

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

CRIMINAL APPEAL NO. AAU 0142 of 2017
[In the High Court at Lautoka Case No. HAC 123 of 2013]

BETWEEN : **WAISAKE WAININIMA**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **08 September 2020**

Date of Ruling : **10 September 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on a single count of rape committed at Fiji Sugar Corporation Quarters, Rakiraki in the Western Division between 01 December 2012 to 30 December 2012 contrary to section 207(1) and (2) (a) and 3 of the Crimes Act, 2009 respectively.

[2] The information read as follows.

'COUNT ONE

Statement of Offence

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

Particulars of Offence

WAISAKE WAININIMA between the 1st day of December, 2012 and 30th day of December 2012 at Fiji Sugar Corporation Quarters, Rakiraki in the Western Division penetrated the vagina of "LD", a child under the age of 13 years, with his penis.

[3] The brief facts, as could be gathered from the sentencing order, are as follows.

[2]

The complainant who was 11 years of age and a class 5 student resided with her parents and two elder brothers at FSC Compound in Rakiraki. She knew the accused who was a distant cousin.

[3] On a day between 1 December, 2012 and 30 December, 2012 whilst the complainant's parents were in Suva the accused and his friends came to the house of the complainant, together with her two brothers they all went to the river for a swim.

[4] The complainant was alone at home after a while the accused came back at this time the complainant was in her bedroom. In the bedroom the accused started kissing the complainant and then forcefully grabbed her and told her to take off her clothes. The complainant did as she was told since she was not strong enough to resist.

[5] The accused made the complainant lie on the bed took out his penis and inserted it into her vagina. The complainant felt pain so she told the accused to go away which he did.

[6] The complainant was frightened and shocked she did not know what to do. The complainant's aunt one evening saw the accused putting his hands around the buttocks of the complainant. The aunt of the complainant suspected something was happening to the complainant. The complainant's father was informed and the matter was reported to the police.'

[4] At the conclusion of the trial on 28 June 2017 the assessors unanimously had opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors in his judgment delivered on 29 June 2017, convicted the appellant and sentenced him on 18 July 2017 to 12 years and 7 ½ months of imprisonment with a non-parole period of 09 years.

[5] The appellant's application for leave to appeal against conviction and sentence had been signed on 28 August 2017. The delay is about 10 days. The Legal Aid Commission had tendered two amended grounds of appeal only against conviction and written submissions on 29 June 2020. The state had tendered its written submissions on 22 July 2020. The counsel for the appellant informed this court that he would tender an application to abandon his appeal against sentence in Form 3.

[6] 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.

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

1. *That the learned trial judge erred in law and in fact when he failed to thoroughly and properly and independently assess the complainant’s evidence and its own contradictions which raised a reasonable doubt in the State case and the learned trial judge’s failure in relying on the complainant’s contradictory evidence caused a miscarriage of justice against the appellant*
2. *That the learned trial judge erred in law and in fact when he convicted the appellant without giving cogent reasons for disagreeing with the unanimous opinion of the assessors.’*

[8] The appellant relies on Lautabui v State [2009] FJSC 7; CAV0024.2008 (6 February 2009) where the Supreme Court examined the trial judge’s duty in disagreeing with the assessors and stated as follows.

[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge’s views as to the credibility of witnesses: Ram Bali v Regina [1960] 7 FLR 80 at 83 (Fiji CA), affirmed Ram Bali v The Queen (Privy Council Appeal No. 18 of 1961, 6 June 1962); Shiu Prasad v Reginam [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in Setevano v The State [1991] FJA 3 at 5, the reasons of a trial judge:

[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her

conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.

[9] The Supreme Court in the subsequent decisions in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) has further elaborated the duty of the trial judge when disagreeing with the majority of assessors.

[10] In **Ram**, the appellant had been charged with murder under section 199 of the Penal Code and tried before three assessors who had unanimously found him guilty as charged, and the trial judge, agreeing with the assessors, had convicted him and sentenced him to life imprisonment. The conviction and sentence was affirmed by the Court of Appeal, but on appeal to the Supreme Court the conviction was set aside on the basis that the Court of Appeal had failed to make an independent assessment of the evidence before affirming the verdict of the High Court which was found to be unsafe, unsatisfactory and unsupported by the evidence, giving rise to a miscarriage of justice. Justice Marsoof said

'80. A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.'

[11] In **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014) the Supreme Court having extensively analyzed previous decisions (but not **Ram**) on the trial judge's responsibility when he agrees with the majority of assessors remarked

'[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.'

[12] The Court of Appeal in **Kaivum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) referring to **Ram** and **Mohammed** said of the trial judge's duty under section 237 of the Criminal Procedure Act, 2009 as follows:

*'[13] While we accept that in **Ram** the Supreme Court did state that an independent analysis of evidence by the trial judge was necessary to ensure the verdict is supported by evidence, the remark is only an obiter dicta. We say this because the remark was made in the course of formulating the test when a guilty verdict is challenged on the basis that it is unreasonable or cannot be supported having regard to the evidence (see, section 23 (1) (a) of the Court of Appeal Act). In subsequent cases, the Supreme Court has clarified that **where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Decree does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment. But the Supreme Court has endorsed that "a short written judgment, even where conforming with the assessors' opinions is a sound practice" (State v Miller (unreported CAV 8 of 2009; 15 April 2011, Mohammed v State (unreported CAV 2 of 2013; 27 February 2014).***

[13] In **Chandra**, Justice Marsoof clarified what His Lordship meant in paragraphs [79] and [80] in **Ram** as follows. In **Chandra** the trial Judge had agreed with the assessors and convicted the appellant for murder.

*'[24] In arriving at its decision, this Court examined in paragraphs [79] and [80] of its judgment the difference between the jury system and the system of trial with assessors that prevails in Fiji, and concluded that in terms of section 299(2) of the Criminal Procedure Code, Cap 21, which was in force at the time of the High Court trial in 2008, as well as under section 237 of the Criminal Procedure Decree, which is currently in force, the trial judge was required to make an independent assessment of the evidence to be satisfied that the verdict of court is supported by the evidence and is not perverse. This Court also noted that if the trial judge disagrees with the unanimous or majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court". This Court was here simply setting out the requirements of the statutory law currently in force. **In Praveen Ram, this***

Court did not, and did not have to in the circumstances of that case, express any view in regard to whether reasons have to be provided by the trial judge for agreeing with the opinion of the assessors.

*[25] The confusion that surfaces in paragraphs [23] and [24] of the impugned judgment of the Court of Appeal arises from a failure to distinguish between (1) the requirement of making an independent assessment of the evidence; and (2) giving reasons for disagreeing with the opinion of the assessors. In every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors. However, as was observed by this Court in paragraph [32] of its judgement in *Mohammed v State* [2014] FJSC 2; CAV02.2013 (27 February 2014), "an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."*

[14] However, Justice Keith said in **Chandra**

*[35] The majority of the assessors expressed the opinion that **Chandra** was guilty of murder. The trial judge agreed with the majority, but in his judgment he did not say why. The form of his judgment is heavily criticised by **Chandra**'s legal team. They rely on *Praveen Ram v The State* [2012] FJSC 12 in which Marsoof JA said at [80]:*

"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the [entirety] of the evidence led at the trial ... In independently assessing the evidence in the case, it is necessary for a trial judge ... to be satisfied that the ultimate verdict is supported by the evidence and is not perverse ..."

*[36] I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that. I unreservedly endorse what Calanchini JA said in *Sheik Mohammed v The State* [2013] FJSC 2 at [32]:*

"An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."

[37] But it is dangerous to elevate what should be best practice into a rule of law. The best practice about the form of the judge's judgment does not mean that the law compels the judge to do that in every single case. I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

- [15] When the trial judge affirms the opinion of the assessors his function was described by the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) in the following manner.

*'[4]Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under **section 237(3) of the Criminal Procedure Act 2009**. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed -v- The State** [2014] FJSC 2: CAV 2 of 2013, 27 February 2014.'*

- [16] In **Singh** the petitioner had been convicted of murder after trial by the High Court judge where the learned judge by his judgment dated 16 September 2014, had overturned the unanimous opinion of the assessors that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations of were made by Hon. Justice Saleem Marsoof.

'[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature.In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.

[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, it is evident on the available evidence that the trial judge had

failed to effectively discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.

- [17] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.
- [18] What could be ascertained as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.
- [19] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors.
- [20] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, 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. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard given to the assessors by the trial judge.

[21] This stance is consistent with the position of the trial judge at a trial with assessors *i.e.* in Fiji, the assessors are not the sole judges of facts. The judge is the sole judge of facts in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide Rokonabete v State [2006] FJCA 85; AAU0048.2005S (22 March 2006), Noa Maya v. The State [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) and Rokopeta v State [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

01st ground of appeal

[22] The appellant's complaint is based on the complainant's evidence as narrated in paragraphs 31 and 32 of the summing-up.

[31] In the bedroom the accused started kissing the complainant and then forcefully grabbed her and told her to take off her clothes. The complainant did as she was told since she was not strong enough to resist.

[32] The accused made the complainant lie on the bed took out his penis and inserted it into her vagina. The complainant felt pain so she told the accused to go away which he did.'

[23] The appellant argues that the trial judge had not drawn his attention to the 'inconsistency' and 'contradiction' as appearing from the above two paragraphs in disagreeing with the assessors. The judge had set out the same in paragraphs 6 and 7 of his judgment too.

[24] In the first place, I do not see such a material 'inconsistency' or 'contradiction' in the two statements of the complainant. To me, they are not mutually exclusive, inconsistent or contradictory. The complainant was 11 years of age (as opposed to that, the appellant was 20 years of age) at the time of the alleged rape and therefore, it was quite possible that she was not physically strong enough to resist the appellant and simply asked the appellant to go away after he inserted his penis into her vagina causing her pain.

[25] The alleged 'inconsistency' or 'contradiction' may have been somewhat important if the appellant's position had been that the complainant had consented which, of course,

was immaterial given her age. The appellant had totally denied the incident and attributed a sinister motive to the complainant's father and aunt for having falsely implicated him.

[26] Therefore, there is no reasonable prospect of success in this first ground of appeal.

02nd ground of appeal

[27] The appellant's contention is that the trial judge had not given cogent reasons for disagreeing with the assessors. On an examination of the summing-up, I find it to be a comprehensive address to the assessors not only the prosecution evidence but also the appellant's evidence and an analysis of both versions. The trial judge had given directions on all relevant aspects of law and facts. He had left it to the assessors to assess and evaluate the evidence. The summing-up is clearly a part and parcel of the judgment being challenged.

[28] In disagreeing with the majority of assessors the trial judge in the judgment had started by directing himself in accordance with the summing-up and the evidence which he had placed in detail before the assessors therein.

[29] Then in the written judgment, the learned trial judge had once again adverted in brief the summary of the evidence led against the appellant and the position taken up by the appellant in his evidence and his witness in support of the total denial of the accusation.

[30] The appellant complains that the trial judge had not based his disagreement with the assessors on the prosecution evidence but rather he had disbelieved the appellant's evidence in disagreeing with the assessors. I do not think that criticism to be valid. Having reminded himself of the evidence of the complainant, Dr. Sharma and Ana Lawanavanua from paragraphs 5-14 of the judgment, the trial judge in paragraphs 24-27 given reasons as to why he believed the complainant's version. Then the judge had accepted the doctor's opinion that the complainant's hymen was not intact and been penetrated. Finally he had stated in paragraphs 29, 30 and 35 as to why he believed Ana Lawanavanua.

[31] The trial judge had equally considered the evidence of the appellant and his close friend Christopher Rakai in paragraphs 15-23 of the judgment and given reason including their poor demeanour and lack of candor as to why he did not believe their evidence in paragraphs 31-34. The trial judge had in particular drawn his attention to the contradiction between the evidence of the appellant and Christopher Rakai in that the appellant had said that on the day of the alleged incident he had in fact gone to the complainant's house situated about six feet away from the river bank, with Rakai and another and from there to the river joined by the complainant's two brothers to swim whereas according to Rakai they never went to the complainant's house on that day. Had the appellant visited the complainant's house on that day as claimed by her he would have got to know that her parents had gone away and with her brothers joining the group to swim in the river, the complainant was alone at home. Thus, the trial judge had not believed Rakai when he also said that he did not see the appellant going anywhere while they were swimming. In any event it is unbelievable that Rakai kept an eye on the movements of the appellant all the time for 02 hours whilst swimming with the friends. It would have been quite possible for the appellant to go to the complainant's house which was 06 steps away from the river bank unnoticed by Rakai, sexually violated the complainant and come back.

[32] Similarly, the trial judge had disbelieved the appellant's position that the allegation of rape was the result of a fabrication by the complainant's father and aunt (Ana) due to a dispute her father had with him relating to his position in the church. This appears to be a far-fetched conspiracy theory and it cannot be believed that a father and an aunt would jeopardize the entire future of an 11 years old the daughter by dragging her into an act of rape by a man to take revenge on him.

[33] The appellant had admitted having gone to see the complainant with her aunt Ana (who had on an earlier occasion seen him putting his hands around the buttocks of the complainant and later elicited from her what had happened between the two) where (according to Ana) he had admitted fondling the complainant for some time and having sex with her on her bed at home during school holidays in 2012. In fact Ana had further stated that the appellant had also confessed to her in the church that he had engaged in

sexual intercourse with the complainant. The trial judge had disbelieved the appellant's denial of both instances, who nevertheless admitted having gone to the complainant's house with Ana to seek forgiveness from her family for the rumours that were spreading of his having raped the complainant. The trial judge had stated that there was no reason for the appellant to go to the complainant's house to seek forgiveness if the rumours had been false and he had nothing to do with the complainant.

[34] The trial judge had thus considered the weight of the evidence and evaluated the credibility of the evidence of prosecution witnesses including the demeanour of the complainant. The trial judge had given convincing reasons why he disagreed with the assessors and agree with the minority view that the appellant was guilty. He had finally held that the prosecution had proved its case against the appellant beyond reasonable doubt. In my view, it was open on the evidence coupled with its credibility for trial judge to have arrived at the verdict of guilty against the appellant.

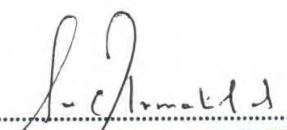
[35] Having examined the summing-up and the judgment I am convinced that the trial judge's finding of guilty against the appellant was supported by the weight of evidence and nothing had seriously affected the credibility of the complainant. The trial judge had discharged the burden cast on him in overturning the assessors' opinion.

[36] Therefore, this ground of appeal too has no reasonable prospect of success.

Order

1. Leave to appeal against conviction is refused.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL