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

CRIMINAL APPEAL NO. AAU 75 of 2022
[In the High Court at Suva Case No. HAC 308 of 2020]

BETWEEN	:	**USA RAICI TUITOGA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. U. M. Ratukalou for the Respondent**
Date of Hearing	:	**12 April 2024**
Date of Ruling	:	**15 April 2024**

RULING

[1] The appellant had been changed at Suva High Court with the following count:

'***FIRST COUNT***

Statement of Offence

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

Particulars of Offence

USA RAICI TUITOGA *on 28th May 2020, at Nasinu in the Central Division, had carnal knowledge of* ***SAINIMILI MASEIKAU*** *without her consent.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

USA RAICI TUITOGA, *on the 28th May 2020, at Nasinu in the Central Division, unlawfully and indecently assaulted* ***SAINIMILI MASEIKAU*** *by bringing into contact his hands to her vagina.'*

[2] The High Court judge convicted the appellant and sentenced him on 16 March 2022 to a final sentence of twelve (12) years imprisonment with a non-parole period of ten (10) years.

[3] The appellant's appeal against conviction and sentence is timely.

[4] 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 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] The prosecution evidence had been summarised by the trial judge in the sentencing order as follows:

> *'2. It was proved during the hearing that you had penetrated the vagina of the Complainant with your penis and then sex assaulted her by indecently and unlawfully touching her vagina with your hands. You were the leader and the Senior Pastor of a church group. The Complainant had joined the church mission group and moved to Suva. She was staying with you and your family in May 2020. On the 28th of May 2020, you went to another house to have a church cell group meeting with the Complainant. Having finished the meeting, you walked back home with the Complainant. On your way back home, you asked the Complainant to turn to another road after passing the*

playground. You then asked the Complainant to have sex with you. She was scared. You told her to do what you asked her to do. You then asked the Complainant to stand facing her back to you. You then pulled up her dress and pulled down her shorts and undergarment. She was forced to bend down. You then inserted your penis in her vagina. Having done that, you penetrated her vagina with your penis for about 2 to 3 minutes. You then touched her vagina with your hands. You have told the Complainant not to tell anyone about this incident.'

[6] The appellant had given evidence and taken up two distinct positions. Firstly, he did not penetrate the complainant's vagina as he was unable to have an erection of his penis. Secondly, he obtained her consent to have sexual intercourse with her.

[7] The appellant urged three grounds of appeal against conviction and one ground of appal against sentence at the LA hearing.

Conviction:

Ground 1:

THAT the conviction was unsafe in that issue of penetration was inconclusive and that the prosecution had not proved case beyond reasonable doubt.

Ground 2:

THAT there was a demonstrable biased against the appellant in that the learned trial judge erred in law in not considering the evidence of the appellants witnesses which was not mentioned at all in the judgment in violation of the liberator principles.

Ground 3:

THAT the Learned Trial Judge erred in law misapplying the limited admissibility of hearsay evidence to support the delay in complaint by the complainant.

Sentence

Ground 4:

THAT the non-parole period is based on a bad law and makes no time to be spent in prison by the accused longer than what the Court intended and infringe on the right to freedom and is unconstitutional.

Ground 1

[8] The appellant argues that the evidence on penetration was not conclusive. The law is that penetration to any extent is sufficient [section 206(4) of the Crimes Act 2009] and penetration of even vulva is sufficient to constitute rape [**Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) & **Navunisaravi v State** AAU 0150 of 2017 (25 May 2023)].

[9] The complainant has been emphatic that the appellant's penis had penetrated her vagina for 2 to 3 minutes. She has even demonstrated it by using her finger in court. The trial judge has said in the judgment as follows on this matter at paragraph 9 of the judgment:

> *'……However, during the cross-examination, she answered 'yes' when the learned Counsel for the Defence asked her that the Accused did not insert his penis into her vagina because he could not erect his penis. I observed that she answered "yes" and then tried to explain something, but the learned Counsel for the Defence interjected, pointing out the Court the Complainant's answer. Besides that answer, the Complainant consistently explained that the Accused penetrated her vagina with his penis from behind. She reaffirmed that the Accused inserted his penis into her vagina during the re-examination.'*

[10] Therefore, although one of her answers in cross-examination has added a bit of confusion to the issue of penetration, the complainant has clarified it in re-examination.

[11] The appellant's position was that he failed to get an erection of his penis and therefore could not penetrate her vagina. The problem for the appellant is that he admittedly asked the complainant to have sex with him and she agreed voluntarily but he could not perform penetration. The appellant has not explained in evidence as to why in the first instance asked the complainant to have sex with him if he had a dysfunctional penis. He has not led any medical evidence to show that he was unable to have a full or partial erection. The required degree of erection for a slightest penetration may vary depending on so many factors. It is pertinent to understand that he allegedly penetrated

her from behind while she was bending forward and it would have been easier for penetration to take place even with a partial erection.

[12] 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****.'*

[13] Thus, the trial judge on the above evidence could have reasonably taken the view that the appellant had indeed penetrated the complainant's vagina and I see no reason to disturb it.

