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

CRIMINAL APPEAL NO. AAU 044 of 2021
[In the High Court at Suva Case No. HAC 20 of 2020]

BETWEEN : **NIMATI QIONIMUA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu and Ms. Vulimainadave for Appellant**
: **Mr. L. Burney for the Respondent**

Date of Hearing : **05 December 2023**

Date of Ruling : **11 December 2023**

RULING

[1] The appellant had been charged in the High Court at Suva with one representative count of rape under the Penal Code. The victim (aged 13) was the appellant's step daughter. The information read as follows:

> *'COUNT ONE*
>
> *(Representative Count)*
>
> *Statement of Offence*
>
> ***RAPE***: *Contrary to Section 149 and 150 of the Penal Code.*
>
> *Particulars of Offence*
>
> ***NIMATI QIONIMUA ,*** *between the 1st day of January 1987 and 28th day of January 1994, at Waibau, Naitasiri, in the Eastern Division, penetrated the vagina of* ***TT***, *with his penis, without her consent.*

[2] The assessors had unanimously opined that the appellant was guilty of rape. Having agreed with their opinion, the trial judge had convicted the appellant accordingly and sentenced him on 08 March 2021 to head sentence of 13 years imprisonment with a non-parole period of 08 years after deducting a period of remand of 01 year.

[3] The appellant had lodged in person a timely appeal against conviction and sentence. 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)].

[4] However, the appellant had lodged on 09 August 2023 a Form 3 seeking to abandon his sentence appeal and I put to the appellant all questions on the guidelines given in **Masirewa v. State** Criminal Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5. Having been satisfied with the appellant's intention to abandon his appeal voluntarily and other matters, his application was allowed and the appeal against sentence was deemed abandoned under Rule 39 of the Court of Appeal Act.

[5] The trial judge had summarized the facts in the sentencing order as follows:

> *'[5]. You are the complainant's step-father. The complainant is now 44 years of age. Her date of birth is 7 December 1976. She clearly testified to the incidents which took place since she was in Class 7. She said that she was in Class 7 in 1990. Thus she would have just turned 13 at the time.*

> *[6] The complainant testified that you penetrated her vagina with your penis 2-3 times a week. This had continued until 28 January 1994, the day she had given birth to her eldest child, who was fathered by you. Thus you had been sexually abusing the complainant for a period of over 4 years. It is clear that the complainant was a juvenile at the time you committed these offences on her.'*

[6] The prosecution had called the victim and the appellant had given evidence on his behalf. His defense was 'consent'.

[7] The sole ground of appeal urged by the appellant is as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *'The learned trial judge had erred in convicting the Appellant when the conviction is not supported by the totality of the evidence and is unreasonable in the circumstances of the case.'*

Ground 1

[8] The appellant argues that the conviction is unreasonable and cannot be supported having regard to the evidence.

Legal test applicable

[9] When the above ground of appeal is raised, at a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. 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 [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021)]. The decisions in **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) were relied upon by the court in formulating the above test.

[10] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[11] It has been said many a time that the trial court has a considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and the appellate court should not lightly interfere and there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[12] The appellant submits that there was a delay of about 20 years in reporting the matter and it is not clear at all from the summing-up, judgment or the sentencing order as to how the matter finally came to light or who reported it. The appellant argues that the trial judge had failed to address the assessors or himself on the aspect of the inordinate delay which could have affected the credibility and veracity of the allegation.

However, the summing-up and the judgment do not suggest that the appellant's counsel had challenged the complainant's evidence on the basis of the belated complaint. Nor had his trial counsel sought any redirections on this aspect either. The complaint of delay in reporting and the complainant's explanation will have to be considered *inter alia* having regard to the 'totality of circumstances' test used to assess a complaint of belated reporting, adopted by the Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018). **Bati v State** [2023] FJCA 160; AAU002.2021 (23 August 2023) and **Chandra v State** [2023] FJCA 233; AAU110.2022 (30 October 2023) have useful discussions on similar complaints.

[13] The entire prosecution case depended on the complainant's testimony who had said in examination-in-chief that she did not agree to the acts done to her but did not tell anyone as she was scared. However, in cross-examination, she had admitted that sometimes she would agree to have sexual intercourse with the appellant and at times when she did not agree they would not have sexual intercourse. Upon re-examination, the complainant had stated that she agreed to have sexual intercourse as that was what she wanted. She had also wanted to withdraw the matter as she and the appellant moved on with their lives and their children (02) have grown-up and married.

[14] The appellant also submits that the prosecution's position was that the complainant did not consent to have sexual intercourse with him and that the appellant used his authority and control over the complainant (or that he took advantage of the complainant's young age and innocence) to have sexual intercourse with her. In other words the 'consent' of the complainant was not real consent in law in that it was not given freely and voluntarily. The trial judge had taken the view in his judgment that considering the complainant's tender age and circumstances at the time, even if she had consented to have sexual intercourse with the appellant at any time, the said consent would not have been freely and voluntarily given by her. The complainant's evidence does not seem to have an unequivocal assertion that she did not consent to sexual intercourse.

[15] The appellant's argument is that age was not material under the Penal Code (unlike the Crimes Act, 2009) in that consent was required irrespective of the complainant's age in

order to prove the offence of rape under section 149 but the matters referred to above cannot be considered as falling within the definition of what is not consent under section 149 which the trial judge had failed to give his mind to. Section149 states:

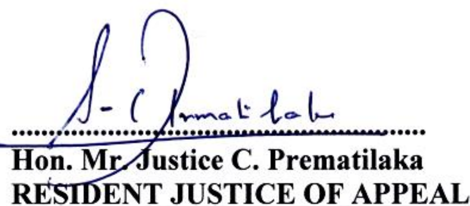
> '***149***. *Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.'*

[16] In other words, the appellant's argument is that if the consent had not been obtained by the appellant by force or by means of threats or intimidation, or by fear of bodily harm, or by means of false representations as to the nature of the act but given by the complainant for other reason/s, it would still amount to real consent under the Penal Code. This appears to be a question of law alone and does not require leave to appeal to be taken up before the full court. However, a lot will depend on actual evidence of the complainant reflected in the transcripts, which are not available at this stage, as to her evidence on the aspect of consent.

[17] Considering all the circumstances, I am of the view that interest of justice will be best served by leaving it to the full court to more fully go into the above issues with the aid of the complete appeal records. Thus, I express no opinion at this stage as to whether or not there is a reasonable prospect of success in the sole grounds of appeal.

Orders of the Court:

1. Leave to appeal against conviction is allowed.
2. Appeal against sentence is deemed to have been abandoned in terms of Rule 39 of the Court of Appeal Rules.



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

Solicitors:

Legal Aid Commission for the Appellant
Office for the Director of Public Prosecutions for the Respondent