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

CRIMINAL APPEAL NO.AAU 156 of 2015
[In the High Court at Suva Case No. HAC 104 of 2013]

BETWEEN	**:**	**THE STATE**
		Appellant
AND	**:**	**SAKEASI SAULEQARAKI**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
	:	**Bandara, JA**
	:	**Wimalasena, JA**
Counsel	**:**	**Mr. M. Vosawale for the Appellant**
	:	**Mr. M. Fesaitu for the Respondent**
Date of Hearing	**:**	**13 May 2021**
Date of Judgment	**:**	**25 June 2021**

JUDGMENT

Prematilaka, ARJA

[1] The respondent had been indicted in the High Court at Suva with two counts of rape contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed on Gau Island in the Eastern Division on 14 January 2013.

[2] At the end of the summing-up, the assessors had unanimously opined that the respondent was guilty of both counts. However, the learned trial judge had disagreed with the assessors in his judgment and acquitted the respondent of both counts.

[3] The appellant's appeal against acquittal had been timely. The following grounds of appeal had been canvased against acquittal by the Legal Aid Commission (LAC) at

the leave to appeal stage. The single Judge had examined the main thrust of the appeal namely the issue of consent and allowed leave to appeal on 06 June 2019 on all grounds of appeal. The appeal grounds urged at the leave stage were as follows:

*'**Acquittal***

*'**Ground 1***

The Learned Trial Judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the Assessors and in particular, by failing to take into account, and properly consider, the following evidence led at trial in respect of Count 1 on the Information:

(a) The complainant's evidence that the accused had told her to open the zip of pullover she was wearing; that she had been scared and put her hand over her chest instead; and the accused person's overt act in then taking the complainant's hand off her chest;

(b) The Accused person's admissions under cross-examination that "mmm"(low inflection) means "no"; and that he was trying to rely on the more English sounding "mmm" (drawn inflection) to support his case for consent; and

(c) The complainant's evidence that the Accused had only asked her whether she liked what he was doing after he had touched her breast, and at no other point.

Ground 2

The learned Trial Judge erred in law and in fact by relying on the complainant's non-expert opinion on the Accused person's state of mind at the time of commission of the act that constituted Count 1 of the Information.

Ground 3

The learned Trial Judge erred in law and in fact by differing from the unanimous opinions of the Assessors on the narrow issue of the Accused person's state of mind in respect of Count 1 and 2 on the Information in circumstances where the learned Trial Judge and the Assessors were ad idem on the facts.

Ground 4

The learned Trial Judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the Assessors and in particular, by failing to give reasons for relying on the evidence of the

Accused and rejecting the evidence of the complainant on Count 2 of the Information.

Ground 5

The learned Trial Judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the Assessors and in particular, by failing to take into account and properly consider, the complainant's evidence that she had told the Accused that she was in pain; that she had cried; and that the Accused had then pushed her to the ground prior to him inserting his fingers in to the complainant's vagina.'

[4] Both counsel apart from oral submissions relied on written submissions filed at the leave stage.

The evidence in brief

[5] The complainant in this case was 18 years old at the time of the incident. The respondent is her father's younger brother and during the material time the complainant was staying with the respondent and his family at Nawaikama in Gau Island. The complainant went to her father's elder brother's house at Somosomo on 09 January 2013. On 14 January 2013, the respondent visited Somosomo with other villagers. To get back home, the respondent and the complainant left for Nawaikama around 9.00 pm by foot. According to the complainant while they were on their way, at Delainaniu, the respondent penetrated her vagina with his penis without her consent and at Nakobua, he penetrated her vagina with his fingers without her consent.

[6] The respondent position was that he penetrated the complainant's vagina with his penis at Delainaniu with her consent. He denied penetrating her vagina with his fingers at Nakobua.

[7] As correctly identified by the single Judge in the ruling the main thrust of the appeal is whether the trial judge had given cogent reasons in differing from the unanimous opinion of guilty expressed by the assessors. The point of departure is clearly the fault element of the offense. Therefore, I shall deal with all appeal grounds collectively rather than individually.

01st Count

[8] The trial judge's reasons for overturning the opinion of the assessors on the first count are at paragraphs 09-13 of the judgment:

> *'9. With regard to the first count, the prosecution says that the accused inserted his penis without the complainant's consent. The defence says that the complainant consented and that the accused perceived that the complainant was consenting due to her responses.*
>
> *10. The complainant said in her evidence that she did not consent for what the accused did to her. However, she said that the accused asked her whether she 'like' what he is doing to her after touching her breast and she did not say anything apart from saying "mmm" as she was scared. According to the accused he asked the complainant thrice whether she like what he is doing, before he inserted his penis into her vagina and he said that he construed the complainant's "mmm" as the complainant giving her consent.*
>
> *11. It is not disputed that the accused asked the complainant while he was touching the complainant's breast but before he inserted his penis into her vagina, whether the complainant 'like what he is doing' and the complainant responded by saying "mmm". Complainant herself admits in her evidence that the accused was not in a position to interpret her response "mmm" properly, because it was dark and it was her evidence that the accused could have 'taken as she was consenting' given her conduct. There was no evidence of any circumstances which shows that the accused knew that the complainant is not consenting or he did not care whether she was consenting.*
>
> *12. The complainant herself creates a reasonable doubt in my mind on whether the accused knew or believed that she was not consenting and on whether the accused was reckless as to whether she was consenting.*
>
> *13. Therefore, I am not satisfied that the prosecution has proved the first count beyond reasonable doubt. Accordingly, I find that the accused is not guilty of the first count.'*

[9] It is clear from the above paragraphs that the trial judge had concluded that there was no evidence that showed that the respondent knew that the complainant was not consenting or he did not care whether she was consenting particularly because the respondent had asked the complainant while he was touching her breast but before he inserted his penis into her vagina whether she liked what he was doing and because

she had responded by saying "mmm". The trial judge had also relied on the complainant's evidence that the respondent was not in a position to interpret her response "mmm" properly, because it was dark and that he could have 'taken as she was consenting' given her conduct.

[10] However, the trial judge had unfortunately ignored the evidence suggesting that the respondent was planning to do what he did during the journey even before they left the complainant's father's elder brother's house at Somosomo. This is clear from paragraph 35 of the summing-up:

> *'.....On 14th January 2013, the accused visited her uncle's house where she was staying at Somosomo with some others. She said, when she was preparing tea for the visitors, the accused signalled her using hand gestures for her to go back to Nawaikama with him. After having tea, the accused came to her several times and told her that they should leave at 9.00pm that night. She left with him accordingly with her clothes in her knapsack. She also took her aunt's torch on the instructions of the accused. She said that the accused told her that she should tell that they were walking to look for land crabs if anyone asked.'*

[11] It is apparent that the respondent had not only coerced the complainant to go with him alone in the night and given her a readymade excuse to avoid suspicion if anyone were to see them. It does not appear at all that there was any urgency for the respondent to take her back to Nawaikama in that night. Obviously, the respondent knew that she would be most vulnerable in the night having no one else present with her during the journey passing lonely areas.

[12] The following evidence at paragraph 36 of the summing-up reveals the devious execution of his plan by the respondent and how he proceeded to sexually abuse her using her vulnerability which he very well knew:

> *'She said that night was really dark and it took them about half an hour to reach Delainaniu where the accused told her to rest for a while. Accused told her to lean against a coconut tree and to keep her legs on another small tree nearby. He then told her to off the torch she was holding and she turned it off. Then the accused moved closer to her and told her to massage his shoulder. She complied. Then the accused touched her breasts and while touching he asked her whether she like what he is doing to her. She said she was scared*

and was anxious and therefore she only said "mmm". She said she could not say anything 'because it was far and I was new to the place' and as there were no houses and no people nearby. He then told her to open the zip of the pullover she was wearing. She was scared and placed her hand on her chest. The accused took her hand off the chest, unzipped the pullover and licked her stomach. The accused then opened the sulu she was wearing and removed her panty. Accused licked her vagina and then inserted his penis into her vagina. She said the accused had his penis inside her vagina for about 5 minutes and he did not ejaculate.'

[13] The complainant's reaction as revealed by evidence should have made the respondent realise that she was not consenting to his advances or what he was doing. Obviously, the respondent knew or at the least was reckless as to the fact that she was not consenting to have sexual intercourse with him but she simply surrendered to the inevitable given the precarious and helpless situation she was in. Her already minimal physical resistance would have been dampened even further by the fact that the respondent was her father's younger brother. In the circumstances, I have no doubt that the fault element of rape had been established by the evidence.

Law on fault element in rape

[14] In **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) the Court of Appeal identified the fault elements of rape as follows:

'[32] Section 14 states inter alia that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) ***recklessness*** *on the part of the accused as defined in section 21(1).'*

'[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. ***Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21***

respectively. *The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape.'*

02nd Count

[15] The trial judge had overruled the assessors with regard to the second count at paragraphs 15-19 of the summing-up:

> *15. The accused denies penetration in this count. Therefore, what is not in dispute in regard to this count is only the accused's identity. The prosecution should prove all the other elements beyond reasonable doubt.*
>
> *16. The complainant says that the accused inserted his fingers into her vagina without her consent at Nakobua and the accused says he did not insert his fingers. He says, he only fondled the complainant's vagina when she was trying to get his penis to erect. It was also the complainant's evidence that when she told the accused at this point that she was in pain, the accused told her that they should then leave and they did leave that place accordingly.*
>
> *17. With regard to this second count, though he denies that he penetrated the complainant's vagina with his fingers, the accused admits that he fondled complainant's vagina. Hence, it is probable that his fingers may have penetrated the complainant's vagina as the complainant testified.I accept the complainant's evidence when she said that the accused penetrated her vagina with his fingers at Nakobua.*
>
> *18. However, considering the totality of the evidence, I am not satisfied beyond reasonable doubt that the accused knew that the complainant was not consenting or that the accused was reckless as to whether or not she was consenting. Among others, the fact that the accused decided to leave the moment he was told that the complainant is in pain does not support the contention that he engaged with his actions knowing that the complainant did not consent for what he was doing or that he did not care whether she was consenting or not.*
>
> *19. Therefore, I am not satisfied that the prosecution has proved the second count beyond reasonable doubt. Accordingly, I find the accused not guilty of the second count.*

[16] The trial judge had again cast doubt on the fault element of the act of digital rape committed by the respondent while accepting the proof of the physical element *i.e.* the penetration of the complainant's vagina by the respondent with his fingers. In other

words, the trial judge had not believed the respondent's total denial of the second count.

[17] However, the trial judge had unfortunately disregarded the evidence which clearly showed not only the physical act but also the fault element as highlighted at paragraph 37 of the summing-up:

> *'After that they continued their journey. She was only wearing her panty as the accused told her to do so. She complied as she was scared. They again stopped at Vunitavola to have a rest. At that place, the accused told her to lie down so that he can ejaculate. She said she told him that she cannot do it because it was paining and that she cried. According to her, the accused then pushed her to the ground and said that he wants to ejaculate. The accused made her suck his penis for it to erect. At this point, the accused inserted two of his fingers into her vagina. She said that after a while the accused told her that they should leave as he failed to get an erection. She said she then got up, got dressed, took her bag and she took the lead.'*

[18] It is clear that the respondent wanted to penetrate the complainant's vagina with his penis once again so that he could ejaculate but gave it up as he could not get an erection despite getting the complainant to suck his penis. I cannot see any doubt on the requisite knowledge or at least recklessness regarding lack of consent on the part of the complainant in the respondent's act of penetration of the complainant's vagina in her evidence. It was erroneous for the trial judge to have stated that the respondent decided to leave the moment he was told that the complainant was in pain. The evidence reveals that the respondent had pushed her to the ground, made her suck his penis for it to erect and inserted two of his fingers into her vagina not before but after she had told him that she was in pain and she had cried.

[19] Paragraph 38 of the summing-up further shows that the complainant had made a very prompt complaint of the incident which should have been considered by the trial judge as enhancing the credibility of the complainant:

> *38. According to her, when they were about to enter the house, the accused kissed her. She could not sleep that night. Next morning she waited till the accused and his wife leave the house and then she went to her aunt Miriama at Somosomo and informed her about the incident.*

[20] The single Judge in the leave to appeal ruling had made the following pertinent remarks the likes of which the trial judge had not been mindful in overturning the assessors based on the issue of consent:

> *'[14] As could be gathered from the Summing Up and the Judgment, the relationship between the accused (respondent) and the complainant (victim) was based on a hierarchical order, in which the accused (respondent) held power over the complainant (victim) and the complainant, who was living under the care of the accused (respondent) may have been subjugated under his power. The unequal social structure that had existed between the accused person (respondent) and the complainant (victim) may have played a prominent role in deciding on the issue of consent, a matter that should be understood having regard to the entirety of the facts of the case.'*

[21] The trial judge had fully ventilated the mater of consent with regard to both counts in the summing-up *vis-à-vis* the evidence of the complainant and the appellant and directed the assessors at paragraph 66 that even if they did not believe the respondent's version but thought that it might be true they should acquit him. The trial judge had also directed the assessors that even if they were to reject the respondent's evidence, they should still consider whether the prosecution had proved all elements of the rape beyond reasonable doubt. If the assessors were to believe the respondent they must acquit him, the trial judge had so directed. However, notwithstanding such fair and balanced directions the assessors had still opined that the respondent was guilty of both counts showing that they were convinced beyond reasonable doubt that the prosecution had proved all elements of the two counts.

[22] In such circumstances, if the trial judge was to overturn the assessors' opinion he carried the burden of giving cogent reasons for doing so.

[23] The Court of Appeal embarked on a detailed discussion on the duty of the trial judge when he disagrees with the assessors in **Fraser v State** AAU 128 of 2014 (05 May 2021) and held:

> *'[24] 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)]'*

[24] I am afraid that the trial judge's reasoning in overturning the unanimous opinion of the assessors does not measure-up to the legal standard set out above. The reasons given by the trial judge to conclude that the fault element in the two counts had not been proved by the prosecution are not founded on the weight of evidence and not capable of withstanding critical examination in the light of the whole of the evidence.

[25] Therefore, the appeal has to be allowed in terms of section 23 (1)(b) of the Court of Appeal Act on the basis that the verdict of acquittal is unreasonable and cannot be supported having regard to the evidence and that the acquittal has caused a substantial miscarriage of justice. Accordingly, the acquittal should be set aside.

[26] The only remaining issue is whether to direct a judgment and verdict of conviction to be entered or order a new trial in terms of section 23(2)(b) of the Court of Appeal Act.

[27] Section 23(2) (b) of the Court of Appeal Act, Cap. 12 provides as follows:

> *"Subject to the provision of this Act, the Court of Appeal shall, if they allow an appeal against acquittal, either set aside the acquittal and direct a judgment and verdict of conviction to be entered, or if in the interests of justice so require, order a new trial."*

[28] In **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) the Court of Appeal laid down some guidance for a retrial to be ordered as follows:

> *'[103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require. In Au Pui-kuen v Attorney-General of Hong Kong [1980] AC 351, the Privy Council said that the interests of justice are not*

> *confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).'*

[29] In my view, it is not in the interest of justice to order a retrial in this instance. There is no logical or justifiable reason for a retrial given the clear evidence led in the case. The summing-up had been presented in a fair, objective and a well-balanced manner. On the evidence available to them and considering the directions in the summing-up it was open for the assessors to find the appellant guilty of both counts [vide **Kumar v State** AAU 102 of 2015 (29 April 2021), **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)] which means that the verdict of acquittal by the trial judge is unreasonable and cannot be supported having regard to the evidence.

[30] I also hold that on the evidence available the respondent's conviction was inevitable [**Baini v R** (2012) 246 CLR 469; [2012] HCA 59 at [33] which means that the verdict of acquittal by the trial judge has caused a substantial miscarriage of justice.

[31] In any event, the offences had been committed as far back as in 2013 and the trial had been concluded in 2015. Therefore, it would not be in the interest of justice to conduct a trial afresh after 08 years.

[32] Therefore, I direct a judgment and verdict of conviction to be entered against the respondent.

[33] Faced with a somewhat similar situation in **State v Rainima [1994]** FJCA 28; AAU0002u.1994s (12 August 1994) (where the Court of Appeal said that where guilt or innocence is dependent purely on credibility and on questions of fact the trial judge would rarely reject the assessors' opinions though the trial judge was not bound to accept

their opinions willy-nilly) the Court allowed the appeal, set aside the order of acquittal and directed a judgment and verdict of conviction of the respondent of attempt to commit rape to be entered and remitted the case to the trial judge to pass sentence on the respondent according to law after taking evidence of his antecedents and after affording him an opportunity to make submissions in mitigation.

[34] I would adopt a similar approach regarding the final orders in this appeal as well.

Bandara, JA

[35] I have read the draft judgement of Prematilaka, ARJA and agree with his reasoning and conclusions.

Wimalasena, JA

[36] I have gone through the judgment of Prematilaka, ARJA and agree with the reasons and orders therein.

Orders

1. Appeal against acquittal allowed.
2. Acquittal set aside.
3. Respondent convicted of 01st and 02nd counts.
4. Judgment and verdict of conviction of the respondent duly entered in respect of 01st and 02nd counts.
5. Case remitted to the High Court for another judge thereof (other than the trial judge) to pass sentence on the respondent according to law.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice Wasantha Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice R. Wimalasena
JUSTICE OF APPEAL