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

CRIMINAL APPEAL NO. AAU0158 OF 2019
[Lautoka Criminal Action No: HAC 35/19]

BETWEEN : **ERNEST PICKERING**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, AP/RJA**
Qetaki, JA
Andrews, JA

Counsel : **Appellant in Person**
Mr. L.J. Burney, for Respondent

Date of Hearing : **6 May, 2024**

Date of Judgment : **30 May, 2024**

JUDGMENT

Mataitoga, AP/RJA

[1] I approve and support the draft judgment by Qetaki, JA.

Qetaki, JA

Background

[2] The appellant is challenging the decision of the High Court at Lautoka where he was indicted with one count of rape of his 5 years old biological daughter contrary to section 207 (1) and (2)(b) and (3) of the Crimes Act 2009.

[3] At the end of the summing up the assessors had been unanimous in their opinion that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion and convicted the appellant of rape. The appellant was sentenced on 06 September 2019 to 14 year's imprisonment, reduced to 13 years 6 months after deducting the period of remand, with a non-parole period of 10 years.

[4] The appellant lodged a timely appeal**.** Thereafter the Legal Aid Commission filed amended grounds of appeal against conviction and a written submission on 15 February 2021. The appellant tendered an application on 15 February 2021 in Form 3 of Rule 39 of the Court of Appeal Rules to abandon the sentence appeal. The State had filed its written submission on 24 February 2021.

Facts

[5] The facts as stated in the Judgment of the High Court are as follows:

> *"[3] The complainant is of tender age. She gave sworn evidence. However, she was reminded to tell the truth. She told the court that she told her mother that her daddy (referring to the Accused) had touched her 'vara', meaning her genital area. She said in her evidence that the Accused touched her vagina.*
>
> *[4] The only issue is the physical act of penetration. Consent or lack of it is not an issue because the complainant is under the age of 13 years.*
>
> *[5] The complainant's mother and aunty gave evidence that the complainant told them that the Accused had touched her vagina when she first complained to the mother that her vagina was sore. On the same day the complainant was medically examined. The doctor found a laceration*

beside the complainant's minora. The injury was about 4 to 5 days old and healing.

[6] The relationship between the Accused and the complainant is not in dispute. Nor is in dispute that the allegation arose at the time when the complainant was under the Accused's care for one week in January 2018 when the complainant's mother left her matrimonial home following a dispute with her husband. The report of the alleged abuse was made to the mother shortly after the child was retrieved from the Accused by the mother under police supervision."

[6] The accused had denied the charge. In his evidence he admitted having extra marital affairs and matrimonial problems with his wife. He denied sexually assaulting the victim, his daughter. He did not know the reasons why his daughter had accused him of touching her vagina but he suspected that his wife had coached her to say that in order to punish him for his infidelity.

Leave Stage

[7] The only ground of appeal urged on behalf of the appellant is;

"That the learned trial Judge erred in law and in fact by not directing the assessors to consider the lesser charge of sexual assault."

[8] Leave to appeal against conviction was refused. The learned single judge (Prematilaka, RJA), having considered the sole conviction ground of appeal determined that there is no reasonable prospect of success. At paragraph [22] of the Ruling, the learned single judge stated:

"…….it is clear that not only was it open to the assessors and the trial judge to have convicted the appellant for rape but also such an outcome was inevitable on the totality of the evidence."

[9] At paragraph [7] of the Ruling, it was recognized that the trial judge had correctly told the assessors, in the directions at paragraph [30] of the summing up, that the real issue for them to determine is whether the appellant had penetrated the vagina of the complainant with his fingers.

[10] The learned single judge considered selected cases from the UK, on the duty of a judge in a criminal trial, to place before a jury all possible alternatives open on the evidence, even if they are not raised by the parties or inconsistent with the defence run by the accused: **Coutts** [2006] UKHL 39, and **Von Starck** [2000] UKPC 5. The cases also support the propositions that placing alternative verdicts before jury is not unqualified, as there must be an evidential basis for a reasonable jury to have come to an alternative verdict. The consequence of failure to leave a lesser alternative verdict raised by the evidence, with the jury, was stated by Lord Rodger in **Coutts**, (supra), as follows:

> *"61. Therefore, I consider that the House should follow the reasoning in the second line of cases and hold that, save in exceptional circumstances, an appellate court should quash a conviction, whether for murder or for a lesser offence, as constituting a serious miscarriage of justice where the judge has erred in failing to leave a lesser alternative verdict obviously raised by the evidence."*

[11] In this case, according to the learned single judge, the trial judge had not left a verdict of sexual assault with the assessors and not considered such a possibility himself in the judgment. At paragraph [20], the learned trial judge stated:

> *"……the question is whether the assessors might reasonably have returned such a verdict on the whole of the evidence. The appellant totally denied the allegation. Had the victim's evidence supported by her mother and aunt and particularly the independent medical evidence been believed and acted upon, as the assessors had obviously done, they could not have reasonably returned a verdict of sexual assault."*

Renewal Notice of Appeal and Renewed Grounds Against Conviction

[12] The appellant had filed a Notice for Renewal of Appeal against Conviction dated 2 August 2021 (Pages 10-12, Record).

[13] The Appellant did not seek renewal of the sole ground of appeal on conviction that was dismissed at the leave stage. Instead, the Appellant had filed new, additional and further grounds of appeal.

[14] By Letter dated 03 April 2024 to the Registrar of the Court, which was received on 05 April 2024, the Appellant had sought leave to appeal on 3 further Consolidated Grounds of appeal against conviction.

[15] At the commencement of hearing, the appellant requested to tender an additional Notice of Amended Grounds and Submission of Conviction Appeal. The Court expressed concern that the appellant had not followed proper procedure applicable to filing of appeal and amended further grounds of appeal. In consideration of the late request, and under the circumstances, the Court agreed to deal only with the 3 Consolidated Grounds of appeal against conviction that were received by the Registrar on 05 April 2024, in this appeal. This decision and the reasons were fully explained to the appellant, who was not legally represented, and the appellant appeared to have fully understood the position.

[16] However, the Court noted with approval the Respondent's written submissions in paragraphs 10 and 11, as follows:

> *"10. The appellant has not renewed his application on that ground. Rather, by Notice dated 2 April 2024, received by the FCA Registry on 5 April 2024 he now seeks to advance three"consolidated further grounds."*
>
> *11. This Court has observed on many occasions that this insidious practice is to be discouraged. It must be clearly understood that, following refusal by the single judge of an application for leave to appeal, applicants cannot simply choose to augment or vary their grounds of appeal in any way they wish. Compelling reasons must be shown why it is in the interests of justice to permit a variation of ground."*

[17] The form and substance of handwritten Notices and Submissions filed by the appellant since the Ruling by the single judge on 30 July 2021 at pages 1- 22, Record, illustrate to some extent the confusion, misunderstanding and the real problems faced by the appellant

who, for whatever reason(s), is not legally represented and assisted, in the preparation of legal documents in this appeal, and at the hearing in this Court.

[18] The respondent also tendered its written submission at the hearing of this appeal.

[19] **Consolidated Grounds On Conviction**

(1) *That the learned judge erred in law when his Lordship stated in para 6 line 7 of the summing up that "**But even if you entirely reject the account given by the accused, that would not relieve the prosecution of its burden of making by evidence of accused's guilt in respect of the charge which you have to consider."***

(2) *That the learned trial judge erred in law when his inequitable supposition on the court's judgment (para.7 lines 3,4 and 5) that **"The only logical inference from all these proved facts is that the accused penetrated the complainant's vagina with his fingers",** when he himself on page 264 of the court record during trial (in ejusdem) with a guilty mind or intent prompt the prosecution advocate to lead witness causing substantial injustice to the appellant.*

(3) *That the learned trial judge's verdict was perverse that the accused is guilty of penetrating the complainant's vagina with his fingers.*

Appellant's Submissions

[20] On **Grounds 1 and 2,** the appellant's submissions on the two grounds allege that the trial judge had misdirected the assessors in the summing up (at paragraph 6, line 7), which could have persuaded the assessors to arrive at the verdict convicting the appellant .As such an injustice is caused to the appellant. The appellant also submitted that as a consequence his right to a fair trial under section 15(1) of the Constitution was affected.

[21] The appellant submits that the misdirection on the part of the learned trial judge has caused prejudice to the appellant in having a fair trial according to law.

[22] The appellant submits that, the learned judge repeated himself when he stated in his judgment (paragraph 7, lines 3, 4 and 5) that *"The only logical inference from all these*

proved facts is the accused penetrated the complainant's vagina with his fingers", "*prompting the state counsel to lead the witness, especially with no strict conformity to truth or fact in besmirching the reputation of potential witness causing injustice to the appellant."*

[23] The appellant added that the standard of satisfaction by the learned trial judge regarding count 2 of this indictment has left the criminal standard of proof in doubt.

[24] On **Ground 3,** the appellant submits that the misdirection by the learned judge regarding the evidence could justifiably be excluded at the full Court's discretion, as it is submitted, with the practice under Rule 403 of the Federal Rules of Evidence of the United States.

[25] The appellant submitted that the trial judge was wrong in permitting Ms Naibe (State Counsel) to lead the complainant's evidence, as was the case. That a judicial officer ought to be impartial, and should not make any comment that might reasonably be expected to affect the outcome of any proceedings or impair the manifest fairness of the judicial process or trial of any person.

[26] The appellant submits that learned judge did not give any warning to the assessors in relation to the evidence lead by the State Counsel, rendering verdict unreliable and no reasonable person would act on it, rendering the guilty verdict perverse. The appellant placed reliance on an Indian case: **Arulvela & Another v State [Public Prosecutor] 2009 AIR SCW 6593**; 2009 (10) SCC 206:

> *"24. We have carefully perused the judgment of the trial court and the impugned judgment of the High Court. The trial court very minutely examined the entire evidence and all documents and exhibits on record. The trial court's analysis of evidence also seems to be correct. The trial court has not deviated from the normal norms or methods of evaluation of the evidence. By no stretch of imagination, we can hold that the judgment of the trial court is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it and consequently the judgment of the trial court is perverse."*

Respondent's Submissions

[27] The respondent submitted that the trial judge, at paragraph [30] of summing up, quite properly directed the assessors that:

> *"[30] The prosecution case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused had touched her vagina and if you feel sure from all proved facts that the only logical inference is that the Accused penetrated the complainant's vagina with his fingers, then you may express an opinion that the Accused is guilty of the charge. But if you do not believe the complainant's evidence that the Accused touched her vagina, or if you not sure whether the Accused penetrated the complainant's vagina with his fingers, or if you have reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of the charge."*

[28] Secondly, adopting best practice, the learned trial judge gave succinct reasons for his verdict at paragraph [7] of his judgment dated 22 August 2019 ("the Judgment"):

> *"[7] The complainant struck me as an honest witness. I believe the account of the complainant that her father had touched her genitals. That account is consistent with her report to her mother and aunty and the injury found in her genitals shortly afterwards. The only logical inference from all these proved facts is that the Accused penetrated the complainant's vagina with his fingers."*

[29] The respondent objected to the three "*consolidated grounds"* advanced by the Appellant by Notice dated 2 April 2024, received by the Court Registry on 5 April 2024 and served on the Respondent on 3 May 2024 as set out in paragraph [16] above.

[30] The respondent submits that there is no merit in the complaint in Ground 1 of the new grounds against conviction by reason of the fact that the learned trial judge at paragraph [6] of the summing up, gave an unimpeachable *Liberato* type direction, which was entirely appropriate in the circumstances where the appellant had given evidence in his own defence. It was also made clear to the assessors that they must acquit the appellant if they were not sure of his guilt. That there is no merit in this complaint.

[31] The respondent submits that there is also no merit in Ground 2 which complains that the appellant did not get a fair trial because the judge permitted the prosecutor to lead evidence from the child complainant (at page 264 of Record). It submits that the complainant was 5 years old at the date of the trial, and there is nothing objectionable in the judge allowing the prosecutor to prompt her on whether she had complained to her Mum about her father's conduct. The question the prosecutor asked about the substance of her complaint was not a leading question.

[32] The real substance of the complainant's evidence is recorded at the bottom of page 264 and over at page 265 of the Record. The evidence was elicited with perfectly legitimate open questions. There is no substance in the appellant's complaint of unfairness. The summing up also explained the defence case in a fair and balanced manner at paragraph [29].

[33] On Ground 3, the respondent submitted that the judge's verdict was not perverse or unreasonable. The test is whether the evidence supports the finding of guilt, and can a reasonable judge convict under the circumstances. It must be noted that the assessors were unanimous in their opinion on the guilt of the appellant. The victim's complaint was supported by the medical evidence. The evidence supported the conviction. There is no merit in this ground.

Analysis

[34] In the context of Ground 1, paragraph 6 of the summing up is perfectly straightforward and cannot be said to have been intended to adversely affect the appellant's right to fair trial. It was a clear direction to the assessors on how they should assess and evaluate the evidence of the appellant in light of evidence as a whole, in the circumstances of this case, where the appellant has elected to give evidence. The appellant is not obliged to give evidence; nor to prove his innocence, and does not have to prove anything.

[35] However, the assessors were directed to consider the evidence given by the appellant, and whether they believe the evidence, and whether the evidence given by the appellant is or

may be true. So, if the account given by the appellant is or may be true, then the appellant may be found not guilty. In the case where the assessors reject the account of the accused, that does not affect or alter the onus of proof which the law requires of the prosecution, which is that the prosecution, must and is not relieved of, the burden of proof in a criminal case, that is to prove its case beyond reasonable doubt.

[36] Paragraph [6] follows paragraphs [4] and [5] where the trial judge explains to the assessors the principles that in a criminal trial the burden of proof rests throughout the trail upon the prosecution, and the burden never changes, never shifts to the accused. The prosecution must prove its case beyond reasonable doubt.

[37] The trial judge followed this up in the judgment, where in paragraph [2], he stated:

> *"[2] The prosecution carries the burden to prove the charge beyond reasonable doubt. The accused does not have to prove anything. He gave evidence. The defence case is of denial and fabrication of the allegation against him."*

[38] There is no merit in this ground.

[39] Ground 2: In paragraph 7 of the Judgment, the learned trial Judge was giving reasons for the verdict reached. The contention is, the appellant did not get a fair trial, presumably because the judge permitted the prosecutor to lead evidence from the child complainant – see pages 264 to 266 of Record, beginning with at mid-page 264:

> ***Judge:*** ***Ms. Naibe, I permit you to lead on her complaint to her mother. Can ask the child witness whether she said anything about her Dad doing something to her to her mum last year."***

[40] The respondent submitted that the evidence was elicited with perfectly legitimate open questions. The complainant was only 5 years old when giving evidence, and there was nothing objectionable in the judge allowing the prosecutor to prompt her on whether she complained to her mum about her father's conduct. The question the prosecutor asked

about the substance of her complaint was not a leading question. The appellant had not provided any legal authority to support

[41] There is no substance in the appellant's claim of unfairness. There is no breach of section 15(1) of the Constitution. It is evident, as stated in paragraph [3] of the judgment that, the complainant is of tender age. She gave unsworn evidence. She was reminded to tell the truth. She told the court that she had told her mother that her daddy (referring to the accused), had touched her "*vara*", meaning her genital area. She said her evidence that the accused touched her vagina.

[42] There is no merit in this ground.

[43] Ground 3: Was the verdict perverse? The verdict was arrived at after a fair trial of the accused in which the accused had fully participated, including opting to give sworn evidence. The learned trial judge had given his summing up to the assessors, which included clear directions (as in paragraph [30]) to the assessors on how to assess and evaluate the evidence before it, especially, when the appellant had given evidence, although he does not have to, nor to prove his innocence.

[44] The Case **Arulvelu & Another** (supra) are appeals directed against the judgment of the High Court of Madras dated 12.3 2002 in Criminal Appeal No.315 of 1992 and RC.No.691 of 1991 respectively. The High Court had reversed the judgment of a lower Court acquitting the accused persons, by convicting them. The case involves the death of a housewife who had committed suicide by hanging herself allegedly caused by the appellants who compelled the deceased to commit suicide. According to the prosecution, she was forced to commit suicide because of the consistent demands of dowry made by the first accused husband. According to PW1, the deceased's father, his daughter committed suicide because he could not give gold and car as agreed before her marriage. The accused persons (appellants) started torturing and harassing the deceased which ultimately led to suicide.

[45] By highlighting paragraph 24, of the above case, the appellant appears to suggest that the views and verdict reached by the assessors and the learned trial judge were not possible or plausible. That the learned judge did not examine in detail the entire evidence at the trial. That the trial judge's analysis of the evidence were completely wrong or mistaken. That the trial judge had deviated from the normal norms or methods of evaluation of the evidence. That the impugned judgment of the High Court is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it and consequently the judgment of the High Court is perverse. This is far from the truth.

[46] The appellant it seems is inviting the Court to hold that the evidence of the trial court (High Court): *"so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse and the findings by the trial court are against the weight of evidence."* (paragraph 25, **Arulvelu & Another**). The circumstances of the case before this Court is quite different both on facts and on issues that are before the Court. Importantly, in this case the appellant was convicted by the High Court and not acquitted.

[47] The appellant was represented by legal Counsel at the High Court trial. The record of proceedings do not indicate that a challenge or objections were made against the learned trial judge's approval for State Counsel to lead the complainant's evidence. There was no objection by Counsel for the accused when closing the defence case at the trail. There was no application for redirection, after the summing up. The Court is entitled to accept that the conduct of the defence at the trial is largely a matter between the accused and his Counsel. In the event the accused is dissatisfied with the conduct of the defence at trial, the Courts have set a procedure and guideline which all aggrieved clients are required to follow: See **Chand v The State** [2019] FJCA 254; AAU78 of 2013; **Baleiono v State [2024]** FJCA 49 (AAU No.101 of 2022); **Teeluck v State of Trinidad & Tobago** [2005] 1 WLR 2421 [para 39].

[48] The opinions of the assessors indicate their rejection of the defence case and found the complainant to be truthful and reliable witness. Similarly, the Judge found the complainant to be honest and reliable witness, and the totality of the evidence satisfy him that the prosecution has discharged the burden of proving the charge against the accused beyond reasonable doubt.

[49] Ground 3 has no merit.

Conclusion

[50] For the above reasons the appellant's appeal has no merit. The renewal application is refused, and the appeal is dismissed.

Andrews, JA

[51] I have read and agree with the reasoning and outcome of the judgment of Qetaki, JA.

Order of Court:

1. *Appeal dismissed.*
2. *Conviction affirmed.*

COURT OF APPEAL FIJI

Hon. Justice Isikeli Mataitoga
ACTING PRESIDENT, COURT OF APPEAL
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL