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

CRIMINAL APPEAL NO. AAU 29 of 2021
[In the High Court at Suva Case No. HAC 350 of 2019]

BETWEEN : **ILAITIA DOKO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. U. M. Tamanikaiyaroi for the Respondent**

Date of Hearing : **15 June 2023**

Date of Ruling : **16 June 2023**

RULING

[1] The appellant had been charged in the High Court at Suva with two representative counts of rape of his biological daughter contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 and section 207(1) and (2) (a) of the Crimes Act, 2009 respectively. They are as follows:

'Count 1

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

ID *between the 1st day of January 2018 - 31st August 2018 at Navua, in the Eastern Division, had carnal knowledge of* ***TM,*** *a child under the age 13 years.*

Count 2

***RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

***ID** between the 1st day of May 2019 - 31st August 2019 at Navua, in the Eastern Division, had carnal knowledge of **TM,** without her consent.*

[2] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty of both counts. The learned High Court judge had agreed with the assessors' opinion, convicted him and sentenced the appellant on 10 December 2020 to an aggregate sentence of 18 years' (effective period – 16 years & 10 months) imprisonment with a non-parole period of 16 years (effective period – 14 years & 10 months).

[3] The appellant's appeal filed in person against conviction only is out of time by less than 02 months and could be regarded as timely.

[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 complainant was the only witnesses summoned by the prosecution. The appellant had given evidence and denied the allegations completely and called his elder daughter (whose evidence related to only one instance of sexual abuse) to give

evidence on his behalf. The trial judge had summarized the evidence as follows in the judgment:

> 6. *The Prosecution alleges that the accused had penetrated the vagina of the complainant in the same way on multiple occasions during the period between the 1st of January 2018 and 31st of August 2018. Furthermore, the Prosecution alleges that the accused had again penetrated the vagina of the complainant in the same manner on a few occasions during the period between the 1st of May 2019 and 31st of August 2019.*

[6] The grounds of appeal urged against conviction are as follows:

Ground 1

THAT the Trial Judge erred in fact and law when he failed to reconsider that the prosecution has failed to prove the element of the charge beyond reasonable doubt.

Ground 2

THAT the Trial Judge erred in fact and law when he failed to consider all the evidence necessary to be compiled in such cases, relevant to justify the conviction.

Ground 3

THAT the Trial Judge erred in fact and law in all circumstances of the case in convicting the appellant

Ground 4

THAT the Trial Judge erred in fact and law when he failed to direct and warn the assessors on the issue of circumstantial evidence.

Ground 5

THAT the appellant reserves the right to amend and add other suitable grounds once the copy of Summing Up and Judgement are received by the applicant.

Ground 6

THAT the Trial Judge erred in law and in fact by not directing himself and the assessors on the principle of similar fact that applied to both indictable offences.

Ground 7

THAT the Trial Judge erred in law and in fact when he failed to direct himself and the assessors upon the defective of the charge of Rape.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors on the principle of one singular transaction before and after the trial.

Grounds 1 -3

[7] The appellant argued at the hearing that the prosecution had not produced medical evidence to prove that there had been any penetration which is an element of rape. The appellant was defended by a counsel at the trial. According to the state counsel, the prosecution had provided all the disclosures including the medical report to the defence. Therefore, if the medical report was favourable to the appellant's case there was no reason as to why his counsel did not want to call the doctor. On the other hand, medical evidence is not essential to prove penetration. There was clear evidence by the victim of penetration of her vagina by the appellant.

[8] The appellant also seems to argue that he should not have been convicted on the victim's evidence alone. There again an accused could be successfully prosecuted and convicted on the victim's evidence alone. There is no rule of evidence or procedure that a certain number of witnesses must be called to prove a criminal case. Section 129 of the Criminal Procedure Act, 2009 states that where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration. Thus, corroborative evidence of even a single witness is not essential to prove a charge of rape.

[9] The appellant had not elaborated as to how the trial judge had erred in convicting the appellant. The trial judge had addressed the assessors in the most fair, balanced and objective manner. While agreeing with them, the judge had given his mind independently to the evidence led in the case not only by the prosecution but by the defence as well and then convicted the appellant.

[10] In **Fraser v State [2021] FJCA 185**; AAU128.2014 (5 May 2021) the Court of Appeal said:

> *'[23] What could be identified as common ground arising from several past judicial pronouncements is that 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* ***Mohammed v State*** *[2014] FJSC 2; CAV02.2013 (27 February 2014),* ***Kaiyum v State*** *[2014] FJCA 35; AAU0071.2012 (14 March 2014),* ***Chandra v State*** *[2015] FJSC 32; CAV21.2015 (10 December 2015) and* ***Kumar v State*** *[2018] FJCA 136; AAU103.2016 (30 August 2018)]'*

[11] The trial judge's reasoning in the judgment is more than what is required of him as expressed in ***Fraser.***

Ground 4

[12] Since the prosecution did not rely on circumstantial evidence there was no question of the trial judge directing the assessors on the issue of circumstantial evidence.

Ground 6 and 8

[13] If the appellant's complaint under these grounds of appeal is that the trial judge had not addressed the assessors on what a representative count was and the need to consider each of the charges separately, I think the appellant is wrong.

[14] The trial judge had indeed directed the assessors on both these aspects at paragraphs 15 and 16 of the summing-up respectively.

[15] Though, the appellant raised the issue of delay in reporting at the hearing, it does not appear to have been a trial issue. Even if it had been raised in cross-examination of

the victim she had explained how she lived in fear of the appellant after he started sexually abusing her in the absence of the mother and how she was dependent on him as the sole bread winner of the family. Therefore, the alleged delayed complaint seems to have passed the "totality of circumstances test" expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

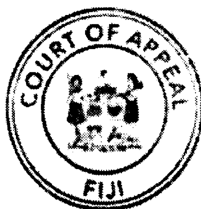
[16] The appellant also submitted at the hearing that the victim had written a letter wanting to withdraw the complaint against him before the trial. However, he admitted that she was not confronted with such a letter at all during the trial.

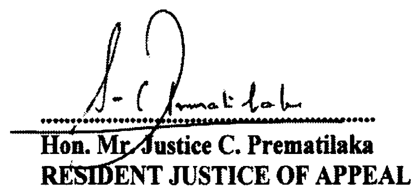
[17] The appellant's testimony does not seem to have offered any explanation in the form of a sinister motive on the part of the victim for the allegations of sexual abuse, as she had admitted that until he started abusing her he looked after all siblings well after their mother left them.

[18] The ultimate question is whether on the evidence available to them it was reasonably open to the assessors to be satisfied of the guilt of the appellant beyond reasonable doubt on both counts [vide **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and whether the trial judge could have reasonably convicted the appellant on both counts on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. I think the answer appears to be in the affirmative for both.

Order of the Court:

1. Leave to appeal against conviction is refused.





Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent