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

CRIMINAL APPEAL NO.AAU 007 of 2021
[In the High Court at Lautoka Case No. HAC 022 of 2019]

BETWEEN	**:**	**NIRBHAI CHAND**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. J. Reddy for the Appellant**
	:	**Mr. T. Tuenuku for the Respondent**
Date of Hearing	**:**	**14 March 2023**
Date of Ruling	**:**	**16 March 2023**

RULING

[1] The appellant had been charged and found guilty in the High Court at Lautoka with two counts of Indecently Annoying Any Person contrary to section 213 (1) (a) of the Crimes Act, one count of Indecent Assault contrary to Section 212 (1) of the Crimes Act, one count of Sexual Assault contrary to Section 210 (1) of the Crimes Act and one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act committed in 2014 and 2015 at Yasiyasi, Tavua in the Western Division.

[2] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was not guilty as charged. The learned High Court judge had disagreed with the assessors' opinion, convicted him and sentenced the appellant on 13 January 2021 for a period of ten (10) years of imprisonment as an aggregate sentence for the five counts with a non-parole period of 08 years.

[3] The appellant's appeal against conviction and sentence is timely.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[6] The learned trial judge has summarized the evidence in the summing-up as follows:

> *11. The complainant explained in her evidence that she got married to the eldest son of the accused in 2014. The accused is her father-in-law. She had actually eloped with her husband against the will of her parents. The complainant had then started to live with her husband at the accused's house. During July 2014, the complainant and her husband had some arguments over making a child. The husband wanted to make a child with the complainant, but she failed to get conceived. One of the evenings, while she was at the living room with the accused, he had invited her to sleep with him and have sexual intercourse with him so that she can get conceived with a child. The complainant was shocked to hear that as she considered him as*

her father. She did not like what he said and got up and went to her room. The mother-in-law and sister-in-law were at the other end of the porch, waiting for the other two sisters-in-law to return home from work. Her husband had gone to a friend's place while the brother-in-law was not at home. The complainant explained that she did not tell anyone of this incident as she thought this would end from there and never thought that this would go this far.

12. *One afternoon in July 2014, when she was in the kitchen, the accused came from behind and held her breasts and pressed them. She looked back and found that it was the accused. The complainant did not like what he did. The complainant had complained to her husband about this incident. However, he had not taken any steps against the accused.*

13. *During the same month of July 2014, the accused had asked the complainant to open the bathroom door, when she was having her shower therein, telling her that he wants to see her naked without clothes. She did not see the accused but recognised him with his voice. The bathroom was situated close to the bedroom of the accused. All other members of the family were in their respective rooms. Her husband was at home that day. She came out of the bathroom when the accused went back to his room. She then told her husband about this incident. Her husband had informed her mother-in-law and sister-in-law about this incident, but nothing happened.*

14. *Between the 1st of May 2015 and 31st of September 2015, the accused had forced sexual intercourse with the complainant. He had forcefully dragged her from her hands to the visitor's room. He had then locked the door. No one was at home except her little son, who was sleeping in their room. The accused had threatened the complainant, telling her not to tell anyone about this incident. If she does that, then her husband will leave her. He then made her lie on the bed facing upwards. The accused then lifted her dress and removed her undergarment. He then started to fondle her breast using his hands and mouth. Afterwards, the accused had inserted the vagina of the complainant with his penis. She did not like what he did and told him not to do that as he is like her father. The accused had told her that his wife is not having sexual intercourse with him; therefore, she has to have sexual intercourse with the accused. After having sexual intercourse with her, the complainant then threatened her, telling her not to tell anyone. The complainant, explained in her evidence that she did not tell anyone at that time. She was scared that her husband would leave her. If then, she had no one to go with her little child. The complainant had finally told her husband in 2018 after she gave birth to her second child. The second child is a daughter, and she afraid that her daughter would face the same fate as she had when she is grown up. Her husband had not taken any steps, so she had discussed this with her sister-in-law. After that, she had reported to the police.*

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

Ground 1

THAT the Learned Trial Judge erred in law and in fact by overturning the unanimous not guilty verdict of all three assessors and finding the appellant guilty on all charges laid against him without giving appropriate and cogent reasons for his findings and his decision.

Ground 2

THAT the Learned Trial Judge erred in law and in fact in finding the appellant guilty on all the charges even though there were so many inconsistencies, discrepancies and contradictions in the evidence of the complainant.

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 testimony of the complainant was inconsistent, unreliable and not credible enough to sustain a conviction.

Ground 6

THAT the Learned Trial Judge erred in law and in fact when he found the complainant being straight, consistent and coherent when she was not. She was evasive, inconsistent and not coherent when answering questions in cross-examination.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the complainant had not provided some details in her statement to police but spoke about the same in her evidence thus prejudicing the appellant thereby tendering her evidence as unreliable and unsafe.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that there was substantial delay in reporting the matter to police thus the credibility of the complainant.

Ground 7

THAT the sentence of 10 years is harsh and excessive in all circumstances.

Ground 1

[8] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) the Court of Appeal summarised the duty of a trial judge in disagreeing with the assessors.

> *'[24] 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)]*
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> *[25] In my view, …… the judgment of a trial judge cannot 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 to the assessors by the trial judge.'*

[9] The trial judge had independently analysed and evaluated the contentious issues from paragraphs 06 to 12 of the judgment and given reasons based on the weight of the evidence reflecting his views on the credibility of the complainant for differing from the opinion of the assessors. Thus, there are no merits in the complaint regarding the alleged lack of cogent reasons.

Ground 2, 3 and 6

[10] The gist of the three grounds of appeal is based on the alleged inconsistencies, contradictions and omissions in the complainant's evidence.

[11] The trial judge had directed the assessors on the inconsistencies, contradictions and omissions at paragraph 32 & 51-55 of the summing-up and dealt with them at paragraphs 06 to 08 of the judgment. The complainant appears to have satisfactorily explained all such inconsistencies, contradictions and omissions.

[12] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), the Court of Appeal said on omissions, inconsistencies, contradictions and discrepancies as follows:

> *[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. 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 (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*
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> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.'*

[13] The inconsistencies, contradictions and omissions the appellant has pointed out are not related to the principal narrative of the complainant's evidence but on somewhat peripheral matters. They do not seem to be so fundamental as to cause her testimony unreliable and untruthful.

Ground 4 and 5

[14] The appellant complains about the delay in reporting. However, the trial judge had been quite mindful of the delay and considered it at paragraph 9, 10 & 11 of the judgment and paragraphs 56-58 of the judgment. The complainant has explained the reasons for the delay in reporting the matter to the police. She seems to have promptly complained to her husband of the appellant's advances and acts of sexual orientation except the last incident of rape but the husband as well as his mother had not done anything about it.

[15] Though, the trial judge had not cited to the assessors, applying the 'totality of circumstances' test regarding how to assess a complaint of delay suggested in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), I am convinced that there cannot be a reasonable prospect of success based on this ground.

[16] Overall, it is clear from the totality of the evidence that it was open to the trial judge to have arrived at the guilty verdict.

[17] The Court of Appeal set down in **Kumar v State** AAU 102 of 2015 (29 April 2021) the test on *'unreasonable or cannot be supported having regard to the evidence'* in section 23(1)(a) as follows [also see **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)]:

> *'[23] ……To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.'*

[18] When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. I think that the trial judge could have reasonably convicted the appellant of all counts.

[19] There is no reasonable prospect of success in the appeal against conviction [see **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)].

Ground 7 (sentence)

[20] The tariff for adult rape had been taken to be between 07 and 15 years of imprisonment by Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) following **State v Marawa** [2004] FJHC 338.

[21] The trial judge had found the level of harm and the culpability of the offending to be significantly high. The appellant was not a first offender. He was the complainant's father-in-law whom she treated as her father (her own parents had abandoned her after the marriage). The sentencing process had been transparent and well-explained.

[22] In the light of the above principles, I see no sentencing error.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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