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

CRIMINAL APPEAL NO.AAU 166 OF 2019
[Suva High Court Criminal Case No. HAC 83 of 2015]

BETWEEN : **WILLIAM PETERS**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Qetaki, JA
Clark, JA

Counsel : **Appellant In Person**
: **Ms. K Semisi and Ms. B Kantharia for the Respondent**

Date of Hearing : **5 September 2024**

Date of Judgment : **27 September 2024**

JUDGMENT

Prematilaka, RJA

[1] I had the benefit of read on the judgment of Clark, JA and agree with reasons and conclusions.

Qetaki, JA

[2] I have read in draft the judgment of Honourable Justice Clark, JA, and I agree with it the reasons and conclusions.

Clark, JA

Introduction

[3] On 11 October 2018, the appellant was found guilty and convicted on two charges of rape:

- Rape: contrary to s 207(1), (2)(a) and (3) of the Crimes Act 2009 (carnal knowledge); and

- Rape: contrary to s 207(1), (2)(c) and (3) of the Crimes Act 2009 (mouth).

[4] The victim was the appellant's step-cousin, a four year old girl. As in the High Court Judgment, she is referred to in this judgment as "SM".

[5] The three assessors returned a unanimous opinion of "not guilty". The trial Judge, Aruna Aluthge J, rejected the assessors' opinion as not being available on the evidence and determined that the prosecution had proved both charges beyond reasonable doubt. The appellant was convicted accordingly.[1]

[6] On 25 October 2018 the appellant was sentenced. The appellant was 23 years old at the time of sentencing and was 19 when he committed the offences. Taking into account that he was a "young offender", and a first offender and had prospects of rehabilitation the Judge sentenced him to 10 years'

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1 *State v Peters* [2018] FJHC 997; HAC83.2015 (11 October 2018).

imprisonment to be served concurrently with a non-parole period of seven years. [2]

Leave to appeal

[7] The appellant filed an appeal against conviction and sentence nearly 11 ½ months out of time. The single Judge characterised the delay as "substantial" but as the DPP had not averred any prejudice from an enlargement of time the single Judge was not inclined to grant an extension to assess whether the two grounds of appeal had a real prospect of success.[3]

[8] The first ground of appeal asserted error by the trial Judge in not properly analysing the evidence of conduct by the victim and her mother in light of the defence case that the complaint had been a fabrication by the mother. It was clear to the single Judge that the trial Judge had analysed the prosecution evidence in light of the propositions advanced in support of the defence and was satisfied the appellant had penetrated the victim's mouth and vagina.

[9] As to the second ground, the single Judge concluded that the finding of guilt and the reasons for that finding, were not undermined by the fact the trial Judge happened to express a view about the possible reasons for the assessors' opinion.

Full Court hearing

[10] To ensure there is clarity about, and a record of, the basis upon which the full Court hearing proceeded, it is necessary to chronicle the progression of documents filed by the appellant. The case on appeal index records that following delivery of the single Judge's refusal to enlarge time to appeal, the appellant filed:

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2 *State v Peters* [2018] FJHC 1050; HAC83.2015 (25 October 2018).
3 *Peters v State* [2021] FJCA 126; AAU166.2019 (20 August 2021) **[single Judge's Ruling]**.

(a) on 14 September 2021 through the LAC, a renewal notice with two grounds of appeal;

(b) on 16 November 2021, a withdrawal of his appeal against conviction;

(c) on 24 February 2022, final submissions and additional grounds in support of appeal;

(d) on 18 July 2022, an affidavit in support;

(e) on 21 July 2022, withdrawal of conviction and sentence appeal;

(f) on 10 July 2024 an application for renewal of leave to appeal against sentence.

[11] It seems from the State's written submissions that it was in receipt of the following further two documents from the appellant which were not in the case on appeal and therefore not before this Court at the hearing:

(a) an application filed 16 February 2022 listing five grounds of appeal;

(b) a document filed 24 February 2022 containing a further three grounds of appeal against conviction.

[12] Beyond the case on appeal, this Court had two loose documents:

(a) a renewal notice of appeal against sentence filed 10 June 2024 and

(b) submissions of the appellant filed 5 September 2024 purporting to address five grounds of appeal.

