IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 003 of 2019

[High Court Criminal Case # HAC 399 of 2016]

BETWEEN : **ANANAISA QAQATURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Morgan, JA

Counsel : **Ms L. Ratidara for the Appellant**
Mr M. Vosawale for the Respondent

Date of Hearing : **12 July 2023**

Date of Judgment : **27 July 2023**

JUDGMENT

Mataitoga JA

[1] I concur with your reasons and conclusion.

Qetaki JA

[2] I have considered the judgment in draft and I agree with it, the reasoning and conclusion.

Morgan JA

[3] This is an appeal from a decision of the High Court at Suva delivered on 10 December 2018 where the Appellant was found guilty and convicted of one count of rape contrary to Section 207(1) and (2)(a) of the Crimes Act No. 44 of 2009.

[4] The information reads as follows:

COUNT ONE

Statement of Offence

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

Particulars of Offence

ANANAIASA QAQATURAGA, on the 15th of October 2016, at Gau Island, in the Eastern Division, penetrated the vagina of **MS** with his penis, without her consent.

Brief Facts

[5] The brief facts are as follows:-

(a) The Appellant is the maternal uncle of the Complainant. Both the Appellant and the Complainant lived in the same village on Gau Island. The Complainant was a 17 year old school girl at the time of the offence and the Appellant was 39 years old.

(b) On the day of the offence the Complainant went to the Appellant's house at the Appellant's request to wash his clothes. The Appellant's wife was away in Suva.

The Appellant's daughter who was 12 years old at the time was at home when the Complainant arrived at the Appellant's house.

(c) After the complainant had commenced washing the clothes in the bathroom attached to the house, the complainant heard the Appellant send his daughter out to look for their mobile phone at another house in the village.

(d) While the complainant was washing the clothes in the bathroom, the Appellant entered the bathroom, held the complainant and pushed her against the wall. When the complainant screamed, the Appellant covered her mouth. The complainant was wearing a t-shirt and sulu at the time.

(e) The Appellant pulled her sulu away pulled panties down and forcefully inserted his penis into her vagina. At the time the Appellant inserted his penis into her vagina they were both in a standing position and facing each other.

(f) The complainant testified that the Appellant's penis went inside her vagina for about 5 minutes. She knew it went inside her vagina because it was painful. She had been resisting when the Appellant did this to her but the Appellant held on to her tightly.

(g) When she was released she ran out of the house to a cousin's house nearby and informed the cousin of the incident. She also told her mother of the incident that day. The matter was subsequently reported to the police on 28 October 2016 and the Appellant was charged.

[6] Following the summing up at the trial the Assessors returned a unanimous opinion of not guilty.

[7] The trial judge disagreed with the Assessors opinion and convicted the Appellant as charged and sentenced him on 17 December 2018 to 13 years and 9 months imprisonment

(after taking into account a period in remand) with a non-parole period of 11 years and 9 months.

The Appeal

[8] The Appellant appealed against his conviction in person on time on 14 January 2019 and the Legal Aid Commission ("LAC") filed an amended notice of appeal on 18 March 2021.

[9] Submissions were filed by the LAC, the Appellant and the Respondent in respect of the Appellant's application for leave to appeal the conviction and the application for leave was heard by Prematilaka JA on 15 December, 2021.

[10] In his Ruling, Prematilaka JA noted that the Appellant had the right to appeal against conviction under Section 21(1) (b) of the Court of Appeal Act with the leave of the Court and that the test in a timely appeal for leave to appeal against conviction is a "*reasonable prospect of success"* and he referred to the following cases in support thereof:-

> *"[**Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AU0038 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)"*

Grounds of Appeal

[11] There were six grounds of appeal submitted by the LAC and the Appellant in person at the leave stage which were as follows:-

> ***"Ground 1 – by LAC***
>
> *THAT the Learned Trial Judge erred in his analysis of evidence and in convicting the appellant when the evidence in totality does not support the charge of Rape.*

Grounds – by the appellant

Ground 2

THAT the Learned Trial Judge erred in law when he brought out paragraph 17 and 18 facts that neither prosecution and defence brought out in evidence, but the Learned Judge relied on this from the defence closing which was not evidence.

Ground 3

THAT the Learned Trial Judge erred when he stated that the teachers were strangers and it was improbable to inform them, but it was clear in evidence that the complainant had known one of the teachers and would speak to one quite often.

Ground 4

THAT the Learned Trial Judge erred in law and fact when he failed to provide reasonable cogent reasons when he disagreed with the not guilty verdict of the assessors at the trial causes a substantial and grave miscarriage of justice.

Ground 5

THAT the Learned Trial Judge erred convicting the appellant on the substantial doubts in the prosecution case where of the benefit of the doubt ought to be given to the appellant.

Ground 6

THAT the Learned Trial Judge erred in principle when he ignored the appellant defence and took into account the relatively sided inquisition in his consideration over the denial of the defence."

[12] After considering the Appellant's grounds of appeal, the trial judges summing up, sentence order and judgment Prematilaka JA ruled on 15 December 2021 that the Appellant's grounds of appeal had no reasonable prospect of success and refused leave.

[13] Being dissatisfied with that decision, the Appellant filed a notice of renewal of appeal pursuant to Section 35(3) of the Court of Appeal Act on 25 January 2022.

Powers of the Court of Appeal

[14] Section 23 (1) of the Court of Appeal Act states:-

> *"Section 23 (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal." Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction or acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

[15] The central issues in this appeal are contained in ground four and they are whether the trial judge was justified in convicting the Appellant of Rape and thereby not following the unanimous opinion of the Assessors that he was not guilty and whether he provided cogent reasons for doing so.

[16] In Fiji the assessors are not the sole judge of the facts. The judge is the sole judge of fact in respect of guilt. Section 237 (2) of the CPC provides that in giving his judgment a Judge shall not be bound to conform to the opinions of the assessors. The judge is the sole judge of fact and law in a trial. The assessors are there to assist the trial judge in evaluating the facts and to offer their opinions. It is the judge who ultimately decides whether the accused is guilty.

[17] In **Baleilevuka v State** (2019) FJCA 209, this was confirmed at paragraph 42 of the judgment as follows:-

> *"[42] The learned Trial Judge in his judgment had correctly cited the cases of **Joseph v The King** [1948] AC 215, **Ram Dulare & others v R***

*[1955] 5 FLR and **Sakiusa Rokonabete v The State,** Criminal appeal No. AAU 0048/05 and stated, in Fiji the responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with Assessors is that of the trial Judge, who is the sole Judge of facts and that the Assessors duty is to offer opinions which might help the trial Judge and does carry great weight, but he is not bound to follow their opinion. Section 237 of the Criminal Procedure Act states that the Judge in giving judgment "shall not be bound to conform to the opinion of the assessors".*

[18] Section 237 (4) of the Criminal Procedure Code ("CPC") states:-

"When the judge does not agree with the majority opinion of the assessors the judge shall give reasons for differing with the majority opinion which shall be:-

(a) written down and
(b) pronounced in open court."

[19] In **Baleilevuka v State** (supra) the Court of Appeal stated:-

*"[43] The learned Trial Judge had again correctly made reference to the provisions of section 237 (4) of the Criminal Procedure Act which states: "When the Judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be – (a) written down; and pronounced in open court." He has cited the cases of **Ram Bali v Regina** (1960) 7 FLR 80 at 83, **Ram Bali v The Queen Privy Council** Appeal No 18 of 1961, **Shiu Prasad v Regina** (1972) 18 FLR 70 at 73, and **Setevano v State** [1991] FJCA 3 at 5 and stated the reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*

[20] Further in **Kumar v State** [2021] FJCA 243, AAU009.2019 (29 October) the test for an appellate court considering a decision of the trial judge against the opinion of the assessors was stated as follows:-

> *"[15] The question for an appellate court would be whether or not upon the whole of the evidence acting rationally it was open to the trial judge to be satisfied of guilt beyond reasonable doubt against the assessors' opinion; whether or not the trial judge must, as distinct from might have entertained a reasonable doubt about the accused's guilt; whether or not it was 'not reasonably open' to the trial judge to be satisfied beyond reasonable doubt of the commission of the offence."*

Analysis of the Grounds of Appeal

[21] Although the Appellant has filed six grounds of appeal I consider that the Appellant's principal ground of appeal is ground four and I will consider this ground first.

[22] Ground four contends that the Trial Judge erred in law and fact when he failed to provide reasonable cogent reasons for disagreeing with the not guilty verdict of the assessors at the trial causing a substantial and grave miscarriage of justice.

[23] Under the terms of Section 237 (4) of the CPC and the cases referred to above a trial judge is not bound to accept the majority opinion of the assessors provided he sets out in his judgment reasoned grounds based on the evidence before him. I will now analyse the Judgement to determine whether the trial judge has set out in his judgment reasoned grounds based on the evidence for not accepting the majority opinion of assessors.

[24] The trial judge noted in his judgment that after the summing up the assessors unanimously found the accused not guilty of the count of Rape. He then confirmed that he had carefully examined the evidence presented during the trial and he directed himself in terms of the law and evidence which he had discussed in his summing up to the assessors and also the opinions of the assessors. He noted the witnesses and evidence produced by the prosecution to support their case.

[25] He noted that the Appellant chose to remain silent. He also reminded himself that the prosecution had to prove that the Appellant penetrated the vagina of the complainant with his penis without her consent and that he knew or believed that the complaint was not consenting or that the Appellant was reckless as to whether or not she was consenting.

[26] The trial judge then sets out in detail in paragraph 14 of his written judgment which was pronounced in open court the evidence of the complainant relative to the charge of rape.

[27] In terms of Section 237 (4) of the CPD, the reasons given by the trial judge in not accepting the majority opinion of the assessors is clearly set out in the evidence given by the complainant at the trial set out in paragraph 14 of the Judgment.

[28] In response to this evidence which was tested in cross-examination by counsel for the Appellant the trial judge stated at paragraph 15 of his judgment that the defence is totally denying that the accused raped the complainant in the bathroom that morning while she was doing the washing. He then states that in his considered opinion the complainant's evidence can be accepted as truthful, credible and reliable evidence. He noted that there was absolutely no reason for the complainant to make up this story against the accused who is her maternal uncle.

[29] The trial judge then addressed certain propositions that had been put by the defence counsel in her closing address and concluded that for all the reasons stated by him in his judgment he found that the unanimous opinion of the Assessors in finding the Appellant not guilty is perverse and not justified.

[30] He then reinforces the position he has taken by stating at paragraphs 22 and 23 of his judgment the following:-

> *"(22) Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Rape with which the accused is charged.*
>
> *(23) In the circumstances, I find the accused guilty of the Charge Rape."*

[31] I have reviewed the evidence adduced at the trial. I have also considered the reasons referred to above of the trial judge in overturning the assessor's verdict. I am satisfied that the verdict was correct and the trial judge has satisfied the requirements of Section 237 (4)

of the CPC and the principles set out in **Baleilevuka v State** (supra) and **Kumar v State** (supra) set out above.

[32] I find that the Appellant's Ground 4 has no merit and that it is declined.

[33] I will now consider the remaining grounds of appeal namely grounds1, 2, 3, 5 and 6.

[34] Ground one contends that the trial judge erred in his analysis of the evidence when convicting the Appellant when the evidence in totality did not support the charge of rape.

[35] The Appellants main contentions in respect of this ground are as follows:-

[36] In her evidence the complainant did not state that the Appellant had penetrated the vagina of the complainant in terms of the definition of rape in Section 206 of the Crimes Act. Their contention is that the Appellant was only "*trying"* to insert his penis into the complainant's vagina. This was not put to the complainant during the trial. In cross examination the only proposition put to the complainant on behalf of the Appellant in this regard was that the Appellant did not rape the complainant. That is a complete denial. In any event it was necessary for the trial judge to assess the evidence and to determine whether the complainant's evidence confirmed that there had been penetration in order to fulfil the requirements under Section 206 of the Crimes Act.

[37] In her evidence the complainant stated that after the Appellant had pulled her sulu away and pulled down her panties, he tried to insert his penis into her vagina. When asked where the Appellant's penis went, she said it went inside her vagina. When asked how she knew it went inside her vagina she answered because it was painful in her vagina. She said that he managed to put his penis in her vagina by forcing himself. There was therefore clear evidence of penetration.

[38] Defence counsel also contended in her closing address at the trial that it was a physical impossibility to commit rape while the Appellant and the complainant were standing face to face. The trial judge noted that this was never put to the complainant in cross-examination however the trial judge addressed this contention in his judgment. He expressed the opinion that it was not physically impossible for a male to insert his erect penis into a female's vagina when standing face to face.

[39] The Trial Judge stated further at paragraph 16 of his judgment that in his considered opinion the complainant's evidence was truthful, credible and reliable. There was absolutely no reason for her to make up this story against the Appellant, who is her maternal uncle.

[40] The Appellant also contended that the complainant didn't tell her cousin Elenoa or her mother directly after the incident that she had been raped by the accused and that this effected the credibility and reliability of her evidence.

[41] Elenoa stated in her evidence that she was at home on the day of the offence when the complainant came to her looking frightened. She said that when she asked the complainant what had happened the complainant told her that the Appellant had tried to take her clothes off so that they could stay together which she understood to mean that they could sleep together.

[42] The complainant's mother's evidence was that the complainant had told her that the Appellant had harassed her. When asked what the complainant had precisely said in this regard she said that the complainant had told her that the Appellant had closed her in the bathroom and harassed her and that she was crying when she was telling her this.

[43] It is clear from this evidence that the complainant did not inform her cousin Elenoa or her mother that the Appellant had raped her, that is, had penetrated her vagina with his penis.

What she did tell them, as outlined above at the least suggested that the Appellant had engaged in unlawful sexual conduct with her.

[44] In dealing with the issue of recent complaint the Supreme Court said the following in **Anand Abhay Raj v The State** [2014] FJSC 12; CA0003.2014 (20 August 2014) :-

> *"[33] In any case, evidence of recent complaint was never capable of corroborating the complainant's account:* ***R v Whitehead*** *(1929) 1 KB 99. At most it was relevant to the question of consistency or inconsistency, in the complainant's conduct and as such was a matter going to her 'credibility and reliability as a witness:* ***Basant Singh & Ors v The State*** *Crim. App. 12.1989;* ***Jones v The Queen*** *[1997] HCA 12 (1997) 191 CLR 439;* ***Vasu v The State*** *Crim. App AAU0011/2006S, 24 November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible both the complainant and the witness complained to, must testify as to the terms of the complaint:* ***Kory White v The Queen*** *[1999] 1AC 210.*
>
> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant."*

[45] Further in **Spooner v R** [2004] EWCA Crim. 1320 Thomas L J said:

> *"The decision in each case as to whether it is sufficiently consistent for it to be admissible must depend on the facts. It is not in our judgment necessary that the complaint discloses the ingredients of the offence; it will, however, usually be necessary that the complaint discloses evidence of material and relevant unlawful sexual conduct on the part of the defendant which could support the credibility of the complainant. It is not, therefore, usually be necessary that the complaint describes the full extent of the unlawful sexual conduct alleged by the complainant in the witness box, provided it is capable of supporting the credibility of the complainant's evidence given at the trial.*
>
> *Differences may be accounted for by a variety of matters, but it is for the jury to assess these. For example, in cases of alleged abused (such as this) by a stepfather or other family member, it would be for the jury to consider whether the difference arises because, as is known to happen on some occasions, the*

complainant cannot bring herself to disclose the full extent of the conduct alleged against the defendant at the time of the contemporaneous complaint."

[46] The Trial Judge also noted in his judgment at paragraph 20 that it must be borne in mind that the complainant had informed the recent complaint witness Elenoa about the incident as soon as she left the Appellant's house.

[47] Based on the above authorities it was not necessary for the Appellant to explain the full extent of the unlawful sexual conduct. The evidence that the complainant told her cousin Elenoa about the incident as soon as she had left the Appellant's house went to support and enhance her credibility. It was not necessary for her to give specific details that the Appellant had penetrated her vagina with his penis.

[48] After addressing the above issues in his judgement, the trial judge stated at paragraph 22 and 23 of his judgment as follows:-

"22. Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying the elements of the offence of Rape with which the accused is charged.

23. In the circumstances I find the accused guilty of the charge of Rape."

[49] I find that Ground 1 has no merit and it is declined.

[50] **Ground 2**

This ground of appeal is based on paragraphs 17 and 18 of the judgment. The Appellant submits that the Trial Judge had referred to facts not introduced by either the prosecution or defence. This ground has no merits. The trial judge had specified that the matters referred to were propositions made by the defence raised in her closing address. Further in paragraph 74 of his Summing Up the trial judge made redirections to make it clear that

the matters raised in paragraphs 17 and 18 of his judgment were not suggestions made to the witnesses in cross-examination but were propositions made by the defence counsel in her closing address. This ground does not have any merits.

[51] **Ground 3**

This ground claims that the trial judge erred when he stated that the teachers were strangers and it was improbable to inform them, but it was clear in evidence that the complainant had known one of the teachers and would speak to her "quite often." The evidence does not support this however. She did not say in evidence that she would speak to one of the teachers drinking grog "quite often." She said she had only seen one of the teachers because she comes to her school quite often. She did not know one of the teachers at all and only knew who the other one was because she had come to her school. It is understandable that she would go immediately to her cousin's house and inform of the incident rather than tell the two teachers. I cannot see anything objectionable in the trial judge's comments. This ground does not have any merits.

[52] **Ground 5**

The Appellant submits that there were substantial doubts in the prosecution case and the benefit of than should have been given to him. There is no merit in this ground. I do not find that there were serious doubts in the prosecution case that would nullify the convictions.

[53] **Ground 6**

The Appellant complains that the trial judge ignored his defence and accepted the prosecution evidence over his denial of the offence. There is obviously no merit in this ground. The Trial Judge referred to the Appellant's defence which was a bare denial in both his summing up and judgment. The trial judge stated the following at paragraphs 15 and 16 of his judgment.

"15. The defence is totally denying the accused raped the complainant in the bathroom that morning whilst she was doing the washing.

16. However in my considered opinion the complainant's evidence can be accepted as truthful, credible and reliable evidence. There was absolutely no reason for her to make up this story against the accused, who is her maternal uncle."

[54] For the reasons stated above I do not consider that there is any merit in the Appellant's grounds of appeal and dismiss the appeal.

[55] I order as follows:

1. *Appeal against the conviction is dismissed.*
2. *Conviction in the High Court affirmed*

.....
Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

.....
Hon. Justice Walton Morgan
JUSTICE OF APPEAL

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