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

CRIMINAL APPEAL NO.AAU 0097 of 2018
[In the High Court at Lautoka Case No. HAC 156 of 2016]

BETWEEN	:	**STATE**
		Appellant
AND	:	**RAVINDRAN MANI**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. R. Kumar for the Appellant**
	:	**Ms. S. Ratu for the Respondent**
Date of Hearing	:	**10 February 2021**
Date of Ruling	:	**11 February 2021**

RULING

[1] The respondent had been indicted in the High Court of Suva on one count of indecent assault contrary to section 212 (1) of the Crimes Act, 2009, one count of sexual assault contrary to Section 210 (1) (a) of the Crimes Act, 2009 and one count of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Lautoka in the Western Division.

[2] The information read as follows.

'COUNT 1

Statement of Offence

***INDECENT ASSAULT**: Contrary to Section 212 (1) of the Crimes Decree 44 of 2009.*

Particulars of Offence

RAVINDRAN MANI, *between 27th November 2015 and January 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted AS.*

COUNT 2

Representative Count

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

RAVINDRAN MANI *on the 1st of August, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted AS.*

COUNT 3

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.*

Particulars of Offence

RAVINDRAN MANI *on the 1st of August, 2016 at Lautoka in the Western Division, penetrated the anus of AS a 12 year old girl, with his penis.*

[3] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

> *5. Prosecution called four witnesses, the victim, two of her classmates and her teacher. Prosecution's case is substantially based on the evidence of the child victim. Other witnesses were called to prove the consistency of the conduct of the victim.*
>
> *6. Accused gave evidence in his defence. Defence's case is one of denial. Accused denies committing any of the sexual offences mentioned in the information.*
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> *7. Prosecution heavily relies on recent complaint evidence to prove the consistency of the conduct of the victim. The victim had promptly complained to two of her friends in school after the alleged incident and then to the teacher two days thereafter. She was crying and in a distressed condition when she reported the matter to her friends and teacher. The victim was 12*

years old student at the time of the offence. She had no apparent motive to make up an allegation against the accused who is her biological father.

[4] The respondent had been acquitted of count 01 of indecent assault for lack of evidence at the end of the prosecution case. Upon conclusion of the summing-up on 30 August 2018 the assessors had unanimously opined that the appellant was guilty of count 02 *i.e.* sexual assault and not guilty of count 3 *i.e.* rape. The learned trial judge had agreed with the unanimous opinion of the assessors on both counts in his judgment delivered on 05 September 2018, convicted the respondent of count 02 and acquitted him of count 03. He was sentenced to 05 years and 11 months of imprisonment on the second count with a non-parole period of 04 years.

[5] The state had filed a timely notice of appeal on 03 October 2018 against the acquittal of the appellant on count 03. The appellant's written submissions had been tendered on 24 August 2020. The respondent had tendered its written submissions on 14 October 2020.

[6] In terms of section 21(2)(b) of the Court of Appeal Act, the state could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[7] Grounds of appeal urged on behalf of the appellant are as follows.

'Conviction

Ground 1 – *The learned trial Judge erred in law by failing to direct the assessors on a lesser charge of the offence of attempt to commit rape which was available as per the evidence.*

01st ground of appeal

[8] The state argues that the trial judge was wrong to have acquitted the respondent of rape charge and also that he should have considered section 162 of the Criminal Procedure Act, 2009 and directed the assessors as per the evidence available on attempted rape.

[9] On the perusal of the summing-up, I find that the trial judge had summarized the evidence for the prosecution at paragraphs 36-52. The evidence relating to the charge of anal rape is found at paragraph 39 which is as follows.

> *'39. Then he took her back to his room, holding her hand forcefully. Whilst in his bedroom, she put the blanket on her. While she was still crying, he made her lie down on his bed and then he took out the blanket and started kissing her lips, breast and vagina. Then he, while sitting on his knees, made her lie down on her stomach and put his sperm on her back side. It was little bit sore. She described 'sperm' as his private part. She described her back side as her 'bum'. She said that he put his private part inside her bum. She felt weird. She didn't like it. She told him not to do it but he kept on doing it.'*

[10] The evidence of PW2, PW3 and PW4 had not testified to the victim having revealed an act of rape or attempted rape to any one of them. The prosecution had not led any medical evidence but had submitted in written submissions that the medical report had not revealed any injuries on the anus or hymen. The respondent had denied the allegations altogether in his evidence and stated further that he could not get a penile erection due to a medical condition.

[11] No criticism could be leveled against the summing-up by the trial judge as far as the prosecution case was concerned and the assessors thereafter on the evidence available had decided that the respondent was not guilty of rape. The state argues that the trial judge should have directed the assessors on attempted rape and appears to rely on section 162 (1)(f) of the Criminal Procedure Code to support that position. The respondent argues that section 162 does not compel a trial judge to direct the assessors on a lesser offence but it only empowers the judge to convict the accused for a lesser offence upon being satisfied on the evidence adduced.

[12] Section 162 gives a discretion to trial court to record a conviction for a lesser or alternative offence in any one of the situations given under 162(1)(a) to (i) when it is satisfied that the evidence adduced in the trial supports such a conviction when the accused is charged with an offence. Technically, the section is silent on any duty on the part of the trial judge to direct the assessors on such lesser or alternative offence.

[13] However, in **State v Rainima** [1994] FJCA 28; AAU0002u.1994s (12 August 1994) where there had been unequivocal evidence in the form of a confessional statement coupled with the accused's own sworn testimony that he wanted to have sexual intercourse but could not do so and the trial judge had failed to direct the assessors on attempted rape, the Court of Appeal held

> *We have no hesitation in holding that in the light of the unequivocal evidence before the Court, the learned trial judge erred in law in not directing the Assessors that there was ample evidence before them based on the Respondent's own admission to constitute the offence of attempted rape even though the Respondent was not charged with attempt. His failure to put the issue of attempt to the Assessors has, in our view, resulted in a miscarriage of justice. Had he done so we have no doubts in our mind that the Assessors would have advised him that the Respondent was guilty of attempted rape.*
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> *In an assessor system such as ours the trial judge is the final arbiter of the innocence or guilt of the accused. He is not bound to accept the opinions of the Assessors willy-nilly although where guilt or innocence is dependent purely on credibility and on questions of fact he would rarely reject their opinion. Where he does so he would be expected to give cogent reasons for differing from the Assessors.*
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> *We, therefore, allow the appeal, set aside the order of acquittal and direct a judgment and verdict of conviction of the Respondent of attempt to commit rape contrary to Section 151 of the Penal Code to be entered, as authorised by Section 170 of the Criminal Procedure Code and Section 23(2)(b) of the Court of Appeal Act (Amendment) Decree, 1990.*

[14] The vital question therefore in this appeal is whether there was such strong and unequivocal evidence of attempted anal rape triggering a direction by the trial judge on attempted rape. In my view, the victim's evidence on an attempt to commit anal rape was inconclusive due to paucity of evidence on attempted penetration of the anus. Therefore, in my view, it cannot be said that the trial judge should have essentially directed the assessors on attempted rape.

[15] In **Ram v State** [2017] FJCA 109: AAU0089.2013 (14 September 2017) in the summing up, the learned trial judge had directed the assessors to consider an alternative charge of attempted rape (although the accused was not charged with an attempt to rape) but the majority of assessors had not opined that he was guilty of attempted rape and the judge in the judgment convicted the accused of attempted rape (digital rape). The Court of Appeal stated:

> *'[16] There is no suggestion by the appellant that the learned trial judge did not have power to consider a conviction for attempted rape when the charge was rape. The trial court's power to convict for offences other than those charged is provided by the Criminal Procedure Act 2009. Section 161 is relevant. It states that when a person is charged with an offence, the person may be convicted of having attempted to commit that offence, although he or she was not charged with attempt.*
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> *[17] Similarly, section 162(1) gives the trial court power to record a conviction for any lesser or alternative sexual offence where the accused is charged with rape. These provisions are clear. Since the appellant was charged with rape, the learned trial judge had power to convict him for attempted rape, although he was not charged with attempt. There is no obligation on the trial court to give advanced notice to convict for attempt when an accused is charged with a substantive offence. Provided the charge is rape and there was evidence adduced at the trial to support a conviction for attempted rape, the trial court has power to convict for attempted rape or a lesser or an alternative sexual offence without advanced notice to the accused.*

[16] In the instant case, the trial judge neither directed the assessors in the summing-up nor did himself consider in the judgment the prospect of conviction of the respondent for attempted rape. It does not appear that the prosecution had alerted the trial judge to that possibility at any stage of the trial. Nor had it sought a redirection for attempted rape. Being well aware that the evidence of the victim had not proven or at least not being sure whether or not the evidence had proven penetration of anus to constitute rape, the prosecutor should have sought redirections in respect of the possibility of attempted rape as held in **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) if it thought that there was evidence of such an attempt to commit anal rape rather than waiting to take it up as an appeal ground. The failure to do so would disentitle the state even to raise it in appeal with any credibility.

[17] Therefore, I do not think that the ground of appeal based on omission to direct the assessors on attempted rape has a reasonable prospect of success.

[18] The trial judge had considered the issue of penetration in the judgment as follows.

> *'15. In her evidence, the victim had never used the words 'penis' or 'buttocks'. It appears that those words have been interpolated (within brackets) by the police officer who recorded the statement. The victim's first version in court is that he put his 'sperm' on her back side. When the prosecutor kept on asking her to describe 'sperm' and 'back side', she described 'sperm' as his private part and her back side as her 'bum'. When she was asked by the court to draw and depict father's private part on a piece of paper, she drew something that resembles penis. In her drawing, the bum she drew resembles buttocks.'*
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> *'20. In view of this observation, it is my considered opinion that this is one such case where a conviction is not safe on unsupported evidence of the child witness in respect of the rape charge. There is no clear evidence that the Accused penetrated the anus of the victim with his penis. The benefit of doubt should be given to the Accused.*

[19] Therefore, there appears to be some degree of uncertainty as to whether the respondent could be guilty of attempted rape in the light of the principles relating to attempt. Attempt requires proof of two essential elements. Firstly, it must be proved that the accused intended to commit the alleged offence and secondly, that, with that intention, the accused did something which was more than mere preparation for committing the alleged offence [*vide* **Ram v State** (supra); **DPP v Stonehouse** [1978] AC 55; [1977] 2 ALL ER 909; 65 Cr App R 192 (HL) at 68; 917; 208, per Lord Diplock and **State v Rainima** (supra)].

[20] Accepting that the respondent had certainly done something more than mere preparation, there still appears to be a doubt as to whether the appellant intended to commit anal rape or he by the alleged act revealed in evidence intended to commit and in fact committed sexual assault only. The respondent had already been convicted for sexual assault under representative count 02 and sentenced. Therefore, conviction for sexual assault under count 03 instead of rape could not have made a significant difference to the sentence.

[21] In any event, the state on the sole ground of appeal had challenged the acquittal only on the basis of lack of direction to the assessors on attempted rape and not on the trial judge's decision to acquit the respondent of anal rape in the judgment without considering the possibility or convicting him for attempted rape. In my view, given the doubt regarding the intention above said it cannot be said that the trial judge would have convicted the respondent for attempted rape even if he had considered that possibility.

Order

1. Leave to appeal against acquittal is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL