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

CRIMINAL APPEAL NO. AAU 102 of 2022
[In the High Court at Suva Case No. HAC 94 of 2019]

BETWEEN	:	**SIMIONE PAKI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**16 April 2024**
Date of Ruling	:	**18 April 2024**

RULING

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

*'**COUNT ONE***

Statement of Offence

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

Particulars of Offence

***SIMIONE PAKI,** between the 1st day of July 2018 and the 31st day of July 2018, at Nasinu, in the Central Division, unlawfully and indecently assaulted **MWM**, a child under the age of 13 years, by sucking the unclothed breast of the said **MWM**.*

COUNT TWO

Statement of Offence

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

Particulars of Offence

SIMIONE PAKI, *between the 1st day of July 2018 and the 14th day of January 2019, at Nasinu, in the Central Division, penetrated the vulva of* ***MWM****, a child under the age of 13 years, with his tongue.*

COUNT THREE

Statement of Offence

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

Particulars of Offence

SIMIONE PAKI, *between the 1st day of July 2018 and the 14th day of January 2019, at Nasinu, in the Central Division, penetrated the vagina of* ***MWM****, a child under the age of 13 years, with his finger.*

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE*: Contrary to Section 208 of the Crimes Act 2009.*

Particulars of Offence

SIMIONE PAKI, *between the 14th day of January 2019 and the 31st day of January 2019, at Nasinu, in the Central Division, attempted to have carnal knowledge of* ***MWM****, a child under the age of 13 years.'*

[2] After assessors' opinion of guilty, the High Court judge had convicted the appellant and sentenced him on 15 October 2020 as follows and directed that all sentences should run concurrently subject to a non-parole period of 11 years.

'Count 1 – Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 4 years' imprisonment.

Count 2- Rape contrary to Section 207 (1) and 2(b) and (3) of the Crimes Act – 14 years' imprisonment.

Count 3 – Rape contrary to Section 207 (1) and 2(b) and (3) of the Crimes Act – 14 years' imprisonment.

Count 4- Attempt to Commit Rape contrary to Section 208 of the Crimes Act – 4 years' imprisonment.

[3] Considering the time the appellant spent in remand, the time remaining to be served is as follows:

Head Sentence - 13 years and 2 months imprisonment.

Non-parole period - 10 years and 2 months imprisonment.

[4] The appellant's appeal against conviction is untimely.

[5] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] The delay in the sentence appeal is almost two years and very substantial. The appellant's explanation for this inordinate delay is that he was unaware of the appeal process and his trial counsel had not advised him. However, the sentence order clearly states that he could appeal within 30 days. Thus, his explanation is unacceptable. However, I would still see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[7] The trial judge has summarised the victim's evidence (she was 10 to 11 years at the time of the incidents) at paragraph [93] in the summing up as follows:

'*(i) The complainant testified that she is 12 years old. Her date of birth is 26 September 2007. A copy of her birth certificate has been tendered by consent, and has been attached to the Amended Agreed Facts. She is schooling at Dilkusha Girls High School and is currently in Year 8.*

(ii) *The witness said that she currently lives at Davuilevu Housing. She testified that she is staying there with her parents and her brothers. Her father's name is Joseph Morell and her mother's name is Miliakere. She has 4 brothers and one sister. It is an agreed fact that her siblings are Vani Morrell, Luke Morrell, Mosese Morrell, Alick Morrell and Josefa Morrell. The complainant said that currently Vani is 19 years old, Luke is 18 years old, Mosese is 14 years old, Alick is 10 years old and Josefa is 7 years old.*

(iii) *The witness testified that in July 2018, she was staying at Davuilevu Housing together with her parents and her younger brother Alick. Her brother Luke was staying in Wailoku with her cousin, while her sister Vani was staying with her grandparents at Koronivia. Her brothers Mosese and Josefa were also staying with her sister Vani, at her grandparents' place.*

(iv) *The accused Simione Paki had come to stay with them in June 2018. It is an agreed fact that Simione is the brother of her grandmother, and that the complainant refers to Simione as grandfather.*

(v) *The complainant drew a rough sketch of the house that she was staying at – the said sketch was tendered to Court as Prosecution Exhibit PE1.*

(vi) *The witness testified to an incident which happened in July 2018. She said that she and her brother Alick came back home after school. It was at 3.00 o'clock. When they returned home only Simione was at home. She and Alick had attended to the house work.*

(vii) *She had then gone to Simione to ask him if she and Alick could go out and play with their neighbour Kirisi (who is also now 12 years old). Simione had only allowed Alick to play with her neighbour Kirisi, but not allowed her to go and play. When asked the reason why Simione had not allowed her to go and play, the witness said "Because I was a girl."*

(viii) *The complainant then testified as follows: "After that I was yawning. I lift up my hands. Then Simione started to lick my arm pit. He pulled down my vest and then he sucked my breasts."*

(ix) *The complainant said that this incident took place in Simione's room. She specifically referred to the bench or chair in the room. The witness said that she had gone to Simione's room to ask for his mobile phone. Simione had told her to sit on the chair and play games on the phone. He then went out to close the curtains and the doors (both the doors of the house). Then he came back to the room. He told her to stand up and he sat on the chair. The witness said: "When I gave back his phone I was yawning and I lift up my hands. Then he started to lick my arm pit. Then he pulled my vest down and sucked my breasts."*

(x) *The complainant said that Simione had used his tongue to lick her arm pit, and that he used his mouth to suck her breasts. When asked for how long Simione had sucked her breasts, the witness said "For about seconds."*

Simione had sucked her right breast. At the time Simione licked her arm pit, pulled down her vest and sucked her breasts, he was seated on the chair but bending towards the front (bending towards her).

(xi) The complainant said that at the time she had been wearing a top and shorts. She said it was a short top with short sleeves. Later the witness described the top as a vest.

(xii) The complainant said that at the time the accused was doing those things to her, she had told him to stop or else that she will tell her dad. The accused had then stopped. He had told her don't tell anyone. "He said if you tell anyone he will not allow me to go to Australia."

(xiii) The witness said that she did not tell her parents or anyone else about the incident, because if she did so the accused would not allow her to go to Australia.

[8] The appellant, aged 51 to 52 at the relevant time (whom the victim called her grandfather or granduncle) had testified and totally denied the four charges against him and said that they were totally false. He had stated that the reason why such false allegations were made against him was due to the fact that the complainant and her family wanted him to leave the house, since it was a small house and the house was crowded.

[9] The appellant urged the following five grounds of appeal against conviction at the LA hearing.

Conviction:

Ground 1:

THAT the Learned Trial Judge erred in law and fact when he considered the opinion which the evidence of the complainant for the prosecution is insufficient evidence to prove all the elements of the first count of sexual assault, the second and third counts of rape and the fourth count of attempted rape beyond reasonable doubt on the offences charged and it is dangerous and unsafe to convict the appellant.

Ground 2:

THAT the Learned Trial Judge erred in law and fact when he accepted the assessors opinion as the complainant's evidence for the prosecution was inconsistent to prove the alleged second and third counts of the information beyond reasonable doubt.

Ground 3:

THAT the Learned Trial Judge erred in law and fact by failing to make an independent assessment on the complainant's evidence for the prosecution was insufficient evidence to establish the offence charge to prove the alleged rape in count two and three in the information beyond reasonable doubt.

Ground 4:

THAT the Learned Trial Judge erred in law and fact when he did not given any cogent reasons to find the appellant guilty of the first count of sexual assault, second and third count of rape and fourth count of attempted rape.

Ground 5:

THAT the Learned Trial Judge erred in law and fact when he was concur with the unanimous opinion of the assessors as the complainant evidence for the prosecution adducing untruthful and incredible evidence to convict the appellant.

Ground 1

[10] The legal basis for this ground appears to be that the verdict is either unreasonable or cannot be supported by evidence.

[11] By no stretch of argument, could I say that the trial judge had not directed the assessors (see paragraphs 92-97) and himself considered (see paragraphs 4 & 18-25) the totality of evidence and analysed them (at paragraphs 98-111). 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 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] 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****'*

[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.

[13] 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)].

[14] 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.'*

[15] 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).

[16] Having considered the comprehensive summing-up and the more than adequate judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence. Nor has the appellant demonstrated why the trial judge could not have reasonably taken the view that he took on the totality of evidence.

02nd and 05th ground of appeal

[17] The inconsistences and omissions complained by the appellant are whether the victim lay on the bed herself or whether the appellant made her lie down. In the light of his defence of denial and not consent (which was immaterial anyway) this had little significance. He also highlights the fact that the victim had said in her police statement that her pants were removed but in evidence she had said that she was wearing a towel. The trial judge had dealt with how to deal with omissions and inconsistencies at paragraphs 20- 23, 103, 104 of the summing-up and placed before the assessors the omissions and inconsistencies highlighted by the defence at paragraphs 93(xxvii) and 93 (xxviii) of the summing-up. Neither the assessors nor the trial judge had found them to be so material as to discredit the victim's overall testimony.

[18] 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.

[19] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) it was held:

*'[13] .....the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. 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 (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

[15] 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. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.'

03rd and 04th grounds of appeal

[20] In it was held in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021):

*'[23] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]*

'[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.'

[21] The trial judge's judgment more than adequately comply with the above requirements and he had said that in his opinion the defence version cannot be accepted and the victim's evidence can be accepted as truthful, credible and reliable and there was absolutely no reason for her to make up this story against the appellant who is her granduncle or grandfather. In the trial judge's view, the assessors' opinion was justified and it was open for them to reach the conclusion that the appellant was guilty on the available evidence and considering the nature of all the evidence before the court, the prosecution had proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the first count of sexual Assault, the second and third counts of rape and the fourth count of attempted rape, with which the appellant is charged. This shows that the trial judge had indeed considered the assessors' verdict and given his mind independently as against the totality of evidence.

Order of the Court:

1. Enlargement of time to appeal against conviction is refused.

COURT OF APPEAL FIJI

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

Solicitors:

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