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

CRIMINAL APPEAL NO.AAU 158 of 2019
[In the High Court at Lautoka Case No. HAC 35 of 2019]

BETWEEN	**:**	**ERNEST PICKERING**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**28 July 2021**
Date of Ruling	**:**	**30 July 2021**

RULING

[1] The appellant, 27 years old, had been indicted in the High Court at Lautoka with one count of rape of his 05 year old biological daughter contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

[2] At the end of the summing-up, the assessors had in unanimity opined that the appellant was guilty of rape as charged. The learned trial judge had agreed with the assessors' opinion and convicted the appellant of rape, and sentenced him on 06 September 2019 to 14 years of imprisonment (13 ½ years after debuting the period of remand) with a non-parole period of 10 years.

[3] The appellant had appealed in person against conviction and sentence in a timely manner. Thereafter, the Legal Aid Commission had tendered amended grounds of appeal against conviction and written submission on 15 February 2021. The appellant

had tendered an application dated 15 February 2021 in Form 03 of Rule 39 of the Court of Appeal Rules to abandon the sentence appeal. The state had tendered its written submissions on 24 February 2021. Both parties had consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions alone without an oral hearing in open court or via Skype.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test 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) 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)].

[5] The sole ground of appeal urged on behalf of the appellant is as follows:

> ***Conviction***
>
> *THE learned trial judge erred in law and fact by not directing the assessors to consider the lesser charge of sexual assault.*

[6] The trial judge had summarized the prosecution evidence in the judgment as follows:

> *'[3] The complainant is of tender age. She gave unsworn evidence. However, she was reminded to tell the truth. She told the court that she told her mother that her daddy (referring to the Accused) had touched her 'vara', meaning her genital area. She said in her evidence that the Accused touched her vagina.*
>
> *[4] The only issue is the physical act of penetration. Consent or lack of it is not an issue because the complainant is under the age of 13 years.*

[5] The complainant's mother and aunty gave evidence that the complainant told them that the Accused had touched her vagina when she first complained to the mother that her vagina was sore. On the same day the complainant was medically examined. The doctor found a 1 cm laceration beside the complainant's labia minora. The injury was about 4 to 5 days old and healing.

[6] The relationship between the Accused and the complainant is not in dispute. Nor is in dispute that the allegation arose at the time when the complainant was under the Accused's care for one week in January 2018 when the complainant's mother left her matrimonial home following a dispute with her husband. The report of the alleged abuse was made to the mother shortly after the child was retrieved from the Accused by the mother under police supervision.

[7] The complainant struck me as an honest witness. I believe the account of the complainant that her father had touched her genitals. That account is consistent with her report to her mother and aunty and the injury found on her genitals shortly afterwards. The only logical inference from all these proved facts is that the Accused penetrated the complainant's vagina with his fingers.

[7] The accused had denied the charge. He had however admitted in his evidence having extra marital affairs and matrimonial problems with his wife but denied sexually abusing his daughter, the victim. According to him, he did not know the reasons why his daughter had accused him of touching her vagina but he suspected that his wife had coached her to say that in order to punish him for his infidelity.

01st ground of appeal

[8] The appellant's complaint is that the trial judge should have directed the assessors on the lesser charge of sexual assault for them to consider if they were not satisfied that appellant was guilty of rape. The argument is based on the victim's evidence that she told her mother that the appellant had 'touched' her *'vara'* pointing to the genital area. The mother and the victim's aunt had corroborated this evidence. However, the victim had said in evidence that the appellant had touched her vagina. Based on this evidence the counsel for the appellant argues that there was no direct evidence (as stated in the summing-up as well) that the appellant had penetrated the victim's vagina by inserting

his finger and the prosecution had relied on circumstantial evidence to infer penetration with fingers.

[9] However, it appears from the summing-up that the mother's evidence was that when she was at her cousin's home, the victim told her that her *'vara'* was sore, referring to her vagina. When she asked the victim what happened she had said that her daddy touched her 'vara'. The victim's aunt had stated that she heard the victim report to her mother that the appellant had touched her vagina.

[10] The victim had said that she told her mother that the appellant had touched her *'vara'* referring to her vagina. She had told court that the appellant had touched her vagina at their home. Under cross examination she had denied that anyone coached her to say that in court.

[11] The doctor had found a laceration beside the complainant's labia minora. The laceration was 01 cm and healing. The doctor had said the injury was 04 to 05 days old and the injury could have been caused by forceful penetration by a finger. She had ruled out scratching because a scratch would have caused an abrasion and not a laceration.

[12] The trial judge had correctly told the assessors that the real issue for them to determine is whether the appellant had penetrated the vagina of the complainant with his fingers. He had finally directed the assessors as follows:

> *'[30] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused had touched her vagina and if you feel sure from all proved facts that the only logical inference is that the Accused penetrated the complainant's vagina with his fingers, then you may express an opinion that the Accused is guilty of the charge. But if you do not believe the complainant's evidence that the Accused touched her vagina, or if you not sure whether the Accused penetrated the complainant's vagina with his fingers, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of the charge.'*

[13] The respondent has submitted that it is well-settled in the UK that the judge in a criminal trial is under a duty to place before the jury all possible alternatives open on

the evidence even if they are not raised by the parties or inconsistent with the defence run by the accused (vide per Lord Clyde in **Von Starck** [2000] 1 WLR 1270 at 1275; [2000] UKPC 5 and per Lord Bingham in **Coutts** [2006] UKHL 39).

[14] Lord Clyde in **Von Starck** [2000] UKPC 5 stated:

> *'12. The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in Xavier v The State (unreported), 17 December 1998; Appeal No. 59 of 1997 a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In Xavier v The State the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, 'If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter'. In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury.'*

[15] Lord Bingham in **Coutts** said:

> *'12. In any criminal prosecution for a serious offence there is an important public interest in the outcome (R v Fairbanks [1986] 1 WLR 1202, 1206). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (Von Starck v The Queen [2000] 1 WLR 1270, 1275; Hunter and Moodie v The Queen [2003] UKPC 69, para 27).'*

[16] Placing alternative verdicts before the jury is not unqualified. There must be an evidential basis for a reasonable jury to have come to an alternative verdict. As Lord Rodger in ***Coutts*** said:

> *'81. As these authorities make clear, the duty of the trial judge to direct the jury on manslaughter arises if a jury might reasonably return such a verdict on the whole of the evidence, whether led by the Crown or by the defence…'*

[17] In the context of a trial by jury Lord Hutton said in ***Coutts*** of the consequence of failure to leave a lesser alternative verdict with the jury as follows:

> *'61. Therefore I consider that the House should follow the reasoning in the second line of cases and hold that, save in exceptional circumstances, an appellate court should quash a conviction, whether for murder or for a lesser offence, as constituting a serious miscarriage of justice where the judge has erred in failing to leave a lesser alternative verdict obviously raised by the evidence.'*

[18] However, this legal position has to be understood in the context of trial by jury which is the ultimate decider of facts and the jurors determine the guilt or otherwise of an accused as guided on the law by the judge. Although the trial judge in Fiji is still under the same duty *vis-à-vis* placing alternative verdicts for consideration of assessors provided they arise on the whole of the evidence, in contrast to UK, the assessors in Fiji do not play the same role as jurors. In Fiji, the trial was by a presiding judge assisted by assessors [the assessors were done away with by Criminal Procedure (Amendment) Act, 2021 – 12 February 2021] who only express an opinion. The trial judge will consider the opinion of the assessors whether the accused is guilty or not but is not bound by such opinion. The judge is the ultimate decider of facts and law in Fiji. The assessors do not decide the issue of guilt. The Court of Appeal stated in **Fraser v State** [2021] FJCA; AAU 128.2014 (5 May 2021):

> *'……. in Fiji, the assessors are not the sole judge 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)].'*

[19] Therefore, the consequence of a failure to direct the assessors on a lesser verdict, if available on the whole of evidence, is also not the same in Fiji as in UK. In a situation where a lesser verdict becomes available on the whole of evidence, if the trial judge fails to leave any alternative verdict with the assessors or fails to consider the alternative verdict himself in the judgment, such failure would not necessarily vitiate the conviction in Fiji. Notwithstanding such failure, the Court of Appeal would still examine the totality of evidence on record and see whether the verdict should be set aside within the scope of section 23 of the Court of Appeal Act and if not, whether the Court should act under section 24 of the Court of Appeal Act by substituting for the verdict a verdict of guilty of another offence which the accused could be found guilty of on the evidence (with an appropriate sentence).

[20] Coming back to the case in hand, the trial judge had not left a verdict of sexual assault with the assessors and not considered such a possibility himself in the judgment. The

question is whether the assessors might reasonably have returned such a verdict on the whole of the evidence. The appellant had totally denied the allegation. Had the victim's evidence supported by her mother and aunt and particularly the independent medical evidence been believed and acted upon, as the assessors had obviously done, they could not have reasonably returned a verdict of sexual assault. As for the trial judge he had not considered any alternative verdict as the final decider of facts and law as he was convinced that the charge of rape had been proved beyond reasonable doubt. He said on the issue of penetration as follows:

> *'[7] The complainant struck me as an honest witness. I believe the account of the complainant that her father had touched her genitals. That account is consistent with her report to her mother and aunty and the injury found on her genitals shortly afterwards. The only logical inference from all these proved facts is that the Accused penetrated the complainant's vagina with his fingers.'*

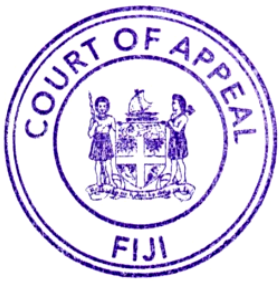
[21] The Court of Appeal recently addressed its mind one again to a complaint regarding penetration in **Naduva v State** [2021]; AAU 125.2015 (27 May 2021) where it reaffirmed that penetration of vagina or vulva is sufficient to constitute the offence of rape as already held in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017. A laceration beside the complainant's *labia minora* is quite sufficient evidence to constitute and prove penetration for the offence of rape.

[22] Therefore, it is clear that not only was it open to the assessors and the trial judge to have convicted the appellant for rape but also such an outcome was inevitable on the totality of evidence.

[23] Hence, no reasonable prospect of success in the 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