-examination by the Court on behalf of the unrepresented appellant [accused] and the summing up of the trial judge that there was clear evidence for assessors to return the verdict of guilty which they did with respect to both counts.

[23] In considering the totality of the evidence in this case the guilty verdict was open to the assessors to find and for the trial judge to accept.

[24] I find that the grounds urged in this appeal against conviction for the two counts of Rape by the appellant have no merit and is dismissed.

Qetaki, JA

[25] I have considered the judgment in draft. I agree with it and the reasoning.

ORDERS:

1. Appeal against conviction is dismissed.
2. Conviction in the High Court is affirmed.

COURT OF APPEAL FIJI

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

Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent