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

CRIMINAL APPEAL NO. AAU 145 of 2020
[In the High Court at Lautoka case No. HAC 88 of 2016]

BETWEEN	:	**ARUN KUMAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. S. P. Gosaiy for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**25 July 2022**
Date of Ruling	:	**27 July 2022**

RULING

[1] The appellant had been charged in the High Court at Lautoka with two counts of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 committed on KR (name withheld) on 23 April 2016 at Nadi in the Western Division.

[2] The assessors had expressed a unanimous opinion that the appellant was not guilty of rape. The learned High Court judge had disagreed with them and convicted the appellant on both counts. He had been sentenced on 20 October 2020 to 11 years and 11 months of imprisonment on each count to be served concurrently with a non-parole period of 08 years and 11 months.

[3] The appellant's appeal against conviction is timely. Both parties had tendered written submissions for the leave to appeal hearing and requested this court to deliver the Ruling on written submissions.

[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 and sentence 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 grounds of appeal urged on behalf of the appellant against conviction are as follows.

CONVICTION

1. *That the learned trial Judge misdirected himself and contracted himself in accordance with the directions given in his summing up when assessing the testimony of witnesses and as such caused substantial miscarriage of justice.*

2. *That the learned trial Judge erred in law and in fact in not directing himself when finding that the evidence of the Complainant was credible when he failed to consider that there were several inconsistencies in her evidence in Court. Failure to direct himself sufficiently on previous inconsistent statement of the complainant caused a substantial miscarriage of justice.*

3. *That the learned trial Judge erred in law and in fact in misdirecting himself when he took into consideration demeanor of witnesses to believe or not to believe relying on the demeanor of the Complainant and not whole evidence as a whole caused a substantial miscarriage of justice.*

4. *That the learned trial Judge erred in law and in fact in not accepting the evidence given by the appellant without giving any cogent reasoning and stating that "with regret I am compelled to disagree with the unanimous opinion of the assessors."*

5. *That the learned trial Judge erred in law and fact in overturning the unanimous decisions of the Assessors of Not Guilty and failing to consider that the facts of the case and the evidence given by the appellant and the complainant clearly indicated that the complaint by the complainant was highly likely to be falsely made.*

6. *That the learned trial judge erred in law and in fact in misdirecting himself when he stated that '...I am satisfied that the prosecution version is acceptable and they have proved their stance on this issue satisfactorily' relying on the demeanor of the complainant and not whole evidence as a whole caused a substantial miscarriage of justice.*

7. *That the learned trial judge erred in law and in fact in overruling the unanimous verdict of the assessors of not guilty did not give cogent reasons as to why he overruled the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.*

8. *That the learned trial judge erred in law and in fact in not directing himself the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

9. *That the learned trial Judge erred in law and in fact by finding the appellant guilty of theoffence charged contradicted himself in his summing up at paragraph 25 when he stated:*

> *'25. The PW1 KR is the sole witness of the alleged incident, for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence.'*

That despite the above directions the 3 assessors found the appellant not guilty and the learned trial judge by overturning their unanimous opinion of not guilty and without giving cogent reasons had caused a substantial miscarriage of justice.

10. *That the learned trial judge erred in law and in fact when he shifted the burden of proof to the appellant when he stated that the 'accused has failed to create a reasonable doubt in the prosecution case' and as such there has been a substantial miscarriage of justice.*

[6] The facts of the case could be succinctly stated as follows. At dusk on the day of the incident *i.e.* on 23 April 2016 which was a Saturday, the appellant drove the complainant, 08 years of age and whom on his own account the appellant treated as his daughter, to a dark place where he proceeded to remove her knickers and penetrate her vagina, first digitally (Count 01) and then with a pen (Count 02). The following morning she revealed to her mother who was the long-term mistress of the appellant, what the appellant had done to her after the latter noticed her blood-stained knickers. The complainant's mother promptly lodged a police report and a medical examination revealed injuries to the complainant's genitalia. Dr Jenyo testified at trial that he found a fresh tear to the complainant's hymen at the 2 o'clock position which was consistent with forceful penetration of her vagina. The appellant gave evidence in his own defence and called his friend, Munesh Reddy, the gist of whose evidence was that he had spoken to the appellant on 23 April 2016, at around 8.30 pm at Burger King as the appellant was leaving the restaurant together with the complainant and her mother.

01st ground of appeal

[7] Upon a perusal of paragraph 3 and 4 of the summing-up, I do not find any contradiction between or confusion in what the trial judge had said therein. He had made himself absolutely clear as to what the assessors should consider as evidence and what not. In any event, despite the alleged 'contradiction' and 'huge confusion' the assessors' opinion had been in favour of the appellant.

02nd ground of appeal

[8] The trial judge had summarized the approach to inconsistencies in the evidence of KR at paragraphs 8-10 of the summing-up and directed himself on them at paragraphs 10 of the judgment and concluded that those were minor in nature and did not affect the very foundation of the prosecution case. The trial judge seems to have followed the broad guideline that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (See **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)] and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016)]. I have examined the instances cited by the appellant and see no reason to disagree with the trial judge.

03rd ground of appeal

[9] Upon a perusal of the judgment, I do not find that the complaint that the trial judge had relied solely on the demeanor of the witnesses and not their evidence, has any merits. The judge had analyzed the relevant issues arising from evidence [and he is not expected to repeat everything he said in the summing-up when he had directed himself on the evidence discussed in the summing-up – see **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)] of all witnesses including the appellant.

04th, 05th and 07th grounds of appeal

[10] The appellant argues that the trial judge had not given cogent reasons in overturning the assessors' opinion.

[11] In Fiji, the assessors were not the sole judges of facts. The judge was and is the sole judge of fact (and law) in respect of guilt, and the assessors were there only to offer their opinions, based on their views of the facts and it was the judge who ultimately decided whether the accused was guilty or not [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[12] At the same time, when the trial judge disagreed with the majority of assessors he had to 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 **Fraser v State** (supra)].

[13] Having examined the judgment, I find that the trial judge had identified the vital issue in the case as to who caused KR's vaginal injuries; whether it was by the appellant or by KR's own mother (PW3) as suggested by the appellant. The evidence of PW1 (KR), PW2 (KR's mother) and PW3 (doctor) unequivocally establish that it was the appellant who was responsible for those injuries; prompt complaint by KR to her mother, mother's observations of a blood-stained knickers and doctor's observations of fresh injuries go a long way to enhance the credibility of KR's version that the appellant caused both acts of rape. The judge's positive and favorable observations of KR's

demeanor in court adds further credibility to her. On the other hand, the appellant's denial and the motive attributed to KR's mother that she wanted to end the relationship with him and therefore, falsely implicated him after inflicting injuries on KR herself lacks any credibility. DW2's evidence that he met KR, her mother and the appellant on 23 April 2016 at around 8.30 pm. coming out of Burger King which was denied by KR did not have a material or adverse impact as far as the allegation of rape was concerned.

[14] The submission that KR's evidence was based on hearsay is baseless. It is clear that contrary to the appellant's assertion, KR's credibility had not been seriously dented by the defense. The trial judge was satisfied that hers was a truthful account of events.

[15] On the evidence available, I can understand why the trial judge was surprised by the assessors' 'not guilty' opinion. In my view, coupled with his summing-up, the trial judge in his judgment had given cogent reasons as to why he was disagreeing with the assessors and convicting the appellant.

06th ground of appeal

[16] The appellant highlights the evidence of KR in that she had first said under cross-examination that the incident happened on a Saturday after she came back from school but admitted later that she in fact did not go to school on that day. He also points out that KR had said that she straightaway went to sleep after coming home but later said that she could not remember what happened after she came home with the appellant.

[17] For a 08 year old child the above discrepancies cannot be attached with any undue weight. On the other hand, looking at closely the impugned evidence is not all that self-contradictory either. If the incident happened on a Saturday she would anyway have not gone to school. If she had gone to sleep after coming home she obviously would not remember what happened thereafter. The only thing she could remember was going to sleep.

[18] Finally, the appellant submits that the trial judge had failed to take into account the demeanor of the complainant. This is totally incorrect in that the trial judge had indeed considered the demeanor of KR. This position on the other hand cuts across the appellant's 03rd ground of appeal.

08th ground of appeal

[19] The appellant complains that the trial judge had failed to direct himself on possible defenses. The counsel for the appellant had not sought any redirections on any such possible defenses. Nor has he pointed out as to what those possible defenses were in his written submissions. The fact remains that despite the alleged failure to point out possible defenses, the assessors had come up with an outcome favorable to the appellant.

[20] The evidence of the appellant that he along with KR and her mother went to Burger King and were met by DW2 which, of course, was denied by KR and also his evidence that after coming home they had diner together and watched TV before going to bed and still KR did not complain of any untoward happening in the afternoon, even if accepted, was not a defense to the two acts of allegation of rape.

[21] It is clear that KR came out with the incident involving two acts of rape only after her mother noticed her blood-stained knickers on the following day. Until then PW2 was not aware of what had happened to her daughter on the previous day's afternoon. Therefore, assuming it is true, PW1 and PW2 going to Burger King or having dinner together and watching TV was not inconstant with what transpired in the afternoon. Things really turned sour for the appellant from the point PW2 got to know his unpardonable crime against the daughter.

09th ground of appeal

[22] By no stretch of imagination can the direction of the trial judge at paragraph 25 of the summing-up be considered as an invitation to the assessors to consider only the evidence of PW1 to the exclusion of the defense witnesses. If at all, the judge had erred in directing them that they should be 'extremely cautious' in acting on the testimony of a sole witness. There is no such requirement in law. In any event, in this case there was more than one witness on either side. The summing-up and the judgment taken as a whole and in the proper context rather than a small portion out of context, have dealt with more than adequately on the evidence of both sides.

10th ground of appeal

[23] By stating in his judgment that the defense had failed to create a reasonable doubt, the trial judge had not shifted the burden of proof as argued by the appellant. Having concluded that the prosecution had proven its case beyond reasonable doubt, the trial judge had generously asked himself the question whether defense had managed to create a reasonable doubt and answered it in the negative.

Order

1. Leave to appeal against conviction is refused.

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