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

CRIMINAL APPEAL NO. AAU 0095 of 2019
[Suva High Court Criminal No. HAC 328 of 2016]

BETWEEN	:	**KERESONI WAQATAIREWA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, AP**
		Andrews, JA
		Winter, JA
Counsel	:	**Appellant in Person**
		Mr Taenuku for the Respondent
Dates of Hearing	:	**5 November 2024**
Date of Judgment	:	**28 November 2024**

JUDGMENT

1. The appellant **[**Keresoni Waqatairewa] was charged with the following offences in the High Court at Suva:

COUNT 1

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, had carnal knowledge of* ***IL*** *without her consent.*

COUNT 2

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of* ***IL*** *without her consent.*

COUNT 3

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1 and Count 2, had carnal knowledge of* ***IL*** *without her consent.*

COUNT 4

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, *on the 31st day of August 2016, at Nabua in the Central Division, assaulted* ***IL*** *causing her actual bodily harm.*

2. The appellant pleaded guilty to Count 4. He pleaded not guilty to the three counts of Rape for which he was charged.

3. Court was satisfied that the appellant fully understood the nature of the charge contained in Count 4 and the consequences of his guilty plea for the said count. Court found that he pleaded guilty on his own free will and free from any influence.

4. The ensuing trial in respect for the remaining three charges was held over a period of 7 days. At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused not guilty of Count 1; and by a majority decision the Assessors found the accused guilty of Counts 2 and 3.

5. In the judgement delivered on 29 May 2019, the appellant was found guilty and was convicted on the two counts of Rape and one count of Assault Causing Actual Bodily Harm. On one count of Rape, the appellant was found not guilty, after a unanimous not guilty opinion of the assessors, was accepted by the trial judge.

6. The appellant was then sentenced on 19 June 2019 to 10 years imprisonment with a non-parole period of 8 years. Due to the fact that the appellant was in remand for 1 year 2 months, this time is deemed and under section 24 of the Sentencing & Penalties Act 2009, to be imprisonment term and must be deducted from the sentence. The final sentence for appellant is 8 Years 10 months, with a non-parole period of 6 years 10 months.

The Appeal

7. The appellant had lodged a timely appeal against conviction pursuant to section 21 (1) (b) of the Court of Appeal Act. At the Leave to Appeal Hearing the Appellant's submitted 7 grounds of appeal against conviction, which was considered by the court. After careful assessment of all the grounds submitted by the Appellant, in a ruling date 10 September 2021, the Resident Justice of Appeal hearing the application, found all the seven grounds of appeal as having no reasonable prospect of success on appeal and refused leave to appeal.

8. The appellant renewed his appeal to the full court under section 35(3) of the Court of Appeal Act and submitted two grounds of appeal against conviction. These are:

    i) The trial judge erred in law and fact by failing to make an independent assessment of the complainant's evidence on the issue of consent as regards the second and third counts of Rape;

    ii) The trial judge erred in law and fact when he did not accept the not guilty verdict as unreasonable or cannot be supported having regard to the evidence. This was especially after all the assessors found the appellant not guilty on count 1 of the Rape charge, but guilty of the Rape charged in counts 2 and 3.

Assessment – Grounds 1 & 2 both deal with consent

9. At the appeal hearing the appellant submitted that the verdict was unreasonable given the fact that the assessors had opined that he was not guilty of Rape in count 1 and the trial judge accepted it and he was not convicted of that count. The appellant argues that because of that the same finding, not guilty of Rape should also be the finding for the two Rape counts for which was found guilty by the court. The appellant submits the trial judge erred in law because the verdict was unreasonable given the evidence at the trial. This is ground has no merit.

10. The Supreme court in **Rokete v State [2022] FJSC 11**; per Keith J at paragraph 109:

> *"109. Marsoof J's observation about the appellate court having to evaluate the evidence and independently assess it has to be seen in its context. He was explaining what the appellate court has to do in its "supervisory" role. When the appellate court is independently assessing the evidence, it is doing so to satisfy itself, to use Marsoof J's own words, "that the ultimate verdict is supported by the evidence and is not perverse". In other words, the function of the Court of Appeal is to look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the accused was guilty of the charge he faced. It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused".*
> [Highlight Mine]

11. At the hearing, and in light of the nature of the submission being made orally by the appellant, it was pointed out to him that at the trial there was only one issue that needed to be established beyond reasonable doubt and that is whether there was consent for the Rape charged in counts 2 and 3. All the other elements of the offence was admitted to by the appellant as part of the agreed facts, namely, he agreed that he had sexual intercourse with the complainant: Refer to paragraphs 12 to 16 of the High Court Judgement.

12. On the evidence directly relevant to the issue of 'consent" the trial judge stated, as follows, at paragraphs 17 and 18 of the Judgement:

> *"**17]** Therefore, the main issue for determination is the issue of consent. The prosecution should prove beyond reasonable doubt that the accused penetrated the complainant's vagina, with his penis, without her consent, on all three occasions. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis on the three occasions, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented.*
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> ***[18]** The complainant testified that she did not consent to the three acts of sexual intercourse with the accused. The accused denies this and testified that the complainant did consent to the three acts of sexual intercourse".*

13. In reviewing the evidence considered by the trial judge, at paragraphs 29 to 31, the evidence he considered as relevant in assessing whether consent was given by the complainant:

> *"**[29]** After the first time the accused had intercourse with the complainant, the complainant testified that she had been wanting to leave. However, the accused had insisted that she remains. She couldn't leave as she was naked. The accused had refused to give her clothes back to her. The accused had left the clothes besides the mattress, where they were lying down. About 30 minutes later, the accused had wanted to have sexual intercourse with her once again. However, she had refused. Notwithstanding, the complainant testified that the accused had forced himself on her and had sexual intercourse.*
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> ***[30]** Even at this point in time the complainant had wanted to leave the house. However, the accused had still insisted that she remains. She still couldn't leave the house as she was naked. Sometime later, the accused had wanted to have sexual intercourse with her for a third time. The complainant had again refused. Notwithstanding, the complainant testified that the accused had forced himself on her and had sexual intercourse.*
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> ***[31]** From the testimony of the complainant it is evident that the accused had kept the complainant in virtual captivity in their home after he had indulged in sexual intercourse with her the first time. Therefore, Court is of the view that the complainant was not in a position to give her consent freely and voluntarily.*

14. The evidence highlighted in the paragraph 12 and 13 above were put to the appellant during the hearing of this appeal he merely repeated that the complainant had consented, despite the fact that he was reckless in finding out whether complainant was consenting to the rape perpetrated on her by the appellant.

15. In light of the above evaluation of the totality of the evidence in this case, it was reasonable and open to the assessors and the trial judge to find the appellant guilty as charged in Counts 2 and 3 of the Rape charges. We find the appellant appeal has no merit and it is dismissed.

ORDER:

1. The Appeal against conviction is dismissed.

2. The conviction and sentence of the High Court in this matter is affirmed.

Hon. Justice Isikeli Mataitoga
ACTING PRESIDENT, COURT OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Gerard Winter
JUSTICE OF APPEAL