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

**CRIMINAL APPEAL NO.AAU 125 of 2020**
**[In the High Court at Suva Case No. HAC 011 of 2020]**

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| **BETWEEN** | **:** | **OM KRISHNA NAICKER** |
| | | ***Appellant*** |
| **AND** | **:** | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | **:** | **Prematilaka, RJA** |
| **Counsel** | **:** | **Appellant in person** |
| | **:** | **Mr. R. Kumar for the Respondent** |
| **Date of Hearing** | **:** | **06 October 2023** |
| **Date of Ruling** | **:** | **11 October 2023** |

# RULING

[1] The appellant had been charged with two counts of digital rape. The allegations were that he sexually penetrated the vulva and anus of a three-year-old child with his finger on 02 April 2019 at Vatuwaqa.

[2] The assessors had opined that the appellant was guilty of the two counts and having agreed with the assessors' opinion, the trial judge had convicted the appellant accordingly and sentenced him on 22 October 2020 to an aggregate sentence of 12 years' imprisonment with a non-parole period of 09 years.

[3] The appellant had lodged in person a timely appeal against conviction and sentence.

[4] The appellant's appeal against conviction and sentence is timely. 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] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The trial judge had summarized the facts in the sentencing order as follows.

> *'[1] The offender was a friend of the victim's father. He came to stay with the victim's family as a co-tenant at Vatuwaqa, Suva when he was in need of an accommodation. The offender is originally from Labasa. Very little is known about his own family. He is 32 years old and single. When he came to Suva from Labasa he worked as a labourer and earned about $150.00 per week to support himself.*
>
> *[2] At the time of the offending, the victim was 3 years old. The incident occurred on 2 April 2019. On the day of the incident the victim was under the care of a babysitter who lived next door to the victim. When the offender returned home from work that evening, the child was left alone with the offender while her mother was still at work. While the victim was under the care of the offender he touched her naked vulva and anus. The victim told the court that the offender used his index finger to touch the inside of her genitals and anus.*
>
> *[3] A neighbour who heard the victim's distress call went to the scene and saw the offender's hand on the victim's thighs over her tights. When the victim's mother returned home that evening she found the victim was distressed and the victim told her that the offender had done something to her.*

[7] The summing-up has the following narrative as well.

> *'[23] In relating to the alleged incidents, the complainant told the court that she is now 5 years old and goes to kindergarten. She said she does not like the Accused because he had touched where she pass stool and urinate after removing her panty when she was alone with him in the sitting room of her home. She said the Accused used his index finger to touch her. She said he put his finger inside where she urinate and pass stool and that she didn't like it. She said she told him not to do it and then he poked her with a pencil. She said she told her mum what the Accused did the same day when she returned home from work.*
>
> *[24] In this case, the child complainant was of very tender age (3 years old) at the time of the alleged incidents. She gave evidence that the Accused tickled her and had also touched her private parts. Her complain to her mother was that the Accused did something to her without giving details of what the Accused had done to her.*
>
> *[27] The third witness was the complainant's mother Namrata Prasad. She said when she arrived at her home from work on the night of 2 April 2019 the complainant came to the front gate and started complaining that the Accused did something to her. Ms Prasad said when she confronted the Accused he acted as if he didn't know anything….'*

[8] The prosecution had called only the victim, a neighbor and the victim's mother. The appellant had given evidence on his behalf. His evidence as per the summing-up was as follows.

> *'[29] The defence called the Accused to give evidence. The Accused told the court that on 2 April 2019 he returned to his home from work around half past six. He said when he arrived home he saw the complainant was crying because her mother was not at home. He called on her mobile but she did not answer. But he told the complainant that her mother was on her way to calm her down. She was quite for a while and when her mother did not turn up she started crying again. At that moment she was in the kitchen. He said he went to her and told her that her mother was on her way and he tickled her underneath her arms and her legs. After tickling her he went to have his shower. He said at no time he had touched the complainant's private parts. He said that Farisha never came to his home that night. He said when the complainant's mother confronted him with the allegation that he had touched the complainant's private parts he told her he didn't do it.*

[9] The grounds of appeal urged by the appellant are as follows.

*'**Convictions:***

***Ground 1 (20 October 2020)***

*THAT the conviction was unreasonable and cannot be supported by evidence, more particularly as to the inconsistencies in the evidence of the second and third prosecution witnesses: (i) The second prosecution in cross-examination by the defence and by the Honourable Court conceded to having told a version of events in examination –in-chief which was incorrect; and (ii) The third prosecution witness agreed to not being present at the scene and hearing to see the event with her own eyes and hearing the events with her own ears when it allegedly happened; and (ii) There was strong inference that the allegation being framed against the appellant.*

***Ground 2 (12 February 2021)***

*THAT the learned trial Judge erred in law when His Lordship misdirected himself with regard to the burden of proof causing a miscarriage.*

***Ground 3 (12 February 2021)***

*THAT the learned trial Judge erred in law when His Lordship did not direct the assessors hold to assess the inconsistent statement of the complainant of miscarriage of justice.*

***Ground 4 (11 October 2021)***

*THAT the learned trial Judge made a pure error of Law when he convicted the appellant of digital rape in the absence I. Independent evidence namely Police Medical Report, and II. IN absence of any independent evaluation done by the learned trial Judge pertaining the veracity of the three (03) year old complaint's evidence.*

***Ground 5 (11 October 2021)***

*THAT the learned trial Judge erred in law by convicting the appellant of digital Rape when the evidence of the complainant was inconsistence with the charge of Rape.*

***Ground 6 (11 October 2021)***

*THAT the learned trial Judge erred in law by convicting the appellant solely on the complainant's evidence and without ascertaining as to why there was no medical examination done in this case when the complainant was of such a tender age (03 years old).*

***Ground 7 (27 June 2023)***

*THAT the learned trial Judge erred in law and fact by convicting the appellant when conviction cannot be supported having regards to the totality of evidence presented at trial resulting into substantial miscarriage of justice.*

***Ground 8 (27 June 2023)***

*THAT the learned trial Judge erred in law and by failing to make an independent assessment of the evidence before affirming the verdict of guilt which was unsafe, unsatisfactory and insecure resulting into substantial miscarriage of justice.*

***Ground 9 (27 June 2023)***

*THAT the admissibility of recent complaint evidence and the judge's direction as to the use to be made of such evidence by the assessors.*

***Ground 10 (27 June 2023)***

*THAT the learned trial Judge erred in law and fact by failing to set out the evidence in the Judgment on which he relied upon and failing to give his mind to the crucial aspects presented at trial resulting into substantial miscarriage of justice.*

***Ground 11 (27 June 2023)***

*THAT the learned trial Judge erred in law and fact by failing to direct himself and the assessors the probabilities, improbabilities, truthfulness and falsehood of the prosecution case resulting into substantial miscarriage of justice.*

***Ground 12 (27 June 2023)***

*THAT the learned trial Judge misdirected the assessors in paragraph 15 of the Summing Up that a witness may tell the truth about one matter and lie about another: he or she may be accurate in saying one thing and be wide of the mark about another resulting into substantial miscarriage of justice.*

***Ground 13 (27 June 2023)***

*THAT the learned trial Judge erred in law and fact in paragraph 4 of the Judgment that I believe the complainant's account that the accused penetrated her external genitalia and anus with his finger after removing her underwear when the no evidence was brought out in evidence by the doctor [to confirm the allegation/ offence therefore causing prejudice to the appellant.*

***Ground 14 (27 June 2023)***

*THAT the learned trial Judge erred in law and fact by failing to consider that prosecution case raised reasonable doubts and case was not proved on the charge thereby failure to give a benefit of that doubt to the accused resulted into substantial miscarriage of justice.*

***Ground 15 (27 June 2023)***

*THAT the learned trial Judge erred in law and fact by failing to consider in his Judgment what revealed by the cross-examination and evidence seriously differed on what PW2 suggested as a result the contradicting version led to substantial miscarriage of justice.*

***Sentence:***

***Ground 16 (12 February 2021)***

*THAT the appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstance of the case.*

***Ground 17 (12 February 2021)***

*THAT the learned trial judge erred in law and in fact in taking irrelevant matter into consideration when sentencing the appellant and not taking into relevant consideration.*

***Grounds 1, 7, 11 & 14***

[10] The gist of these grounds is that the verdict is unreasonable or cannot be supported having regard to the evidence.

[11] The test is that whether due to alleged inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence and in light of defence evidence, the assessors, acting rationally, ought to have entertained a reasonable doubt as to proof of the appellant's guilt. To put it another way whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt (see **Rainima v State** [2023] FJCA 190; AAU011.2019 (28 September 2023) at [43] & [44]).

[13] As the trial judge had remarked, the prosecution case was wholly dependent on the evidence of 05 year-old girl (PW1- at the time of the incident she was just 03 years old).

[14] PW1 had given very straightforward evidence and robustly cross-examined. The appellant has not demonstrated any material inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the child victim's evidence which ought to have made her evidence incredible in the eyes of the assessors and the trial judge.

[15] The evidence of PW2, a neighbour had not taken the case against the appellant much further due to some conflicts in her evidence. The trial judge had fairly and squarely placed the conflicts in the evidence of PW2 and taken her version most favourable to

the appellant. It lends not a great deal of support to the prosecution case except some corroboration of PW1's account of events in some measure.

[16] The mother's evidence (PW3) could be best described as distress evidence rather than recent complaint evidence. However, what is important is that the first complaint by PW1 was very prompt and PW3's reporting to police too was equally prompt.

[17] All the evidence had been placed before the assessors in its true perspectives. I think despite perceived shortcomings in the evidence of PW2 and PW3 that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of guilt beyond reasonable doubt.

***Ground 2***

[18] There is no merit at all in this complaint as paragraph 4 of the summing-up has adequately dealt with burden and standard of proof.

***Ground 3, 5 and 12***

[19] There is no issue about the victim's evidence being pre-recorded on a video and presented at the trial. The trial judge had dealt with this mode of taking evidence of witnesses of tender years at paragraph 8 of the summing-up. This had been agreed upon by both parties at pre-trial stage.

[20] PW1 had told that she did not like the appellant because he had touched where she passed stool and urinated after removing her panty when she was alone with him in the sitting room of her home. She had said that appellant used his index finger to touch her and put his finger inside where she urinated and passed stool and that she didn't like it.

[21] The trial judge had correctly directed the assessors and himself that the real issue to be determined was whether the appellant penetrated the external genitalia and anus of the victim with his finger as alleged on counts one and two. The child victim's evidence alone had proved all elements of the two counts.

[22] The trial judge had properly directed the assessors how to approach the evidence and objectively assess it from paragraphs 14-16 including a direction on divisibility of credibility.

***Ground 4, 6 and 13***

[23] Medical report is not a *sine quo none* to prove a charge of rape. Nor should the victim's version be corroborated otherwise. The trial judge had indeed evaluated the evidence of the child victim in that having directed himself in accordance with the summing up and after looking at all the evidence the judge had felt sure that the victim's account was true. He had believed her account that the appellant penetrated her external genitalia and anus with his finger after removing her underwear when she was left alone with the appellant at her home on 2 April 2019.

[24] The trial judge had stated in the sentencing order for a possible reason for not having a medical examination done on the victim. The judge had said that there was no evidence that the offender's conduct caused any physical injury to the victim's private parts and the only cogent explanation for the lack of physical injuries to the victim's private parts was that the penetration was fleeting. The trial judge's reasoning must have been based on his reading of the totality of the evidence. In any event, a penetration of vulva and anus with a finger need not necessarily have caused physical injuries despite the victim having felt pain.

***Ground 8 & 10***

[25] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [ **Rainima v**

**State** [2023] FJCA 190; AAU011.2019 (28 September 2023) & **Fraser v State** [2021] FJCA 185 ; AAU128.2014 (5 May 2021)].

[26] 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 (vide ***Rainima*** v & ***Fraser*** )

[27] The trial judge's summing-up had been a well-rounded, objective and analytical discourse covering all aspects of the case. The judge had directed himself according to the summing-up and therefore there was no need to repeat the same over and again in the judgment which is short and concise.

***Ground 9***

[28] It is doubtful whether there was really recent complaint evidence in the case. PW1's complaint to her mother was that the appellant did something to her without giving details of what he had done to her. The complainant's mother Namrata Prasad had said that when she arrived at her home from work on the night of 2 April 2019 the daughter came to the front gate and started complaining that the appellant did something to her. Thus, there does not appear to be any evidence of recent complaint of sexual nature. There is also a question whether it is reasonable to strictly expect a 03 year-old to come out with evidence of material and relevant unlawful sexual conduct on the part of the accused as required in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[29] However, when the victim's mother returned home that evening she found that the victim was distressed and even if the so-called recent complaint is disregarded there had been evidence of distress (see **Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021) & **Tuagone v State** [2021] FJCA 86; AAU136.2018 (31 March 2021)]. Nevertheless, the trial judge's directions on recent complaint evidence cannot be faulted.

> *[27] ……..There is a further direction that I wish to give you regarding the complaint evidence. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant, which may help you to decide whether or not the complainant has told you the truth. It is for you to decide whether the evidence of this complaint given to a mother (that the Accused did something) helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between the complainant and the Accused, and it therefore cannot itself prove that the complaint is true. You must consider these matters if you decide to rely upon the complaint evidence to assess whether the complainant's evidence is consistent and therefore believable*

[30] However, the conviction as pointed out before, could be based on the child victim's evidence alone without the alleged recent complaint evidence.

***Ground 16 & 17 (sentence)***

[31] I have examined the sentencing order in the light of the appellant's complaints of the sentence being harsh and excessive and based on relevant maters not being considered and irrelevant matters being considered.

[32] I do not see any merits in them which are simply 'shot gun' criticisms based on hope than on substance. The only criticism, if levelled against the sentence could possibly be that it tilts too much towards the lower side of the scale.

[33] Thus, there is no overall reasonable prospect of success in the appeal (vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019).

**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**