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

CRIMINAL APPEAL NO.AAU 0002 of 2019
[In the High Court at Lautoka Case No. HAC 60 of 2015]

BETWEEN	:	**MAIKELI SAUKURU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**24 September 2021**
Date of Ruling	:	**01 October 2021**

RULING

[1] The appellant (02nd accused) had been indicted with another (01st accused and the appellant in AAU08 of 2019) in the High Court at Lautoka with one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division on 03 April 2015.

[2] The information read as follows:

*'**FIRST COUNT***

Statement of Offence

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

Particulars of Offence

INIA NAQIA on the 3rd day of April, 2015 at Nadi in the Western Division penetrated the vagina of ***ANI TINAI,*** *with his penis, without the consent of the said* ***ANI TINAI.***

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MAIKELI SAUKURU *on the 3rd day of April, 2015 at Nadi in the Western Division penetrated the vagina of* ***ANI TINAI,*** *with his penis, without the consent of the said* ***ANI TINAI.****'*

[3] At the end of the summing-up the assessors had unanimously opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors' opinion, convicted the appellant and sentenced him on 12 December 2018 to an imprisonment of 08 years and 10 months with a non-parole period of 08 years.

[4] The appellant had appealed in person against conviction and sentence in a timely manner. Subsequently, he had tendered amended and additional grounds of appeal from time to time. Thereafter, the Legal Aid Commission had filed amended notice of appeal against conviction along with written submission on 28 September 2020. The appellant had also filed an abandonment notice relating to his sentence appeal in Form 03 under Rule 39 on 28 September 2020. The state had tendered its written submissions on 28 October 2020. Counsel for both parties had consented to take a ruling on written submissions without an oral hearing *via* Skype.

[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 in a timely appeal for leave to appeal against conviction is **'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) 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 (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 ground of appeal urged on behalf of the appellant against conviction is as follows:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to adequately direct his mind on the compound improbabilities that emanated from the totality of evidence thus raising doubt on the evidence and prejudicing the Appellant on his right to a fair trial.*

[7] The trial judge in the sentencing order had summarized the evidence against the appellant as follows:

> *'2. The brief facts were as follows:*
>
> *On 3rd April, 2015 the victim was drinking alcohol with both the accused persons in the early hours of the morning at the back of a dairy shop near Saunaka Village.*
>
> *3. The drinking finished after 9am that morning. The victim went to the nearby sugar cane field to relieve herself where she blacked out. When she regained consciousness both the accused persons were holding her tight. They removed her clothes, the first accused Inia started to touch all over her body while the second accused forcefully started kissing her mouth, to stop him she bit his lips.*
>
> *4. Both the accused persons took turns in having sexual intercourse with her by penetrating her vagina with their penis. The first accused had sexual intercourse first followed by the second accused. The victim did not give consent to any of the accused to have sexual intercourse with her.*
>
> *5. After both the accused persons left the victim walked back to the village where she told her friend Solomoni Qurai what the two accused had done to her.*

6. The matter was immediately reported to the police, upon investigations both the accused were arrested and charged.'

[8] The appellant had given evidence and denied having sex with the complainant and taken up the position that he left the scene around 6.30-7.00 a.m. Though he asked her to accompany him to the village she had refused and gone to join another group drinking nearby. The appellant had walked alone and came to know of the allegation in the afternoon.

01st ground of appeal

[9] This ground is based on what the counsel had proposed as 'compounded probabilities' in the prosecution case which the trial judge had allegedly failed to consider and which cast a reasonable doubt and therefore the verdict of guilty is unreasonable or cannot be supported having regard to the evidence. The improbabilities highlighted are *'why did it take the complainant an incredible 1 ½ hours to reach Saunaka Village…'* and *'how much truth is there regarding there being another group present after the Appellant left'.*

[10] The trial judge had overturned the opinion of not guilty by the assessors which he had every right to do. 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).

[11] 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)].

Test of 'unreasonable or cannot be supported having regard to the evidence'

[12] Trial by the judge assisted by assessors the test has been formulated as follows. 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).

[13] When the above test is recalibrated to a situation where the trial judge disagrees with the assessors or the trail is by the judge alone it may be restated as follows. The question for an appellate court would be whether upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion; whether the trial judge must, as

distinct from might, have entertained a reasonable doubt about the accused's guilt; whether it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence.

[14] Having directed himself with the lengthy summing-up the trial judge had embarked on an examination of the prosecution evidence from paragraphs 4-13 and defence evidence from paragraph 20-24. Then the trial judge had reflected the credibility of the prosecution and defence witnesses from paragraphs 25-34. Finally, the trial judge had stated:

> *35. The defence put forward by both the accused persons has not been able to create a reasonable doubt in the prosecution case.*
>
> *36. I am satisfied beyond reasonable doubt that both the accused persons on 3rd April, 2015 had penetrated the vagina of the complainant with their penis without her consent.*
>
> *37. I also accept that both the accused persons knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.*
>
> *38. In view of the above, I overturn the unanimous opinion of the assessors that both the accused persons are not guilty of rape.*
>
> *39. I find both the accused persons guilty as charged and I convict both of them for one count of rape each.*

[15] The trial judge had in fact addressed his mind to the two issues raised by the appellant as improbabilities and dismissed them for good reasons.

> *9. <u>After the accused persons left the complainant walked to Saunaka Village, it took her about 1 ½ to 2 hours to reach the village.</u> At the village the complainant went to the house of her friend Solomoni Qurai and asked him to take her to the Police Station.*
>
> *28. On the other hand, both the accused persons did not tell the truth in court their demeanour was not consistent with their honesty. They were careful in narrating their evidence and in answering questions during cross examination they were not forthright. <u>In cross examination of the complainant none of the accused persons had cross examined her that she had joined the group which was drinking nearby yet the second accused in</u>*

his evidence said the complainant went to join the other group before he left for home.

29. *The first accused said after 6am but before 7am he left the drinking party for home at Saunaka Village by taking short cuts he reached home around 7am. The complainant said it took her 1 ½ to 2 hours to go to the same village. Again none of the accused persons in cross examination of the complainant had disputed this aspect of the complainant's evidence. I reject the evidence of the first accused in this regard as well.*

[16] Thus, the trial judge had satisfactorily discharged his burden in disagreeing with the assessors and convicting the appellant. Therefore, I do not see any reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is refused.

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