Ground 2

[14] The appellant complains of lack of Liberato direction in the judgment. The full court dealt with in detail a similar complaint in **Naidu v State** AAU 0158 of 2016 (24 November 2022). In **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) the majority in the High Court held that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."*. In **Johnson v Western Australia** (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA criticized ***Liberato*** direction as a template for the direction that a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on

that issue. Thus, for a trial before a jury or assessors, the full court in ***Naidu*** preferred the modified ***Liberato*** directions as formulated in **Anderson** (2001) 127 A Crim R 116 at 121 in a situation particularly, involving a 'word against word' scenario. The appellant complains that modified ***Liberato*** direction **(ii)** *i.e.* if the assessors do not accept the appellant's evidence but they consider that it might be true, still they must acquit, had not been given resulting in a miscarriage of justice.

[15] Although the main evidence for the prosecution was that of the complainant and that of the appellant for the defence, the trial judge does not seem to have had any doubt at all of the credibility of her evidence. Since the matter was before a trained and experienced trial judge without assessors, I do not think that there was any risk that the judge was under any misguided perception that the appellant's evidence will only give rise to a reasonable doubt if he believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt. Since the trial judge had fully analysed the defence case rejected it totally, there was no real purpose of a Liberato direction in this matter.

Ground 3

[16] The appellant's argument is that the trial judge had relied on hearsay evidence to explain the delay in reporting.

[17] The trial judge had dealt with the issue of delay at paragraphs 19-22 of the judgment. Paragraph 20 explains the complainant's reasons for the belated complaint.

> *20. The Complainant explained that the Accused had told her not to tell anyone about this incident. According to the Complainant, the Accused was the leader and Senior Pastor of the church. She had finally decided to confide this matter to Jimi after hearing that the Accused had done something similar to another girl. She then told Jimi about this incident. They thought the church members were the proper channel of dealing with this matter. In the meantime, the Accused had relieved Jimi and the Complainant from the church group.*

[18] Jimi was the second prosecution witness. Thus, what the complainant said as told to her by Jimi was not hearsay evidence, for Jimi was called to substantiate what he told

the complainant. What is hearsay was what Jimi had heard from a person who was not called as witnesses. The trial judge had dealt with this part of Jimi's evidence at paragraph 21.

> *21. According to Jimi, a person informed them what the Accused had done to another girl. Then the Complainant confided Jimi what had happened to her. What Jimi heard from the person about the Accused is not admissible to establish that the Accused had done something to another girl. But it is admissible to the extent that a person made a statement to Jimi, and that statement prompted the Complainant to confide Jim what the Accused had done to her.* ***(vide; Goundar v State [2020] FJCA 4; AAU29.2015 (the 27th of February 2020), Subramaniam v Public Prosecutor [1956] 1 WLR 965 at 969).***

[19] Thus, it is clear that the trial judge had not relied on the truth of what Jimi had heard from an unidentified person (hearsay part of his evidence) as part of prosecution evidence against the appellant but he had considered that only to understand how the matter ultimately came to light belatedly and what made the complaint to eventually report the matter to police. It appears that the complainant had confided Jimi about this incident before being relieved from the church duties and therefore that was not the sinister motive for the late complaint as argued by the appellant.

[20] Although the appellant's grounds of appeal have not touched the issue of consent, in fairness to him I shall deal with it as well. According to him, the decision to have sexual intercourse was consensual. The trial judge had fully analysed the element of consent at paragraphs 12-18 of the judgment and decided that he was satisfied that the appellant knew or believed or reckless that the complainant was not consenting for him to insert his penis.

[21] The only matter that I had some concern was the evidence of the complainant as recorded at paragraphs 15 and 17 that *'In contrast, the complainant said that the accused said he will stop when she asked him to stop'* and *'The Accused only said he would stop when she asked him to stop penetrating her vagina with his penis'*. I inquired from the state counsel whether this evidence meant that she had agreed to have sexual intercourse with the appellant on the condition that he would stop when she asked him to do so, because the appellant had said in his evidence that he stopped

it when the complainant asked him to stop. The state counsel clarified that according to her evidence at the trial the appellant had uttered these words while having sexual intercourse and not before it. Thus, his offer to stop his act of penetration at her request had no bearing on the alleged consent on her part for the act of sexual intercourse.

Ground 4 (sentence)

[22] The appellant argues that the non-parole period is based on 'bad law' and infringes on the right to freedom and is unconstitutional. Currently fixing a non-parole period is a must for any sentence above 02 years [section 18(1) of the Sentencing and Penalties Act] and no discretion is left with the judge. The appellant's contention seems to be that his non-parole term which is 02 years less than the head sentence denies or discourage the possibility of his rehabilitation. In **Tora v The State** [2015] FJCA 20; AAU0063.2011 (27 February 2015) para 2 where Calanchini P (as he then was) said:

> *"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".*

[23] Neither the legislature nor the courts have said otherwise on the above position since then despite the scrutiny to which the non-parole period has been subjected [see **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023)].

[24] The effect of section 27 of the Corrections Service Act 2006 (after the amendment) is that the Commissioner has to release the prisoner (provided that he has been of "good behaviour") once the prisoner has served two-thirds of the head sentence ***or*** has completed her non-parole period, ***whichever is the late*** [vide **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023) & **Navuda v State** [2023] FJSC 45; CAV0013.2022 (26 October 2023)]. This is the law on non-parole.

Orders of the Court:

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

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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