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

CRIMINAL APPEAL NO. AAU 045 of 2021
[In the High Court at Suva Case No. HAC 44 of 2020]

BETWEEN : **PRASHANT NISCHAL DASS**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. Y. Kumar for the Appellant**
: **Ms. L. Swastika for the Respondent**

Date of Hearing : **03 April 2024**

Date of Ruling : **04 April 2024**

RULING

[1] The appellant had been changed at Labasa High Court with the following count:

'***Statement of Offence***

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

Particulars of Offence

PRASHANT NISCHAL DASS *on 3rd December 2019, at Seaqaqa in the Northern Division, penetrated the vagina of* **APIKALI WAQAVONOVONO,** *with his fingers, without her consent.'*

[2] The High Court judge convicted the appellant and on 19 March 2021 and sentenced him to a head sentence of 08 years and 11 months of imprisonment with a non-parole period of 04 years and 11 months.

[3] The appellant's appeal against conviction is timely.

[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 evidence had been summarised by the trial judge in the sentencing order as follows:

> 2. *To state the facts very briefly, you being an intern nurse, made false and fraudulent representations to the victim who was a six months pregnant mother at the material time during the antenatal clinic held at Naqumu Nursing Station on 03/12/19, that it is part of your duty as a nurse during that clinic to penetrate her vagina with your fingers and then you inserted two of your fingers inside her vagina and kept your fingers inserted in her vagina for a considerable period of time, twisting your fingers inside her vagina. It was clear from the evidence given by the victim that you did not obtain her consent for this act at all and she simply allowed you to penetrate her vagina, because of your misrepresentation and because she had placed her trust on you as a nurse.*

[6] The appellant had preferred 12 grounds of appeal against conviction but his counsel only urged grounds 1, 3 and 09-11 at the hearing and stated that the appellant wishes to abandon the rest of the grounds:

> '***Ground 1:***
>
> *THAT the Learned Trial Judge erred in law and in fact in failing to properly evaluate evidence of all the witnesses.*

Ground 3:

THAT the Learned Trial Judge erred in law and in fact in failing into account that the accused was only an intern nurse and had not been given proper training and as such his knowledge of the procedure of vaginal examination should not have been compared with other far experienced nurses and doctors.

Ground 9:

THAT the Learned Trial Judge erred in law and in fact when he came to a finding that the accused had not obtained consent of the victim by falsely representing to her that it was a job of the nurse to touch her.

Ground 10:

THAT the Learned Trial Judge erred in law and in fact when he came to a finding that the accused had not obtained consent of the victim to insert his fingers in her vagina.

Ground 11:

THAT the Learned Trial Judge erred in law and in fact when he came to a finding that the accused's representation was fraudulent.'

[7] In addition, the appellant's written submissions has taken up the position that he should have been charged under the Nursing Act 2011 and not under the Crimes Act 2009. However, the appellant has made no written submissions on any of the grounds of appeal urged at the hearing.

Ground 1

[8] The trial judge had in a very comprehensive judgment spanning 27 pages and 70 paragraphs discussed every aspect of the case including evaluating and analysing the evidence on both sides. This ground of appeal has no basis and merit at all.

Ground 3

[9] It appears that although DW2 has said in his evidence that it is important to conduct a vaginal examination on a patient who had presented herself at a clinic for the first time for good reasons, DW2 has not said that this was a mandatory procedure. More importantly, DW2 has said that this vaginal examination is usually done by a doctor or

a midwife. The appellant was neither a doctor nor a midwife. In addition, the appellant had a bachelor's degree in nursing and was posted to Naqumu Health Centre on 03/11/19 as part of his public health attachment. He had not worked in an obstetrics and gynaecology department but he worked with PW2 (experienced nurse) for 02 weeks (from 16/12/19 till 03/01/20) until PW2 went on leave. He had received guidance from PW2 as to his responsibilities during this period. For one month till 16/12/19 the appellant was on his own as the relieving nurse due to the shortage of staff as assigned by PW3.

[10] The trial judge had concluded upon considering all the evidence that his act was penetrating the complainant's vagina was not due to his want of experience or knowledge but a deliberate and calculated act having deceived the complainant and obtained her ostensible consent for the same which did not amount to real and true consent. I see no good reason to disagree with the trial judge.

Ground 9, 10, & 11

[11] The appellant challenges the trial judge's conclusion that the appellant had not obtained the complainant's (PW1) consent because he falsely represented to her that it was a job of a nurse to insert the fingers inside her vagina.

[12] These appeal grounds encompasses the fundamental issue in this case whether there was real and true consent given by the victim for the appellant to insert his fingers into her vagina constituting digital penetration.

[13] It is common ground that the appellant did penetrate the complaint's vagina with his fingers. According to her, the appellant simply informed her that he will touch her inside and she should remove her panty, before going inside the examination room and then at the examination room after listening to the heartbeat by using the machine on her stomach, he requested her to remove her undergarments after telling her that it is his job as a nurse to touch her. After she removed her undergarments, he inserted two fingers inside her vagina.

[14] The appellant has admitted that he did insert his fingers inside PW1's vagina on 03/12/19 but he did it with PW1's consent, after explaining to PW1 of the reason why he had to insert his fingers. He has said in his evidence that what he did was, being the relieving nurse at the material time at Naqumu Nursing Station, to simply perform a vaginal examination to determine whether the baby was in the correct position and two other factors because he could not feel the fetus completely during his external examination.

[15] The appellant had agreed that the complainant was not in labour. He had also said that during examination he touched the baby's head. PW2 and PW3 had testified that the position of the fetus can be known by palpation of the abdomen and if palpation is inconclusive an ultra sound is done. The prosecution evidence showed that vaginal examination was unnecessary at the gestational age of the baby and a baby does not descend to the birth canal at 07 months of pregnancy.

[16] The trial judge has stated that PW1 allowed the appellant to penetrate her vagina because he told her and made her believe that it was his job as a nurse to touch her when he had no authority to do so. He had twisted his fingers inside her vagina for about 20 minutes and only stopped when the phone rang and he had to leave the room. As per the judgment, PW2 and PW3 explained that being a nurse in itself does not give the right to perform procedures on patients and nurses need to obtain consent of patients before conducting such invasive procedures. Therefore, the judge had concluded that it was a false representation by the appellant as to the purpose of the act of penetration and because he intended by this representation to deceive PW1 into allowing her vagina to be penetrated by his fingers, the representation was fraudulent. The trial judge has further concluded that the appellant very well knew that he would not be able to touch the baby's head by inserting two of his fingers inside PW1's vagina and he knew that he did not touch the head when he performed the penetration. Yet, when PW1 asked about the progress, he told her that he managed to touch the baby's head and that the baby said 'bula'. He had not recorded that he performed a vaginal examination either. This conduct of the appellant, according to the judge, further reinforces the fact that he had the intention to deceive PW1 and because of this false and fraudulent representation, PW1 allowed her vagina to be penetrated by

the appellant with two fingers. Thus, the judge had determined that PW1 did not freely and voluntarily consent to the act of penetration.

[17] The real concern, to my mind, here is whether there is any inadequacy of reasons in the judgment for the trial judge's conclusion.

[18] 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.'*

[19] Having perused the judgment in this case and applying the above proposition of law, I am not satisfied that the reasons are inadequate for the acceptance of the prosecution

case and rejection of the defence case and ultimately the verdict of guilty. Reasons are sufficiently intelligible to permit appellate review of the correctness of the decision.

[20] For any concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows (which is the same test where the trial is held by judge alone – see **Filippou v The Queen** (2015) 256 CLR 47):

> *'[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**'*

[21] 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.

[22] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was

undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[23] 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.'*

[24] 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 carry 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 or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, to decide 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).

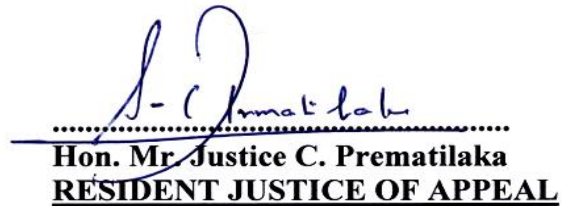
[25] Having considered the comprehensive judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence.

[26] I have considered the appellant's submission that he should have been charged under the Nursing Act 2011 and not under the Crimes Act 2009. This contention is simply misconceived. Section 65 of the Nursing Act shows that in any disciplinary

proceedings under the Nursing Act, the Committee may take proceedings in any previous criminal proceedings into account in its deliberations. Thus, the disciplinary proceedings under the Nursing Act 2011 and criminal proceedings under the Crimes Act 2009 can take place either simultaneously or separately. One does not exclude the other. One is not a legal bar to the other.

Order of the Court:

1. Leave to appeal against conviction is refused.



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

Solicitors:

Jiten Reddy Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent