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

CRIMINAL APPEAL NO.AAU 138 of 2019
[In the High Court at Suva Case No. HAC 200 of 2016]

BETWEEN	**:**	**EPI KOROINAMOCE TUITECI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Hazelman for the Appellant**
	:	**Mr. S. Kiran for the Respondent**
Date of Hearing	**:**	**26 March 2021**
Date of Ruling	**:**	**29 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one representative count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed between the 01 August 2016 to 31August 2016 at Sigatoka in the Western Division. The victim was 16 years of age and the appellant, who was her neighbour, was 18 years old at the time of the incident.

[2] The information read as follows:

'COUNT ONE'

REPRESENTATIVE COUNT

Statement of Offence

***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

> ***EPI KOROINAMOCE TUITECI****, between the 1st day of August, 2016 to the 31st day of August, 2016 at Sigatoka in the Western Division, inserted his penis into the vagina of "EL" without her consent.*

[3] At the conclusion of the summing-up on 14 August 2019, the assessors' unanimous opinion was that the appellant was not guilty of the representative count of rape. The learned trial judge had disagreed with the assessors in his judgment delivered on 15 August 2019, convicted the appellant of rape and on 29 August 2019 imposed a sentence of 14 years and 11 months of imprisonment with a non-parole period of 11 years.

[4] The appellant had in person signed a timely notice of appeal against conviction on 10 September 2019. The Legal Aid Commission had filed amended notice of appeal and written submissions only against conviction on 10 November 2020. The state had tendered its written submissions on 21 December 2020.

[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 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), **Chaudhry 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.

[6] The grounds of appeal against conviction urged on behalf of the appellant are as follows:

> ***Ground 1***
>
> *THAT the learned trial judge had erred in law and in fact in not providing cogent reasons to overturn the unanimous opinions of the assessors.*

Ground 2

THAT the verdict is unreasonable and not supported by the totality of evidence

[7] The learned trial judge had summarized the evidence led by the prosecution in the sentencing order as follows:

> 2. '*The brief facts were as follows:*
>
> *In August, 2016 the victim who was 16 years of age was alone at home when the accused who was her neighbour came and asked her about the whereabouts of her brother and parents.*
>
> 3. *When the victim told the accused that they were not at home the accused walked into her house and asked her if she had a boyfriend the victim did not reply. At this time the accused came close to her and told her to remove her clothes she refused and told the accused that she will tell her father.*
>
> 4. *The accused told her not to be scared he then forcefully removed the victim's clothes and pushed her on the floor, he made her lie down on the floor and told her not to be afraid. The victim did not like what the accused was doing to her, at this time the accused forced the victim to remove her shorts and panty.*
>
> 5. *The accused also had his pants down, he put on a condom then went on top of the victim and inserted his penis into her vagina, she told the accused that it was painful but the accused said keep still and he will do it slowly.*
>
> 6. *The victim wanted to cry for help, but since her house was far from the village she did not, the accused had forceful sexual intercourse with her for about 5 minutes during this time she felt pain, was feeling weak and had a headache.*
>
> 7. *After having sex with the victim the accused stood up, took his clothes and left. The victim felt so weak that she could not stand up, she did not tell anyone about what the accused had done to her.*
>
> 8. *Also, on another occasion during the same month the accused came into the complainant's house and asked for some tobacco. After the victim found some she gave it to the accused. The accused smoked the tobacco in the verandah of her house after a while he came inside the house. He moved close to her and pushed her on the floor and then forced her to remove her shorts and panty.*

9. *As the victim was about to scream the accused threatened her that if she screams he will do something to her, this made the victim scared and embarrassed the accused forcefully inserted his penis into her vagina and had forceful sexual intercourse with her for about 5 minutes. On this occasion the accused did not wear a condom after the accused had finished, he took his clothes and left. She did not tell anyone since she was afraid her father would harm the accused if he came to know about what the accused had done to her. The victim did not consent to have sexual intercourse with the accused on any occasion.*

10. *When the victim got pregnant she told her aunt about what the accused had done to her. The matter was reported to the police and an investigation was carried out whereby the accused was arrested and charged.*

01st ground of appeal

[8] The appellant submits that it appears from the assessors' opinion that they had not believed the complainant that she had been raped on two occasions and complains that the trial judge had not provided cogent reasons for overturning the assessors' opinion.

[9] 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 **Waininima v State** [2020] FJCA 159; AAU0142.2017 (10 September 2020)]

[10] The prosecution case entirely depended on the testimony of the complainant. The appellant had remained silent and had not called any witnesses on his behalf. His position taken up while cross-examining the complainant had been that he had sexual intercourse with the complainant only once with her consent at the palm trees near the

piggery in September 2016 and not in August 2016 as alleged. The defense had also alleged that the complainant had complained of rape only after she got pregnant.

[11] The trial judge had summarised the complainant's evidence at paragraphs 28-38 of the summing-up in the course of which he had also summarised the appellant's position that they had consensual sexual intercourse in September 2016 and no sexual intercourse had taken place in August 2016. The complainant had denied those suggestions under cross-examination (see paragraphs 36-38). In addition, the trial judge had once again drawn the attention of the assessors to the appellant's position arising from cross-examination of the complainant at paragraph 44 and 51 of the summing-up.

[12] I remarked in **Waininima v State** (supra) regarding the interconnection between the summing-up and the judgment and the trial judge's role in Fiji as follows:

> *'[20] In my view, in both situations, a judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard given to the assessors by the trial judge.*
>
> *[21] This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judges of facts. The judge is the sole judge of facts 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).*

[13] Thus, irrespective of the opinion of the assessors ultimately it is the trial judge who has to decide both matters of fact and law regarding the culpability or otherwise of the appellant.

[14] The trial judge had first set out the evidence of the complainant at paragraphs 5-13 of the judgment. Then, he had given his mind to the appellant's denial in cross-examination of the complainant having had no sexual intercourse in August 2016 but had consensual sex once in September 2016 and the motive attributed to her for having complained against him due her becoming pregnant both of which the complainant had denied. As a result there was no evidence on both positions taken up by the appellant but they remained only suggestions denied by the complainant.

[15] The trial judge has then gone onto state why he believed the complainant at paragraphs 15 and 16 of the judgment. He had given reasons why he did not believe the appellant's version at paragraphs 17. The trial judge had been impressed by the complainant's demeanor (see paragraph 18) and stated that the defense had not succeeded in creating a reasonable doubt in the prosecution case (vide paragraph 19)

[16] I am of the view that the trial judge in overturning the opinion of the assessors had undertaken an independent assessment and evaluation of the evidence and given 'cogent reasons' based on the weight of the evidence reflecting his views as to the credibility of the complainant for differing from the opinion of the assessors. The appellant had not demonstrated that the trial judge's decision is not capable of withstanding critical examination in the light of the whole of the evidence presented in the trial which consisted of only the evidence of the complainant.

[17] Therefore, I do not think that there is a reasonable prospect of success of this ground of appeal.

02nd ground of appeal

[18] The appellant's complaint is that the verdict is unreasonable and not supported by the totality of evidence. The appellant admits that since he had not given evidence the case stands or falls on the complainant's evidence.

[19] The appellant argues that given the complainant's evidence that on the first occasion he had put on a condom before inserting his penis into her vagina and him saying that he would go 'slowly' and asked her to keep still when she complained of plain are matters that may suggest 'consent' on her part. Similarly, the appellant submits that the complainant's reply *'if my father finds out we will both be in trouble'* when he asked her '*can we do something bad or no'* on the second occasion also as suggesting consensual act of sexual intercourse. He argues that the trial judge should have entertained a reasonable doubt as the lack of consent.

[20] The trial judge had considered both these items of evidence in the judgment (see paragraphs 8 and 11). However, the trial judge had concluded that on both occasions the appellant either knew that the complainant was not consenting or did not care whether she was consenting or not *i.e.* he was reckless as to her consent (see paragraph 21).

[21] Another major problem with this theory is that the appellant had not even cross-examined the complainant regarding two instances of consensual sexual intercourse. According his suggestion to the complainant there was only one occasion in September 2016 where consensual sexual intercourse took place which, of course, the complainant had denied.

[22] Therefore, the appellant's argument cuts across his own suggestion. If the appellant's position was that both instances of rape in August 2016 as stated in the information had been consensual acts, his suggestion should have been on those lines. But, he completely denied any acts of sexual intercourse in August 2016 with consent or otherwise. His line of cross-examination in answer to the information had been one of denial; not consent. Thus, the appellant's argument under this ground of appeal does not lend itself a great deal of credibility.

[23] Therefore, I do not think that the trial judge can be criticized for not considering a defense of consent in relation to the two instances of rape spoken to by the complainant.

[24] Thus, I do not think that this ground of appeal has a reasonable prospect of success in appeal.

[25] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..**Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based**…*….

[26] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[27] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is **whether the trial judge could have reasonably convicted on the evidence before him** (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[28] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaiyum**.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

.....

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL