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

CRIMINAL APPEAL NO.AAU 180 of 2016
[In the High Court at Suva Case No. HAC 103 of 2016]

BETWEEN	:	**PANAPASA GANITA**	
			Appellant
AND	:	**STATE**	***Respondent***
Coram	:	**Prematilaka, JA**	
Counsel	:	**Ms. S. Nasedra for the Appellant**	
	:	**Ms. S. Tivao for the Respondent**	
Date of Hearing	:	**15 July 2020**	
Date of Ruling	:	**21 July 2020**	

RULING

[1] The appellant had been indicted in the High Court of Suva on two counts of rape and five counts of sexual assault allegedly committed at Nasinu in the Central Division contrary to section 207(1) and (2) (a) and section 210 (1) (a) of the Crimes Decree, 2009 respectively.

[2] The information read as follows.

'FIRST COUNT

Statement of offence

RAPE: *Contrary to section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *on the 19th February 2016 at Nasinu in the Central Division had carnal knowledge of EK without her consent.*

SECOND COUNT

Statement of offence

RAPE: *Contrary to section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *on the 26th February 2016 at Nasinu in the Central Division had carnal knowledge of EK without her consent.*

THIRD COUNT

Statement of offence

SEXUAL ASSAULT: *Contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *between the 1st day of November 2015 and 30th day of November 2015 at Nasinu in the Central Division unlawfully and indecently assaulted EK by fondling her breast.*

FOURTH COUNT

Statement of offence

SEXUAL ASSAULT: *Contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

PANAPASA GANITA *between the 1st day of January 2016 and 18th February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by fondling her vagina.*

FIFTH COUNT

Representative Count

Statement of offence

SEXUAL ASSAULT: *Contrary to section 210(1)(a) and (2) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

***PANAPASA GANITA** between the 1st day of January 2016 and 18th January 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by licking her vagina.*

SIXTH COUNT

Statement of offence

***SEXUAL ASSAULT:** Contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

***PANAPASA GANITA** on 26th February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by sucking her breast.*

SEVENTH COUNT

Statement of offence

***SEXUAL ASSAULT:** Contrary to section 210(1)(a) and (2) of the Crimes Decree No. 44 of 2009.*

Particulars of offence

***PANAPASA GANITA** on 26th February 2016 at Nasinu in the Central Division unlawfully and indecently assaulted EK by licking her vagina.*

[3] At the close of the prosecution case, the learned High Court judge had held that there was no case to answer in respect of 3rd, 4th 5th and 07th counts of sexual assault. At the conclusion of the trial on 28 October 2016 the assessors' opinion was unanimous that the appellant was guilty of the 01st, 02nd and 06th counts against him. The learned trial judge had agreed with the assessors in his judgment delivered on 01 November 2016, convicted the appellant and on 03 November 2016 sentenced him to 10 years and 04 months of imprisonment as an aggregate sentence with a non-parole period of 07 years and 04 months.

[4] The appellant's timely application for leave to appeal against conviction had been filed in person on 30 November 2016. Subsequently, the appellant had in person filed an application for bail pending appeal on 26 January 2017 but not pursued thereafter. He had tendered written submissions in person on 31 October 2018. He had also filed

an application to abandon his appeal against sentence (Form 3) on 01 March 2019 though it is not clear at what stage he had appealed against sentence. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction on 08 June 2020 along with written submissions. The state had tendered its written submissions on 17 April 2019 and 17 July 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

> *Ground One:*
>
> *That the Learned Trial Judge erred in law and fact when he failed to fully and properly consider the contradictions in the complainant's evidence in count 1, count 2 and count 6 where the complainant had first stated in her evidence that she said 'no' to the Appellant's request to have sex and later on in cross-examination, she stated that she was 'forced to say yes' and this in turn caused a reasonable doubt in the complainant's evidence.*
>
> *Ground Two:*
>
> *That the learned trial Judge erred in law and in fact when he stated in his Judgment that the complainant asked for money from the Appellant and the Appellant wanted the complainant to have sex with him first for him to give her money, this is not supported by evidence and caused a grave miscarriage of justice.*

[7] The evidence of the complainant could be summarized as follows. The complainant, born on 19 August 1996, lived in Lau and came to the appellant's house in October 2015 to look after his children at his request. The appellant's behavior had changed while she was living there in his house in such a way that the appellant started speaking to her slowly and giving her money saying that it was for her makeup. The appellant was sending signals to her that he was going to do something at night. She wanted to tell her aunt, Tulia but she could not. The appellant had told her not to tell anyone and she would have no money if others come to know. One night the appellant had come to her room and attempted to give her money but she had refused.

[8] According to the complainant she had asked for money from the appellant for 'recharge' and body spay prior to 19 February 2016, however, on that day the appellant had forced her to say 'yes' for them to have sex. When she was asked by court as to how she was forced by the appellant to say 'yes' to have sexual intercourse, she had said that the appellant asked her to have sex and there had been some conversation on the line "*For him to give the money first, then to say 'yes' to have sex with him in the evening*". When she had said 'no', the appellant got hold of her and pulled her to lie down on the bed. He had removed her clothes and his clothes and then penetrated his penis into her vagina. She had said she could feel the pain and she cried. She was also worried that she would get pregnant. She had stated that she did not consent for him to penetrate her vagina with his penis.

[9] Then on 26 February 2016 the appellant had given her money for her cosmetics. When she was cleaning the room, the accused had come around 2.00 p.m. (where there were 04 boys, 06 children and her aunt's brother in the house), locked the door, and pushed her onto the bed when she tried to open the door. Then the appellant had tried to take her clothes off but she had pushed him away and struggled. The appellant had got on top of her, licked her neck, mouth, and breast, and forcefully opened her legs and inserted his penis inside her vagina without her consent. She had not screamed. The appellant had forced her not to tell anyone at home. After that he had slapped, punched and pushed her. She had cried and then gone to open the door. The appellant had come to stop her but she had pushed him away and gone outside. She had told the appellant's wife but she had not believed her. The complainant had then

gone to a relative named Tui Vakacegu and told them everything and reported the matter to police with her aunt, Apikali Vutevute.

01st ground of appeal

[10] The complainant had not stayed with the appellant's house February 2016, the month in which the acts of rape and sexual assault in the first, second and third counts had allegedly occurred. The appellant had admitted having consensual sex with the complainant on 19 February 2016. She had asked for money and he in return had given her money and asked her to engage in sex with him and according to him both had agreed to the suggestion. He had stated that on 26 February 2016 too, he had engaged in sex with her but did not force the complainant to do so. According to him, the complainant had come to the room and asked for money. He had told her that he would give her money and also asked her to have sex with him. He said both had agreed and engaged in sexual intercourse.

[11] The appellant had admitted the two acts of sexual intercourse and one act of sexual assault relating to 1st, 2nd and 6th counts and had taken up the position that on both occasions he had believed that she was consenting to have sex as on 19th February he had given the money asked for by the complainant and on 26th February he had agreed to give her money and because on both occasions she had removed her cloths before the acts of sexual intercourse. Further, according to him, she would not have returned to his house on 26th February if the act of sexual intercourse on the 19th February had happened without her consent. The motive for the complaint, according to the appellant was that he could not give her money as promised on 26 February as he was held up due to a cyclone warning from Friday and when he returned on Monday she had left.

[12] The learned trial judge had placed the above evidence before the assessors and in paragraph 62 of the summing-up had said

> *'Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;*

(i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.

(ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
(iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

[13] The assessors do not seems to have thought that the appellant version might at least be have been true, for if that be the case they may not have opined unanimously that the appellant was guilty of 01st, 02nd and 06thcounts. Whether the assessors thought that there was no consent at all on the part of the complainant or though there was consent, her consent was not freely and voluntarily given cannot be ascertained.

[14] However, in agreeing with the assessor the learned trial judge in the judgment had gone on the basis that the appellant was in a position of authority (being also her father's brother) as far as the complainant was concerned and he had obtained the complainant's consent by the exercise of authority and therefore her consent had not been free and voluntary.

6. The evidence of the complainant was that she did not consent for the accused to penetrate her vagina on 19/02/16 and 26/02/16, and for the accused to lick her breast on 26/02/16. The complainant was 19 years old at the time of the three alleged offences. She was brought to Suva from Lau by the accused to babysit his children. It was the first time for the complainant to come to Suva. The accused was in a position of authority and trust over the complainant. The evidence revealed that the complainant asked money from the accused and the accused wanted the complainant to have sex with him first, for him to give her money. The complainant clearly said that she did not consent for the accused who was her uncle to have sexual intercourse with her on the two occasions.

7. The consent relevant to the offence of rape should be consent freely and voluntarily given. Consent obtained by the exercise of authority is not considered as consent freely and voluntarily given. Mere submission does not constitute consent.

[15] The learned trial judge had not specifically addressed the assessors on this aspect except the general directions in paragraph 24 of the summing-up on free and voluntary consent. However, in the light of the uncontroverted evidence that the appellant was not living in the appellant's house in February 2016 (when she left his house is not clear from the summing-up and the judgment) but was staying elsewhere and she kept coming to his house on her own volition even after the first alleged incident of rape on 19th February only to be 'raped' again on 26th February, whether the appellant could still be said to be in that position of authority after she left his house and whether her consent had been obtained by exercise of that authority seem to pose a question of mixed law and facts which cannot be determined at this stage without the full appeal record. This concern is further heightened by the fact that that there had been 'sex for money or money for sex' scenario that had unfolded in the evidence of both parties.

[16] On the other hand it is also possible the appellant had thought that the complainant was under obligation, whether she liked it or not, to agree to have sex with him because she had taken money or agreed to take money from him in which event he had not cared whether she was freely and voluntarily agreeing to have sex. Further, it could also be that the appellant had taken the complainant's consent for granted at all times. The state has submitted **Balemaira v State** [2013] FJCA 40; AAU098 of 2010 (30 May 2013) where it was held

> *'[4] In the instant case prosecution alleges two sessions of sexual act. Even if one assumes that there was consent for the first act, as the second act is a subsequent distinct act, court has to find out whether there was consent in regard to the second act or not. One cannot presume continuity of consent for the second act as consent can be withdrawn at any time. Consent is an ongoing state of mind and is not irrevocable once given.* Consent must be given at the time of the activity. *In this case the victim says in evidence:*

[17] Therefore, though I cannot say that this stage that the appellant has a reasonable prospect of success in his appeal against conviction, I am inclined to grant leave to appeal so as to enable the full court to consider the appeal with the benefit of the complete appeal record.

02nd ground of appeal

[18] The appellant's complaint under this ground of appeal rests on paragraph 6 of the judgment. It is as follows.

> *'.....The evidence revealed that the complainant asked money from the accused and the accused wanted the complainant to have sex with him first, for him to give her money....'.*

[19] The judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court (vide **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020), **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Lasarusa Tikoigiladi v State** AAU 138 of 2016 (23 June 2020) and **Ravulowa v State** [2020] FJCA 93; AAU0090.2018 (1 July 2020)].

[20] This statement appears to be based on paragraph 47 of the summing-up.

> *'The accused said in his evidence that he admits having sex with the complainant on 19/02/16, but he did not force her. He said that they had sex because of money. She asked for money and he asked to have sex with her. He said they both agreed.*

[21] Thus, there had been evidence to support what the learned trial judge stated in paragraph 6 of the judgment. Therefore, this ground of appeal has no prospect of success.

Order

1. Leave to appeal against conviction is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL