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

CRIMINAL APPEAL NO.AAU 0066 of 2017
[In the High Court at Lautoka Case No. HAC 68 of 2015]

BETWEEN	:	**KRISHNA REDDY**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. Nasedra for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**29 December 2020**
Date of Ruling	:	**30 December 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on two counts of rape contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act, 2009 committed between 01 February 2015 and 28 February 2015 and during 01 March 2015 and 31 March 2015 at Nadi in the Western Division. The victim had been 06 years old and the appellant had been her step father at the time of the commission of the offences.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Decree 44 of 2009.*

Particulars of Offence

KRISHNA REDDY between the 1st day of February, 2015 and 28th day of February, 2015 at Nadi in the Western Division penetrated the mouth of JJ, a 6-year-old child, with his penis.

SECOND COUNT

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Decree 44 of 2009.*

Particulars of Offence

KRISHNA REDDY between the 1st day of March, 2015 and 31st day of March, 2015 at Nadi in the Western Division penetrated the mouth of JJ, a 6-year-old child, with his penis.

[3] After the summing-up on 23 January 2017 the assessors had unanimously opined that the appellant was guilty of count 01 and not guilty of count 02. In the judgment delivered on 24 January 2017 the learned trial judge had agreed on count 01 and disagreed on count 02 with the assessors and convicted the appellant for both counts. On 26 January 2016 the appellant had been sentenced to 12 years of imprisonment subject to a non-parole period of 09 years.

[4] The appellant's notice of appeal and against conviction and sentence had been signed on 17 February 2017 within time (which had, however, reached the CA registry on 15 May 2017. He had filed additional grounds of appeal in 2018 and 2020. The Legal Aid Commission on 13 August 2020 had filed amended grounds of appeal only against conviction and written submissions. The appellant has not yet filed an abonnement notice regarding his sentence appeal and is directed to do so in due course. The state had responded on 03 November 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] The grounds of appeal against conviction urged on behalf of the appellant are as follows.

> *(i) 'The Learned Trial Judge erred in law and in fact when he failed to make a competency inquiry to determine whether the victim was competent in giving her evidence.*
>
> *(ii) The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the principle of competency inquiry.*
>
> *(iii) The Learned Trial Judge erred in law and in fact in failing to give reasons when he overturned the unanimous verdict of not guilty given by the Assessors for the 02nd count.*

[7] The prosecution had adduced evidence of the victim (JJ), her grandmother and three other witnesses. At the end of the prosecution case, the appellant had elected to give evidence in his own defence. The trial judge had summarised *inter alia* the evidence of the victim and her grandmother in the summing-up as follows.

> *'29. Prosecution called Roshni Davi as its 1st witness. She is the grandmother of the Victim JJ. She said that her eldest daughter Ranjeeta was earlier married to a European guy. By that marriage she had two children Abhay and the Victim, JJ. Ranjeeta then got married to Krishna Reddy and got one child, Arushi. They were all residing at Korovuto, Nadi.*
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> *30. JJ and Abhay were living most of the time in Malolo with her. She brought JJ from Korovuto to her house because JJ was reluctant to live with their parents. JJ told her that at times Papa used to beat her and do something wrong to her. So JJ did not want to go back to her mother.*
>
> *31. JJ told her that Papa, after opening his pants, used to put his penis inside her mouth. She did not tell the exact dates this happened. JJ also informed that Papa used to press her breasts. After hearing all these, she felt bad and informed this to her daughter Ranjeeta. Ranjeeta got angry and informed the police. She also went to the Nadi Police Station with JJ. Ranjeeta took JJ also for a medical examination.*

38. JJ said that, in 2015, she was in Class 2. She is now residing at her grandmother's place. Her mother Ranjeeta is living with Papa, in Korovuto.

39. She said that she was not staying with her mom and Papa because Papa was doing bad things to her. Describing bad things JJ said that Papa's pants were torn and he used to penetrate her mouth with his penis. Papa did this bad thing twice when her mother went shopping. Papa was doing this for some time. Then she said for about 2 hours. One day, Papa sent her mother to the shop and took her to a corner and slapped her and told to drink water from the sink.

40. She did inform her mom and her grandmother Roshni about the assaults. She told grandmother about the bad things Papa was doing to her. Papa was bad to her prior to the incidents.

41. When he was doing all these bad things she didn't report to anyone promptly as she was scared of her Papa who used to hit her.

44. She reiterated that Papa put his penis into her mouth twice when her mother was away. Papa had taken a day off and was staying at home when he did this. She denied that she was making up a story.

[8] The appellant's position had been summarised as follows.

59. Accused admitted that he sometimes had to growl at JJ to discipline her as she was very mischievous, naughty and used to fight with other kids. She used to tell him, 'you be quiet you have no authority over me, only my mom has the authority to say things to me'. He also admitted that, at times, he had beaten her with a stick, once or twice because she was not listening to him and not studying. Most of the time she wanted to stay with her grandmother without doing homework. He did not allow that. JJ hated him and disliked him.

60. He further said that he was in a good relationship with JJ's mother in 2015.

61. Under cross-examination, accused admitted that JJ was was calling him Papa and looked up to him as a fatherly figure because he was living with her mother.

62. Accused said that he was looking after JJ nicely and had no idea why JJ, a 6-year-old girl in 2015, made very serious allegations against him. He suspected that allegations would have been made because she didn't like him and she was not staying with him in a good way.

63. He admitted that a girl like JJ at a tender age would not be able to know about sexual terms. He had no idea as to how she came to know about those terms.

64. He admitted that Ranjeeta questioned him about the allegations when she came to know about them from her mother. However, he denied having admitted to Ranjeeta that he put his penis on JJ's face accidently. He also admitted that Ranjeeta who was pregnant at that time left him with her children when those allegations were made. She came back because she was carrying his daughter and she wanted him to look after the child.

65. He also admitted that Ranjeeta on her own tried to withdraw this case. However, he denied having threatened Ranjeeta or putting pressure on JJ through Ranjeeta not to give evidence against him. He admitted beating JJ lightly with a stick after getting permission from her mother.

66. He admitted that he failed to tell the police that he was working from 6 o'clock in the morning to 5.45 pm in the afternoon from Monday to Saturday although he felt that information was important for his defence. However, he denied fabricating a story in Court to save himself. He said later that he informed interviewing officer Gupta that he was working from Monday to Saturday.

01st and 02nd grounds of appeal

[9] The appellant argues that there is nothing in the summing-up or the judgment to show that the trial judge had conducted a competency inquiry or that he had directed the assessors on that aspect. He relies on **Kumar v State** [2016] FJSC 44 CAV 0024 of 2016 (27 October 2016) and **Alfaaz v State** [2018] FJCA 19; AAU0030 of 2014 (08 March 2018)

[10] In ***Alfaaz*** the Court of Appeal considered several previous decisions including **Kumar v State** (supra) and declared:

> *'[25] Thus, in the light of the decision in Kumar the current legal position, in my view, could be stated as follows.*
>
> *(i) There is no longer any legal requirement for the unsworn evidence of a child to be corroborated to secure a conviction.*
>
> *(ii) Although there should no longer be any legal requirement on trial judges to give a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, they may do so if they think that it is appropriate in a particular case.*
>
> *(iii) The Trial Judge should conduct a 'competence inquiry' required*

by section 10(1) of the Juvenile Act before a child can give evidence to ascertain whether the child could give sworn evidence and if not unsworn evidence. However, failure to do so would not per se be fatal to a conviction but it is a good practice for a judge to tell the child that he or she must tell the truth.

[11] As admitted by the appellant in his written submissions there is nothing to indicate that the victim had given evidence under oath or not. There is no record to ascertain at this stage as to whether the trial judge had conducted a competency test or not. Neither is there any basis to argue at this stage that the trial judge had not told the child victim to tell the truth and failed to warn the assessors. Thus, the appellant's complaints that there had not been a competence inquiry held by the trial judge and the trial judge had not told the child victim to tell the truth are not substantiated and cannot be sustained at this stage without the complete appeal record.

[12] In **Cumu v State** [2020] FJCA 182; AAU0009.2017 (28 September 2020) regarding a similar complaint I stated

'[19] At this stage in the absence of the full appeal record, there is no material at all to justify the criticism that the trial judge had failed to look into the competence of the child victim and therefore there is no weight to the appellant's complaint. Nor does it appear that there had been any objection raised at the trial by the counsel appearing for the appellant as to the competency of the victim to give evidence. If there was such a contest, I would expect it to have figured in the summing-up and the judgment. In the recent past the Court of Appeal examined in detail inter alia the legal framework of a competency test in Alfaaz v State [2018] FJCA 19; AAU0030.2014 (8 March 2018) and it is only with the benefit of the appeal record this ground of appeal could be examined in the light of Alfaaz.'

[13] In any event, it is only a good practice for a trial judge to tell the child that he or she must tell the truth but it is not a rule of law. Neither the Supreme Court nor the Court of Appeal has elevated this good practice to the higher pedestal of a rule of law.

[14] The appellant argues that the trial judge should have done all of the above because his position was that the allegations of sexual abuses were fabrications by the child victim and cites her knowledge of sexual terms as proof of such fabrication (vide paragraph 63 of the summing-up). The state argues that the competency of the child to give evidence is clearly demonstrated by the trial judge's assessment of her credibility at paragraph 05 of the judgment.

> *'5. The victim was only six years old at the time of the alleged incidents. I observed her demeanor carefully. She was straightforward and not evasive. She answered all the questions unhesitantly. I am certain JJ, at her tender age, came to know about sexual terminology because she was really exposed to the alleged sexual experience at the hand of the Accused.'*

[15] Regarding any alleged failure on the part of the trial judge to have warned the assessors of the danger of convicting the appellant on the uncorroborated evidence of the child victim, the counsel for the appellant should have sought a redirection in that regard as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). The deliberate failure to do so would disentitle the appellant even to raise this complaint in appeal with any credibility.

[16] Failure to hold a competency test is not by itself fatal to a conviction. There is no longer any legal requirement for the unsworn evidence of a child to be corroborated to secure a conviction and similarly, there is no longer any legal requirement for trial judges to give a warning of the danger of convicting an accused on the uncorroborated evidence of a child unless the trial judge thinks it appropriate to do so. Therefore, failure to hold a competency test or to administer a warning of the danger of convicting an accused on the uncorroborated evidence of a child or to inform the child that he/she must tell the truth *ipso facto* would not vitiate a conviction. The crucial consideration is whether the child's evidence, sworn or unsworn, could be accepted as truthful, credible, reliable and devoid of any reasonable doubt.

[17] Therefore, in the final analysis what is most important at the appeal stage is to consider whether the assessors had accepted the child victim's evidence (even excluding the other evidence) as truthful credible, reliable and devoid of any reasonable doubt and whether the trial judge had believed her. The assessors had clearly acted on her testimony on count 01. The trial judge in the summing-up had directed the assessors as follows on that aspect.

> *67. The Prosecution based its case mainly on the evidence of the Victim. If you are satisfied that the evidence she gave in Court is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. You must remember that evidence of the victim alone is sufficient*

to bring about a conviction in a rape case, if you believe her evidence to be truthful.

68. A most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events she was describing. Some of you will have children and grandchildren who are of a similar age to the victim who has given evidence. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of their evidence, but remember that I am speaking of an approach to the evidence and evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.'

77. If you are satisfied that JJ had told the truth and her evidence is believable, then you have to consider whether the Prosecution has discharged its burden and proved each element of each count beyond reasonable doubt. If you find accused guilty of one charge that does not mean he must be guilty of other charges as well unless you are satisfied that each element of the charge is proved beyond reasonable doubt. You have to consider each count separately.'

[18] The trial judge had considered the question of the truthfulness of the child victim's testimony in the judgment as follows and decided to act on her evidence.

5. The victim was only six years old at the time of the alleged incidents. I observed her demeanor carefully. She was straightforward and not evasive. She answered all the questions un-hesitantly. I am certain JJ, at her tender age, came to know about sexual terminology because she was really exposed to the alleged sexual experience at the hand of the Accused.

6. Defence says that JJ made up this allegation because she disliked her stepfather and wanted to be with her grandmother. Evidence led in trial does not support the version of the Defence. There is no material evidence for me to believe that JJ, a girl of six years, was capable of fabricating not one but two such serious allegation against her step father who, according to Accused's own version, had treated her 'nicely'.

7. JJ had reported the incidents to her mother and grandmother albeit not immediately. JJ's grandmother, Roshni Devi, testified and confirmed that she received a complaint from JJ when she came to reside at her place. Devi in turn had relayed the information to JJ's mother Ranjeeta. Accused himself admitted that Ranjeeta questioned him about the allegation and thereafter she left the house with her children. The Police Investigation Officer confirmed that he received a complaint from Ranjeeta on the 21st of April, 2015.

8. JJ explained why the complaint was not made promptly. She said she was scared of her Papa who used to growl at her and beat her. Accused himself admitted that he did growl at JJ and beat her 'lightly' with a stick once or twice. Evidence of JJ's former Head Teacher and Child Protection

Officer of Korovuto Primary School indicates that JJ had received severe beatings leaving dark marks on her body.

9. The Head Teacher had received the complaint from JJ's mother on 24th March 2015 in regard to assaults by her stepfather. According to Head Teacher's evidence, JJ's mother, after lodging the complaint, had withdrawn JJ from Korovuto Primary School on the premise that JJ would be relocated at her grandmother's house to ensure her safety. It can be inferred that JJ moved to her grandmother's place after this incident.

10. It is admitted that JJ was residing with the accused at his house in Korovuto, Nadi until 28th March, 2015. It is clear that it is only after JJ had relocated herself in a secure environment at her grandmother's place that the information about sexual assaults had come to light. In this context I am inclined to regard the complaint made by JJ to her grandmother in April as a recent complaint capable of boosting the consistency and credibility of JJ's evidence.

'16. JJ clearly said accused penetrated her mouth on two different occasions during the period mentioned in the Information although she did not mention the exact dates. A girl of six years cannot be expected to testify to the exact dates. Therefore, Assessors opinion on Count 2 that exonerated the Accused is perverse.'

[19] What could be identified as common ground arising from several past judicial pronouncements 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 the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

[20] The trial judge's judgment more than satisfies his obligation in agreeing with the assessors on count 01 and there is no reasonable prospect of success of the first and second grounds of appeal.

03rd ground of appeal

[21] The appellant argues that the trial judge had failed to give cogent reasons for overturning the assessors' opinion on count 02.

[22] 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 and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]

[23] In addition to what the trial judge had stated regarding the prosecution evidence as quoted earlier he had addressed himself on the defence evidence as well as follows.

> *'11. Accused advanced a self-serving version to escape criminal liability. He failed to create any doubt in the Prosecution case. Version of the Defence is that JJ fabricated this story because she disliked her stepfather. Defence also argues that the evidence JJ gave in Court is not probable and the alleged incidents could not have happened as the Accused always kept himself away from home and was engaged in his work during daytime.*
>
> *12. It is highly improbable such a serious allegation to have been made by a girl of six years even though she disliked her stepfather and wanted to be away from him.*
>
> *13. Even if the accused was engaged as a fulltime worker it is not improbable that the alleged incidences could have happened during daytime. JJ said that both incidents occurred when his Papa was staying at home and mother went shopping. Accused had never told police at the interview that he was engaged as a fulltime worker and he was away when the alleged incidents occurred although he was expected to advance his defence at the earliest opportunity if it was true.*
>
> *14. Accused admitted that he treated JJ nicely although she was not her biological father. Evidence proved otherwise. Severe marks observed by the*

Child Protection Officer on JJ's body bear clear testimony to the fact that she was not treated nicely.

15. Accused said that he maintained a good relationship with JJ's mother in 2015. The fact that she had made two complaints against the accused during that period, one to JJ's school and the other to Police proves that she made truthful complaints.

16. JJ clearly said accused penetrated her mouth on two different occasions during the period mentioned in the Information although she did not mention the exact dates. A girl of six years cannot be expected to testify to the exact dates. Therefore, Assessors opinion on Count 2 that exonerated the Accused is perverse.

17. I accept the version of the Prosecution and reject that of the Defence. The Prosecution discharged its burden and proved each element of each count beyond reasonable doubt.

18. I accept the unanimous opinion of Assessors on Count one. I reject their opinion on count two. I find the Accused guilty of Rape on both counts and convict the Accused accordingly.

[24] Thus, the trial judge had embarked on his own assessment and evaluation of the evidence of the prosecution and defence and given 'cogent reasons' based on the weight of the evidence reflecting his views as to the credibility of witnesses for differing from the opinion of the assessors on count 02. There is no need to engage in an exercise of artificially separating the evidence regarding the two counts in the judgment as the evidence of the child victim on both counts is inseparable and the assessors' opinion on count 02 is clearly unfounded and cannot be rationally explained. Having believed the victim on count 01 there was no basis for the assessors to disbelieve her on count 02.

[25] 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 to the assessors by the trial judge.

[26] 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 judge of facts. The judge is the sole judge of fact 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 Mava 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).

[27] Therefore, the third ground of appeal too has no reasonable prospect of success.

[28] Having considered the evidence against this appellant as a whole, I cannot say that the verdict was unreasonable. There was clearly evidence on which the verdict could be based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Ravawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[29] The trial judge also could have reasonably convicted the appellant on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

Order

1. Leave to appeal against conviction is refused.
2. The appellant is directed to file an abonnement notice regarding the sentence appeal in Form 3 in due course; his counsel to assist him in this regard.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL