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

CRIMINAL APPEAL NO.AAU 037 of 2020
[In the High Court at Lautoka Case No. HAC 020 of 2017]

BETWEEN	**:**	**BARMA NAND**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. J. Reddy and Ms. S. Dutt for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	**:**	**22 August 2022**
Date of Ruling	**:**	**24 August 2022**

RULING

[1] The appellant had been charged in the High Court at Suva with four counts of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 but was acquitted of two and convicted of two committed on ML (name withheld) aged 10 years between the 01 January 2015 and 31 December 2015 and between the 01st day of January, 2016 and 31January 2016 at Rakiraki in the Western Division.

[2] The assessors had expressed a majority opinion that the appellant was guilty of both counts of rape. The learned High Court judge had agreed with them and convicted the appellant on both counts. He had been sentenced on 11 June 2020 to 11 years and 08 months and 20 days with a non-parole period of 08 years and 08 months and 20 days.

[3] The appellant's appeal against conviction is timely. Both parties had tendered written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (b) and (c) 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***
>
> *Ground 1*
>
> *THAT the Learned Trial Judge erred in law and in fact in finding the appellant guilty on 2 counts of rape in spite of the fact there were so many inconsistencies, discrepancies and contradictions in the evidence of the complainant and her aunt. Thus not giving reasons of his finding why he believed the witnesses on 2 counts of rape and not believing them on the other 2 counts wherein he was acquitted.*
>
> *Ground 2*
>
> *THAT the Learned Trial Judge erred in law and in fact when he acquitted the appellant on 2 counts of rape at the no case to answer submission because he did not believe the testimony of the complainant and her aunt but believe her version of events on the rest of the counts of rape in spite of the facts that there were so many inconsistencies, discrepancies, and contradictions between her statement and that of her aunt.*

Ground 3

THAT the Learned Trial Judge erred in law and in fact when the conviction against the appellant, taken as a whole, was unsafe and untenable given that the evidence adduced did not prove beyond reasonable doubts the guilt of the appellant in respect of the 2 counts of rape for which he was found guilty.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he assumed the role of a prosecutor and cross examiner during the trial thus prejudicing the defence case.

Ground 5

THAT the Learned Trial Judge erred in law and in fact in convicting the appellant on the charges of rape when the testimony of the complainant and her aunt were not credible against the appellant.

Ground 6

THAT the Learned Trial Judge erred in law and in fact when he failed to appropriately observe the demeanor of the complainant and her aunt who testified against the appellant in that both were very evasive in their answers and was not cooperating throughout the trial.

Ground 7

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the allegations of rape only arose after the complainant went to the aunt's house with whom the appellant had prior issues and problems and who have warned the appellant that she will see him, meaning she will take revenge on him.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the lateness of her complaint and there were no reasonable explanations for the lateness in spite of the fact that she was with her mother throughout with whom she had confided.

Ground 9

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the matter was not reported to the police when she was taken to the police station.

Ground 10

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the matter was not reported to the doctor at Rakiraki Hospital when she was taken to hospital for examination and a different version was given.

Ground 11

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the third witness, the medical officer who examined her stated that her hymen not to be intact but the complainant had not adduced that the accused had penetrated her with his penis and there were no reasonable explanation for loss of her hymen.

Ground 12

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the evidence of the 3rd prosecution witness (PW3), the doctor whose evidence in whole supported or favoured the version of the appellant.

Ground 13

THAT the Learned Trial Judge erred in law and in fact when he failed to take into account the evidence of the medical officer, the third witness that there could be many reasons for the hymen not being intact and if one would have been relayed to her then the same would have beenrecorded.

Ground 14

THAT the Learned Trial Judge erred in law and in fact when he failed to believe the testimony of the appellant who was very forthright in his answer compared to that of the complainant and her aunt.

Ground 15

THAT the Learned Trial Judge erred in law and in fact when he failed to take into account that the prosecution had allowed refreshing of memory by furnishing statements to the complainant to go through while at home.

Ground 16

THAT the Learned Trial Judge erred in law and in fact in not finding the accused evidence credible but did not give reasons for his findings.

Ground 17

THAT the Learned Trial Judge erred in law and in fact when he kept saying that whatever he writes forms part of the evidence rather than recording everything that was said thus prejudicing the appellant's case.

[6] The learned trial judge has stated in the sentencing order that during the trial that lasted for 04 days the victim (ML), her aunt Urmila and Dr. Ranita Vikashini Maharaj who had examined ML at the Ba Mission Hospital, had given evidence for the prosecution while the appellant had given evidence on his behalf. According to the trial judge it was proved during the trial that being the step father of the ML how the appellant had abused, sexually assaulted and raped his step-daughter over a period of time.

01 and 02 grounds of appeal

[7] Both are very similar in substance. The complaint is that the trial judge was somehow or other wrong to have acquitted the appellant of two counts at the no case to answer stage and then convicted him of the other given the inconsistencies, discrepancies and

contradictions in the evidence of the complainant and her aunt. If the trial judge had not believed them on two counts he could not have believed their evidence in respect of the other two grounds too.

[8] An acquittal at no case to answer stage is governed by section 231(1) of the Criminal Procedure Act and the threshold test is whether there is no evidence that the accused committed the offence. If the court considers that there is evidence that the accused committed the offence, he must be informed of his rights [vide section 231(2)] and the trial should proceed. Thus, the test for recording a finding of not guilty at no case to answer stage is not based on the credibility of witnesses but on the existence or otherwise of evidence. The fact that an accused is acquitted of one charge at no case to answer stage does not mean that the witnesses are incredible regarding another charge.

[9] The trial judge had dealt with the alleged inconsistencies at paragraph 9 of the judgment in relation to the two charges in respect of which the trial proceeded and concluded that they were not directly going to the root of the alleged charges. The broad guideline is 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 [**Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]. The inconsistences discrepancies, contradictions and omission highlighted by the appellant are not so significant as to affect the very foundation of the prosecution case.

03rd ground of appeal

[10] The majority of assessors and the trial judge had found the appellant guilty of two counts on the evidence led by the prosecution. The appellant has not demonstrated that it was not open to them to find him guilty on the totality of evidence. Therefore, applying the test formulated in **Kumar v State** [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) and **Balak v State** [2021]; AAU 132.2015 (03 June 2021), it cannot be said that the verdict is unreasonable or cannot be supported having regard to the evidence.

04th ground of appeal

[11] There is no material to substantiate the allegation that the trial judge had cross-examined the appellant causing prejudice to his defense. The appellant has not pointed out how and what questions may have caused such an effect. This court examined the relevant law applicable to a complaint of this nature in **Lal v State** [2022] FJCA 27; AAU047.2016 (3 March 2022).

05th ground of appeal

[12] This ground of appeal somewhat connected to the 01st and 02nd grounds of appeal. Both the majority of assessors and the trial judge who had heard evidence and seen the demeanor of the victim and her aunt have held their evidence to be credible. In my view, in this case it was quite open to the assessors and the trial judge on the material available to find the appellant guilty of two counts of rape [see **Pell v The Queen** [2020] HCA 12 and **M v The Queen** (1994) 181 CLR 487, 494)].

[13] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere.

06th ground of appeal

[14] The appellant submits that the victim and her aunt were evasive witnesses and the trial judge had failed to draw adverse inferences from their demeanor. However, what the trial judge has said in the judgment is that having carefully listened, taken down all the evidence and observed the demeanor of all the witnesses, he decided to accept the evidence of the victim as truthful and acceptable and held accordingly that the prosecution had proved the alleged charges beyond reasonable doubt. When it comes to the demeanor of witnesses what matters is not what the accused thinks of them but what impression they had created in the minds of the assessors and the trial judge.

07th ground of appeal

[15] The appellant attributes a possible motive for the aunt of the victim to get her to falsely implicate him as the aunt had issues with him earlier and she had issued a veiled threat previously. He also submits that that is the reason why the complaint surfaced only after the victim went to the aunt's house.

[16] This is a trial issue that had been ventilated before the assessors and the trial judge and therefore, cannot form the basis for a successful appeal point. In any event, a case will be decided on the proof or otherwise of the elements of the offence and not on the availability of a motive or not. While a strong motive could strengthen the prosecution case, lack of motive would not defeat a successful prosecution.

08th, 09th and 10th grounds of appeal

[17] The appellant challenges the victim's evidence on the basis of delay in reporting.

[18] The State concedes that the trial judge had not addressed the assessors on how to approach a belated complaint. The counsel for the appellant says that he cross-examined the victim on this aspect. According to the victim, she did not inform the alleged incidents to the nurse and the doctor at Rakiraki hospital because the appellant had threatened her to not to tell. The trial judge had not considered it in the judgment either.

[19] The appellant's counsel did not provide an answer as to why he did not ask for redirections on this point if he thought the delay to be so vital as far as the defense case was concerned. If the trial Counsel has failed to do so, he is not entitled to raise them as appeal points (vide **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) unless a cogent reason is given for the failure.

[20] The mere lapse of time occurring after the offending and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay (vide **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018). If the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness [vide **Thulia Kali v State of Tamil Naidu**; 1973 AIR.501; 1972 SCR (3) 622].

11th, 12thand 13th grounds of appeal

[21] These grounds of appeal deal with more or less with the same aspects of medical evidence including the victim's hymen being not intact and her having not told the doctor that the appellant's penis penetrated her vagina.

[22] In **Reddy v State** [2018] FJCA 10; AAU06.2014 (8 March 2018) and **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017), the Court of Appeal thoroughly ventilated the issue of penetration of vulva and vagina. The fact that there are other ways by which the hymen could be broken as a medical theory is not a reason to disbelieve the victim on her evidence of penile penetration.

[23] The appellant's stance has been that he has not engaged in any sexual activity with the victim and he was framed by the victim's aunt. Thus, medical evidence that her hymen was intact and victim's evidence that the appellant penetrated her vagina with his penis were sufficient to establish the element of penetration. Her failure to inform the doctor of penile penetration does not necessarily cast a reasonable doubt if her evidence as a whole was trustworthy.

14th ground of appeal

[24] The appellant complains that his testimony was straightforward and forthright compared to that of the victim and her aunt who were evasive.

[25] These are matters that have been considered by the assessors and the trial judge who have thought otherwise. Their view should prevail as opposed to the appellant's judgment of himself and prosecution witnesses.

15th ground of appeal

[26] The appellant appears to argue that refreshing memories of prosecution witnesses by furnishing them their previous statements prior to the trial amounts to substantial miscarriage of justice and deprives him of a fair trial. As discussed below there is no absolute bar or a universal rule that refreshing memories of witnesses cause miscarriage of justice or is not compatible with a fair trial.

[27] Counsel for the respondent submitted that it is a practice that has been adopted in Fiji for years and many other jurisdictions and refreshing memories of prosecution witnesses is not obnoxious to the concept of a fair trial or amounts to a procedural impropriety. However, neither party submitted to this court any material by way of judicial decision or legal literature on this point.

[28] There are two stages at which refreshing a witness's memory may occur. One is where a witness may refresh his memory while giving evidence in the witness-box and the other is where he does so from a statement before going into the witness-box. In this appeal we are confronted with the later.

[29] **BLACKSTONE'S CRIMINAL PRACTICE, 1993** at pages 1839-1840 (F6.12) under the heading **'Refreshing Memory out of Court'** gives a useful account of this matter and I would quote the relevant parts as guidance for the prosecutors, defence attorneys and trial courts.

*"**Refreshing Memory out of Court***

The conditions on which a witness may refresh his memory while giving evidence in the witness-box do not apply to a witness who refreshes his memory from a statement before going into the witness-box. In Richardson [1971] 2 QB 484 the accused was convicted of burglary offences committed 18 months earlier. Before the trial, four prosecution witnesses were shown their police statements, which they had made some weeks after the alleged offences. On appeal it was argued that the evidence of the four witnesses was, in the circumstances, inadmissible. The appeal was dismissed on the ground that there can be no general rule (which, unlike the rule as to what can be done in the witness-box, would be unenforceable) that witnesses may not before trial see the statements which they made at some period reasonable close to the time of the events which are the subject of the trial. Sach LJ, giving the judgment of the Court, made the following observations:

(a) *It has been recognised in Home Office Circular No. 82-1969 (Supplies of Copies of Witnesses' Statements'), issues with the approval of the Lord Chief Justice and the judges of the Queen's Bench Division, that witnesses for the prosecution in criminal cases are normally entitled, if they so request, to copies of any statements taken from them by police officers.*

(b) *It is the practice, normally, for witnesses for the defence to be allowed to have copies of their statements and to refresh their memories from them before going into the witness-box.*

(c) *The Court agreed with the following two observations of the Supreme Court of Hong Kong in Lau Pak Ngam v R [1966] Crim LR 443: 'Testimony in the witness-box becomes more a test of memory than truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question.' Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses.'*

(d) *Obviously it would be wrong if several witnesses were handed statements in circumstances which enable one to compare with another what each had said.*

It is also open to the judge, in the exercise of his discretion and in the interest of justice, to permit a witness who had begun to give evidence to refresh his memory from a statement made near to the time of the events in question, even though it is not contemporaneous (i.e., written at the time of the transaction or so shortly afterwards that the facts were fresh in his memory), provided he is satisfied:

(a) *That the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place;*

(b) That the witness made a statement much nearer the time of the events, and that the contents of the statement represented his recollection at the time he made it;

(c) That the witness had not read the statement before coming into the witness-box; and

(d) That the witness wished to have an opportunity to read the statement before he continued to give evidence.

It does not matter whether the witness withdraws from the witness-box and reads the statement, or whether he reads it in the witness-box; but it is important if the former course is adopted, that no communication be had with the witness other than to see that he can read the statement in peace. If either course is adopted, the statement must be removed from him when he comes to give his evidence, and he should not be permitted to refer to it again, unlike a contemporaneous statement which may be used to refresh memory while giving evidence (per Stuart-Smith LJ, delivering the judgment of the Court of Appeal in Da Silva [1990] 1 WLR 31, at p.35). On the facts of that case, therefore, the Court of Appeal held that the trial judge had properly intervened by inviting a prosecution witness to withdraw and read a statement which was made by him a month after the events to which it related, and which was not treated as a contemporaneous statement.

If prosecution witnesses have refreshed their memories out of court and before entering the witness-box, it is desirable, but not essential, that the defence should be informed of this (Worley v Bentley [1976] 2 All ER 449, affirmed in Westwell [1976] 2 All ER 812). ……..In some cases the fact that a witness has read his statement out of court may be relevant to the weight which can properly be attached to his evidence, and injustice might be caused to the accused if the jury were left in ignorance of the fact. Accordingly, if the prosecution are aware that statements have been seen by their witnesses, it will be appropriate to inform the defence, although if for any reason this is not done, the omission cannot of itself be a ground for acquittal (Westwell).

If a witness has refreshed his memory out of court and before entering the witness-box, counsel for the other side is entitled not only to inspect the memory-refreshing document, but also to cross-examine the witness upon the relevant matters contained therein. If counsel cross-examines upon material in the document from which the witness has refreshed his memory. The document is not thereby made evidence in the case; but if he cross-examines upon material which has not been referred to by the witness, this entitles the party calling the witness to put the document in evidence so that the tribunal of fact may see the document upon which the cross-examination is based. In this respect, therefore, the rules are the same as those which apply in the case of a witness refreshing his memory in the witness-box (as to which, see Senat v Senat [1965] P172, at F6.10). See Owen v Edwards (1983) 77 Cr App R 191.

16th ground of appeal

[30] The appellant complains that the trial judge erred in not finding that his evidence was not credible without giving reasons.

[31] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]

[32] The trial judge has stated in the judgment that the appellant's position was that he had not engaged in any sexual activity with the victim and he was framed by the victim's aunt. The judge has concluded that when the evidence of the victim is accepted as true, the allegation that the appellant was framed bears no ground and accordingly, he had failed to create any reasonable doubt in the prosecution case.

17th ground of appeal

[33] This allegation is simply unsubstantiated at this stage.

[34] Therefore, I hold that none of the grounds of appeal has a reasonable prospect of success.

Bail pending appeal

[35] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing

and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[36] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[37] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[38] Since I have already held that that none of the grounds of appeal has a reasonable prospect of success, the appellant's appeal cannot be said to be having a 'very high

likelihood of success' which is the higher threshold to pass for a bail pending appeal application to succeed.

Orders

1. Leave to appeal against conviction is refused.
2. Bail pending appeal is refused.

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