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

CRIMINAL APPEAL NO. AAU 84 of 2022
[In the High Court at Suva Case No. HAC 74 of 2020]

BETWEEN	**:**	**DANIEL SINGH**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. Y. Kumar for the Appellant** **Mr. L. Burney for the Respondent**
Date of Hearing	**:**	**12 January 2024**
Date of Ruling	**:**	**15 January 2024**

RULING

[1] The appellant had been convicted in the High Court at Suva with rape (two counts) and sexual assault (one count). The victim was a child at the time of the offending. The charges were as follows:

COUNT 1

'Statement of offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

DANIEL SINGH *sometime between the 1st day of January 2016 and the 31st day of December 2016 at Suva, in the Central Division, had carnal knowledge of* ***NB****, a child under the age of 13 year.*

COUNT 2

Statement of Offence

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

Particulars of Offence

DANIEL SINGH *sometimes between the 1st day of January 2016 and the 31st day of December 2016 at Suva, in the Central Division, unlawfully and indecently assaulted* ***NB****, by touching her breasts with his hands.*

COUNT 3

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) and (3) of the Crimes Act 2009*

Particulars of Offence

DANIEL SINGH *sometime between the 1st day of January 2017 and the 31st day of December 2017 at Suva, in the Central Division, penetrated the mouth of* ***NB****, a child under the age of 13 years, with his penis.*

[2] After trial before a judge alone, the trial judge had convicted the appellant on the above counts and sentenced him on 30 August 2022 to an aggregate imprisonment of 14 years with a non-parole period of 11 years.

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

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction 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 trial judge had summarized the facts in the sentencing order as follows:

> 3. *Your victim is a child and was under 13 years of age at the time of the offences. She is related to you. The victim's mother was babysitting at your house during the period between 2016 and 2018. The victim occasionally accompanied her mother to your house during school holidays. You treated her as your own daughter and your wife assisted her in her education. She was happy in your company and she trusted you very much.*
>
> 4. *During school holidays in 2016, the victim was staying at your house. At one night, your wife told the victim to tidy your bedroom. When the victim was in the bedroom, you entered the bedroom and threatened her. You forced her by holding her hand and putting your hand on her mouth. She started shouting but no one could hear her. You took off her clothes and started touching her body. You fondled her breast in a bad way. You inserted your penis into her vagina and had sexual intercourse for about 10 minutes. Then you took out your penis, wiped the 'white things' and asked her to leave the room. When she indicated to you that she is going to tell her mother, you threatened to kill her if she told her mother or anyone. She was not feeling comfortable and could not walk properly. She got sick after this incident.*
>
> 5. *In 2017, when she went to the sitting room to clean it up, you approached her and tied up her hands and put your penis on her mouth for 5 minutes. She was shouting but no one could hear her. She didn't tell her mother about what you did because you threatened to kill her.*
>
> 6. *In 2018, the victim was in a distressed condition at school. She told one of her friends about what you had done to her from 2016 until 2018. The matter was reported to the teacher and to police by the school.*

[6] The prosecution had called only the victim. The appellant, his wife and his sister had given evidence on his behalf in support of his total denial. The gist of the defense evidence was to show that the incidents as alleged did not happen or could not have happened whilst other people were present in the house.

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

> ***Conviction:***
>
> ***Ground 1***
>
> ***THAT*** *the Learned Trial Judge erred in law and in fact when the conviction against the appellant, taken as a whole, was unsafe and untenable given that the evidence adduced did not prove beyond reasonable doubts the guilty of the appellant in respect of 3 counts.*
>
> ***Ground 2***
>
> ***THAT*** *the Learned trial Judge erred in law and in fact in convicting the appellant on the charge of all 4 counts when there were many contradictions and discrepancies in the testimony of the complainant and the evidence of the complainant was not credible against the appellant.*
>
> ***Ground 3***
>
> ***THAT*** *the Learned Trial Judge erred in law and in fact when he failed to appropriately observe the demeanor of the complainant who testified against the appellant in that she was very evasive in her answer and was inconsistent throughout the trial.*
>
> ***Ground 4***
>
> ***THAT*** *the learned trial judge erred in law and in fact when he failed to believe the testimony of the appellant who was very forthright in his answer compared to that of the complainant.*

Ground 1

[8] The appellant had misconceived section 23 (1)(a) of the Court of Appeal in stating that the conviction is unsafe and untenable. As far back as in 1992 the Court of Appeal said that whether the verdict is unsafe or unsatisfactory 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.

[9] 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'***

[10] 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)

[11] 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.

[12] 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)].

[13] 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.*

[14] 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).

[15] I have considered the maters raised by the appellant under the first ground of appeal but do not find them to be in anyway adequate to render the verdicts unreasonable.

[16] As for delayed reporting, the trial judge had dealt with them at paragraphs 46-49 of the judgment.

[17] The legal principle relating to delayed reporting is set out in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018). In **Prasad v State** [2020] FJCA 231; AAU02.2018 (20 November 2020) it was held:

> *'[21] The credibility of a witness is not diminished simply because his or her complaint is late until and unless he or she is impeached on the footing that either he or she has complained belatedly due to the sinister motive of implicating the accused falsely or the delay enabled fabricating false allegations, embellishments or afterthought as a result of deliberation and consultation. Delayed reporting should be a trial issue for the judge to address the assessors and himself on. It should not be simply taken up as an appeal point for the first time for want of any other legitimate grounds of appeal. If the delayed complaint is made a live issue at the trial it has be assessed by using "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) and appropriate directions should be given to assessors. If not, it has to be assumed that the defense has no issue with the complaints not made within a reasonable time and seeks no explanation for the delay.'*

[18] The trial judge had said that there was not even a suggestion put to the complainant that she had fabricated her complaint or that she had an ulterior motive to make up these allegations. From the judgment, I do not find that the appellant had challenged the victim's evidence on the basis of deliberate delay in reporting the alleged sexual abuse. However, I do find that she had given clear evidence as to why she was scared to come out with the acts of sexual abuse by the appellant earlier. The fact that the police had unreasonably delayed charging the appellant should not be held against her

credibility. Similarly there is no merit in the criticism that the trial judge had failed to provide sufficient reason for the verdicts.

02nd ground of appeal

[19] The appellant has not specifically asserted what the alleged discrepancies in the evidence of the victim were. The law on omissions, discrepancies, contradictions and inconsistencies is that 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 omissions, discrepancies, contradictions and inconsistencies 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)].

[20] As the trial judge had correctly remarked the victim could not be expected to give evidence from a photographic memory and describe each and every fine detail of an incident that took place 5-6 years ago.

03rd ground of appeal

[21] As for this complaint, the trial judge seems to have indeed observed the victim's demeanour and deportment in that the trial judge had remarked that she was evasive in answering some of the immaterial questions, for example the question as to how old the daughter of the appellant then was but the judge was confident that the victim was an honest witness who told the truth in court.

04th ground of appeal

[22] The trial judge had stated in the judgment that the appellant's evidence that the door to his room was always kept closed and no outsider had access to it was contradicted by his wife Fariza and that it was obvious that he was giving evidence to save his own

skin. In addition. Neha, the sister, and Fariza, the wife of the appellant, according to the judge were not in a position to say whether the alleged incidents occurred or not. Fariza had said she would do whatever it takes to get her husband out of trouble. Thus, the trial judge had concluded that the evidence adduced for the defence was not appealing to him and he rejected the evidence of the defence.

[23] This ground of appeal too has no reasonable prospect of success.

Order of the Court:

1. Leave to appeal against conviction is refused.

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

Solicitors:

Jiten Reddy Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent