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

CRIMINAL APPEAL NO. AAU 124 of 2017
[High Court of Labasa Criminal Case No. HAC 009 of 2016 LAB]

BETWEEN	**:**	**SADDAM FIDA HUSSAIN**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
	:	**Bandara, JA**
	:	**Rajasinghe, JA**
Counsel	**:**	**Mr. P. Kumar for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	**:**	**06 February 2023**
Date of Judgment	**:**	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been charged in the High Court at Labasa on one count of sexual assault contrary to section 210(1)(a) of the Crimes Act, 2009 and one count of rape contrary to section 207(1) and (2)(b) of the Crimes Act, 2009 committed on 26 February 2016 at Tabia in the Northern Division.

[2] Under the 01st count the appellant was alleged to have touched the breast of SSB (real name withheld) and under the 02nd count he was alleged to have penetrated SSB's vagina with his finger.

[3] After trial, the assessors had expressed a unanimous opinion of not guilty on both counts. The learned High Court judge had disagreed with the assessors and convicted the appellant as charged. He was sentenced on 28 July 2017 to 06 months of imprisonment on the first count of sexual assault and 09 years of imprisonment on the second count of rape; both sentences were to run concurrently with a non-parole period of 06 years.

[4] A judge of this court sitting alone granted leave to appeal against conviction but refused leave to appeal against sentence. The appellant had not renewed his sentence appeal before the full court.

[5] The grounds of appeal urged before the full court are as follows:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact by overruling the assessors unanimous opinion of "Not Guilty" contrary to his own directions to the assessors.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in fact in that whilst applying the laws on overruling the verdict of the assessors, as he did, he did not give cogent reasons as to why he over-ruled the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge did not consider the defence case adequately, or in detail, in particular the evidence given in relation to the location and entrance of the bathroom where the alleged incident was supposed to have taken place and also the fact that it was dark and the appellant was not sufficiently identified by the complainant.*
>
> ***Ground 4***
>
> *THAT the Learned Trial Judge erred in law and in fact in not adequately directing himself that the defence had raised sufficient doubt against the prosecution's evidence before the court and as such the benefit of the doubt ought to have been given to the appellant.*

Ground 5

THAT the Learned Trial Judge erred in law and in fact in not adequately directing himself to the possible defence available on the evidence and with such failure, there was a substantial miscarriage of justice.'

[6] Both counsel in their respective written submissions have dealt with 01st and 02nd grounds together and grouped 03rd to 05th grounds separately.

01st and 02nd grounds of appeal

[7] Both grounds of appeal deal with the learned trial judge's overturning of the assessors' unanimous opinion of not guilty and convicting the appellant without giving cogent reasons.

[8] Having analyzed several previous decisions the Court of Appeal in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) succinctly stated as follows:

*'[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)]'*

[9] However, lack of cogent reasons alone is not a basis on which a verdict could be set aside. In terms of section 23(1)(a), a verdict should be set aside if it is unreasonable or cannot be supported having regard to the evidence or on a wrong decision on any question of law or on any ground amounting to substantial miscarriage of justice (read with the proviso) [vide **Fraser v State** (supra)] .

[10] In order to determine whether the reasons are capable of withstanding critical examination in the light of the whole of the evidence presented in the trial, the appellate court has to necessarily examine the record of the case. A trial judge's decision to differ from the opinion of the assessors involves an evaluation of the entirety of the evidence led at the trial, and so does the decision of the Court of Appeal where the trial judge's decision is challenged by way of appeal. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence.

[11] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020), the petitioner had been convicted of murder after trial by the High Court judge where the learned judge by his judgment dated 16 September 2014, had overturned the unanimous opinion of the assessors that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations were made by Hon. Justice Saleem Marsoof.

> *'[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. ……....., the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.*
>
> *[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, it is evident on the available evidence that the trial judge had failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.'*

[12] The Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) examined the trial judge's duty in disagreeing with the assessors where the accused had also given evidence and stated as follows.

> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.'*

[13] I shall now examine the evidence on record in regard to the appellant's complaint under the 01st and 02nd grounds of appeal within the above legal framework.

[14] According to the complainant (PW1), around 05 pm. the appellant came inside the bathroom when she was having a bath. He was her cousin living in another house beside her house. There is a controversy as to how the appellant entered the bathroom. PW1 said that climbing the wall he entered from the top through a half-covered roof. However, according to PW2 (cousin sister of PW1 and the appellant) the bathroom had a roof and walls right up to the roof and one had to enter the bathroom going through the main house. PW1 admitted under cross-examination that the bathroom was not outside the house but connected to the house and one would have to walk into it from the house. PW2 claimed to be closer to PW1 than to the appellant as PW1 used to come and stay with her. PW1 was her husband's cousin sister and the appellant was her husband's brother. There was also a dispute as to when the incident happened. PW1 insisted that it took place on 26 February 2016 whereas PW2 was emphatic that PW1 came and complained to her on 19 February 2016 which was her brother's birthday as well.

[15] Having entered the bathroom the appellant stood behind her and touched her breast with one hand while pressing her mouth with the other hand saying *'don't shout and don't push'*. Then, the appellant had touched her private part and poked his finger inside it and she had felt pain. She then pushed him backwards and started shouting. The appellant had then left the house. PW1 had immediately thereafter gone to PW2's house but only told her that when she was bathing the appellant came inside the bathroom. At the medical examination, PW1 had only told the doctor that the appellant entered the bathroom while she was bathing and started touching her and her private parts.

[16] Under cross-examination PW1 had said that the police recorded her statement on 26 February 2016 at home and altogether she gave two statements. The second one was made on 07 Match 2016. She admitted that she had not said in her second statement that the appellant poked his finger in her private part. Although, PW1 said under cross-examination that the appellant placed his hand inside her panty, she had not mentioned it in the statement made on 07 Match 2016. She then tried to explain the omissions by stating that she told only half information to the police on the second statement. PW1 revealed under cross-examination that the police had come to her school and recorded a third statement on 08 March 2016. She admitted that she had only told the police at all times prior to 08 March 2016 that the appellant only touched her breast and the private part. It looks as if PW1 had told the police that the appellant poked his finger inside her private part for the first time only on 08 March 2016 or even thereafter. She also admitted that she had told PW2 and the doctor (PW3) that the appellant only touched her private part. PW1 also admitted that her father told her to stick to her police statement in giving evidence in court as she had read it and that is what she was doing in court.

[17] PW2 on her part had said that PW1 came to her house on 19 February 2016 and said that the appellant entered the bathroom, covered her mouth and when she screamed out he ran away.

[18] Dr. Inosi Vatucicila Voce who had examined PW1 on 08 March 2016 had observed no external injuries on the breast or any other part of the body and also not seen any injury on the external genital area or at vaginal opening. He had also not observed the presence of the hymen. His opinion is that the introduction of any blunt object including poking a finger into the vagina through the vaginal opening is one of the possible means of the hymen becoming absent. According to the doctor, PW1 had told him that a boy called Saddam entered the bathroom when she was bathing and started touching her breast and inside her panty. The doctor is emphatic that PW1 never said that anyone poked a finger into her vagina. Under cross-examination the doctor had said that he found no evidence of any recent sexual activity resulting in a recent injury due to a blunt object and did not find her hymen to be freshly torn. He also had stated that if the hymen had been recently damaged his examination would have revealed it. The doctor was unable to define what a 'recent' period could be as healing tends to be very fast in the vagina which has a very rich blood supply and a lot of healing would have taken place after 11 days.

[19] In my view, the medical evidence at best in inconclusive of any penetration of PW's vagina. Further, the history narrated by her to the doctor does not speak to any such penetration either.

[20] In my view, the summing-up and the judgment lacks sufficient deliberations on this crucial issue of penetration. PW1 had not spoken to penetration of her vagina until her third or the last police statement made on 08th March 2016 or thereafter. There is a possibility that the police recorded the last statement after the medical examination revealing no evidence of hymen. She had not told PW2 soon after the alleged incident that the appellant had poked inside the vagina but she only told her that the appellant came inside the bathroom and covered her mouth. PW1 had told the doctor that the appellant entered the bathroom while she was bathing and started touching her breast and her private parts inside her panty (she is said to have stated to the police that she was bathing naked). Medical evidence is inconclusive and does not lend any support for penetration of her vagina.

[21] The trial judge had said only as follows in the judgment for overturning the assessors' opinion.

> *'7. My reasons are as follows:*
>
> *8. I accept the female complainant's (PW1) evidence and her version of events. Although Mr. A. Sen, on behalf of the defence, managed to rattle her during cross-examination, her evidence as a whole was credible, despite her inability to fully name her "private part" and being mixed up on the dates. I accept it was often not easy for young female complainants to expose what allegedly happened to them during rape trials, and PW1 was no different. On the whole she was a credible witness to me.*
>
> *9. I accept what she said that the accused came into the bathroom when she was bathing on 26 February 2016. I accept that the accused stood behind her, gagged her with one hand and used the other hand to touch her right breast. I accept that the accused then touched and poked her vagina with his finger.*
>
> *10. I accept Doctor Inosi Vatucicila Voce's (PW3) evidence and PW1's medical report, he tendered as Prosecution Exhibit No. 1. PW3 confirmed in D(12) of the report that PW1's hymen was absent 11 days after the alleged finger rape. PW3 said in D(10) of the report PW1 told him, the accused entered her bathroom and touched her breast and inside her panty. As you can see in the courtroom, PW1 was very shy in describing the details of her private part. That is not unusual with young female complainants in most rape cases.*
>
> *11. Furthermore, in his evidence, the accused said that on 26 February 2016, he was tying goats and cows next to PW1's house. So, he was near the crime scene at the material time. I reject his denials, as I find them not credible.*
>
> *12. On the whole, I accept the complainant (PW1) and the doctor's evidence (PW3), and I find the accused guilty as charged on both counts. I convict him accordingly on those counts.'*

[22] Thus, I cannot say that the trial judge had embarked on an independent assessment and evaluation of the evidence and given 'cogent reasons' founded on the weight of the evidence (although he had expressed his views as to the credibility of witnesses) for differing from the opinion of the assessors on the crucial issue whether there had been any penetration at the time of the incident relating to the second count or whether *'poking inside the vagina'* was a subsequent embellishment or exaggeration after the medical examination showing no evidence of a hymen. To me, the reasons given for differing from the assessors are not capable of withstanding a critical

examination in the light of the whole of the evidence presented at the trial. It is evident on the available evidence that the trial judge had failed to effectively discharge his duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors on the charge of rape.

[23] 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.'*

[24] Thus, as stated by the Court of Appeal in ***Kumar*** and ***Naduva,*** 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.

[25] Upon an examination of the record, in my view, it was open for the assessors to have found the appellant not guilty on count 02 and it was not open for the trial judge to have found the appellant guilty of count 02 on rape charge by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence tested *per se* and *inter se* against the other prosecution evidence. 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 do not think that the trial judge could have reasonably convicted the appellant of rape under

the second count had he effectively discharged his duty of evaluation and independent assessment of the evidence.

[26] Therefore, I would quash the conviction of the appellant on count 02 for rape and instead enter a conviction for sexual assault on his touching her vagina with his hand and sentence him to 04 years of imprisonment with a non-parole period of 03 years to be effective from 28 July 2017. I would also affirm the conviction on count 01 for sexual assault. The appellant has already served almost 05 years 07 months. Thus, in effect the appellant has already served both sentences for count 01 and count 02.

03rd ground of appeal

[27] The appellant complains that the learned trial judge did not consider the defence case adequately, or in detail, in particular the evidence given in relation to the location and entrance of the bathroom where the alleged incident was supposed to have taken place and also the fact that it was dark and the appellant was not sufficiently identified by the complainant.

[28] Having perused the entirety of the record, I have little doubt that PW1 who knew the appellant from her childhood had any real difficulty in identifying him. The discrepancy regarding the location of the bathroom and how the appellant entered the bathroom are not matters that go to the root of the prosecution case. As stated in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) this discrepancy cannot shake the foundation of the prosecution case.

> *'[13]…….. 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).*

04th ground of appeal

[29] The appellant also argues that the learned trial judge erred in law and in fact in not adequately directing himself that the defence had raised sufficient doubt against the prosecution's evidence before the court and as such the benefit of the doubt ought to have been given to the appellant.

[30] The doubt is with regard to the act of penetration and not on his act of touching PW1's breast and vagina. I have already dealt with it and set aside the conviction for rape and substituted it with a conviction for sexual assault.

05th ground of appeal

[31] The appellant contends that the learned trial judge erred in law and in fact in not adequately directing himself to the possible defence available on the evidence and with such failure, there was a substantial miscarriage of justice.

[32] This ground of appeal is frivolous. There was no other defense other than the total denial of the allegations taken up. No other defense was available on evidence either. Thus, there was no duty upon the trial judge to have considered any alternative defense.

Bandara, JA

[33] I agree with the conclusions and orders proposed by Prematilaka, RJA.

Rajasinghe, JA

[34] I have read in draft the judgment of Prematilaka, RJA and agree with his reasons, conclusion and orders proposed.

Orders of the Court:

1. Conviction on count 02 (rape) is set aside and a conviction for sexual assault is substituted thereof in terms of section 24(2) of the Court of Appeal Act.
2. A sentence of 04 years with a non-parole period of 03 years is passed on the appellant for sexual assault on count 02 to be effective from 28 July 2017.
3. Appeal against conviction on count 01 is dismissed.
4. Appellant is to be released forthwith.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

Patrick Kumar Lawyers for the Appellant
Office for the Director of Public Prosecutions for the Respondent