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

CRIMINAL APPEAL NO.AAU 141 of 2016
[High Court Criminal Case No. HAC 090 of 2013]

BETWEEN	:	**HARRY MOSES LILO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. S. Ratu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**11 May 2020**
Date of Ruling	:	**13 May 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a representative count of rape committed on the complainant, aged 14, between 01 October 2012 and 31 March 2013 contrary to section 207(1)(2) (a) of the Crimes Decree No.44 of 2009.

[2] After full trial, the assessors had expressed a unanimous opinion of guilty on 04 August 2016. The Learned High Court Judge in the judgment delivered on the same day had agreed with the assessors and convicted the appellant of the charge of rape. He was sentenced on 05 August 2016 to 14 years of imprisonment with a non-parole period of 13 years.

[3] The appellant had signed a timely notice of appeal on 08 August 2016 against conviction and sentence. Subsequently, Legal Aid Commission appearing for him had tendered an amended notice of appeal on 31 December 2019 containing a single

ground of appeal only against conviction accompanied by written submissions. The State had tendered its written submissions on 12 March 2020.

[4] The evidence had revealed that the complainant was the appellant's step daughter and a High School student. The appellant had come home in the early hours around 02 a.m. on one Saturday in October 2012 and had sexual intercourse with the victim without her consent. He had come home after consuming grog in the village. When the appellant knocked the door of the kitchen, the victim had come and opened the door for him. He had then forcefully held her hand and elbowed on her ribs to make her bend down. He had then removed her undergarment and inserted his penis into her vagina without her consent. The appellant had been the *de-facto* partner of her mother. The victim at that time had been fourteen years old and attending High School in Form three and got pregnant as a result of acts sexual intercourse with the appellant.

[5] The appellant had given evidence and admitted that he had indulged in sexual intercourse with the complainant but defended himself on the basis that the victim had given her consent. In agreed facts also the appellant's position had been the same. Thus, the only issue in the case was that of consent or lack of it.

Ground of appeal

[6] The sole ground of appeal urged on behalf of the appellant is as follows

> ***'The learned Trial Judge erred in law and in fact when he convicted the appellant without adequately assessing the totality of the evidence.'***

[7] 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 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87.

[8] The counsel for the appellant in his written submissions had brought up a few distinct complaints under the single ground of appeal as follows.

(i) The learned trial judge has devoted mostly two paragraphs in the judgment to expound the appellant's case and the judgment is more bent towards analysing the complainant's evidence.

(ii) The learned trial judge in his judgment has decided to disbelieve the appellant on the basis that he had failed offer a credible explanation for his inconsistent evidence when the complainant's evidence also had inconsistencies and a considerable delay in reporting the matter.

(ii) The trial judge had referred only to the portion of the appellant's cautioned interview to show his inconsistency rather than his answers in totality depriving him of a fair trial.

[9] A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. 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). In fact, it was stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal

> *'[4] The grounds of appeal against conviction are yet again another example of the scatter gun approach to drafting an appeal notice..... 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*

[10] The learned trial judge had in paragraphs 31-39 dealt with the prosecution case and in paragraphs 40-43 directed the assessors on the defence case. I do not think that there was anything more that the trial judge could have said of the appellant's case. He had complied with what was held in **R v Lawerance** [1981] 1 ALL ER 974 at 977 that the summing-up *'should also include a succinct but important summary of the evidence of*

facts as to which a decision is required, a correct but concise summary of the evidence and argument of both sides.'

[11] It was held in **Rauqe v State** [2020] FJCA 43; AAU61.2016 (21 April 2020)

> *'[18] The objective nature and well-balanced quality of a summing-up should not be measured by the number of paragraphs devoted to the prosecution and defence cases. It goes without saying that no hard and fast rule could be laid down as to the space that should be allocated in a summing-up to the cases for the prosecution and defence. It invariably varies from case to case.'*

[12] Regarding how to evaluate inconsistencies the learned trial judge had addressed the assessors on the complainant's evidence in paragraph 53 and appellant's evidence in paragraph 54 of the summing-up. Delay in the first complaint had been addressed in paragraph 51 of the summing-up and in paragraph 7 of the judgment. He had thereafter dealt with how to evaluate alleged inconsistencies in both accounts in paragraphs 55-58 of the summing-up. The learned judge had considered those inconsistencies in the judgment in paragraphs 6 and 9.

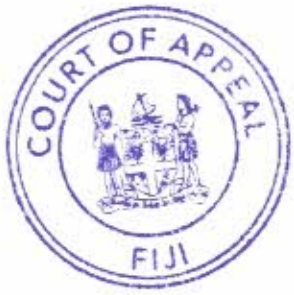
[13] The entire cautioned interview of the appellant was before the assessors as an agreed fact. The learned judge had referred to the portion where the appellant had stated that he had indulged in sexual intercourse with the complainant's consent for the first time on a mattress in the siting room as opposed to his position at the trial that it was not in the sitting area but in the kitchen. The complainant's evidence had been that it was in the kitchen that the first act of rape took place against her wishes. This fact coupled with the absence of an explanation by the appellant for the said inconsistency, had been considered as an important pointer to the credibility of the appellant by the learned trial judge, for had the first act of sexual intercourse been carried out without the consent of the complainant as alleged by her it is immaterial whether subsequent acts were done with or without her consent. There is nothing prejudicial in the trial judge having referred to that part of the cautioned interview in the summing-up and the judgement in paragraph 43 and 06 respectively.

[14] Therefore, there is no reasonable prospect of success at all of the ground of appeal in appeal.

[15] Accordingly, leave to appeal is refused.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL