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

**CRIMINAL APPEAL NO. AAU 68 of 2021**
**[In the High Court at Suva Case No. HAC 365 of 2019]**

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| **BETWEEN** | : | **SAMUELA MACEDRU** |
| | | ***Appellant*** |
| **AND** | : | **THE STATE** |
| | | ***Respondent*** |
| **Coram** | : | **Prematilaka, RJA** |
| **Counsel** | : | **Appellant in person** |
| | : | **Ms. U. Tamanikaiyaroi for the Respondent** |
| **Date of Hearing** | : | **14 March 2024** |
| **Date of Ruling** | : | **15 March 2024** |

# RULING

[1] The appellant had been found guilty at Suva High Court on the following count:

*'**COUNT 1***

***Statement of Offence***

***RAPE**: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

***Particulars of Offence***

***SAMUELA MACEDRU,** between the 1st day of January and the 31st day of December 2019, at Koro, in the Eastern Division, penetrated the vulva of **SL**, a child under the age of 13 years, with his finger.'*

[2] The High Court judge found the appellant guilty and on 07 October 2021 sentenced him to a period of 10 years' imprisonment with a non-parole period of 06 years and 08

months. After the remand period was deducted, the effective sentence was 09 years and 01 month imprisonment with a non-parole period of 05 years and 09 months.

[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 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] Further 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].

[6] One night in August 2019, the complainant, SL (11 years old at the time) went to watch movies at Tukai Lepani's house with Ledua and Litia. Later, as she was walking towards her grand-mother's house, she saw Samu, the appellant who asked her whether they could go together to the village hall. She replied 'yes'. While they were going to the village hall, the appellant suggested to her whether they could have sex (veikaba). She said 'yes'. After that they went to the hall. He opened the door at the hall and both entered and went inside. Then she took off her trousers and her undergarments and lied down spreading her legs. She was lying facing up. The appellant was sitting down with an open leg and he

took one of his fingers and penetrated inside her vagina (the complainant used the term vagina in English). He pulled his finger out and shook his hand. She told him that it was painful. After that he kissed her and stood up. At the same time she also got up and wore her under-garment and trousers. After that both came back outside and the appellant told her not to tell anyone else. The appellant went back to his house, while she went back to her house.

[7] The appellant, 19 years of age at the time the offence was committed, gave evidence and said that in the year 2019 he was staying more frequently in Suva then Kade Village. He totally denied all the allegations made by the complainant against him. He said that after the village hall was renovated the village headman used to lock the door and take the keys with him. The witness said that he had no sexual feelings for the complainant. When asked to explain further he said: *"Firstly because of our age difference. And secondly because we have a good relationship with her father".*

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

> ***Conviction:***
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> ***Ground 1***
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> *THAT the Learned Judge erred in law and fact by not adequately considering the inconsistencies of the complainant's evidence.*
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> ***Ground 2***
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> *THAT the conviction of Rape is not supported by the totality of evidence as the complainant is not a credible witness.*
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> ***Ground 3***
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> *THAT the circumstances of the reporting of the complaint was not about me but another person, who had given her a love bite on her neck.*
>
> ***Ground 4***
>
> *THAT his father searched for the boy and then reported the matter to police.*
>
> ***Ground 5***
>
> *THAT she admitted that she had ditched several boys in the village but no charges can be laid for either sexual assault or rape.*

***Sentence:***

***Ground 6***

*THAT I am imposed with a harsh and excessive sentence of 5 years and 9 months after remission.*

***Ground 7***

*THAT the appellant seeks a further reduction in sentence with conviction appeal pending before the court of appeal.*

***Ground 1 & 2***

[9] In a nutshell, the appellant seems to argue that the verdict is unreasonable or cannot be supported by evidence. 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.

[10] 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'***

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

[12] 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.*

*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)).*

[13] 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.'*

[14] 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.

[15] The appellant particularly refers to the following questions and answers of SL to highlight the possibility of a mistaken identity in her evidence at paragraph 20 (xxii) of his judgment.

> *Q. 'Would it be correct to say that you could have been mistaken that it was Samu that night?*
> *A. Yes.*
> *Q. Would it be correct to say that because there was no light in the village hall and the moonlight which was outside – you could have been mistaken that it was Samu?*
> *A. Yes.*

……

*Q. Is it possible that because of the other 4 names (Tukai Amena, Tukai Bola, Peni and Pita) you have mentioned and the different incidents, you could have been mistaken with regard to the incident naming Samu?*

*A. Yes.*

[16] He also draws attention to the following omissions, inconsistencies and contradictions in her evidence as highlighted by the trial judge at paragraph 20(xxi) of his judgment possibly affecting her credibility.

*i. 'In her testimony in Court, the witness said that Samu had asked her to go together with him to the village hall and that she had agreed.*

*However, in her statement made to the Police (Answer to Question No. 66), it is recorded as follows:*

*"He took me forcefully towards the village hall, opened the door and pulled me inside on the middle of the hall".*

*The complainant denied having said so in her Police Statement.*

*ii. In her testimony in Court the witness said that she had seen Samu from the light of the moon inside the village hall. However, no mention has been made of this fact in her statement made to the Police.*

*iii. In her testimony in Court the witness said that Samu had asked her to go with him and have sex (veikaba). However, no mention has been made of this fact in her statement made to the Police.*

*iv. In her testimony in Court the witness gave a specific description of the person she had seen that night. She said that the person was tall, was fair in complexion, had short hair and was slim. However, no mention has been made of this fact in her statement made to the Police.*

*v. In her testimony in Court the witness said that she took off her trousers and under-garments and laid down in the village hall. However, no mention has been made of this fact in her statement made to the Police.*

[17] According to the judgment the complainant had tried to explain those under re-examination at paragraph 20 (xxiv) of his judgment.

*(i)* '*Regarding the omissions with regard to her statement made to the police:*

*- When asked as to why she did not tell the police that Samu had asked her to go with him and have sex (veikaba), she answered that she was scared of the police.*

*- When asked as to why she did not tell the police that she had seen Samu from the light of the moon inside the village hall, she said she forgot to say so.*

*- When asked as to why she did not tell the police about the description of the person she saw that night, the witness said: "They did not ask".*

*- When asked as to why she did not tell the police that she took off her trousers and her under-garments and laid down, she said that she was ashamed.*

*(ii) The complainant clarified that it was Samu she saw that night and not someone else. She also clarified that she was not mistaken with regard to the incident naming Samu and that it was Samu who had done the alleged act to her that night.*

[18] The problem with some of the omissions, inconsistencies and contradictions is they seem to go to the question of consensual sex which was not in issue as the complainant was under the age of 13 years. The trial judge had said that the complainant had provided acceptable explanations for the inconsistency and omissions in her evidence, which were highlighted by the defence, specifically with regard to her police statement.

[19] Some other answers may affect the identity of the appellant. In other words, whether it was a case of mistaken identity by the complainant. However, it is common ground that the appellant and the complainant were not strangers. They were known and related to each other. In respect of that the trial judge had concluded that he was satisfied that the prosecution had established beyond reasonable doubt that it was the appellant Samuela, who the complainant refers to as Samu, and who she had met near Lisi's house in the month of August 2019, at Koro Island and that that it was the same Samuela who had taken the complainant to the village hall that night. The judge had emphasized that Samuela was not a total stranger to the complainant and they were related and known to each other for a long period of time. Despite challenges to the

light available for recognition, I do not think that there should be real concern on the complainant's ability to recognise the appellant.

[20] With regard to her proven instances of previous sexual encounters with several adults, they cannot by themselves negate the fact that the appellant too made use of the opportunity to engage with the complainant in a sexual relationship on the day in question. State counsel submitted that her grandparents Amena and Bola who had sexually abused her before had been separately charged and convicted. Peni who had given her love bites observed by her mother had not been charged but along with Peni and 3-4 others who had done similar acts on her, she had mentioned the appellant's name thus exposing the appellant's acts of sexual abuse.

[21] 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 (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015).

[22] Therefore, overall I do not see a reasonable prospect of success on these two grounds of appeal at a full court hearing.

***Ground 3 & 4***

[23] The fact that the initial police complaint was not made about the appellant is no basis for not to charge him for his act of sexual abuse revealed later in the course of the investigation.

***Ground 5***

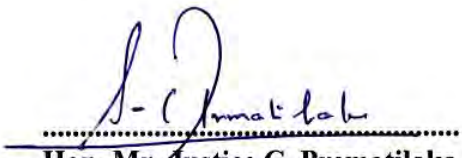
[24] This ground had no merit at all and frivolous.

***Ground 6 & 7 (sentence)***

[25] Having examined the sentencing order, I find no sentencing errors at all. In **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018), Chief Justice Gates stated that the sentencing tariff for the rape of a juvenile should now be increased to between 11 and 20 years imprisonment. The appellant has received a below par sentence with a very generous non-parole period usually not imposed on a person convicted of child rape and he cannot reasonably ask for more leniency.

***Orders of the Court:***

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