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

CRIMINAL APPEAL NO.AAU 137 of 2019
[In the High Court at Suva Case No. HAC 281 of 2018]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**MOHAMMED YUNUSH**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Mr. L. J. Burney for the Appellant**
	:	**Mr. D. Sharma for the Respondent**
Date of Hearing	:	**31 August 2021**
Date of Ruling	:	**17 September2021**

RULING

[1] The respondent had been indicted in the High Court at Suva with eleven counts. The trial judge had ruled that there was a case to answer only on seven counts namely two counts of rape contrary to Section 207 (1) and (2) (c) of the Crimes Act, three counts of rape contrary to Section 207 (1) and (2) (a) of the Crimes Act, and two counts of the Sexual Assault contrary to Section 210 (1) (b) (i) of the Crimes Act allegedly committed on 28 June 2018 at Nasinu in the Central Division. The other four counts in the information related to two sexual assault charges and two rape charges (01st, 02nd, 08th and 11th counts in the information).

[2] The seven counts where the defense was called are as follows:

*'**COUNT THREE***

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (c) of Crimes Act 2009.*

Particulars of Offence

***MOHAMMED YUNUSH** on the 28th day of June, 2018 at Nasinu, in the Central Division, penetrated the mouth of **MAHMUN NISHA** with his penis, without her consent.*

COUNT FOUR

Statement of Offence

***SEXUAL ASSAULT:** Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009.*

Particulars of Offence

***MOHAMMED YUNUSH** on the 28th day of June, 2018 at Nasinu, in the Central Division, procured **MAHMUN NISHA**, without her consent, to commit an act of gross indecency by making her lick his thighs and genitals.*

COUNT FIVE

Statement of Offence

***SEXUAL ASSAULT:** Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009.*

Particulars of Offence

***MOHAMMED YUNUSH** on the 28th day of June, 2018 at Nasinu, in the Central Division, procured **MAHMUN NISHA**, without her consent, to commit an act of gross indecency by making her lick his anus.*

COUNT SIX

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (a) of Crimes Act 2009.*

Particulars of Offence

***MOHAMMED YUNUSH** on the 28th day of June, 2018 at Nasinu, in the Central Division, penetrated the vagina of **MAHMUN NISHA** with his penis, without her consent.*

COUNT SEVEN

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of Crimes Act 2009.*

Particulars of Offence

MOHAMMED YUNUSH *on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than* ***COUNT 6*** *penetrated the vagina of* ***MAHMUN NISHA*** *with his penis, without her consent.*

COUNT NINE

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (a) of Crimes Act 2009.*

Particulars of Offence

MOHAMMED YUNUSH *on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than in* ***COUNT 7*** *penetrated the vagina of* ***MAHMUN NISHA*** *with his penis, without her consent.*

COUNT TEN

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (c) of Crimes Act 2009.*

Particulars of Offence

MOHAMMED YUNUSH *on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than in* ***COUNT 3*** *penetrated the mouth of* ***MAHMUN NISHA*** *with his penis, without her consent.'*

[3] After the summing-up, the assessors by a majority had expressed an opinion that the respondent was guilty of all counts above. The learned High Court judge had disagreed with the assessors' majority opinion and acquitted him of all 07 counts on 02 September 2019.

[4] The appellant had lodged a timely appeal against acquittal (19 September 2019) and filed written submissions on 26 August 2020. The respondent too had filed written submission on 16 September 2020. Both parties have consented in writing that this

court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or via Skype.