[13] The appellant confirmed at the hearing on 5 September 2024 that he intended to rely only on the five grounds of appeal addressed in his submissions filed

on 5 September 2024. When pressed he said he relied entirely on the document filed 5 September 2024. Furthermore, the appellant confirmed that he did not intend to pursue his appeal against sentence. He had filed the required Form 3 formally abandoning the sentence appeal and an order was made allowing his application.

[14] Before turning to the appellant's submissions two final points need to be made about the 5 September 2024 document:

(a) The State did not have the document. The written submissions which the State filed addressed ten grounds that counsel had diligently identified in the assorted documentation the appellant had filed over time.

(b) The second point is that although the appellant confirmed he relied on the five grounds in the 5 September document, the grounds were misnumbered as "ONE", "TWO", "FOUR", and "FIVE". Consequently four grounds of appeal were argued on the day, not five.

Grounds of appeal

Ground one

[15] Under this ground the appellant submits the Judge erred in failing to properly analyse the evidence of the victim and her mother whose evidence was fabricated and of bad character. This ground was advanced unsuccessfully before the single Judge who considered the trial Judge had properly considered the evidence and directed himself along the lines of his summing-up.

[16] At trial, the prosecution case relied on SM's evidence, her mother's evidence and supporting medical evidence. The appellant elected to remain silent. He called no witnesses but advanced a multi-themed defence through

cross- examination of SM, her mother and the doctor. I address those themes in due course.

[17] The first task for this Court is to assess whether the trial Judge, in differing from the opinion of the assessors, discharged the duty on him to independently assess and evaluate the evidence and give cogent reasons for so differing. The Hon Justice Saleem Marsoof described the requirement on a trial judge to give very good and careful reasons for differing from the assessors as —[4]

> *...a fundamental safeguard that ensures justice is done in every case according to law. The objective of such a requirement is to explain to the assessors, the prosecution and the accused as well as to the society at large, the reasons for the decision, so that the social conscience can rest in the knowledge that justice was done.*

[18] In *Ram v The State* the Supreme Court described in the following way the role of an appellate court when assessing the correctness of a trial Judge's decision to differ from a majority opinion of the assessors:[5]

> *A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of he Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal ...* ***In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence*** *and is not perverse.* ***The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature,*** *and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case. [Emphasis added]*

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4 *Singh v State* [2020] FJSC 1; at [21].

5 *Ram v State* [2012] FJSC 12; CAV0001.2011 (9 May 2012) at [80]

[19] The requisite critical examination of the trial Judge's reasons cannot be undertaken without an appreciation of the evidence given at trial by the three witnesses called for the prosecution. I turn now to that evidence.

Doctor's evidence

[20] Dr Vaniqi prepared a medical report dated 9 May 2015 following her examination of SM that day. The report stated:

> ***D(12) Specific Medical Findings:***
>
> *Hymen not intact*
>
> *Area around inner part of vagina appears red*
>
> *Anal region appears normal no bruises noted*
>
> ***D(14) Professional Opinion***
>
> *Injury is consistent with the statement. There is a possibility of sexual penetration involved in the vagina but not the anal region.*
>
> ***D 16 Summary and conclusions***
>
> *Hymen open not intact – sexual penetration involved*
>
> *Anal area appears intact. No injury involved*
>
> *Area red around vagina – blunt force injury*

[21] Addressing her report Dr Vaniqi said it was unusual in a four-year old for the hymen to be torn or broken or for the vaginal area to be red. She clarified that it was the vaginal wall that was red.

Mother's evidence

[22] Ana, SM's mother, testified that on 8 May 2015 she was looking at herself in the mirror. Her daughter was standing beside her, also looking in the mirror. She was playing with saliva from her mouth — *"Like putting the saliva out and inside back in the mouth, repeatedly doing the same."* Ana told her daughter to stop doing that because it was bad manners. Her evidence continued:

At one point in time, she put the saliva out from her mouth, then she told me, mum you remember the day you were washing clothes, Willie put his palu ... palu that means penis, the private part my Lord. He put his palu on my mouth, on my bum and also on my balei meaning vagina.

[23] When asked to clarify whether her daughter said *"put in or on"* Ana answered *"inside"*. Ana said she sat down with her daughter and gave her a pen and asked her daughter to show how he did it. Ana testified that her daughter put the pen in her mouth and said he lifted her up and bent her over and inserted his palu inside her bum and also in her balei.

[24] The further key points from Ana's evidence were that her daughter told her she wanted to shout for help but he blocked her mouth; that when her daughter told the appellant she would tell on him he slapped her and told her not to tell anybody; that she reported the matter to the Police the following day and the Police took her statement; that afterwards they took SM to the hospital and once the doctor had examined SM the doctor showed Ana her daughter's private parts and where there was injury.

SM's evidence

[25] SM was seven years old when she gave evidence. She understood she was there to tell the truth. She said the appellant put his *"palu" in* her mouth, not on top of her mouth and that he carried her and *"put his palu on my bum"*. She was asked to show the Court how he carried her and it seems from the notes of evidence she did that. (There is a simple "A:" with a space next to it.). SM was asked to point to her body to show *"balei"* (vagina) and did so. When asked why she did not call for her mum, SM answered:

I did try to shout my Lord but he blocked my mouth

[26] SM recalled she was wearing her yellow pants and pink watermelon t-shirt. She was then asked what she had told her mother. This evidence was initially

more difficult to elicit because SM had just recounted the details of the offending and it seems from the notes of evidence she understood she was being asked to do so again. So her initial answers to the question "what did you tell your mum about what Willie did" were: *"About Willie my Lord"*; then *"What Willie did to me my Lord"; then "He always did the bad things to me my Lord"*. Ultimately, SM gave evidence that she told her mother that Willie pushed the toilet door open, took off her pants, and put his palu in her mouth and buttocks.

[27] SM was asked if she would look around the courtroom to see if Willie was there and point to him. The screen was removed for the purpose and she pointed to the appellant. Finally, the Judge asked SM if she could draw palu on a piece of paper. When she said *"I can't my Lord"* she was asked if she could have a look at a picture and point to where "palu" is on a picture. She did so, the Judge saying *"Yes that's it"*.

Cross-examination of the three Witnesses

[28] Beyond his denial of any offending, there were four further themes central to the appellant's defence:

(a) that SM was allergic to mangos thus the saliva;

(b) that Ana wanted the appellant out of the house and had fabricated the story to achieve that end;

(c) that SM's hymen was not intact due to her playing on a bike;

(d) that the mother's account was inconsistent with the daughter's evidence because the daughter did not mention in her evidence that she had been slapped.

Dr Vaniqi

[29] Dr Vaniqi was asked whether it was a must that all four-year olds have an intact hymen. Her evidence was that it was not a must. Hymens could be torn from gymnastics, or horse-riding, or the use of tampons but she would find it surprising that SM, at her age, would have engaged in these behaviours.

Ana

[30] Ana was cross-examined extensively in relation to all themes of the defence.

[31] It was put to her that SM had eaten a type of mango (maqo karasini) to which she was allergic and that the mango sap affected her lips and that was the reason saliva kept coming from her mouth. Ana's evidence was that her daughter was not allergic to mango and *"on that day she was playing with saliva from her mouth"*.

[32] Next it was put to Ana that within her big family, her sisters and those inside the house in 2015, would argue at times over food and bills, and that when the appellant and her sister visited everything was "ok" but when they started to stay, things started to change. Despite the insistent questioning Ana's evidence remained firm and consistent: there were no serious disagreements or arguments inside the house; they were all working and all shared equally — someone would pay for one bill, someone else would pay for another. As to the suggestion things started to change when the appellant and sister moved in, Ana said:

> *"No. Nothing changed. We did not differentiate them from us my Lord"*.

[33] When it was put to Ana that her sister was not staying with her or visiting and that she was frightened to go back to the house Ana responded: *"they were not scared they were ashamed of what had happened"*.

[34] Ana accepted there was an old bicycle at a separate house where another sister lived, behind Ana's house but she did not know whether or not it had a seat and she could not agree that all the children, including SM, "*waited eagerly*" for their turn to ride the bike because she hadn't seen them doing that.

[35] When Ana was asked why she did not refer to her daughter being slapped when she made her statement she said at the time she made her statement she did not think of that. It was put to Ana that she made up the whole story but forgot to include in her statement the slapping part, which she had told her daughter to say, and that it was a lie to say the appellant said not to inform anyone. Ana said counsel was wrong – that what her daughter told her was the truth and the reason for any inconsistency was "*because during the time my daughter was relaying the incident to me, at that time I was feeling scared of what she was informing me*".

SM

[36] Because of the importance of her evidence I reproduce the critical part of SM's cross-examination:.

Q: Before you had gone to the Police. Do you love mangoes?
A: Yes my Lord.

Q: Do you know this mango in itaukei called 'maqo karasini'?
A: Yes my Lord.

Q: Do you love eating that mango?
A: Yes my Lord.

Q: Now Sarah when you eat that mango, the sap of that mango, if it touches your skin then it's itchy and starts to rash, right?
A: No my Lord.

Q: On the day you had gone to the Police Station in Namaka, one Police Lady was there, correct?
A: Yes my Lord.

Q: So isn't it true when the Police Officer was asking the question, it was your mother who was answering the question not you right?
A: It was me my Lord.

Q: On that day you had already come back from the hospital, or you go to the hospital first, then to the Police Station?
A: To the Police Station first my Lord.

Q: So at the Police Station both you and your mum were talking to the Police Officer?
A: It was me my Lord.

Q: Now at the hospital, your mum was talking to the doctor?
A: My mum my Lord.

Q: Sarah the story that you just told us about this Willie putting the "palu" here the "palu" there, right that story, your mother told you that story, right?
A: No my Lord.

Q: The story that you also said about Willie putting the "palu" in you, is not true?
A: He did it my Lord.

[37] As to the bicycle dimension of the defence, SM was asked if she was given a chance to ride the bicycle and she said no. She agreed with counsel that someone had to help her ride the bicycle.

Judge's evaluation of the evidence and reasons for rejecting assessors' opinion

[38] In his decision the Judge expressly addressed the defence arguments to which I have referred and the evidence bearing on each. He assessed SM as appearing to have understood the obligation to tell the truth and was *"certain that she told the truth"* having observed her demeanour and *"manner of giving evidence carefully"* when being examined.[6] He said he had no reason to disbelieve her evidence.

[39] As to the defence argument that Ana made up the allegation because she wanted the accused and his mother out of the house after disputes over food

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6 High Court judgment above, fn1at [7].

and utility bills, there was no evidence of any disputes. Nor was there any material contradiction between her evidence and her statement to the police.[7] The Judge regarded Ana as straightforward and found her to be a credible and honest witness.

[40] The Judge had no difficulty relying on Ana's evidence to find SM's complaint to her mother, some nine days after the offending, was a recent complaint. SM's evidence was that the appellant blocked her mouth when she wanted to shout out and that he warned her not to tell anyone. The Judge regarded as acceptable SM's explanation that she was scared to complain.[8]

[41] The Judge addressed the mango allergy proposition. SM denied she was allergic to mango sap. And her mother rejected the suggestion her daughter was allergic to mango. The Judge observed that the child's complaint against the accused arose naturally when she was asked to stop playing with her saliva. It appeared to the Judge SM had opened up with her story when her mother noticed her playing with saliva.[9]

[42] The medical evidence was consistent with SM's evidence about penile penetration although, the Judge added, it did not implicate the accused. The Judge referred to the doctor's conclusion of possible sexual penetration which she reached following her findings that the hymen was not intact and there was redness around the vagina — two common symptoms of a blunt force injury. His Honour considered "*no other possible inference [could] be drawn from the medical evidence than that of a penetration of victim's vagina with a blunt object*".[10]

[43] His Honour believed SM was telling the truth when she said Willy put his "palu" in her mouth and in her "balei". He added that while children may not

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7 At [12].
8 At [14].
9 At [15].
10 At [16]-[18].

necessarily have the vocabulary to describe sexual organs the words she had used when complaining to her mother were "palu" and "balei" and she had pointed to her vagina when asked to point to "balei" and pointed to where a *"male genital organ is located when she was shown a diagram of a man"*.[11]

[44] The Judge concluded he was certain the accused had penetrated the victim's mouth and vagina with his penis and rejected the opinion of the assessors on the basis of the evidence, and his directions to the assessors in his summing up and because their opinion was not available on the evidence. The prosecution had proved both charges beyond reasonable doubt.

[45] It is clear from this review that the Judge engaged in an analysis of all relevant evidence and was satisfied his ultimate verdict was supported by his assessments of the credibility of the witnesses and the evidence they gave. The differing view he took was carefully reasoned and indeed cogent. And one can see from a close examination of the notes of evidence that the differing view he took was indeed available to him.

[46] SM's responses in cross-examination, particularly in the evidence set out above, reveal a level of composure, an attentiveness to the questions, and a clarity of approach that might be thought unexpected given her age and the alien nature of the court process. Her precision is particularly apparent from the series of questions put to her about the visit to the police station and whether they went there first or the hospital and who did the talking at each place.

[47] Likewise, Ana's responses demonstrated her attention to detail. She corrected defence counsel when it was put to her she reported the matter to the police on 8 May. She said she reported on the 9th. Her denials that she coached her daughter were categorical. Her evidence that there were no significant quarrels or discord in the home was not impeached. The final question asked of Ana was whether she wanted the Court to believe what was in her statement or what

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[11] At [21]-[22].

she said in Court. She answered that *"the story is quite the same. But the only difference is that some of the story the full story is not written in the statement. It's coming out today in evidence."* It was a thoughtful and credible reply.

[48] The Judge's demeanour and credibility assessments were supported and reasoned as was his ultimate finding that the prosecution had proved both charges beyond reasonable doubt.

[49] The first ground of appeal is without merit.

Ground two

[50] Under this ground the appellant argues that the Judge erred in law and fact in not agreeing with the assessors and in offering the view that the assessors were reluctant to send the young accused to prison.

[51] When the Judge stated at [22] of his judgment that he was certain the accused had penetrated the victim's mouth and vagina with his penis and that he was unable to agree with the assessors opinion he added that he thought their opinion was motivated by a reluctance to send the young accused to prison.

[52] I agree with the single Judge's assessment of this ground of appeal. The Judge's observation was an *"unwarranted passing reference"*. It would have been better left unsaid. The important point is that the Judge's speculation as to why the assessors decided as they did, did not in any sense undercut his analysis of the evidence or his credibility findings and did not compromise his ultimate finding of guilt.

[53] The appellant's further submission that SM has a "gluttoral defect inherited since birth" appears baseless and is in any event irrelevant.

[54] The second ground of appeal fails

Ground three (misnumbered four)

[55] In his written submission in support of this ground, which alleges error because of insufficiency of evidence of injury, the appellant argues that in the circumstances of the rape alleged by the victim she would have sustained more serious injuries to her labia minor and would have suffered tears or lacerations.

[56] The ground gets no traction in light of the medical evidence and opinion that was adduced at trial. The appellant's speculation about the nature of the injuries that he considers should have been apparent scarcely constitutes a credible ground of appeal.

[57] Ground three is meritless.

Ground four (misnumbered five)

[58] This ground states the Judge erred in law and fact when he convicted the appellant on the unreliable and incredible evidence of PW1 and PW2 (meaning the evidence of the mother and victim).

[59] The appellant's submissions are implicitly addressed in the following responses. For all of the foregoing reasons, the prosecution did not fail to prove its case; the evidence was not unreliable or "incredible" and the conviction was not based solely on the word of the victim but was supported by the medical evidence, and the mother's account of SM playing with her saliva which led to the victim's recent complaint. Furthermore, the appellant adduced no evidence in support of the theories he advanced in his defence in cross-examination, which theories had as their purpose the undermining of the evidence for the prosecution.

[60] Ground four has no merit.

Final point regarding late filing of submissions

[61] The Court received the State's written submissions on 5 September at 9.30 as the hearing was about to commence. Ms Semisi was asked why the Court was receiving submissions at the 11th hour. Ms Semisi explained that the matter was originally handled by counsel who had recently been appointed to judicial office. The file had not been reallocated within the Office of the Director of Public Prosecutions. The night before the hearing, when Ms Semesi was on leave, she was contacted and asked to appear on the appeal which (it had been discovered) was scheduled for the next morning. The file was delivered to Ms Semesi for preparation of submissions. The Court expressed its gratitude to Ms Semesi for her evident industry but wished to record that it regarded the position as unsatisfactory and unhelpful. Ms Semesi was asked to bring the Court's concern to the DPP's attention.

Orders of court

1. **Enlargement of time to appeal against conviction is refused.**

2. **The appeal against conviction is dismissed.**

Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Madam. Justice Karen Clark
JUSTICE OF APPEAL