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

CRIMINAL APPEAL NO. AAU 164 of 2020
[In the High Court at Lautoka Case No. HAC 33 of 2017]

BETWEEN	**:**	**PRASHANT RAJU**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. L. Burney for the Respondent**
Date of Hearing	**:**	**04 December 2023**
Date of Ruling	**:**	**05 December 2023**

RULING

[1] The appellant had been charged in the High Court at Lautoka on two representative counts of sexual assault and one count of rape. The victim (aged 09) was the appellant's biological daughter. The charges are as follows:

'COUNT ONE

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

PRASHANT RAJU, *between the 1st January, 2015 and the 31st of December, 2015 at Nadi in the Western Division, unlawfully and indecently assaulted "PW" a 9 year old girl, by licking her vagina and sucking her breasts.*

COUNT TWO

[REPRESENTATIVE COUNT]

Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

PRASHANT RAJU, *between the 1st January, 2016 and the 30th of November, 2016 at Nadi in the Western Division, unlawfully and indecently assaulted "PW" a 9 year old girl, by licking her vagina and sucking her breasts.*

COUNT THREE

Statement of Offence

RAPE*: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

PRASHANT RAJU, *between the 1st January, 2016 and the 30th of November, 2016 at Nadi in the Western Division, had carnal knowledge with "PW", a 10 year old girl.'*

[2] The assessors had unanimously opined that the appellant was guilty of all counts. Having agreed with their opinion, the trial judge had convicted the appellant accordingly and sentenced him on 08 June 2020 to an aggregate sentence of 17 years 10 months and 15 days imprisonment with a non-parole period of 16 years after deducting a period of remand of 01 month and 15 days.

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

[4] 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].

[5] The trial judge had summarized the facts in the sentencing order as follows:

> *'2. The brief facts were as follows:*
>
> *In the year 2015 the victim was 9 years of age, she lived with her parents and other siblings at Solovi, Nadi. The accused is her father, from the middle of November 2015 to November 2016 the accused would come into the victim's bedroom, after removing her clothes he would lick her vagina and suck her breasts for about 4 to 5 minutes.*
>
> *3. The victim also recalled that during Diwali time in 2016 the accused came into her room removed his clothes and also her clothes and then started licking her vagina and sucking her breasts. The accused then went on top of the victim and had sexual intercourse by penetrating her vagina with his penis for about two to three minutes. According to the victim this act of sexual intercourse happened once only, however, the accused had licked the victim's vagina and sucked her breasts on four different occasions. The accused did these to the victim when her mother and other siblings were not at home.*
>
> *4. The victim did not tell anyone about what the accused had done to her since she was threatened by the accused on all occasions that if she told anyone or her mother he will kill or hurt her.*
>
> *5. In late 2016 the complainant, her mother and her siblings left their family home at Solovi and went to stay at the Loloma Home. At the Loloma Home the victim met Adi Laite to whom she told what her father had done. The matter was then reported to the police.*

[6] The prosecution had called the victim (PW1) and Adi Laite, the Director of Loloma Home and Care Centre and medical evidence. The appellant and his wife (victim's mother) gave evidence on his behalf.

[7] The grounds of appeal urged by the appellant are as follows:

> ***Conviction:***
>
> ***Ground 1:***
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> *THAT the guilty verdict on the single count of rape and on the other (2) counts of sexual assault was unreasonable and perverse having regard to the whole evidence led at the trial thus the conviction of the appellant ought to quashed accordingly.*
>
> ***Ground 2:***
>
> *THAT the recent complainants evidence was doubtful whereas the complainant's evidence on oath that she was raped ten (10) times.*
>
> ***Ground 3:***
>
> *THAT the defense of the appellant was not properly considered by the trial court being supported by his wife's evidence on oath.*
>
> ***Sentence:***
>
> ***Ground 4:***
>
> *THAT the non-parole term being too close to the head sentence.*

Ground 1

[8] The appellant argues that the conviction is unreasonable and cannot be supported having regard to the evidence.

Legal test applicable

[9] When a ground of appeal as above is raised, at a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence

the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way 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 jury to be satisfied beyond reasonable doubt of the commission of the offence [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021)]. The decisions in **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) were relied upon by the court in formulating the above test.

[10] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[11] It has been said many a time that the trial court has a considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and the appellate court should not lightly interfere and there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[12] The appellant submits that the medical evidence, though showing the absence of hymen, creates a doubt whether there had been penetration of the victim's vagina at all and in any event how it could have happened whether by digital penetration or penile penetration. He also submits that the victim's evidence cast doubt as to whether any sexual assault ever took on occasions and places as described by her, for seemingly lack of opportunity. These complaints were placed in adequate measure before the assessors by the trial judge who also had the advantage of seeing the victim still aged 09-10 years, giving evidence against her biological father. Both the assessors and the trial judge in unanimity had believed the victim's evidence and rejected the defence evidence which they were as fact finders entitled to do.

[13] Having applied the above tests to the facts of this case, I am convinced that upon the whole of the evidence it was open to the assessors to be satisfied of appellant's guilt beyond reasonable doubt. Similarly, the trial judge also could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). Therefore, the verdict of guilty is reasonable and could be supported having regard to the evidence (see section 23(1)(a) of the Court of Appeal Act).

Ground 2

[14] The appellant submits that recent complaint evidence of PW2 could not be relied upon in as much as the victim had told PW2 that the appellant had raped her 10 times but no allegation of sexual assault whereas she said under oath that she was raped only once and a few of sexual assaults were also performed on her. Had the victim fabricated an allegation of rape against the appellant she could have stuck to her story narrated to PW2. The fact that the victim confined herself only to one instance of rape shows that she was being truthful in court.

[15] In any event, the existence of inconsistencies by itself would not impeach the creditworthiness of a witness and that it would depend on how material they are – **Laveta v State** [2022] FJCA 66; AAU0089.2016 (26 May 2022). The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic

version of the witnesses cannot be annexed with undue importance [**Mohammed Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) & **Krishna v The State** [2021] FJCA 51; AAU0028.2017 (18 February 2021)].

[16] Similarly, the trial judge had adequately addressed the assessors on the delay in reporting. The victim had clearly explained why she did not complain even to her mother as she was on the appellant's side and the victim was later proved right as the mother became a defence witness. In addition, the threats issued by the appellant also had deterred the victim from early reporting of sexual abuse. The victim's explanation satisfies the 'totality of circumstances' test used to assess a complaint of belated reporting, adopted by the Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

Ground 3

[17] The appellant complains that the prosecution had not rebutted his evidence of lack of opportunity to commit the offences and therefore the conviction is unsafe and dangerous. It was a matter for the fact finders to decide whether any reasonable doubt had arisen in the prosecution case as a result of defence evidence. A verdict being unsafe and dangerous is not the test applicable in Fiji under section 23(1) of the Court of Appeal Act.

[18] In any event, the trial judge had directed the assessors as follows in more favourable terms to the appellant than directing the assessors to see whether the prosecution had rebutted defence evidence.

> *'118. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
>
> *119. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*

120. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.'

[19] I do not see any reasonable prospect of this ground of appeal either.

Ground 4 (sentence)

[20] 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)]. The approach taken by the appellate court in an appeal against sentence 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)]; if outside the range, whether sufficient reasons have been adduced by the trial judge.

[21] The sentence imposed by the trial judge is within the tariff of 11-20 years (see **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018). The gap of nearly 02 years between the non-parole period and the head sentence is sufficient to allow for rehabilitation and achieve deterrence as well [see **Tora v State** [2015] FJCA 20; AAU0063.2011 (27 February 2015)].

Orders of the Court:

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

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent