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

CRIMINAL APPEAL NO. AAU 18 of 2022
[In the High Court at Suva Case No. HAC 156 of 2020]

BETWEEN	:	**JOJI MANASA VOUNIA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. Unaisi M. Ratukalou for the Respondent**
Date of Hearing	:	**21 March 2024**
Date of Ruling	:	**22 March 2024**

RULING

[1] The appellant had been changed at Suva High Court on the following counts:

'***Count 1***

Statement of Offence

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

Particulars of Offence

JOJI MANASA VOUNIA, *between the 7th day of May 2020, at Suva, in the Central Division, penetrated the anus of* ***MUN****, a child under the age of 13 years, with his finger.*

Count 2

Statement of Offence

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

Particulars of Offence

JOJI MANASA VOUNIA, *between the 7th day of May 2020, at Suva, in the Central Division, penetrated the vulva of* ***MUN****, a child under the age of 13 years, with his finger.*

Count 3

Statement of Offence

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

Particulars of Offence

JOJI MANASA VOUNIA, *between the 7th day of May 2020, at Suva, in the Central Division, on an occasion other than mentioned in Count 1, penetrated the anus of* ***MUN****, a child under the age of 13 years, with his finger.*

Count 4

Statement of Offence

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

Particulars of Offence

JOJI MANASA VOUNIA, *between the 7th day of May 2020, at Suva, in the Central Division, on an occasion other than mentioned in Count 2, penetrated the vulva of* ***MUN****, a child under the age of 13 years, with his finger.*

Count 5

Statement of Offence

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

Particulars of Offence

JOJI MANASA VOUNIA, *between the 7th day of May 2020, at Suva, in the Central Division, on an occasion other than mentioned in Count 1 & Count 3, penetrated the anus of* ***MUN****, a child under the age of 13 years, with his finger.*

Count 6

Statement of Offence

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

Particulars of Offence

JOJI MANASA VOUNIA, *between the 7th day of May 2020, at Suva, in the Central Division, on an occasion other than mentioned in Count 2 & Count 4, penetrated the vulva of* ***MUN****, a child under the age of 13 years, with his finger.'*

[2] The High Court judge had acquitted the appellant of counts 1, 3 and 5 at the 'no case to answer' stage and at the end of the trial found him guilty of counts 2, 4 and 6 and on 03 March 2022 sentenced him to a period of 12 years' and 8 months imprisonment with a non-parole period of 9 years' and 8 months imprisonment.

[3] The appellant's appeal against conviction is out of time by 01 month and 02 weeks but the delay could be excused as he had appealed in person.

[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 victim's evidence had been summarised by the trial judge in the judgment at paragraph 22 as follows:

> *'(xvi) Inside Sai's room the accused had used both his hands to carry her. He had touched her thighs and lifted her – the witness demonstrated as to how this had happened. When asked to explain what she meant by touched, the witness said: "He grabbed hold of my thighs and he lifted me." He had held her from behind/back upper region of her thighs and lifted her.*

(xvii) After the accused had carried her up she was standing on a luggage. After she stood on the luggage then the accused had been touching between her thighs. When asked if she knows a name to describe that area the witness said she did not. However, when she was asked what she usually uses that area for she said: "The place where a female would urinate".

(xviii) The complainant explained further that the accused had used his left hand to touch her in that area. When asked which part of the hand she said the middle finger (the witness demonstrated by showing the middle finger of her left hand). She said the accused was rubbing that area. She had felt afraid and also felt pain at the place he was touching. She said: "In the middle of me". She again said that it was the place from where females urinate from. When asked for how long the accused was touching her or rubbing her in that area she said about 7 seconds.

(xix) The witness was asked whether the accused touched any other part of her body whilst inside Sai's room and she answered no.

(xx) The complainant was asked to explain further the manner in which the accused touched her in the living room (the door in the living room). She said that the accused had carried her in the same way he had done on the first occasion. In this instance too the accused had touched her between her thighs at the place where females urinate from. The accused had used the middle finger of his right hand to touch her. When asked if the accused's hand was over her trousers or inside her trousers she said inside her trousers [even in Sai's room when the accused had touched her his hands had been inside her trousers].

(xxi) The witness said that she had again felt pain at the place where the accused was rubbing her – the place where females urinate from. When asked how long the accused was doing this for she said 7 seconds.

(xxii) The witness was asked whether the accused touched any other part of her body whilst in the living room and she answered no.

(xxiii) The complainant was next asked to explain further the manner in which the accused had touched her in the children's room. She said the accused had touched her with his left middle finger. In the children's room he had told her to reach above the door of the room. On the corner of the door there was a shelf where the witness had stood on. The accused had lifted her so as to enable her to stand on the shelf. He had used both his hands to carry/lift her. The accused had used his left middle finger to touch her at the time the complainant was standing on the shelf (not while lifting her). He had touched her for 7 seconds. He touched her in the place where females urinate from. She had again felt pain in that part of her body where he had been rubbing his finger.

[6] The grounds of appeal urged by the appellant against conviction are as follows:

Ground 1

THAT the Learned Trial Judge erred in law in failing to analyse credible evidence and in fact independent evidence such as the medical report so as to support a conviction for a lesser offence.

Ground 2

THAT the Learned Trial Judge erred in law and in fact when he took the unfair decision to acquit the appellant on counts 1, 3 and 5 of the information without taking into consideration the sudden and unexpected movement taken by the appellant to rescue the little girl or the complainant from falling from that height which can cause serious injuries. And a reasonable tribunal cannot convict on this separate act where the vulva and the anus was both penetrated at once by the appellant. If counts 1, 3 and 5 are acquitted then counts 2, 4 and 6 should be acquitted too since those following acts evolved from counts 1, 3 and 5. Therefore the convictions on counts 2, 4 and 6 is unsatisfactory to stand in this circumstances must be acquitted too.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he failed to take on board upon assessment of the facts the incredible time span this acts was committed as alleged by the complainant, a time frame of 7 seconds to penetrate both the anus and the vulva at the same time as in the information. Failure to do so created injustice upon the trial miscarrying it along the way to end up with an unsafe conviction.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he took the recent complaint evidence to strengthen the prosecution's case even though there were admitted inconsistencies and omissions in the victims or complainants evidence and witness evidence. And the Learned Trial Judge misled the trial court about acceptable explanations given in spite of the fact that this explanations cannot be fully comprehended. Considering this error of law, the conviction is deemed unsafe.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he failed independently analyse the medical report independent evidence to support the recent complaint threshold test in law. Failure by the trial judge to properly assess the findings of this expert independent evidence can cause the trial to miscarry.

Ground 1 & 5

[7] Neither the prosecution nor the appellant had relied on or called any medical evidence nor produced the medical report as part of their respective cases. Therefore, these grounds of appal are misconceived.

Ground 2

[8] The appellant argues that because he was acquitted of counts 1, 3 and 5, he should have been acquitted of counts 2, 4 and 6 as well as all charges were to be supported by the victim's evidence.

[9] The appellant was acquitted of counts 1, 3 and 5 simply because there was no evidence at all of anal penetration coming from the victim. The acquittals were not based on questionable credibility on her part. Therefore, there was nothing wrong in convicting the appellant on counts 2, 4 and 6 based on the victim's evidence credibility of which was enhanced by her recent complaint to Latileta Liauselala (PW2). The fact that the victim had not sought to falsely implicate the appellant in any act of anal penetration by digital means also goes to her enhanced credibility as a truthful witness.

Ground 3

[10] The gist of the appellant's complaint is that within a time frame of 07 seconds, he could not have committed both anal and vulva penetration and therefore, the victim's evidence should be deemed improbable.

[11] The fact is that the victim never said under oath that the appellant committed anal penetration resulting in him being acquitted of counts 1, 3 and 5. Secondly, by and large victims of sexual abuse estimate time by guess work and not by the clock. Moreover, the victim was just 10 years old. In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280) the Supreme Court of India held:

> *(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the*

spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the 'time sense' of individuals which varies from person to person.

[12] In view of the law governing the evidentiary value of a recent complaint evidence as pronounced in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014), the trial judge had correctly treated the evidence of Latileta Liauselala (PW2) only as enhancing the credibility of the victim (paragraph 44 of the judgment) and not corroboration. As to the inconsistencies in the evidence of the victim and PW2, the trial judge had dealt with them at paragraph 45 and held that the same had been explained and therefore did not affect the credibility of those witnesses. 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 [**Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

[13] Though these grounds of appeal are without merit, the more pressing and the real concern, to my mind, is the inadequacy of reasons in the judgment for the crucial issue of penetration.

[14] I had the occasion to consider the issue of inadequate reasons in somewhat detail in **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023) and **Prasad v State** [2023] FJCA 280; AAU45.2022 (18 December 2023) and the proposition of law, I arrived at is as follows:

'Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's

explanation in its own reasons is sufficient. There is no need in that case for a new trial.'

'If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court i.e. to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an error of law within the meaning of section 23 of the Court of Appeal Act. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act.'

[15] Having perused the judgment in this case and applying the above proposition of law, I am not satisfied that there is adequate reasons for the determination that the element of penetration had been established beyond reasonable doubt which may amount to an error of law. The victim's evidence as summarised in the judgment is that the appellant touched and/or rubbed where females urinate with his left hand middle finger and she felt pain. Nowhere in the judgment does it say that the victim had spoken to penetration or insertion of the appellant's finger. Thus, it appears that the only way the element of penetration could be inferred circumstantially was from the evidence of touching/rubbing the victim's vulva by the appellant coupled with her feeling pain.

[16] On the contrary, however, the trial judge seems to have introduced the word 'insertion' at paragraphs 22 (xxx) and 40 of the judgment on his own without any evidence (at least according to the judgment) or proper analysis.

*'**[39]** Now with regard to the all-important physical element which the prosecution has to prove. That is that the accused penetrated the vulva of the complainant with his finger, on the three occasions.*

***[40]** I have considered the prosecution evidence in relation to the remaining charges. The complainant has clearly testified to the manner in which the accused had touched her or inserted his middle finger at the place where females urinate from, on the three occasions.*

[17] However, whether the inadequacy of reasons has resulted in a substantial miscarriage of justice as opposed to a mere error of law amounting a miscarriage of justice, is a matter for the full court to decide upon reading the transcript of trial proceedings.

Law on bail pending appeal

[18] The legal position is that the appellants have the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellants when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellants have to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, appellants can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***),*** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[19] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[20] If the appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[21] I am allowing leave to appeal against conviction to enable the full court to examine the transcript to decide on the question of penetration and not on 'reasonable prospect of success' of the appeal itself [see **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)]. Therefore, the requirement of 'very high likelihood of success' for bail pending appeal is not satisfied.

[22] In the circumstances, I am not inclined to release the appellant on bail pending appeal at this stage.

Orders of the Court:

1. *Leave to appeal against conviction is allowed.*
2. *Bail pending appeal is refused.*

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent