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

CRIMINAL APPEAL NO.AAU 095 of 2017
[In the High Court at Suva Case No. HAC 121 of 2016S]

BETWEEN	:	**JOSUA COLANAUDOLU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. L. Burney for the Respondent**
Date of Hearing	:	**05 August 2020**
Date of Ruling	:	**11 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on six counts of rape, four counts of abduction, one count of indecently annoying females and one count of murder allegedly committed at Navua in the Central Division from 1998 to 2016.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

ABDUCTION: *Contrary to section 252 of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *between the 1st day of April 1998 and 31st day of December 1999, at Navua in the Central Division, abducted* ***A.A*** *in order to subject her to his unnatural lust.*

SECOND COUNT

Statement of Offence

RAPE: *Contrary to section 149 and 150 of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *between the 1st day of April 1998 and 31st day of December 1999, at Navua in the Central Division, had unlawful carnal knowledge of* ***A.A*** *without her consent.*

THIRD COUNT

Statement of Offence

ABDUCTION: *Contrary to section 252 of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *in February 2000 at Navua, in the Central Division, abducted* ***A. A*** *in order to subject her to his unnatural lust.*

FOURTH COUNT

Statement of Offence

RAPE: *Contrary to section 149 and 150 of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *in February 2000 at Navua in the Central Division, had unlawful carnal knowledge of* ***A. A*** *without her consent.*

FIFTH COUNT

Statement of Offence

ABDUCTION: *Contrary to section 252 of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *between the 1st day of June 2002 and 31st day of July 2002, at Navua in the Central Division, abducted* ***S. L. V*** *in order to subject her to his unnatural lust.*

SIXTH COUNT

Statement of Offence

RAPE: *Contrary to section 149 and 150 of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *between the 1st day of June 2002 and 31st day of July 2002, at Navua in the Central Division, had unlawful carnal knowledge of* ***S. L. V*** *without her consent.*

SEVENTH COUNT

Statement of Offence

INDECENTLY ANNOYING FEMALES: *Contrary to section 154(4) of the Penal Code [Cap 17].*

Particulars of Offence

JOSUA COLANAUDOLU *between the 1st day of January 2004 and 31st day of December 2004, at Navua in the Central Division, with intent to insult the modesty of* ***S. L. V****, exposed his naked penis to her, intending that his penis be seen by her.*

EIGHTH COUNT

Statement of Offence

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

Particulars of Offence

JOSUA COLANAUDOLU *on the 16th day of November 2012, at Navua in the Central Division, had carnal knowledge of* ***S. A. N*** *without her consent.*

NINTH COUNT

Statement of Offence

ABDUCTION: *Contrary to section 282 (c) of the Crimes Act 2009.*

Particulars of Offence

JOSUA COLANAUDOLU *between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, abducted* ***MERE AILEVU MACEDRU*** *in order to subject her to his unnatural lust.*

TENTH COUNT

Statement of Offence

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

Particulars of Offence

***JOSUA COLANAUDOLU** between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, had carnal knowledge of **MERE AILEVU MACEDRU** without her consent.*

ELEVENTH COUNT

Statement of Offence

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

Particulars of Offence

***JOSUA COLANAUDOLU** between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, penetrated the anus of **MERE AILEVU MACEDRU** with his penis without her consent.*

TWELFTH COUNT

Statement of Offence

***MURDER**: Contrary to section 237 of the Crimes Act 2009.*

Particulars of Offence

***JOSUA COLANAUDOLU** between the 13th day of March 2016 and 14th day of March 2016, at Navua in the Central Division, murdered **MERE AILEVU MACEDRU**.*

[3] At the conclusion of the trial on 24 May 2017 the assessors had unanimously opined that the appellant was guilty of all counts against him. The learned trial judge had agreed with the assessors in his judgment delivered on 25 May 2017 on their decision on counts 2, 4, 6, 7, 8, 9, 10, 11 and 12 and convicted the appellant accordingly. The High Court judge had disagreed with the assessors on counts 1, 3 and 5 due to 'technical reasons' and found the appellant not guilty of those charges. On 26 May 2017 the High court judge had sentenced the appellant to 14 years of imprisonment on all rape charges, 05 years and 06 months respectively on charges of abduction and

indecently annoying females and mandatory life imprisonment on the count of murder with a minimum serving period of 30 years; all of the sentences to run concurrently.

[4] The appellant's timely application for leave to appeal against conviction had been filed in person on 15 June 2017 and his amended grounds of appeal had been filed on 23 May 2018. Thereafter, the Legal Aid Commission had filed an amended notice of appeal against conviction on 19 June 2020 along with written submissions. The state had tendered its written submissions on 02 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 1-*** *That the learned trial Judge erred in law and in fact when he failed to consider and accept the evidence of Dr.salote and Dr.Anaseini at voir dire regarding the injuries discovered on the Appellant through their examination and that these injuries substantiated the complaints of assault on the Appellant.*
>
> ***Ground 2-*** *That the learned trial Judge erred in law and in fact when he acted upon a wrong principle in disbelieving the appellant at voir dire on account of the inconsistency in injuries suffered and complaints made rather than accepting that there was evidence on injuries which goes to the heart of the admissibility of the caution interview.*
>
> ***Ground 3 -*** *That the learned trial Judge erred in law and in fact when he convicted the Appellant of the count of Murder when there was an insufficiency of evidence to secure a conviction for Murder.*

[7] The facts of the case against the appellant had been summarized by the trial judge in the sentencing order as follows.

> *3. Between the 1st April 1998 and 31 December 1999, at the age of 22 years old, you attacked the first complainant (PW2), who was a 14 year old girl at the time. She was tiny, and you were bigger and stronger than her. PW2 was sent to the shop by her parents. You waited for her among the flower gardens. When she came near you, you forcefully grabbed her, gagged her and forcefully took her to your house. There you subdued her forcefully and raped her. You warned her not to report on the incident, or you will kill her.*
>
> *4. You continually harassed PW2 until February 2000, and did the above incident to her 8 times. She was scared to report the matter until Mere Ailevu's murder in 2016. Next you turned your attention on the second complainant (PW3). She was PW2's elder sister. The sisters were your neighbour in the Vunibuabua/Lepanoni Settlement area. PW3 said sometimes between 1 June and 31 July 2002, she was breastfeeding her baby daughter in their family house. Her daughter was born on 30 May 2002. PW3 said, she was 20 years old at the time. You were 26 years old at the time.*
>
> *5. PW3 said, her parents were sleeping in the sitting room. It was night time. You entered their house without their permission. You forcefully took PW3 outside the house. When she wanted to raise the alarm, you put a knife to her throat and warned her not to do so, or you will injure her parents or baby daughter. You took her to an outside dog house. You threw her in the dog house, forcefully took off her clothes and forcefully raped her for about an hour. You fled the scene because you were disturbed by another. PW3 was so scared to report the incident to the authorities, until the Mere Ailevu's murder case arose.*
>
> *6. Next you turned your attention on your niece, complainant no. 3 (PW4). PW4 was your elder brother's daughter. On 16 November 2012, you tricked her that her father was looking for her. She was 18 years old at the time. You were 36 years old at the time. Instead of taking her to her father, your elder brother, you took her to the Deuba beach. At the beach, you forcefully subdued her and raped her for 20 minutes. She fainted as a result of the attack. You left her there, and fled the scene. All the above attacks on young women came to a head when you turned your attention on Mere Ailevu, a 14 year old girl. You were 39 years old at the time.*
>
> *7. Throughout the 13 March 2016 (Sunday) you had been drinking liquor with friends. You worked from 8pm on 12 March 2016 (Saturday) to 5am 13 March 2016 at Hide Tide Bar in Deuba. On 13 March 2016, you went home to have your dinner. You felt asleep while having your dinner. After 10pm, you woke up and wandered to the village market. You saw Mere Ailevu at the*

market. You forcefully took her across the Queens Highway towards the Loloma Beach side. You later threw her over the fence. Then you assaulted her by elbowing her. You forcefully carried her to the beach and repeatedly raped her vaginally and anally. You later left her there and fled the scene. Mere was found dead on the beach on Monday, 14 March 2016 in the afternoon. She died as a result of massive brain injuries.[3]

01st and 02nd ground of appeal

[8] The appellant argues that the learned trial judge had failed to accept the medical evidence regarding his injuries which substantiated his complaint of police assaults and that the trial judge had looked at the inconsistency between the medical evidence revealing some injuries on the appellant and the appellant's version of the police assault rather than considering the effect of the appellant's injuries on the admissibility of the confessional statements at the *voir dire*. Specific reference is made to paragraphs 13-16 of the *voir dire* ruling dated 12 May 2017. They are as follows.

> *13. 'I have carefully listened to the witnesses of the parties during the voir dire hearing. I have carefully considered their evidence and compared them. I have looked particular to the two doctors' medical reports, which were accepted into evidence, for confirmation or otherwise of the parties' position on the issue of assaults. Doctor Salote Behr examined the accused at CWM Hospital on 22 March 2016 at 4.45pm and finished at 5.45pm.*
>
> *14. In D (10) of her report, Doctor Behr noted "minor laceration on left side of the tongue". In court, the accused drew the length of the laceration of his tongue as 1 ¼ inches. In my view, a 1 ¼ inches cut to the tongue is not minor, thus the accused's version differs from the doctor's. Secondly, the doctor noted "mild swelling and tenderness over left jaw and limited range of movement". In court, the accused said, on 20 March 2016, the police threw 10 hard punches on his body. He said, some of the punches landed on his jaw. In my view, I would expect not mild swelling, but serious swelling on his jaw and a possible broken jaw if he was punched hard on the jaw. The police officers who gave evidence in court were big men, and their punches on the accused would not leave a "mild swelling and tenderness". The other injuries noted by the doctor were "tenderness behind left ear and right costal region". In court, the accused said he was given 10 hard punches to the body and kicked hard on the hips and back. However, the doctor mentioned no injuries on these parts of the accused's body.*
>
> *15. Also, Doctor Behr saw no laceration or bruises on the accused's anus. Accused said they roughly rubbed the chilies on the edge of his anus. One would expect some injuries to that part of his body, but none were found.*

16. As for Doctor Anaseini Tabua, she medically examined the accused on 30 March 2016 at 11.10am at Navua Hospital. In D(12) of her medical report, she noted in injuries number (i) to (iv) tenderness in left chest, right chest, left side of face and left side of hip. The accused in court said he was given 10 hard punches and kicks to his body. In my view, seeing the police officers who appeared in court, if the accused was telling the truth, I would expect the accused to be seriously injured if he was in fact punched and kicked repeatedly by police."

[9] The appellant had been caution interviewed on four occasions. Firstly it had been on 20 - 22 March, secondly on 23 and 24 March, thirdly on 25 March and fourthly on 26 - 29 March 2016 at Crime Office at Navua police station. He had made partial or full confessions to some counts alleged against him in the course of his cautioned interview. During the recording of the fourth segment of the cautioned interview the appellant had been taken to the crime scene relating to the murder and he had confessed the crimes committed against the deceased Mere Ailevu in the course of the re-construction of the incident. The police had video recorded this episode and produced to court as evidence against the appellant. After the last of the interviews the appellant had been formally charged in respect of the offences against Mere Ailevu.

[10] The appellant had challenged his cautioned interview on the basis that the police had repeatedly assaulted, threatened and forced him whilst in police custody to confess to the alleged crimes which the police had denied. It appears that the appellant had been examined by Doctor Behr while he was being held in police custody and by Doctor Anaseini Tabua on the day after the cautioned interview was concluded.

[11] The appellant had stated that a police officer had also inserted two fingers into his anus with chillies rubbed on the edge of the anus and the repeated assaults had taken place while he was blindfolded. According to him, fearing further assault he had confessed to the commission of the offences and the confessions were not voluntary or given out of his free will.

[12] The trial judge had compared the injuries recorded by the two doctors and rejected the appellant's version on the premise that the reported injuries differed from the assault described by the appellant. For, example the trial judge had stated that the length of

the laceration on his tongue that the appellant drew in court was not a *"minor laceration on left side of the tongue"*. The trial judge had also reasoned out that had the police thrown 10 hard punches on the appellant's body including his jaw, he would have expected not *"mild swelling and tenderness over left jaw and limited range of movement"* but serious swelling on his body and a possible broken jaw. In addition the trial judge had noted that though the appellant had complained of hard kicks on his hip and back, the doctors had not noted such injuries. Dr. Behr had also noted *"tenderness behind left ear and right costal region"* but no injuries on his anus or anal area.

[13] As regards the injuries recorded by Dr. Anaseini namely *'tenderness in left chest, right chest, left side of face and left side of hip'* the High Court judge had stated that seeing the police officers who appeared in court, he would expect the appellant to be seriously injured if he was in fact punched and kicked repeatedly by the police.

[14] The appellant's contention is that despite the observations by the trial judge regarding the incompatibility of the assault the appellant had alleged and what the doctors had observed on his body, the fact remained that the appellant had sustained some injuries whilst in police custody and there was no explanation by the police as to how he came by those injuries. Therefore, the appellant argues that it was wrong for the trial judge to have rejected the appellant's version given that it was for the prosecution to prove beyond reasonable doubt that the confessional statements were voluntarily.

[15] In **Nacagi v State** [2015] FJCA 156; AAU49.2010 (3 December 2015) where a similar ground of appeal was urged the Court of Appeal stated:

> *'[14] The question at this stage is what approach should be taken by this Court to an appeal that challenges confessions made by the Appellants in caution statements that, after a voir dire hearing, were found by the trial Judge to have been made voluntarily, that is, without violence or the threat of violence. In **Rahiman –v- The State** (CAV 2 of 2011; 24 October 2012) the Supreme Court referred to the observations of Lord Salmon in **Director of Public Prosecution –v- Ping Lin** [1975] 3 WLR 419 at page 445:*
>
> > *"The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact on apparently similar evidence in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of the*

evidence before him or failed to apply the correct principle – always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."

[16] The court in ***Nacagi*** further remarked:

> *'[15] In my judgment the absence of any analysis of the independent medical evidence and the absence of any indication as to how much, if any, weight ought to be attached to that evidence represent a wrong assessment of the evidence. The task of assessing the evidence went beyond merely assessing the credibility of the Respondent's witnesses and the evidence given by the three Appellants challenging the admission into evidence of their caution statements. Furthermore I am satisfied that had the learned Judge assessed the independent medical evidence he would have reached the conclusion that the Respondent had failed to establish beyond reasonable doubt that the three caution statements had been made voluntarily. I find that this ground of appeal raised by three of the Appellants has succeeded.....'*

[17] In the present case the learned trial judge had considered and then compared the medical evidence with the degree of assault alleged by the appellant and found that the medical evidence did not support the kind of assault described by the appellant. The trial judge had not ruled out medical evidence as irrelevant or determined that the appellant did not suffer such injuries during his detention by the police. The judge appears to have rejected the alleged police assault on general credibility of the appellant's version mainly due to the said incompatibility.

[18] In **Tuilagi v State** [2018] FJSC 3; CAV0013.2017 (26 April 2018) the Supreme Court examined a similar complaint of police assault *vis-à-vis* medical evidence and held

> *'39. The fundamental condition in deciding the admissibility of a confession is that the statement made by the accused shall have been made voluntarily and in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority or by oppression. As held in the case of **State v Mool Chand Lal** (1999 Labasa High Court) oppression is anything that tends to sap and has sapped that free will that must exist before a confession is recorded.*
>
> *40. As regards the standard of proof, the prosecution must prove the voluntariness beyond reasonable doubt. As held in the case of **R v Sartiori** (1961 Crim. L. Rev.397), if the judge is in doubt as to whether the confession was made under the influence of any improper inducement he will reject the confession. This position has been reiterated in the case of **Ganga***

Ram and Shiv Charan v Regina *(Criminal Appeal 46 of 1983) where the Fiji Court of Appeal held that "..it will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as use of force, threats or prejudice or inducement by the offer of some advantage....."*

'41. ..... In the instant case, as referred to earlier, the Petitioner asserted at the Voir Dire that he was beaten by the police. To some extent the medical evidence corroborates that position. The prosecution had not offered any explanation as to how the Petitioner came about those injuries and as such the assertion of the Petitioner remains unassailed. The learned trial judge did not think it fit to admit the caution interview statement of the co-accused, whose statement was also recorded at the same time, at the same location, by the same team of police officers as that of the petitioner's. The co-accused Uliano Waqa also had sustained blunt trauma injuries.'

[19] In **Sugu v State** [2016] FJCA 69; AAU44.2012 (27 May 2016) the Court of Appeal held on a similar issue as follows:

'[57] Reverting back to the Second Ground of Appeal, it is crystal clear having regard to the medical evidence that the Appellant Koroinavosa had received the injuries while in the police custody. Most importantly, in the trial he chose to testify on his behalf and threw down the gauntlet to the prosecution that the confession is not voluntary. As I pointed out earlier, this issue seemed to have escaped the attention of the Learned Trial Judge while evaluating the voire dire evidence. Since it is the burden of the prosecution to establish the voluntariness beyond any reasonable doubt, in the light of the totality of the evidence involved, it is unsafe to allow the evidence of the caution statement to be admitted in evidence.'

[20] I think in the light of above decisions, it becomes a question of law whether by the methodology adopted by the trial judge he had distracted himself from the vital issue whether the unchallenged medical evidence of the appellant's injuries, though not being fully corroborative of the brutal police assault the appellant made it out to be, had still affected the voluntariness of the confessional statements and if so whether the prosecution had discharged its burden of proving beyond reasonable doubt that they contained voluntary admissions of guilt. Therefore, leave to appeal is not required in regard to this issue but as a matter of formality I would allow leave to appeal. Needless to state that an examination of the full record of *voir dire* proceedings also would be required to go into this issue as it is also a question of mixed law and facts in the end.

03rd ground of appeal

[21] The appellant argues that there was insufficiency of evidence to secure a conviction of murder. He refers to paragraph 50 of the summing-up and submits that the admission referred to therein does not necessarily connect him with the murder. However, the portion of the cautioned interview pointed out by the appellant has to be considered contextually; not in isolation but in conjunction with all other evidence in the case. Paragraph 50 is as follows.

> *'.....In question and answer 13 of the charge statement, Prosecution Exhibit No. 7(B), the accused confessed to count no. 9 to 12. He said the following,* ***"...I am confessing to the offences I have been charged with. I am regretting the mistakes I did. I want to seek forgiveness to the family of Mere Ailevu for the mistakes I've committed..."*** *The State said the accused voluntarily signed all the pages of his caution interview and charge statements.'*

[22] What is inextricably connected to this argument is the fact that it is evident from paragraph 54 of the summing-up that apart from the appellant's confession with regard to the offences committed against Mere Ailevu including her death there had been circumstantial evidence to implicate him with those crimes. Paragraph 54 is as follows.

> *'The State called Josivini Maria (PW5) and Logapila Salailagi (PW9) who attended the Assembly of God church opposite the Queens Road, near the crime scene from 7pm to 10pm on 13 March 2016. Both of them said, they saw the accused carrying something across his chest with both hands, and he crossed the Queens Road to the beach side, after 10pm on 13 March 2016. They said they saw Josua throw something over the fence. Both PW5 and PW9 have resided in Lepanoni Village for a long time and knew Josua well. PW5 and PW9 were with Maraia Kula (PW6) and Sereti Chapman (PW7) at the same time. PW6 and PW7 said they were attending the same church as PW5 and PW9 and the church concluded after 10pm. Both PW6 and PW9 said they saw a huge man carrying something across the Queens Road towards the beach side and threw the same over the fence. They said they couldn't identify the man. All the above witnesses said the lights from the passing vehicles allowed them to see the man. You have heard the evidence of these witnesses in court, and it is for you to judge their credibility. Note how similar their stories are to the accused's alleged confession in his caution interview statements and when taken for a scene reconstruction. Look at how he explained in the video recording how he carried Mere across the road and threw her over the fence.*

[23] The above circumstantial evidence appears to have presented a fairly strong case against the appellant even if his confessional statements were excluded. In ***Nacagi*** the Court of Appeal examined this aspect of wrongful admission of evidence *vis-à-vis* the application of the proviso to section 23(1) of the Court of Appeal Act and dismissal of the appeal.

> *'[29] Whether the wrongful admission of evidence will result in the quashing of a conviction depends upon the application of the proviso to section 23(1). The Court of Appeal (England) in* ***R –v- Redd*** *[1923] 1 KB 104 discussed the application of the proviso and at page 109 observed:*
>
> *"In the present case no doubt there was substantial evidence upon which the jury might have convicted the appellant apart from this evidence. If however the Court comes to the conclusion that the jury might have entertained a doubt as to the guilt of the Appellant if this evidence had not been given it is sufficient to prevent the proviso to section 4 being applied."*
>
> *[30] The issue comes down to this. Was their sufficient evidence adduced at the trial upon which the Judge would or must have arrived at the same verdict apart from or without the three caution statements of the Appellants. This question can only be answered after a consideration of the nature of the evidence, the directions given by the trial Judge to the assessors and to himself and the reasons, if any, in the judgment convicting the Appellants.*

[24] Thus, the Court of Appeal may still dismiss the appellant's appeal applying the proviso to section 23(1) of the Court of Appeal Act if the circumstantial evidence against the appellant is thought to be sufficient to uphold the verdict of guilty even if the appellant's confessions are excluded. It is a matter for the full court to decide with the aid of the complete appeal record. The trial judge had stated in paragraph 11 that he accepted the circumstantial evidence described in the summing-up.

[25] Therefore, there is no reasonable prospect of success in appeal at this stage as far as the third ground of appeal is concerned.

Order

1. Leave to appeal against conviction is allowed.

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL