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

CRIMINAL APPEAL NO.AAU 132 of 2015
[In the High Court at Suva Case No. HAC 260 of 2014]

BETWEEN	**:**	**SHIU BALAK**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
	:	**Bandara, JA**
	:	**Temo, JA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	**:**	**11 May 2021**
Date of Judgment	**:**	**03 June 2021**

JUDGMENT

Prematilaka, JA

[1] The appellant had been indicted in the High Court of Suva with one count of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 and two counts of defilement contrary to section 215 (1) of the Crimes Act, 2009 committed at Tailevu in the Eastern Division on three different occasions.

[2] At the end of the summing-up, the assessors had unanimously opined that the appellant was guilty of all counts. The learned trial judge had agreed with the opinion of the assessors in his judgment, convicted the appellant as charged and sentenced him to imprisonment of 13 years for rape and 04 years each for the two offences of defilement (all sentences to run concurrently) with a non-parole period of 11 years.

[3] The appellant's appeal against conviction and sentence had been timely. The following grounds of appeal had been canvased against conviction by the Legal Aid Commission. The sentence appeal had not been pursued at the leave to appeal hearing. The single Judge had allowed leave to appeal on the first and second grounds of appeal on 06 December 2018. All appeal grounds filed were as follows:

> *'(i) The learned Judge erred in law by failing to adequately and properly direct the assessors on the defence available to an accused person charged with the offence of Defilement.*
>
> *(ii) That the learned trial Judge caused the trial to miscarry when the summing up lacked fairness and balance.*
>
> *(iii) That the conviction entered against the Appellant is unsafe and unsatisfactory giving rise to a grave miscarriage of justice.*
>
> *(iv) That the learned Sentencing Judge was not consistent and uniformed in sentencing the Appellant thus erring in law.'*

Factual matrix

[4] The appellant and the complainant's father had been co-workers on a dairy farm in Tailevu. They both lived nearby. The two were on friendly terms and the complainant would call the appellant "uncle". It had been agreed between the two men that the complainant could assist the appellant doing chores such as cleaning his van.

[5] In January 2014 when the complainant was 12 years and 11 months old, the appellant had picked her up from home to wash his van. He had taken her to the farm and to the milk tank shed where he made her lie on a sack on the floor and raped her. He had given her $20 (ostensibly for van cleaning, but she didn't do any).

[6] In June 2014 when the complainant was 13 but under 16 the appellant had again picked her up from home to clean his van. He had again taken her to the farm and this time he had made her lie down in the animal feed store where he had indulged in sexual intercourse with her. He had given her $20.

[7] In July 2014, the appellant had collected her from home to take her to his home to "clean the window". He had made her lie on his bed in his home and again had engaged in sexual intercourse with her. For this he had given her $50.

[8] These incidents had been detected on enquiry by her teacher who saw that the complainant had an unusual amount of money with her. Then, the incidents had been told to two female teachers by the complainant, whom she trusted and thereafter her father too had been told. The complaint's father, brother and teacher had confirmed the complainant's evidence with relation to the three events. The teacher had even told court that he was stopped in the street by the appellant who was known to him and who said to the teacher "please save me".

[9] The medical evidence had disclosed no sign of injury and the hymen was intact. The doctor had said that if the abuse were more than 72 hours before examination there would be no bruising or laceration and as such a young girl even the hymen would heal and become intact again.

[10] At the trial the appellant gave evidence and denied any contact whatsoever with the complainant.

01st ground of appeal

[11] The appellant's argument based on **Reddy v State** [2018] FJCA 10; AAU06 of 2014 (08 March 2018) is that the trial judge's directions on the defences available to an accused charged with the offence of defilement is inadequate. The impugned paragraphs in the summing-up are as follows:

> *'10. Defilement is the act of sexual intercourse with a degree of penetration of a person over 13 years old but under the age of 16.*
>
> *11. The State must prove to you that there was an act of sex including penetration to some degree. Consent has nothing to do with it. There is a defence to the charge, but I won't bother you with that because the accused never relied on that defence. His defence is, as you know, that it never happened.'*

[12] Section 215 of the Crimes Act, 2009 reads as follows:

> *'215.— (1) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.*
>
> *Penalty — Imprisonment for 10 years.*
>
> *(2) It shall be a sufficient defence to any charge under sub-section (1) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.*
>
> *(3) It is no defence to any charge under sub-section (1)(a) to prove that the person consented to the act.'*

[13] If an accused takes up the defence under section 215(2) of the Crimes Act, 2009 in a case where his is charged with an offence of defilement, his burden is set out in ***Reddy*** as follows:

> *'[28] It is clear from section 215 (2) that if and when an accused takes up the defense stated therein two requirements must be satisfied; the first is objective and the second subjective. It must be made to appear to the court firstly, that the accused 'had reasonable cause to believe' and secondly, that he 'did in fact believe' that the victim was of or above the age 16 years. This evidential burden should be discharged by adducing or pointing to evidence that suggests a reasonable possibility that both of the said requirements exist (vide section 59).'*

[14] However, in this case the appellant did not take up the defence under section 215(2) of the Crimes Act, 2009. His defence was a total denial. Therefore, direction on the statutory defence under section 215(2) of the Crimes Act, 2009 was irrelevant and unwarranted.

[15] In ***Reddy*** neither consent (in respect of the rape charge) nor age (in respect of the defilement charge) had been raised by the appellant and the court held that once the appellant had indicated that his defence was that no act of sexual intercourse took place, then the issue of age which is the basis of the statutory defence, is irrelevant. The court proceeded to hold:

'[7] In my view once the Appellant had indicated that his defence was that no act of sexual intercourse took place, then the issue of age which is the basis of the statutory defence, is irrelevant. Questions by Counsel relating to age should not have been allowed. The obligation of the trial judge to consider whether to give directions on defences rests on there being some evidence adduced during the trial that warrants consideration of that defence by him and whether to give directions. In this case there was no evidence that related to what the Appellant believed to be the age of the complainant nor was there any evidence as to the appearance of the complainant at the time of the alleged sexual intercourse. There was no challenge to the age of the complainant and the defence was not raised by any evidence given by the Appellant.

[8] Under those circumstances it was not necessary for the trial judge to raise the defence in his summing up let alone give detailed directions as to whether the defence was available on the evidence. In fact in the absence of the defence being raised by the appellant in the form of some evidence that satisfied the evidentiary burden it is difficult to understand how the Judge could give meaningful directions.

[9] In my judgment it is unnecessary to consider ground 1 which seeks to challenge the learned trial judge's directions or the lack thereof on the statutory defence when it was not raised in evidence nor relied upon by the Appellant. For that reason I conclude that there is no merit to ground 1.'

[16] It is the duty of a trial judge in Fiji to decide whether on the evidence he should direct the assessors and himself on the availability of any alternative defence or verdict that is not raised by the defence (**Praveen Ram v The State** [2012] 2 Fiji LR 34. However, there was no other defence either that arose from the evidence in this case requiring the trial judge to direct the assessors.

[17] It was said in ***Reddy*** that in the ordinary course of events the defences available to an accused charged with defilement would include (a) that he was not the person who committed the act as he was not present at the time, or (b) that he was present but that sexual intercourse never took place or (c) that he had reasonable cause to believe and did in fact believe that the other person was of or above the age of 16 years. This is not by any means an exhaustive list. It is clear that the first defence is when an accused takes up an *alibi*. The second relates to denying the physical element of rape and defilement. The third is the statutory defence available under section 215(2) of the

Crimes Act, 2009. The appellant had not alluded to any of them. His defence was a denial simpliciter.

[18] Therefore, the above narrative in ***Reddy*** on defences available in defilement cases should not be construed, as done by the appellant's counsel, to mean that trial judges are required to address the assessors on these positions in every case. In any event, none of these defences was taken up by the appellant whose evidence had been that none of the incidents alleged ever happened. According to him, he was completely oblivious to the three incidents.

[19] Therefore, there are no merits in this ground of appeal.

02nd ground of appeal

[20] The single Judge had left it to the full court to decide the second ground of appeal on the summing-up lacking fairness and balance having regard to the appeal record.

[21] The trial judge had specifically dealt with the age of the complainant at paragraph 9 of the summing-up and the appellant had not made delay a live issue at the trial for the trial judge to deal with it. In any event, how the incidents of sexual abuse came to light and reported to the police after the complainant was found to be having $50 in her possession at school had been well documented at paragraphs 21, 27 and 28 in the summing-up. The delay in reporting, in my view, passes *'the totality of circumstances test"* as set out in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) which discussed as to how to deal with a belated complaint.

[22] In **Silatolu v State** (10th March 2006) Criminal Appeal No. AAU 0024 of 2003 the Court of Appeal referred to **R v Lawrence** [1982] A.C. 510 at 5'19, HL) and stated:

> *"12. ..... It is not part of this court's role to try and see into the assessors' minds or to determine the manner in which they reached their conclusions. The role of the appellate court is to analyse the summing up as a whole and to intervene if it finds they are confusing in themselves or if the assessors' opinions suggest confusion.*

13. When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; ***R v Lawrence*** *(supra). It should be an orderly, objective and balanced analysis of the case;* ***R v Fotu*** *[1953] 3NZLR 129 ..."*

[23] The trial judge in my mind has fairly, objectively and in a balanced manner put the cases for both sides to the assessors. The trial judge had acted very fairly when he finally directed the assessors as follows:

> *'[42] Well that was all of the evidence Madame and Gentlemen. Remember that if you think what the accused has told you is true or may be true then you will find him not guilty. If you don't believe a word he says it doesn't necessarily make him guilty. The State still have to prove to you, so that you are sure, that he committed these crimes.'*

[24] I have examined the record (as indicated in the single judge's ruling as well) in relation to the second ground of appeal. I find that the complainant's direct evidence had been supported by circumstantial evidence of her father, brother, and the school master in material particulars. In fact even the appellant's evidence seems to support the complainant's evidence as to the locations where incidents of sexual abuse had occurred.

[25] Recently, the Court of Appeal set down in **Kumar v State** AAU 102 of 2015 (29 April 2021) the test regarding grounds of appeal based on verdicts that are supposedly 'unreasonable or cannot be supported having regard to the evidence' in the following terms:

> *'[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the*

assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.

*[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges 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 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]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.'*

[26] The appellant's grievance should be considered under *'unreasonable or cannot be supported having regard to the evidence'* in section 23(1)(a) of the Court of Appeal Act. Having examined the record, I would conclude that upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see also **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992). Consequently, I hold that the verdict is not unreasonable and could be supported having regard to the evidence.

[27] As a result pursuant to section 23(1) of the Court of Appeal Act the appeal must be dismissed.

Bandara, JA

[28] I have read the draft judgment of Prematilaka, JA and agree with his reasoning and conclusion.

Temo, JA

[29] I have read the draft judgment of His Lordship Mr. Justice Prematilaka, JA, and I agree with his reasons and conclusion.

Order

1. Appeal dismissed.

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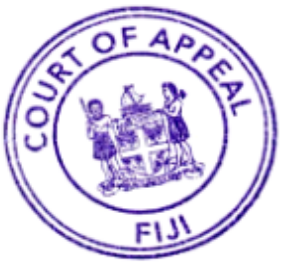
Hon. Mr. Justice C. Prematilaka

ACTING RESIDENT JUSTICE OF APPEAL



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Hon. Mr. Justice W. Bandara

JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo

JUSTICE OF APPEAL