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

CRIMINAL APPEAL NO.AAU 154 of 2017
[High Court of Lautoka Criminal Case No. HAC 163 of 2013]

BETWEEN	**:**	**VINIT VIKASH CHAND**
		Appellant
AND	**:**	**THE STATE**
		Respondent

Coram	**:**	**Prematilaka, RJA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	**:**	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	**:**	**09 February 2023**
Date of Judgment	**:**	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court at Lautoka on one count of rape contrary to section 207(1) and (2)(c) and (3) of the Crimes Act, 2009 and one count of attempt to commit rape contrary to section 208 of the Crimes Act, 2009 committed on 08 July 2013 at Nadi in the Western Division.

[2] Under the 01st count it was alleged that the appellant inserted his penis into the mouth of R (real name withheld) and under the 02nd count he was alleged to have attempted to insert his penis into the anus of R. R was a 08 year old boy at the time of the incident. The appellant was his cousin and 21 years of age at that time.

[3] After trial, the assessors had expressed a unanimous opinion of guilty on both counts. The learned High Court judge had agreed with the assessors and convicted the appellant as charged. He was sentenced on 09 October 2017 to 09 years, 10 months and 20 days of imprisonment for rape and 04 years of imprisonment for attempted rape; both sentences to run concurrently with a non-parole period of 08 years.

[4] A judge of this court sitting alone refused leave to appeal against conviction and sentence. The appellant has renewed his appeal before the full court on the following grounds of appeal.

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact in not adequately/sufficiently referring/directing/putting/considering and or misdirecting himself and the assessors on the confessional statement that was allegedly made by the appellant.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in fact in not analysing all the facts before him before he made a decision that the appellant was guilty as charged on the charge of Rape.*
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> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in facts before him before he made a decision that the appellant was guilty as charged on the charge of Rape. Such error of the learned trial judge in law by failing to make an independent assessment of the evidence before affirming a verdict was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.*
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> ***Ground 4***
>
> *THAT the Learned Trial Judge erred in law and in facts in not directing himself and/or the assessors to refer to any Summing Up the possible defence on evidence and as such by his failure was a substantial miscarriage of justice.*
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> ***Ground 5***
>
> *THAT the Learned Trial Judge erred in law and in facts in not adequately/sufficiently/ referring/directing/putting/considering himself or the assessors the evidence of the appellant on oath.*

THAT the learned judge has erred by failing to summarise and to analyse the evidence in his summing-up by stating "I don't propose to go over the evidence it will be fresh in your mind".

Ground 6

THAT the Learned Trial Judge erred in law and in facts in not adequately directing/misdirecting himself the previous inconsistent statements made by the prosecution witnesses and as such there has been a substantial miscarriage of justice.

THAT the learned trial judge failed to direct the assessors and himself carefully and in detail with regard to the inconsistencies' of evidence.

Ground 7

THAT the Learned Trial Judge erred in law and in fact mistaking the facts in his Judgment, Summing Up and Sentence in which 'fresh evidence' is admitted to assist the Full Bench to have regard to in which the facts pertaining to evidence mistaken led to a substantial miscarriage of justice.

Ground 8 *- (sentence)*

That the Appellant's appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

Ground 9

That the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

Ground 10

That the Learned Trial Judge erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree2009 when he passed the sentence against the Appellant."

[5] On 08 July 2013, the appellant had accompanied the victim (R), who was his cousin to help him sell coriander or dhania for his pocket money. He had taken R under a mango tree and asked him to suck his penis. When the victim tried to run away, the appellant had forcefully opened his mouth and inserted his penis into R's mouth. Then, the appellant had spat in R's anus and forced him to sit on his erected penis. In the cautioned statement, the appellant had voluntarily admitted making R suck his penis and rubbing his erected penis on his anus. R had promptly complained to his uncle, his mother and the headmaster.

[6] The appellant had given evidence and said that on 08 July 2013, he was released from work early and came home around 4.30 pm. His cousin R came when he was riding his bicycle in the compound. The appellant's father had told him to accompany R and help him to sell coriander. The appellant went with R to his uncle's place, to sell coriander. R was on his foot. He did not allow R to sit on the bicycle because there was no brake. He came near the school and parked the bicycle there to help Pulu to repair the pipe. After repairing the pipe, he came looking for the bicycle, but he could not find it there. After that he found out from an iTaukei man that R had taken the bicycle and thrown it near a slope. He got angry because bicycle was broken. Then he rode the bicycle very fast looking for R. He found R walking towards his house. He stopped and slapped him once. R told him that he will go home and tell that *'you had done vulgar things to me'*.

01st ground of appeal

[7] The appellant had made submissions under subheadings (a) to (e).

Sub-heading (a)

[8] His complaint made under (a) is that contrary to what has been recorded as the end, his cautioned interview was recorded in Hindi and translated to English. It is clear that DC 3260 Vishal Kumar's note at the end that he translated it from English to Hindi is an obvious error. The cautioned statement commences with the correct title 'Translation of Cautioned Interview of Vinit Vikash Chand from Hindustani to English language' showing that it was how the translation was done.

Sub-heading (b)

[9] Subparagraph (b) deals with the voluntariness of the cautioned interview. Contrary to his assertion that he made the confessions in the absence of his father, it appears that on the first day of the interview at Q & A 50-54 the appellant had confessed to both acts of rape and attempted rape when his father was present. On the discrepancy regarding the distance from the main road to the mango tree, it is the appellant who

had stated at Q & A 47 that it was 100m away whereas the rough sketch drawn by the police officer has shown that it was 10m away which is more plausible. Both the appellant and the police officer have confirmed the presence of the mango tree at the crime scene.

Subheading (c)

[10] If the appellant so wished, he could have called 'Munnu' and or 'Pandit Sanjay' whom the appellant allegedly helped repair the pipe showing that he was with them (at the time of the alleged sexual abuses, an *alibi* of some sort) while the victim had allegedly gone away with the appellant's bicycle. There was no obligation on the part of the prosecution to call any of these witnesses as in the prosecution case theory no such scenario took place.

Subheading (d) & (e)

[11] The appellant is clearly wrong in alleging that no *voir dire* was held. *Voir dire* grounds are at page 104. *Voir dire* proceedings had commenced and ended on 18 September 2017 at pages 290-340 and the ruling at page 99 had been delivered on 19 September 2017.

02nd (a) & (b) and 03rd grounds of appeal

[12] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021), the Court of Appeal summarized from several past decisions as to the obligation a trial judge carries in agreeing with the assessors.

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that 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 [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]'*

[25] In my view, in either situation 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.'

[13] Having examined the judgment, I cannot agree with the appellant's complaint that the trial judge had not discharged his obligation in agreeing with assessors. He had directed himself according to the summing-up and need not have repeated the same discussion in the judgment. However, the trial judge had reflected on all important issues relating to the child victim's evidence, recent complaint evidence and the appellant's confession and why he disbelieved the appellant.

[14] The appellant has referred to a letter dated 13 July 2020 (even after the single judge ruling) submitted by the parents of the child victim stating that they do not want to proceed with the case as *'we do not know whether this incident had happened or not'*. Needless to say that this letter has no relevance to the appellant's conviction though the two families may have reconciled according to the evidence.

[15] The appellant's complaint that the medical report does not reveal any injuries has no merits at all. Firstly, neither party led it in evidence. Secondly, there may not have been observable injuries anyway in as much as the act of rape was penetration of the victim's mouth and the other allegation was only relating to an attempt to commit anal rape.

[16] In respect of the 03rd ground of appeal, the appellant has not demonstrated how the trial judge had failed to make an independent assessment of evidence.

04th ground of appeal

[17] It is the duty of a trial judge in Fiji to decide whether on the evidence he should direct the assessors and himself on the availability of any alternative defence or verdict that is not raised by the defence (vide **Praveen Ram v The State** [2012] 2 Fiji LR 34.)

[18] The appellant's defence was a denial. Yet, it might be suggested that the appellant had impliedly spoken to an *alibi* when he said that he was with Pulu helping him to repair the pipe but after repairing the pipe, he came looking for the bicycle, but he could not find it there. After that he found out from an iTaukei man that R had taken the bicycle and thrown it near a slope. He got angry because bicycle was broken and he rode it very fast looking for R. When he found R walking towards his house, he stopped and slapped him once. R told him that he will go home and tell that 'you had done vulgar things to me'. Thus, it might be remotely argued that what the appellant had said was that he was with Pulu at the time he allegedly committed raped and attempted rape.

[19] However, the appellant's counsel did not file an *alibi* notice in terms of Section 125 of the Criminal Procedure Act, 2009 which would have enabled the prosecution to check the veracity of the appellant's story. Secondly, the appellant's evidence was a denial of the allegations of sexual abuse rather than an *alibi*. The case theory of the defence was not that of an alibi. R admitted that he went to sell dhania with the appellant on the bicycle the appellant was riding but said that he could not recall whether the appellant had gone to a school with him and the appellant was helping somebody to fix a pipe. R denied that he had taken the appellant's bicycle while the appellant was fixing the pipe and then throwing it to a swampy place. He also denied that the appellant had slapped him because he had thrown his bicycle in a swampy place. He also denied that he had made up an allegation against the appellant because he was angry of the slap.

[20] Evidence of alibi means *'evidence tending to show by reason of the presence at a particular place or in a particular area at a particular time he was not, or was unlikely to have been at the place he was not, or was unlikely to have been at a place where the offence is alleged to have been committed at the time of its alleged commission'* per Fatiaki, J in **Andrew Ian Carter v State (**1990) 36 FLR 125).

[21] There was no such a factual basis in this case as required for an *alibi* to be placed before the assessors. The above evidence of the appellant and that of the prosecution did not reach the minimum evidential and factual threshold to trigger the trial judge's duty to place it before assessors and for the judge to direct himself in the judgment.

05th ground of appeal

[22] The learned trial judge had fully summed-up to the jury the defence case at paragraphs 64-71 and then at paragraphs 77-78. Having directed himself in accordance with the summing-up, the trial judge had concluded that the appellant's evidence was not credible and the appellant had admitted that he lied to police and also to court under oath.

[23] Similarly, the learned trial judge had fully summed-up to the jury the prosecution case at paragraphs 39-61. Thus, I do not find fault at all with the trial judge's statement at paragraph 38 of the summing-up.

> *'I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. It was a short trial and I am sure thing are still fresh in your minds. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.*

06th ground of appeal

[24] The appellant attempts to show inconsistencies of R's police complaint with those of other witnesses erroneously assuming that recent complaint evidence refers to

witnesses' police statements. However, in the context of the case, recent complaint evidence came from R's uncle Ami Chand (PW2) who even confronted the appellant with the allegation immediately, R's mother Jyotika Prasad (PW3) and his headmaster Amal Kumar (PW4). R had complained to PW2 and PW3 soon after the incident and two days later to his headmaster. Any other alleged inconsistences with police statements had to be brought out during the trial and if not, they do not become part of the proceedings. The alleged inconsistency between 'mango tree' and 'tree' has no substantial effect on R's evidence.

[25] As stated in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) there were no discrepancies in the evidence of prosecution witnesses that could shake the foundation of the prosecution case.

> *'[13]…….. 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 (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

07th ground of appeal and application for fresh evidence

[26] The fresh evidence the appellant seeks to adduce is a letter from R's parents dated 15 July 2020 and three character certificates of three other persons.

[27] Section 28 of the Court of Appeal Act, provides that the Court of Appeal may, if it thinks it necessary or expedient in the interest of justice receive fresh evidence by way of documents or witnesses (see **Mudaliar v State** Criminal Appeal No. CAV 0001 of 2007: 17 October 2008 [2008] FJSC 25 and **Chand v State** CAV0014 of 2010: 9 May 2012 [2012] FJSC 6).

[28] In **Tuilagi v State** AAU0090 of 2013: 14 September 2017 [2017] FJCA 116 the Court of Appeal considered several past decisions and held that the main criteria for fresh evidence at the appeal stage is set out in **Ladd v Marshall** [1954] 3 All ER 745.

*'[36] The Supreme Court in **Mudaliar** quoted with approval **Ladd v Marshall** [1954] 3 All ER 745 and stated there were three following preconditions to the reception of such evidence on appeal. The Supreme Court had referred to other decisions quoted in the following paragraphs as well.*

> *(i) the evidence could not have been obtained prior to the trial by reasonable diligence;*
>
> *(ii) it must be such as could have had a substantial influence on the result and*
>
> *(iii) it must be apparently credible.'*

*'[37] **Tuimereke v State** Criminal Appeal No. AAU 11 of 1998: 14 August 1998 [1998] FJCA 30 the Court of Appeal considered the principles governing the reception of fresh evidence in criminal matters. They referred to **Ratten v R** [1974] HCA 35; (1974) 131 CLR 510 and **Lawless v R** [1979] HCA 49; (1979) 142 CLR 659. In both **Ratten** and **Lawless** the High Court focussed upon the expression "miscarriage of justice" in the context of intermediate appellate courts dealing with criminal matters.'*

*'[41] In **Singh v The State** Criminal Appeal No.CAV0007U of 2005S: 19 October 2006 [2006] FJSC 15 the Supreme Court stated:*

> *"The well-established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict ..."*

[29] R's parents' withdrawal letter state that they do not want to proceed with the case and further embarrassment as they do not know whether the incident had happened or not. This letter signed on 15 July 2020 (*i.e.* even after leave to appeal ruling on 22 August 2019) comes as no surprise as the evidence reveal that following the incident there had been a reconciliation between the families. However, criminal proceedings cannot be withdrawn according to the whims and fancies of the parties namely the wrongdoer and the victim. Criminal proceedings are matters between the State representing the whole society and the offender. In any event, the matter of reconciliation was before court at the trial. This is no fresh evidence. The letter concerned would make no difference to the conviction.

[30] Other character certificates also do not affect the conviction. No character evidence was led at the trial and if necessary this evidence could have been led therein with the prospect of being challenged by the prosecution. Thus, this is not fresh evidence either. They were available or could have been obtained at the time of the trial.

[31] Therefore, applying the principles applicable to leading fresh evidence, I do not see any basis to allow the appellant's application to call the so called fresh evidence.

08th, 09th and 10th grounds of appeal (sentence)

[32] The learned trial judge had referred to the sentencing tariff for juvenile rape as between 10-16 years [vide **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)] and selected 10 years as the starting point. The trial judge had then added 02 years for aggravating factors and deducted 02 years for mitigating factors and discounted further 40 days for the remand period ending up with the final sentence of 09 years, 10 months and 20 days which is below the accepted tariff. I see no sentencing error in the process. If at all, the sentence appears to be on the lower side of the sentencing pattern for child rape in Fiji.

[33] However, the matter does not end there, for this court has to now decide what the appropriate sentence should be in this instance. In doing so, the approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015) appears to be the best guide. The Supreme Court held that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it and 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. It was also held that the approach taken by appellate courts is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge.

[34] The ultimate sentence may be far too lenient. However, in all circumstances of the case I do not propose to revisit the sentence particularly as the state has not appealed against the sentence and nearly 05 years and 05 months have lapsed since the appellant was sentenced and it is now nearly 09 years 08 months since the commission of the offence. The appellant should consider himself lucky to have escaped with this lenient sentence.

Bandara, JA

[35] I have read the judgment of Prematilaka, RJA in draft and agree with his reasons and proposed orders.

Rajasinghe, JA

[36] I read in draft the judgment and agree with the reason and conclusion.

Orders of the Court:

1. Appeal against conviction is dismissed.
2. Appeal against sentence is dismissed.

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

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

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