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

CRIMINAL APPEAL NO. AAU 008 of 2021
[In the High Court at Lautoka Case No. HAC 143 of 2017]

BETWEEN	:	**MOTUISELA TAWAKE**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person** **Ms. S. Shameem for the Respondent**
Date of Hearing	:	**18 December 2023**
Date of Ruling	:	**19 December 2023**

RULING

[1] The appellant had been charged in the High Court at Lautoka with one 'assault with intent to commit rape' count, one 'sexual assault' count and one 'rape' count. The charges are as follows:

> *'**COUNT ONE***
> ***Statement of Offence***
>
> ***ASSAULT WITH INTENT TO COMMIT RAPE:*** *Contrary to section 209 of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***MOTUISELA TAWAKE*** *on the 10th of July, 2017 at Nadi in the Western Division assaulted "PS" with intent to rape the said "PS".*

COUNT TWO
(Representative Count)
Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.*

Particulars of Offence

MOTUISELA TAWAKE *on the 10th of July, 2017 at Nadi in the Western Division, unlawfully and indecently assaulted "PS".*

COUNT THREE
Statement of Offence

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

Particulars of Offence

MOTUISELA TAWAKE *on the 10th of July, 2017 at Nadi in the Western Division penetrated the anus of "PS" with his penis without his consent.'*

[2] After the prosecution closed its case, the trial judge had ruled that the appellant had a case to answer in respect of count one (assault with intent to commit rape) and count three (rape). In respect of count two the judge had ruled that the appellant had no case to answer in respect of the offence of sexual assault but had a case to answer in respect of the lesser offence of indecent assault.

[3] The assessors had returned with a majority decision that the appellant was guilty of assault with intent to commit rape, lesser count of indecent assault and rape. Having agreed with their opinion, the trial judge had convicted the appellant accordingly and sentenced him on 15 December 2020 to an aggregate sentence of 11 years 09 months and 10 days imprisonment with a non-parole period of 09 years.

[4] 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)].

[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:

> 2. *'The brief facts were as follows:*
>
> > *On 9th July, 2017 the victim was drinking alcohol with the accused and a few others at various places in Nadi. The drinking ended the next day near Sikituru Village, by this time the others had left. The accused told the victim he will take him to the place where the others were drinking when they were approaching a cassava patch the accused told the victim that he wanted to have anal intercourse with the victim. When the victim refused, the accused threatened him and punched him three times on his face which made the victim fall.*
>
> 3. *After the victim had fallen the accused lifted the victim's legs, put them on his shoulders and after removing the victim's underwear inserted his penis into the victim's anus.*
> 4. *The accused did this repeatedly, the victim felt pain he wanted to shout but the accused was biting his lips and threatened to kill him if he shouted. At this time, the accused also bit the victim's neck and chest as well.*
> 5. *The accused stopped when he ejaculated, when the accused was penetrating his penis into the anus of the victim he felt pain, was injured and also his stool came out.*

6. *The matter was reported to the police, the victim was medically examined which revealed that there were lacerations on the anal area of the victim and brutal bite marks were seen on the victim's body.'*

[7] The prosecution had called two witnesses and the appellant had given evidence. His defense had been one of consent.

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

Conviction:

Ground 1:

THAT the Learned Trial Judge did not properly direct the assessors on the issues of inconsistencies of evidence of the complainant in accordance to the guidelines established in the Swadesh Singh v State which followed Gyan Singh v State. The failure to follow the Supreme Court guideline contravenes section 18 (6) of 2013 Constitution.

Ground 2:

THAT the Learned Trial Judge verdict acquitting the appellant on a count of sexual assault guilty of rape and assault with intent to commit rape meant that the verdict was inconsistent and hence findings of the court has miscarried the failure to properly assess the entire evidence was contrary to principles in Praveen Ram v State.

Sentence

THAT the Learned Trial Judge erred in law and fact in not giving proper discount for good character.

Ground 1

[9] The existence of inconsistencies by themselves 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 **[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)].

[10] The trial judge had pointed out to the assessors the inconsistencies brought up in the course of cross-examination of the complainant at paragraphs 59-61. He had directed the assessors as to how they should evaluate the inconsistencies at paragraphs 63-65 of the summing-up which are by and large in line with the correct legal principles as stated above. The trial judge once again given his mind to such inconsistencies at paragraphs 21 and 22 of the judgment and concluded that the inconsistencies were not significant to adversely affect the reliability of the complainant's evidence.

Ground 2

[11] The appellant's argument is based on inconsistent verdicts. He argues that having been acquitted of sexual assault, he could not have been convicted for rape and assault with intent to commit rape and indecent assault. An appellant who asserts that two verdicts are inconsistent with each other, 'must satisfy the court that the two verdicts cannot stand together' - Devlin J in **R v Stone** (13 December 1954) (unreported). The Court of Appeal in the recent case of **State v Khan** [2023] FJCA 141; AAU122.2015 (28 July 2023) delved deep into a discussion on a similar complaint.

[12] In Fiji, **Balemaira v State** [2013] FJSC 17, CAV0008 of 2013 (6 November, 2013) and **Vulaca v State** [2013] FJSC 16; CAV0005.2011 (21 November 2013) followed the well-known case of **Mackenzie v R** (1996) 190 CLR 348 where the High Court of Australia held that the test that is applied in dealing with questions of inconsistent verdicts 'is one of logical reasonableness'.

[13] If a verdict is to be set aside as being unreasonable it must be a situation where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis, the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise - **R v Mc Shannock** (1980) 44 CCC (2d) 53 (Ont C.A) at p.56.

[14] In ***Mackenzie*** it was held:

> *'A distinction must be drawn between cases of legal or technical inconsistency and cases of suggested factual inconsistency. The former will generally be easier to*

resolve. On the face of the court's record there will be two verdicts which in law, cannot stand together. Examples include the case where the accused was convicted both of an attempt to commit an offence and the completed offence or of being, in respect of the same property and occasion, both the thief and the receive. There are other like cases. Where technical or legal inconsistency is established, it must be inferred that the jury misunderstood the judge's directions on the law; compromised disputes among themselves; or otherwise fell into an unidentifiable error. The impugned verdict or verdicts must be set aside and appropriate consequential orders made' (at page 82).*'*

[15] Considering the appellant's complaint in the light of the above legal framework, I see no basis to call the verdicts as inconsistent verdicts. The summing-up and the judgment clearly show the legal and factual basis for them to exist side by side. Acquittal of sexual assault and conviction of rape, assault with intent to commit rape and indecent assault does not lead to a legal/technical inconsistency or a factual inconsistency.

Ground 3 (sentence)

[16] Contrary to the appellant's assertion, the trial judge had indeed given a discount of 01 year for his previous good character which cannot be termed as totally inadequate.

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