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

CRIMINAL APPEAL NO. AAU 21 of 2023
[In the High Court at Suva Case No. HAC 187 of 2022]

BETWEEN	:	**MANOJ KUMAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**12 June 2024**
Date of Ruling	:	**13 June 2024**

RULING

[1] The appellant was charged at Suva High Court as follows:

Count 1
Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM*: Contrary to section 275 of the Crimes Act 2009.*

Particulars of Offence

MANOJ KUMAR *on the 23rd day of May 2022 at Cunningham in the Central Division, assaulted* ***KK*** *by slapping and punching her face, thereby causing her actual bodily harm.*

Count 2
Statement of Offence

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

Particulars of Offence

MANOJ KUMAR *on the 23rd day of May 2022 at Cunningham in the Central Division, penetrated the mouth of* ***KK*** *with his penis, without her consent.*

Count 3
Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210(1) (a) of the Crimes Act 2009.*

Particulars of Offence

MANOJ KUMAR *on the 2rd day of May 2022 at Cunningham in the Central Division, unlawfully and indecently assaulted* ***KK****, by making love bites on her thighs.*

Count 4
Statement of Offence

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

Particulars of Offence

MANOJ KUMAR *on the 23rd day of May 2022 at Cunningham in the Central Division, penetrated the vagina of* ***KK****, with his fingers, without her consent.*

Count 5
Statement of Offence

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

Particulars of Offence

MANOJ KUMAR *on the 23rd day of May 2022 at Cunningham in the Central Division, had carnal knowledge of* ***KK****, without her consent.*

Count 6
Statement of Offence

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

Particulars of Offence

MANOJ KUMAR *on the 23rd day of May 2022 at Cunningham in the Central Division, ad carnal knowledge of* ***KK****, with his penis, without her consent.*

Count 7
Statement of Offence

CRIMINAL INTIMIDATION: *Contrary to section 375(1) (a) (i) (iv) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

> ***MANOJ KUMAR*** *on the 23rd day of May 2022 at Cunningham in the Central Division, without lawful excuse threatened to kill* ***KK****, with intent to cause alarm to* ***KK****.*

[2] The High Court judge acquitted the appellant of count 03 and found him guilty and convicted of the rest of the counts. On 11 November 2022 the appellant was sentenced to an aggregate sentence of 10 years' of imprisonment with a non-parole period of 08 years.

[3] Being filed by the appellant in person in less than 03 months from the sentence, the appellant's appeal against conviction and sentence could be considered timely. The appellant on 21 March 2024 had lodged an application in Form 3 to abandon his sentence appeal.

[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 prosecution led the evidence of the complainant, WDC Clare and Dr. Priya Nandini Lal. The appellant gave evidence but did not call any other witnesses. His defence was a denial.

[6] The trial judge had summarised the evidence as follows in the sentencing order.

'3. On 23 May 2022, you came home drunk. As soon as you entered the house, you locked the door from inside. Having returned from work, your wife, (the complainant), was relaxing on the sofa. She told you to go and have a bath as you were stinking beer. You then started punching her in her face, lips and eyes. Her head was banged badly. You also strangled her neck to the extent that she was not able to breathe properly or shout. Blood was flowing out form her lips.

4. You then forcefully dragged her to the bedroom and took off her clothes without her consent. She was not ready for sex at that time as you were drunk. You did not listen to her and went ahead to satisfy your lustful demands. Firstly, you put two fingers inside her vagina. Then you took a shaving gear and shaved her pubic hair. You then penetrated her vagina with your penis without her consent. After that, you penetrated her mouth with your penis. Then you punched her in her face again and warned her not to shout. Finally you put your penis on her anus. You threatened her that you will chop her into pieces, kill her and put in the mortuary.

[7] The grounds of appeal urged by the appellant are as follows:

*'**Conviction:***

Ground 1
THAT the Learned Judge failed to consider the testimony of evidence which pointed to sexual intercourse unlikely to have happened.

Ground 2
THAT the Learned Judge failed to consider that the complainant did not raise alarm to my parents who were just next door.

Ground 3
THAT the Learned Judge failed to consider the improbability of the complainant's evidence and demeanour properly as she gave contradictory evidence to the doctor about the allegation.

Ground 4
THAT the Learned Judge failed to consider the improbability of complainant's evidence with respect to the alleged offences.

Ground 5
THAT the Learned Judge failed to consider that the complainant did not give good reasons of not reporting to the police station immediately after leaving home although she had the opportunity to do so.

Ground 1

[8] The appellant's argument is centered on the question whether his testimony made the alleged sexual intercourse unlikely or improbable. The trial judge had described the

complainant's evidence in the judgment on the issue of acts of sexual abuse including sexual intercourse as follows:

> *'17. Firstly, he put the two fingers inside her vagina. It was really painful. When Manoj was putting his fingers he was sitting on the bed. He took the shaving machine from the sitting room and shaved the pubic hair of her private area. Then he put it inside her vagina and on the side when it hit on her skin. It was really painful too. Then he penetrated her vagina with his penis 5 times. She told him to stop it but he did not listen. After that, he penetrated her mouth with his penis. He insisted that she open a big mouth to send it inside. She could not take it. She kept on shouting. Then he punched her on face again and warned her not to shout. She said she shouted because it was paining. After that, he put his penis on her anus.*
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> *18. He again started to penetrate her mouth with his penis. He did this 4 or 5 times. She was just lying on the bed. He kept on doing these things repeatedly several times while taking breaks in between. He put his penis into her anus again and penetrated her vagina with his penis and with two fingers. She could feel it because they went inside.*
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> *19. She told him to take her to the hospital because her head was in pain. He said he will take her but he never took her to the hospital. She kept on crying. She was just lying down on the bed looking up at the ceiling.*
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> *20. She was just lying on the bed. He took quiet a long time, nearly 3 hours for the assault, saying he was not satisfied. When he was done, she went to have a bath and went to sleep at around 12.30 a.m. He threatened her that if she reported to police he will chop her into pieces and kill her so she won't be able to go to the police station but will just go straight to the mortuary. He could not shout but kept on crying.*

[9] In **Pell v The Queen** [2020] HCA 12 it was held that in a criminal case, the prosecution is required to prove the case beyond all reasonable doubt and if there is any evidence that would raise doubt, then the accused cannot be convicted, however, the prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but only beyond reasonable doubt, The burden of proof is on the prosecution to, as dissenting Judge Weinberg noted, *"exclude the reasonable possibility that the applicant did not commit the offences"*(see [42] of ***Pell***). When an accused gives evidence, the question is whether the prosecution had negatived the reasonable possibility that the complainant's account was not correct rather than the question whether there existed the reasonable possibility that the accused's account was correct (see [54] of ***Pell***). If an appellant's evidence is assessed as thoroughly credible and

reliable, the issue for the appellate court is *"whether the compounding improbabilities caused by the unchallenged evidence required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt* (as per [119] of ***Pell***].

[10] Thus, in the complainant's evidence there is absolutely no such improbability of sexual intercourse having occurred because at paragraphs 43-71 of the judgment, the trial judge had thoroughly analyzed the evidence for the prosecution and held that having considered the totality of the evidence of the complainant and her demeanour in court, it was his considered view that her evidence was credible and reliable and her conduct was consistent with that of an honest rape victim. Similarly, after an exhaustive analysis of defense evidence, the judge had rejected the appellant's version and held that his evidence did not create any doubt in the prosecution case. In other words, the prosecution had negatived the reasonable possibility that the complainant's version was not correct. Therefore, I do not see any basis for the appellant to argue that sexual intercourse was unlikely to have happened.

Ground 2 and 5

[11] The trial judge had indeed looked into the concern raised by the appellant that the complainant did not raise any alarm to his parents living just next door at paragraphs 51 of the judgment as follows:

> *'The same explanations are good to explain complainant's behaviour that she had not screamed aloud to ring alarm. In this case, the complainant said she in fact shouted and cried. But no one had come to her help. He had threatened her and warned not to shout. Although it was suggested that his parents and brothers were living close by, there is no evidence that they were present home when the alleged incident occurred. The defence counsel indicated that the accused did not intend to call any of his relatives despite the early indication that he would call them. It has to be conceded that the accused does not have to prove that complainant's conduct was not plausible. That burden was on the Prosecution. However, the claim of the accused that the complainant after the alleged incident had stayed the whole day at his brother's place with brother's wife could have been supported easily if they were called.'*

[12] Similarly the trial judge had dealt with the appellant's argument based on late reporting at paragraphs 46-50 of the judgment as follows:

> *'46. The Defence says that the complainant did not tell the truth so her evidence must be rejected. According to the evidence of the complainant, she had not complained to anybody until he lodged the complaint with police on 30 May 2022 that was seven days after the alleged incident. The Defence says her conduct is not consistent with that of a rape victim.*
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> *47. The complainant gave two explanations for the delay. She said she could not walk properly and she had a severe headache after the assault. The second reason is that she was threatened with death if she reported. As for the first explanation, the accused admitted that his wife did not go to work on the 24rd and that he made porridge because she could not eat and having offered her to be taken to hospital. It was not disputed that she had informed her company that she was unable to report to work because she had a swollen head.*
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> *48. She admitted that she was reporting to work from 25th onwards. Why then she did not report the matter to police or anybody until the 30th? That behaviour should be tested against the circumstances in this particular case. According to her, after the repeated assaults, she had been threatened not to report or else she will be chopped into pieces and put her in the mortuary. This warning had come after a physical assault (slapping) admitted to have been done by the accused. The death threat had been repeated even two days after the incident.*
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> *49. The accused is not a stranger to her. He is her own husband whom she described as a good man unless he got drunk. Once got drunk only, he goes mad and wild. Reporting her own husband for a rape, which at one time was never considered a crime, to police would certainly have been a serious decision for a wife to take. She was living under the same roof and the threats had been serious and continuous. That would have been the reason she never returned home after lodging the report on 30 May 2022.*
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> *50. The conduct of a rape victims is highly unpredictable. Some of them may go and complain at the first available opportunity. Some may not. There is no stereotype for rape or victims of rape. The explanations given for the delayed reporting in this case are reasonable and acceptable.*

[13] Thus, the complaint of delay in reporting has been fully analyzed by the trial judge in keeping with principles set out in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

Ground 3 and 4

[14] The trial judge has quite admirably dealt with medical evidence in the judgment as follows and concluded that the fact that the medical report (prepared on the basis of a belated examination) does not lend any support for complainant's claim, does not mean that she was never raped anally, orally or vaginally.

> *'52. The main contention of the Defence was that the complainant's evidence is not consistent with the medical evidence adduced by Dr. Priya. According to Dr. Priya the only visible sign of injury or bruising was that that found on complainant's inner right upper thigh. It was also in the process of fading.*
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> *53. Doctor's observation comes as no surprise to me. She had examined the complainant seven days after the alleged incident. The doctor agreed that bruisers will heal in 6-7 days' time. The only visible injury the complainant said she suffered is the cut on her lips. However, the complainant had wanted the male doctor (to whom she was first presented) to examine the love bites on her thighs. But the male doctor was reluctant to examine the so called love bites thus wanted her to be examined by a female doctor.*
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> *54. It is obvious that a bruise or a cut on the lips is likely to heal very fast leaving no marks on the lips after 7 days. Doctor Priya observed some fading bruises on complainant's upper inner right thigh, like designs. This observation is consistent with the love bites the complainant wanted the male doctor to examine.*
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> *55. Doctor Priya had done only a visual genital examination even after her being relayed a history of a sexual assault and more specifically 'by putting fist in her vagina'. According to doctor's own evidence, as per the history provided, she had expected to see some sort of injuries or lacerations being present on patient's genitalia. In such a scenario, it is surprising that the doctor had not done a speculum or at least inserted her fingers to the patient's private part to examine her for vaginal injuries. The doctor just had a visual look of the patient with the help of a torch to see 'around' the genitalia.*
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> *56. The fact that the doctor had not done a proper vaginal examination is consistent with detective Clara's evidence. Clara had received a complaint from the complainant just after the medical examination about the inadequacy of doctor's genital examination. It is not for a doctor who was called upon to examine an alleged rape victim to come to court and say that she could not notice any laceration, cut or swelling in the private parts of the patient after having done only a visual examination.*

57. The doctor opined that if the patient is a married woman, who has been sexually active and presented for examination number of days after such an incident, she would not expect to see injuries or lacerations on patient's genitalia. However, she added a qualification and said it all depends on the mechanism of injury/ how the patient was assaulted.

58. The Defence contended that the history relayed by the complainant is not consistent with her evidence that she was vaginally penetrated with fingers. In the history (D10) as recorded by the doctor in her report states 'sexually assaulted by putting fist'. The doctor said that she did know the difference between fingering and fisting and that what was noted down in her report reflects everything the patient had told her.

59. It is trite rule of evidence that a previous consistent statement of a witness cannot be called in aid to show the consistency of that witness unless it comes under the exception –'recent complaint' in a case sexual nature. Therefore, the State is not allowed to rely on the history as it was not intended to prove a recent complaint. However, a previous statement made by the complainant to a doctor can certainly be used by the Defence to contradict the version of the complainant.

60. The question is whether the complainant's evidence in court is inconsistent with her previous statement to the doctor on material particular. I am not convinced that the argument of the Defence on this point is sound. The complainant maintained that she specifically stated to the doctor that she was vaginally penetrated with two fingers. In the process of communication however, she had shown her fist to the doctor to describe the nature of the assault. The doctor it seems had noted that "sexually assaulted by putting fist". I cannot see any material inconsistency there.

61. Even in case of fisting, the doctor said she would not expect to see virginal tears because vagina inside is elastic. However, doctor said she would expect to see, even after 7 days, some injuries on the opening of vagina if the penetration had been forceful. There is no evidence that the complainant fought with the accused and offered physical resistance. She had merely submitted herself to the threat verbally and physically (punching on face) coming from the accused although she did protest and indicate to the accused in clear terms that she was not ready for sex that particular night because he was drunk and stinking beer. She had every reason to say 'no' to sex because she knew, from her past experience, how he would behave when he is drunk.

62. The doctor had not examined the anus of the complainant at all. It was suggested that, whilst the patient's genital area was being examined, the doctor would have noted if the complainant had any anal injuries. However, the doctor had done only a visual examination of the genital area so I am not convinced that such a superficial examination would have discovered any injury in the annul cavity. On the other hand, the

complainant said that the accused withdrew from annul penetration after a few seconds when she started to scream in pain. In such a scenario it is possible that the complainant never got any injury on her anus.

63. The evidence of the doctor does not provide any tangible assistance to this court to solve the issue on penetration either of vagina or anus. However, the fact that the medical report (prepared on the basis of a belated examination) does not lend any support for complainant's claim does not mean that she was never raped anally, orally or vaginally.

[15] Thus, it is clear that the trial judge had solely relied on the complainant's testimony and her demeanor to bring home charges against the appellant as demonstrated by the judgment.

'66. I carefully observed complainant's demeanour in Court. Her conduct in Court was consistent with that of a genuine rape victim. She was straightforward in her answers and was not evasive. Having considered the totality of the evidence of the complainant and her demeanour in court, it is my considered view that her evidence is credible and reliable. Her conduct is consistent with that of an honest rape victim.'

[16] 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.'

[17] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) and **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) it was emphasised that in terms of section 23 (1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the

judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed but the proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

[18] The test to be applied under section 23 of the Court of Appeal in considering a challenge to a verdict of guilty on this basis has been elaborated again in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [the assessors were dispensed with by the Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] as follows:

> *'[23] ……**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 assessors 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**.'*

[19] This is the same test where the trial is held by a judge alone – see **Filippou v The Queen** (2015) 256 CLR 47).

[20] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court. In **Vulaca v State** [2012] FJSC 22;

CAV0005.2011 (21 August 2012) the Supreme Court elaborated the pronouncement in ***Ram*** as follows:

> *35. Praveen Ram Vs Sate (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors or differ from the opinion of the assessors. If the Judge differs he has to give his reasons.*
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> *36. ……..... As the appellate courts have not seen and heard the witnesses it cannot independently assess and evaluate the evidence led at the trial to the extent of a trial court judge. But an analysis of evidence is necessary for two reasons one is to ascertain whether there is evidence to convict the accused. If there is no evidence it is a question of law, the Court of Appeal have to take into consideration in arriving at its finding. The other is to ascertain whether on the given facts if a properly directed panel of assessors would have come to the same decision. This is to ascertain whether the assessors were properly directed in the application of law on the given facts. However the Court of Appeal will not set aside a verdict of a High Court on a question of law (s.21(1)(a)) or fact (s.21(1)(b)) unless a substantial miscarriage of justice has in fact occurred (s.22(6)).*

[21] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether the verdict is reasonable and supported by evidence ***and*** whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt; as expressed by the Court of Appeal in another way, whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). This exercise involves both subjective and objective elements which, however, do not exist in watertight compartments.

[22] Upon a perusal of the judgment, I have no doubt that verdict of guilty is reasonable and entirely supported by evidence.

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 of the Director of Public Prosecution for the Respondent