[5] The appellant could appeal against acquittal only with leave of court except on a question of law alone. For a timely appeal, the test for leave to appeal against acquittal under section 21(2)(b) of the Court of Appeal Act is the same as for a conviction appeal in terms of section 21(1)(b) *i.e.* **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The appellant's grounds of appeal against conviction are as follows:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law in allowing the defence to call Dr. Misimisi to give evidence going beyond his purported expertise, namely that due to certain medical conditions the respondent was not able, at the material time, to achieve and maintain erection of his penis sufficiently in order to engage in sexual intercourse. This error was prejudicial to the prosecution in that the learned trial judge relied on his inadmissible evidence in order to found a doubt about the truthfulness of the complainant's evidence that the respondent penetrate her vagina and mouth with his penis multiple times without her consent.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law in allowing the defence to adduce inadmissible hearsay evidence under the guise of the so-called expert evidence of Dr Misimisi to the effect that the respondent had informed him that he had suffered from erectile dysfunction for several years. At the very least, having allowed inadmissible hearsay evidence to be adduced, the learned trial judge ought to have given himself and the assessors a strong warning that what the*

respondent told Dr Misimisi about his erectile dysfunction was not evidence of truth.

Ground 3

THAT the Learned Trial Judge erred in law in finding, at paragraph 11 of his judgment, that the prosecution must prove beyond reasonable doubt that the respondent made a forceful, hard and painful penetration into the vagina of the complainant with his penis. "Forceful, hard and painful" are not elements of the offence of rape. The Judge's error lay in failing to follow his own legal directions at paragraph 17 of the summing up and is such a fundamental error as to have caused the trial to miscarry.

Ground 4

THAT the Learned Trial Judge erred when he followed an impermissible line of reasoning in concluding, at paragraph 24 of the Judgment, that the absence of injuries to the complainant's vaginal area was probative of the absence of forceful, hard and painful penetration of the complainant's vagina by the respondent. It was not reasonably open to the learned trial judge to arrive at this conclusion in the absence of medical evidence that forceful, hard and painful penetration would inevitably have caused injuries to the complainant's vagina.

Ground 5

THAT the Learned Trial Judge fell into similar error, at paragraph 21 of the judgment, when he concluded, based on his observation that the complainant has a "pale fair complexion", that the absence of findings of marks and bruises in the medical report created a reasonable doubt about the complainant's allegations of assaults by the respondent. It was not reasonably open to the trial judge to draw conclusions about the absence of injuries based on ill-conceived assumptions unsupported by expert evidence.

Ground 6

THAT the Learned Trial Judge erred in law in failing to adequately direct himself on the correct approach to "inconsistencies". In light of the evidence and the arguments advanced at trial it was incumbent on the trial judge to assist the assessors and himself on the significance of any apparent inconsistencies to the central issue in the case, namely whether the complainant was telling the truth about non-consensual penetration. The trial judge ought to have provided guidance to the effect that minor discrepancies on peripheral matters not touching the core of the case should not be given undue importance. Failure to provide this guidance resulted in a miscarriage of justice because the trial judge did attach undue importance to peripheral matters such as the reason why the respondent went to the complainant's house on the day of the alleged sexual offending.

Ground 7

THAT the verdict of acquittal is unreasonable and cannot be supported having regard to the evidence:

(a) The central issue for the fact finders at trial was whether they could be sure that the complainant was telling the truth about the serious sexual offending she suffered at the hand of the respondent. The battle lines were clearly drawn. The defence mounted an all-out attack on the complainant's character in support of the defence of total fabrication.

(b) Despite this attack on her credibility, the majority of the assessors, by their opinions of guilty, must have been sure that the complainant told the truth about the complainant penetrating her without her consent. Obviously, the majority of assessors were sure that the respondent had lied under oath about the central issue. Equally clearly, the majority must have rejected the so-called expert sufficient to achieve penetration of the complainant's vagina. Plainly, it was properly open to the majority of assessors to reach these conclusions on the totality of the evidence.

(c) In these, circumstances even though he was not obliged to accept the majority opinions, it was incumbent on the learned trial judge to give cogent reasons, capable of withstanding scrutiny in the Court of Appeal, for not agreeing with the majority opinions of guilty.

(d) The learned trial judge manifestly failed to provide cogent reasons for his verdicts of not guilty on all counts. Rather the reasons set out in the judgment are equivocal, illogical and founded on impermissible assumptions.

(e) The learned judge failed to make any express finding on the issue whether at the material time the respondent was incapable of penetrating the complainant's vagina with his penis. This is unsurprising given there was no adequate evidential basis for such a finding. However, the trial judge did give as a reason for not agreeing with the majority of assessors his reasonable doubt whether the respondent's claim that he had been suffering from erectile dysfunction was true. This is not a cogent reason because a doubt about the respondent's erectile dysfunction is neutral on the central issue unless the judge found as a fact that the respondent was incapable of penetrative sex.

(f) The trial judge's flawed reasoning is exposed at paragraph 22 of the judgment. The learned judge must have accepted the complainant's evidence that whilst the respondent was penetrating her she obeyed his request to say "I love you" and "ha ha ha".

The judge used this evidence to support his doubt whether the complainant willingly took part in sexual intercourse. The problem with this reasoning is the defence was fabrication not consent. In order to harbour a doubt about consensual intercourse, the trial judge must have rejected the defence argument that the respondent was incapable of penetrative sexual intercourse. However, the trial judge also relied on the claimed erectile dysfunction to found a doubt whether the respondent had penetrated the complainant with his penis. Internally inconsistent reasoning is plainly not cogent.

(g) The learned trial judge properly directed the assessors and himself about the danger of making unwarranted assumptions in rape cases at paragraph 25 to 27 of the summing up. Regrettably, the judge failed to follow his own directions and relied on a number of unwarranted assumptions in order to justify rejecting the majority opinions of guilty:

(i) At paragraph 23 of the judgment, the trial judge made an unwarranted assumption that a violent sexual offender would not scratch the complainant's body if she did not physically resist. The judge relied on this unwarranted assumption to support his professed doubt about whether the respondent had scratched the complainant as alleged.

(ii) At paragraph 25 of the judgment the trial judge made a number of unwarranted stereotypical assumptions about who the complainant should have complained to if she had just been raped as she alleged (neighbours and her daughter). The judge made the further unwarranted assumption at paragraph 26 of the judgment that if the complainant found her friend Virisila more comfortable to be with during such a horrendous experience ahead of her own daughter, she should not have gone to the police station alone. Plainly, the learned judge disregarded his own warning, at paragraph 27 of the summing up that he "must be mindful not to bring into the assessment of evidence any preconceived views as to how a victim had gone in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident.'

[7] The trial judge had summarised respective cases of the prosecution and the defence in the judgment as follows:

5. The prosecution alleges that the accused came to the complainant's house on the 28th of June 2018, pretending that he was not well and wanted to stay in the night. He has told the complainant that he would go back to

Nadi on the following morning. The accused had come to her room while she was sleeping in there. He then forcefully dragged her into his room and physically assaulted by slapping, strangulating her neck, pinching, snatching and scratching her body. He has then threatened her and forced her to lick his thighs, genitals and anus. The accused had then forced her to perform oral sex on him. He had then inserted his penis into her vagina and had sexual intercourse with her without her consent. The prosecution alleges that the accused had penetrated into the vagina of the complainant three times during the course of the events that have allegedly unfolded on the night of the 28th of June 2018. Having done the said sexual intercourses with the complainant, he had then forced her to perform oral sex on him again in the living room.

6. *In contrary, the defence claims that the accused never engaged in such sexual and physical assaults on the complainant. According to the accused he had come to her house in order to discuss a settlement for the property matter that the complainant has involved with her brother-in-law. The accused was the intermediary between the complainant and her brother-in-law. He wanted to discuss the property issue with the complainant and her children because the children are also the beneficiaries of the property. However, the complainant had lured him into her house under the pretext that her children would come soon to discuss the matter. When the accused came to her home, the complainant had made certain sexual advancement by touching and then masturbating his penis. When the accused refused or try to elude her sexual advancement, the complainant had threatened him that if she would scream and made it public that he was with her in the night alone, his reputation would be gone. Afterwards, the complainant had started to masturbate his penis. The accused had told her that he has an erectile dysfunction, the complainant had then started to perform oral sex on him, saying that she could make any man erected. However, the accused had not achieved an erection. Thereafter he had gone to the bathroom to get himself cleaned. Once he finished his cleaning, he found that he was locked inside the bathroom.*

[8] The trial judge had stated in the judgment that the defence was mainly founded on two issues; the first issue is that the accused has been suffering from erectile dysfunction, hence, he was not in a position to achieve and maintain an erection of his penis sufficient to engage in sexual intercourse and secondly the motivation of the complainant *i.e.* as act of revenge from him for taking the side of her brother-in-law in the civil litigation of the property at the Kennedy Avenue where the respondent was the main witness who gave evidence against the complainant in the High Court of Lautoka (see paragraph 8 and 15).

01st and 02nd ground of appeal

[9] The appellant complains that the trial judge should not have allowed to lead expert evidence on erectile dysfunction by Dr. Misimisi as he did not have the expertise to express an opinion on that aspect and his opinion had been based entirely on what the respondent had told him - paragraph 86 of the summing-up (vide **R v Bradshaw** (1985) 82 Cr App R 79). Therefore, the appellant argues that at least the judge should have directed himself in that regard correctly. At the same time, it further argues that logically the trial judge should be taken to have rejected Dr. Misimisi's opinion (though no specific finding had been made by the judge) as if it was accepted the trial judge need not have gone into other aspects of the prosecution case such as consent to overturn the assessors' opinion.

[10] The prosecution does not seem to have objected to Doctor Misimisi's evidence or challenged his expertise during the trial or sought any redirections on what it now considers to be objectionable part of the doctor's evidence [see **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)] so that the trial judge could have addressed those concerns in the judgment.

[11] An expert's opinion is admissible to furnish the court with scientific information or criteria which are likely to be outside the experience and knowledge of a judge or assessors so as to enable the judge or assessors to form their own independent judgment by the application of these information or criteria to the facts proved in evidence. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. In other words where the question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received [see **Goundar v State** [2021] FJCA 117; AAU0042.2018 (6 August 2021)].

[12] It appears from paragraph 12 of the judgment that Doctor Misimisi's findings and the opinion of the health condition of the respondent had been based on the physical examination of the respondent, history provided by him and the laboratory tests

results not only on what the respondent had told the doctor (see also paragraphs 82-87 of the summing-up).

[13] All in all it looks as if the medical evidence and the complainant's own inconsistent evidence on the issue of erection had created a reasonable doubt in the mind of the trial judge as to whether the respondent had been capable of penetrating the complainant's vagina (see paragraph 12, 13 and 14 of the judgment) particularly in the backdrop of the complainant's evidence that it was a forceful, hard and painful penetration and not a slight or momentary penetration. In his approach to the evidence of the defence the trial judge seems to have been guided by **Abramovitch** (1914) 84 L.J.K.B 397). He had formed this view largely on the defence evidence coupled with the complainant's own evidence.

[14] In addition, having examined the complainant's own evidence from paragraphs 19-30 the trial judge had entertained a reasonable doubt about the reliability, credibility and probability and truthfulness of the complainant and found her evidence to be not reliable, credible, and probable. 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).

[15] I have before me only the summing-up and the judgment and not the trial proceedings at this stage. Examining the summing-up and the judgment, I am afraid that I cannot say that there is a reasonable prospect of success of these two grounds of appeal.

03rd ground of appeal

[16] The appellant criticises what the trial judge had stated at paragraph 11 of the judgment that it is the onus of the prosecution to prove beyond reasonable doubt that the

accused made a forceful, hard and painful penetration into the vagina of the complainant with his penis.

> *11. According to Section 207 of the Crimes Act, a slightest penetration of the penis is sufficient to prove the element of penetration. Therefore, it is not necessary to prove that the penis was erected when the alleged penetration was made. However, in this case, the complainant alleged that it was a forceful, hard and painful penetration into her vagina with the penis of the accused. The nature of the allegation made by the complainant is not a slightest or momentarily penetration. Therefore, it is the onus of the prosecution to prove beyond reasonable doubt that the accused made a forceful, hard and painful penetration into the vagina of the complainant with his penis.*

[17] When the above paragraph is considered along with paragraph 17 in the summing-up (which too he had considered in the judgment) that evidence of slightest penetration of the penis of the respondent into the vagina and/or to the mouth of the complainant was sufficient to prove the element of penetration and it was not necessarily required to adduce the evidence of full penetration, it appears that his subsequent statement in the judgment that it is the onus of the prosecution to prove beyond reasonable doubt that the respondent made a forceful, hard and painful penetration into the vagina of the complainant with his penis had been made in the context of the complainant's evidence that it was a forceful, hard and painful penetration as opposed to a slightest or momentary penetration (see paragraph 37 of the summing-up, paragraphs 11 and 14 of the judgment)

[18] However, the statement that it was the onus of the prosecution to prove beyond reasonable doubt that the respondent made a forceful, hard and painful penetration was wrong in law though the trial judge had made a correct exposition of the law in the summing-up. Nevertheless, I do not think that what had created a reasonable doubt in the mind of the trial judge as to whether the respondent had been capable of penetrating the complainant's vagina was not just this error of law as appearing in the judgment. It appears from the judgment that his view was based on an analysis of the totality of the evidence.

[19] While I recognise the impugned statement taken in isolation to be an erroneous account of the law, I do not think that there is a reasonable prospect of success of the appeal on this ground of appeal alone.

04th and 05th ground of appeal

[20] The appellant's complain under the above grounds of appeal are based on paragraphs 24 and 21 of the judgment.

[21] The appellant argues that the trial judge had drawn an impermissible conclusion from the absence of vaginal injuries.

> *24. According to the medical report, there are no vaginal injuries or bruises found by the doctor during the medical examination. As explained by the complainant, the accused made forceful, hard and painful penetration into her vagina with his penis on the three occasions. If such forceful and hard penetrations were made into her vagina, there is a possibility of causing some bruises or laceration in or around her vaginal area. The prosecution did not call the Doctor or provide any expert medical evidence to rule out this reasonable doubt.*

[22] I do not think that the trial judge was looking for corroboration of the acts of alleged sexual intercourse but rather attempting to assess the truthfulness and probability of the complainant's version of events with reference to medical evidence in the context of the complainant's evidence that the appellant had forceful, hard and painful penetration of her vagina with his penis on the three occasions. It appears from the above paragraph that the prosecution had not made an attempt to elicit from Dr. Doctor Misimisi or explain through another doctor the possibility of the complainant (a mother of three children) not having suffered vaginal injuries as opposed to pain despite several acts of forceful, hard and painful penetration of her vagina. Nevertheless, the trial judge's conclusion that if such forceful and hard penetrations were made into her vagina, there was a possibility of causing some bruises or laceration in or around her vaginal area could not be justified as there does not appear to have been medical evidence that presence of such injuries was necessarily a

possibility given *inter alia* the fact that the complainant was around 45 years and had three children.

[23] It is also submitted by the appellant that the trial judge had erroneously speculated that because the complainant had a *'pale fair complexion'* she should have displaced signs of the assault she was complaining at the hands of the respondent.

> *21. The complainant was medically examined by a Doctor at the CWM Hospital nearly three hours after the alleged incident. She had not taken any shower before she presented herself to the medical examination. According to the medical examination report which was tendered by the parties as an admitted document, the Doctor has not found any injuries or bruises, laceration or any marks on her neck and face. Apart from multiple linear bruises on her right arms, forearm and also on the thighs, a liner bruises on the stomach, a liner bruises below the right side of her breast, and several patchy bruises on the left side of the neck and chest, the Doctor has not found any marks or bruises on her neck, stomach, face, cheeks, wrist or waist. I observed that the complainant has a pale fair complexion. The learned counsel for the prosecution reaffirmed the forcefulness and hardness of those physical assault allegedly done to the complainant during the re - examination. The absence of such findings of marks and bruises in the medical examination report creates a reasonable doubt about the allegation that the complainant made about these physical assaults.*

[24] To me it appears, that leaving aside the trial judge's observation of the complainant being of fair complexion (which he was entitled to do), what he tried to say is that had the complainant suffered the kind of physical assault she had described as hard and forceful the absence of any evidence of them after 03 hours of the incident made him doubtful of the complainant's assertions. It does not appear to be mere speculation. The respondent has submitted that it is surprising that the complainant's medical report had showed up only scratches on her hand and around her thighs given the nature of her evidence on his assault on her. However, I agree that the trial judge had not explained as to what he made of the injuries disclosed in the agreed medical evidence referred to in paragraph 21.

[25] The respondent has submitted that at the instance of the prosecution the medical report prepared by Dr. Brian Guevara was tendered sans his opinion as he was not

available to give evidence. That medical report has recorded multiple bruises all over the complainant's body which the respondent had called self-inflicted scratch marks (which proposition looks to me somewhat far-fetched at this stage). In the circumstances, the trial judge's conclusion that the absence of findings of marks and bruises in the medical examination report creates a reasonable doubt about the allegation that the complainant made about these physical assaults, seems beyond the realm of reasonable and logical inference in the absence of the doctor at the trial to elaborate on his report.

[26] Therefore, I find both the above grounds of appeal to have some merits but at this stage I cannot say whether by themselves they have a reasonable prospect of success of the appeal against acquittal.

06th ground of appeal

[27] The argument here appears to be that the trial judge had failed to direct the assessors and himself on the correct approach to inconsistencies in that he had allegedly given undue weight to peripheral matters such as those listed in the written submissions.

[28] The broad guideline is that discrepancies in the form of contradictions, inconsistencies and omissions which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance but the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) particularly when the all-important 'probabilities-factor' echoes in favour of the version narrated by the witnesses (vide **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016).

[29] This validity of complaint in my view has to be assessed having regard to the total evidential context in which the alleged 'peripheral matters' highlighted by the appellant had occurred. Therefore, I would not go into details of matters submitted by both parties under this ground of appeal at this stage.

07th ground of appeal

[30] This appears to be the real substantive ground of appeal. The appellant alleges that the verdict of acquittal is unreasonable and cannot be supported by evidence. This ground seems more or less capable of subsuming all other grounds.

[31] The appellant also argues that the trial judge had not given cogent reasons when disagreeing with the assessors.

[32] When the trial judge disagrees with the majority of assessors he 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) and **Fraser v State** [2021]; AAU 128.2014 (5 May 2021)].

[33] 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. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[34] These tests could be applied *mutatis mutandis* to a trial by a judge or Magistrate alone without assessors. Although the above tests had been formulated regarding an appeal against conviction the same approach may *mutatis mutandis* be taken by the full court regarding an appeal against an acquittal as well *i.e.* the question for an appellate court would be whether upon the whole of the evidence acting rationally it was open to the trial judge not to be satisfied of guilt beyond reasonable doubt in order to have acquitted the respondent against the assessors' opinion, which is to say whether the trial judge must, as distinct from might, have entertained a reasonable doubt about the respondent's guilt against the assessors' opinion; whether it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence by the respondent.

[35] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) earlier stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..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…. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.'*
>
> *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.'

[36] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him. Thus, in an appeal against acquittal it should be whether trial judge could have reasonably acquitted on the evidence before him.

[37] Thus, it is clear that for the above ground to be properly considered the full court has to examine the complete trial proceedings and by examining only the summing-up and the judgment it cannot be determined whether the verdict of acquittal is unreasonable and cannot be supported by evidence. The full court also will have the benefit of oral submissions by counsel for both parties which I have not had at this stage.

[38] Obviously, the majority of assessors have not entertained a reasonable doubt about the respondent's guilt. However, I cannot say whether the trial judge also 'must', as opposed to 'might', have entertained a reasonable doubt about the respondent's guilt at this stage to justify the acquittal due to want of trial proceedings and oral arguments by counsel. Therefore, I shall not endeavour to consider lengthy submissions of both parties and express any opinion at this stage on this ground of appeal.

[39] Therefore, I am inclined to grant leave to appeal so that the full court may consider the success or otherwise of this ground of appeal upon an examination of the record or the transcript with the benefit of full arguments at the hearing by both sides.

Order

1. Leave to appeal against acquittal is allowed.

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL