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

CRIMINAL APPEAL NO. AAU 090 of 2022
[In the High Court at Lautoka Case No. HAC 53 of 2019

BETWEEN : **MOROTIKEI VOCEVOCE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
Ms. S. Shameem for the Respondent

Date of Hearing : **22 December 2023**

Date of Ruling : **16 January 2024**

RULING

[1] The appellant had been charged in the High Court at Lautoka with rape. The charge is as follows:

'***Statement of Offence***

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

Particulars of Offence

MOROTIKEI VOCEVOCE on the 9th day of November, 2017 at Clopcott, Ba in the Western Division, had carnal knowledge of **"A.T"**, without her consent.'

[2] After trial, the trial judge had convicted the appellant and sentenced him on 27 April 2022 to 8 years and 6 months imprisonment with a non-parole period of 7 years and 6 months.

[3] The appellant's in person appeal against conviction could be considered as timely (though late by one month) but his sentence appeal is late by over a year. 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] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[5] The delay in the sentence appeal is over a year which is very substantial, and there is no explanation for the delay by the appellant. However, I would still see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[6] 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].

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

> 2. *'The brief facts were as follows:*
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> *On 9th November, 2017 at around 9 am the victim (38 years) was having tea at her home with Emosi her husband's cousin and Melai her neighbour. After a while Melai left, since she was going to Nadi, she asked the victim to close the doors and windows of her house after the accused leaves. The victim and the accused were known to each other and she also knew the accused was a police officer.*
>
> 3. *After sometime, the victim went outside to get some water to wash the dishes. The accused called the victim from Melai's house asking her to close the doors and windows of Melai's house. The victim responded by saying that she will attend to it later, however, the accused kept on insisting that she closes the doors and windows of Melai's house immediately.*
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> 4. *As soon as the victim entered the house through the kitchen door, the accused pulled her inside, and started touching her vagina. Thereafter, the accused forcefully made the victim lie on the floor, she tried to push him but could not. The accused was able to remove the complainant's shorts, push aside her swimming togs and then penetrated his penis into her vagina.*
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> 5. *The victim started to cry, she could not believe what the accused was doing to her she did not consent to what the accused had done to her. After this, the accused stood up put on his clothes and left. The victim later told her husband about what the accused had done to her. The matter was reported to the police, the accused was arrested, caution interviewed and charged.*

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

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

> ***Conviction***
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> ***Ground 1***
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> *THAT the Learned Trial Judge erred in law and in fact when he failed to apply the test of belatedness 'the totality of circumstance test' in relation to the veracity and*

the credibility of PW. Therefore failure to do so caused a grave substantial miscarriage of justice.

Ground 2

THAT the Learned Trial Judge erred in law and in fact when his lordship failed to imply the rule on previous inconsistent statement made by PW1 (the Complainant) where PW1 was an unreliable witness. Failure in doing so has given rise to miscarriage of justice.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he failed to make an independent assessment before affirming the verdict of guilty which was dangerous, unsatisfactory, and unreliable and unsupported by the evidence, giving rise to a miscarriage of justice.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he failed to undertake a proper analysis in considering the admission contained in the victim statement in terms of voluntariness and the weight that may or may not attach to it…..

Ground 5

THAT the Learned Trial Judge erred in law when he shifts the burden of proof to the appellant by requiring the appellant in his innocent in the Judgment through his credibility forthrightness in responding to question in cross-examination.

Ground 6

THAT the Learned Trial Judge erred in law when he failed to include in his summing up and also properly consider the evidence under cross-examination of PW2 namely Leone Ratoto who was the husband of the complainant…

Ground 7

THAT the Learned Trial Judge erred in law when he failed to direct himself and the prosecution to whether the complainant was acting under duress which was not proved beyond reasonable doubt by the prosecution during trial, failure to give such a direction caused a grave miscarriage of justice.

Sentence

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he imposed a non-parole term so close to the head sentence.

Ground 9

THAT the Learned Trial Judge took into account impermissible aggravating factors to enhance sentence and also taking irrelevant matters into consideration while sentencing the appellant.

Ground 10

THAT the sentence imposed on the appellant is manifestly harsh and excessive in the circumstances of the case, in comparison to other cases of the same offence.

Ground 1

[10] The trial judge had dealt with the issue of delay in reporting at paragraphs 38-49 of the judgment and contrary to the appellant's assertion that the trial judge had failed to apply 'totally of circumstances test', the trial judge had indeed applied this test as expounded in **State v Serelevu** (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018) and dealt with belated reporting at paragraphs 75-77. In the end the judge had accepted that the complainant was restrained by circumstances beyond her control in failing to immediately report the matter to the police and the delay of 09 days was not substantial but reasonable in the totality of circumstances.

Ground 2

[11] The trial judge had dealt with this aspect of the appellant's complaint also at paragraphs 50-54, 68 and 78-84 of the judgment.

[12] 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)].

[13] The trial judge had considered all the alleged inconsistences pointed out by the defence and having given his mind to the relevant judicial pronouncements on how to evaluate discrepancies, inconsistencies and omissions, the judge had concluded that they were not significant enough to adversely affect the reliability of the complainant's evidence and that of her husband.

Ground 3

[14] The appellant had misconceived section 23 (1)(a) of the Court of Appeal in stating that the conviction is dangerous, unsatisfactory and unreliable. As far back as in 1992 the Court of Appeal said that whether the verdict is unsafe or unsatisfactory (same with 'dangerous' or 'unreliable') is not the basis under section 23 (see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) but the question the appellate court should ask itself is whether there was evidence before the court on which a reasonably minded jury (in Fiji assessors) could have convicted the appellant in that having considered the evidence against the appellant as a whole, whether the court can or cannot say whether the verdict was unreasonable in that whether there was clearly evidence on which the verdict could be based. In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) it was again stated that whether the conviction is unsafe is not the law in Fiji. In both decisions it was emphasised that in terms of section 23 (1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed but the proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

[15] As for the appellant's compliant that the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before

Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[23] ……**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 assessors to be satisfied beyond reasonable doubt of the commission of the offence. **These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors'***

[16] As expressed by the Court of Appeal in another way, before a judge alone the question is whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)

[17] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[18] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when 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)].

[19] 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.'*

[20] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[21] I have considered the matters raised by the appellant under this ground of appeal but do not find them to be in anyway adequate to render the verdicts unreasonable or unsupported by evidence. The judge had fully ventilated the evidence led by both sides and engaged in an independent evaluation and assessment of it at paragraphs 15-37, 50-54, 55-62 and 63-95 of the judgment.

Ground 4 and 7

[22] The gist of the appellant's argument is that the complainant had given evidence implicating him under duress from her husband. The trial judge had been mindful of this allegation of the appellant and considered but not accepted it for reasons set out in

the judgment. There is nothing to suggest that the complainant did come up with the allegations due to pressure or duress exerted by her husband though at some point he had assaulted her out of anger.

[23] The appellant's position was that she made the allegations due to a business deal going wrong. The complainant had denied having had any business deals with the appellant.

Ground 5

[24] The trial judge had correctly identified the standard and burden of proof at paragraphs 03 and 70 of the judgment. The trial judge's reasoning at paragraphs 85-90 as to why he rejected the appellant's evidence cannot be by any stretch of imagination construed as shifting the burden of proof to the appellant.

Ground 6

[25] Contrary to the assertion of the appellant, the trial judge had indeed discussed PW2's evidence at paragraphs 27-29, 36 & 37 of the judgment and several other paragraphs in relation to different aspects of the case such as recent complaint evidence.

Ground 8 (sentence)

[26] The appellant argues that the gap between the non-parole period and the head sentence is too close (one year).

[27] In **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023), Keith J said:

> *47. The resolution of these issues resulted in some of the court's original pronouncements about the non-parole period being lost sight of. One was important for this case. It was that the non-parole period should not be too close to the head sentence. As Calanchini P (as he then was) said in **Tora v The State** [2015] FJCA 20 at para 2:*
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> *"The non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation. Nor should the gap between*

the non-parole term and the head sentence be such as to be ineffective as a deterrent".

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

[28] On the strength of the above pronouncement, I am inclined to allow enlargement of time to appeal against sentence on this ground so that the full court may consider the appellant's grievance.

Ground 9

First part

[29] The appellant challenges the trial judge having taken into account the complainant being emotionally affected based on victim impact statement (referring to the rape incident) because her medical report had stated 'no trauma'. One thing is that the medical report was not part of the trial and secondly, 'no trauma' did not obviously refer to the mental state of the complainant. Further, the incident referred to in the medical report by the complainant is not the rape but the assault by her husband. This compliant has no basis.

Second part

[30] The trial judge being a seasoned and an experienced judicial officer had every right to refer to the 'prevalence of offending' in general but whether he could have used it as an aggravating factor against the appellant was an arguable proposition.

Ground 10

[31] This ground of appeal is without any merit. The ultimate sentence of 08 ½ years is not excessive or harsh. The tariff for adult rape is between 07 and 15 years of imprisonment - **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338.

[32] However, 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)].

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed on the 08th ground of appeal and second part of the 09th ground of appeal.

COURT OF APPEAL FIJI

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

Solicitors:

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