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

CRIMINAL APPEAL NO.AAU 0008 of 2019
[In the High Court at Lautoka Case No. HAC 60 of 2015]

BETWEEN	**:**	**INIA NAQIA**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. T. Lee 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 (01st accused) had been indicted with another (02nd accused and the appellant in AAU0002 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. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction along with written submission on 11 January 2021. The counsel for the appellant had stated in the written submissions that the appellant sought to abandon the sentence appeal by filing a Form 3 under Rule 39 of the Court of Appeal Rules on 28 September 2020. However, I do not find Form 3 in the file and therefore, the counsel is directed to submit a copy of it to the CA registry forthwith. The state had tendered its written submissions on 11 January 2021. 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 grounds of appeal urged on behalf of the appellant against conviction are as follows:

> ***Ground 1***
>
> *THAT the Learned Trial Judge may have fallen into an error in fact and law to convict the Appellant when the conviction was unreasonable or cannot be supported having regard to the evidence adduced so as to relieve the State of the burden of proving the element of penetration beyond a reasonable doubt.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge may have fallen into an error in fact and law to convict the Appellant without having regarding to the totality of evidence presented by the Appellant to prove beyond a reasonable doubt that State was relived of the burden of proving their case against the Appellant.*

[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 and 02nd grounds of appeal

[9] The gist of both grounds is that the verdict of guilty is unreasonable or cannot be supported having regard to the evidence. The substantive arguments under this are that there was no medical report led at the trial to prove the act of sexual intercourse, the trial judge was unreasonable in ejecting the appellant's *alibi* defence and the judge had not given great weight to the appellant having presented himself at the police station promptly.

[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] At a 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 14-19. Then the trial judge had reflected on 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] It is trite law in Fiji that medical evidence is not a ***sine qua non*** to prove penetration or broadly for a conviction for rape. Section 129 of the Criminal Procedure Act lends legitimacy to this proposition of law. There is no evidence that the complainant had been subjected to a medical examination. The defence does not seem to have delved into this aspect during the trial, for the appellant's defence was a denial and an *alibi*.

The complainant's evidence was sufficient to prove penetration and the trail judge had believed the complainant fully in this regard.

[16] According to the appellant the drinking ended after 6.00 am. Between 06.00 and 07.00 am he left the drinking party for home and the complainant and the co-accused Maikeli were still drinking. The appellant claimed to have taken short cuts and reached home around 7.00am. His mother was cooking and he went straight to bed waking up in the afternoon at about 4.00pm to 5.00pm. When he woke up he was informed by his mother that the complainant blamed him and Maikeli for rape. His mother had stated that he came home 20 minutes before 07.00am but she had told the police that he came home between 6.00 and 6.30am.

[17] Regarding the *alibi* defence, the trial judge had given his consideration to it in the judgment at paragraphs 29 - 33 and stated:

> *34. I reject the defence of both the accused persons as unbelievable and unreliable. Both the accused persons were at the alleged crime scene as mentioned by the complainant the prosecution has disproved the defence of alibi raised by the second accused.*

[18] The appellant having presented himself at the police station promptly was not a matter that should have been accorded a great deal of or any significant weight as argued by the appellant in the mater of conviction.

[19] All in all, the trial judge had satisfactorily discharged his burden in disagreeing with the assessors and convicting the appellant according to law. Therefore, I do not see any reasonable prospect of these two grounds of appeal succeeding.

Order

1. Leave to appeal against conviction is refused.

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