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

CRIMINAL APPEAL NO.AAU 0163 of 2017

[In the Magistrates Court at Lautoka Case No. 55 of 2009 - Conviction]
[In the High Court at Lautoka Case No. HAC 167 of 2017- Sentence]

BETWEEN : **PENIASI VATU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

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

Date of Hearing : **17 November 2020**

Date of Ruling : **18 November 2020**

RULING

[1] The appellant had been arraigned in the Magistrates Court of Lautoka on a single count of rape contrary to section 149 and 150 of the Penal Code committed 31 December 2008 at Lautoka in the Western Division.

[2] The charge read as follows.

Statement of the offence

RAPE: *Contrary to Section 149 and 150 of the Penal Code, Cap 17*

Particulars of the Offence

PENIASI VATU on the 31st day of December 2009, at Lautoka in the Western Division had unlawful carnal knowledge of a SULUETI ADI without her consent.

[3] After the trial was concluded on 16 March 2017 (which had commenced on 21 April 2015) the judgment was delivered by the learned Magistrate on 23 June 2017 and the appellant was convicted as charged. After the case was referred to the High Court for sentencing he had been sentenced to 13 years 04 months and 09 days of imprisonment subject to a non-parole period of 11 years on 22 November 2017.

[4] The appellant in person had tendered a timely notice of appeal against conviction and sentence on 01 December 2017. He had subsequently filed additional grounds of appeal and written submissions which the CA registry had received on 14 July 2020. The Legal Aid Commission had thereafter filed an amended notice of appeal only against conviction supplemented by written submissions on 20 July 2020. The state had responded by its written submission on 04 August 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.

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

> (i) *'That the Learned Trial Magistrate erred in law and fact when he failed to fully and properly consider that the State's evidence was so discredited that a conviction would be unreasonable and cannot be supported having regard to the evidence led during the hearing..*

> (ii) *That the learned trial Magistrate erred in fact and in law when he relied on the evidence of PW7 whose evidence was contradictory and discredited and could not be relied upon to uphold a conviction.*

[7] The evidence of the case could be summarised as follows. On the 31 December 2008 the victim (the victim was 14 years of age) was asked by the appellant to accompany him to his house to get some grog. This was overheard by Inoke Kubu (PW2). The house of the accused was about 15 to 20 steps away from the victim's house. When the victim was inside the house of the appellant he grabbed her hands and carried her on his shoulder. The victim tried to free herself but was unable to do so since the appellant held her tightly. The accused carried the victim to the other side of the village to the kitchen of one Samanunu (PW4). The victim was told to lie down by the appellant who placed his hand on the victim's mouth and used his other hand to remove her clothes. The appellant removed the victim's sulu, pants and panty and inserted his penis into the victim's vagina without her consent. The victim suffered pain and was frightened when she was threatened by the accused that he would kill her if she told anyone. The victim saw that blood had come out of her vagina. It was her menstrual period as well. After the victim informed her aunty Loame Buka (PW3) about what had happened to her the matter was reported to the Police. The victim was thereafter medically examined and her medical report was tendered in evidence.

[8] The doctor (PW7) who had examined the victim after three weeks had noted redness at 2 o'clock position at vaginal orifice and found that the hymen was not intact which, according to the doctor, could have been caused by sexual intercourse or by other injury.

[9] The appellant had given sworn evidence denying the allegation and stating that the victim and PW2 Inoke Kubu had lied in court but attributed no reason why they should have falsely implicated him.

01st ground of appeal

[10] The appellant raises a few points in support of his argument that the conviction is unreasonable and cannot be supported having regard to the evidence. Firstly, he argues that though the complainant (aged 14 at the time the offence was committed)

had said that there was no one present when the appellant had carried her away. PW2's evidence had suggested that he was present at the material time but not seen the complainant being taken away by the appellant. Secondly, he submits that PW4's initial statement had not contained any reference to blood seen on the floor of her kitchen and on her husband's t-shirt which, of course, was not recovered by the police. He also complains of the police not having provided him with the photographs of the alleged crime scene. The appellant submits that how the confrontation of PW1 (the complainant) by PW3 came about was not clear and points out that the complainant had not told the police that she was carried by the appellant on his shoulder.

[11] The respondent has replied by submitting that what PW2, who was 09 years of age at the time of the incident, had said was that sitting under a breadfruit tree at about 10.30 p.m. on the day of the incident he had seen the appellant coming and calling the complainant to come and get grog from his house when she came out of the house (Josaia Naka's house) where she was living with her adopted parents, to fill the kettle but not followed it up to find out what happened thereafter. Therefore, according to the state it is possible that PW2 had not seen the appellant carrying away the appellant when she went into his house.

[12] The state has also pointed out that according to PW4 she had thrown the blood stained t-shirt belonging to her husband in to a flowing creek and could not be recovered by the police. As for the photographs of the crime scene the respondent's position is that due to the delay of one week in reporting the incident the crime scene was not in the original state but had been disturbed when photographs were taken and therefore they were not of use or relevant at the trial.

[13] As far as PW3 (complainant's adopted mother's sister) having confronted the complainant (PW1) is concerned it appears from the judgment that PW2, Inoke Kubu had informed his aunt PW3, Loame Buka who had come to the village on 07 January 2009 of what he had seen and heard. Thereafter, PW3 had confronted PW1 about it and the complainant had relayed her of the appellant having raped her. The complainant had been frightened and crying when she came out with the incident to PW3 who also had said that the complainant could not even complete the story as she

was frightened and crying. The confrontation had taken place about a week after the incident. It is PW5, the mother of the complainant who had heard of the rape from PW3, who had reported the matter to the police.

[14] It is clear that the case against the appellant manly depended on the testimony of the complainant. Much of the appellant's criticism does not directly touch on her evidence but the other witnesses called by the prosecution. The complainant had admitted that she had not told the police that the appellant carried her on his shoulder but insisted in evidence that he in fact did so. It also appears that the discrepancy highlighted by the appellant in PW2's evidence is not in conflict or irreconcilable with that of the complainant's evidence. The appeal record reveals that PW2 had said that he did not know whether the complainant complied with the appellant's request but seen her going towards the appellant's house. His having seen (and heard) the appellant calling the complainant to come to his house to get grog and her going toward that direction, of course, provide corroboration as far as the complainant's evidence is concerned. PW2 had not spoken to as to what happened thereafter as he had come back to his house. Thus, he may well not have seen what happened between the appellant and the complainant after that inside or outside the appellant's house.

[15] It is also not clear whether the appellant had demanded an explanation under cross-examination as to why PW4 had not mentioned of having seen blood stains on the kitchen floor in her first statement. However, she and the police had explained why the blood t-shirt could not be not produced at the trial. If the crime scene had been disturbed after a week the photographs would not have been of much use either to the prosecution or the defence, for they would not have shown any signs of blood on the kitchen floor.

[16] Therefore, despite the matters pointed out by the appellant had the evidence of the complainant been acted upon it could have sustained the conviction even without the rest of the evidence. The Magistrate had been satisfied with the complainant's evidence and her demeanour despite minor contradictions. He had also been mindful that corroboration of the complainant's evidence was not required in terms of section 129 of the Criminal Procedure Act, 2009 and concluded that the prosecution had

proved the case beyond reasonable doubt. Nevertheless, PW2, PW3 and PW7 seem to enhance the credibility of different aspects of her narrative.

[17] In the circumstances, overall it is not possible to conclude that the appellant has a reasonable prospect of success in appeal on this ground of appeal.

02nd ground of appeal

[18] The appellant has pointed out that PW7, Dr. Usher Naicker had said in her evidence that the injuries she saw on the complainant's vagina when examined 03 weeks after the alleged rape would have been a week old. Obviously, PW7 had been a general practitioner and not an expert in forensic medicine who could determine the age of an injury accurately. In any event, the Magistrate was not bound to follow any expert evidence but could attach such weight which he thought was appropriate to such evidence. The same is applicable to medical evidence too.

[19] Therefore, doctor's evidence on the age of the injuries cannot undermine the complainant's evidence decisively. Therefore, there is no real prospect of success in appeal as far as this ground of appeal is concerned.

[20] In **Kaiyum v State** (supra) the Court of Appeal had said in the context of a trial by assessors and judge in the High Court that when a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him.

[21] Similarly, at a trial by assessors and judge in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated in appeal as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> '*It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.*'
>
> '*…………Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various*

discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

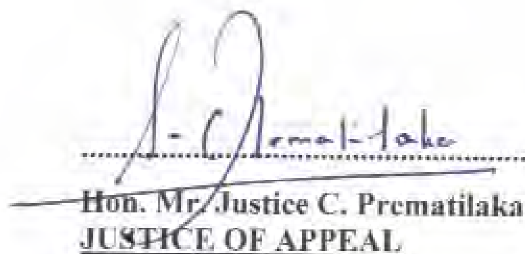
The appeal is dismissed.'

[22] I do not see any reason why the same tests should not be applied to a trial by a judge or Magistrate alone when the verdict is challenged on the basis that it is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

[23] When the above tests are applied to the facts of this case (as the appellant argues that the verdict is unreasonable and cannot be supported by evidence), I have no doubt that there was evidence before the Magistrate on which the appellant could have been reasonably convicted. Having considered the evidence against the appellant as a whole, it cannot be said that the verdict is unreasonable and there was clearly evidence on which the verdict could be based.

Order

1 Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL