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

CRIMINAL APPEAL NO. AAU 063 of 2023
[In the High Court at Suva Case No. HAC 074 of 2021]

BETWEEN	:	**ATESHWAR PRASAD**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. Y. Kumar for the Appellant**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**23 April 2024**
Date of Ruling	:	**24 April 2024**

RULING

[1] The appellant was charged at Suva High Court with one count each of rape [sections 207(1), (2)(a), (3) Crimes Act)], sexual assault [sections 210(1)(a) & (2) Crimes Act], abduction of a person under 18 years of age with intent to have carnal knowledge [section 211(1) Crimes Act] and wrongful confinement [section 286 Crimes Act] committed on 21 July 2018 at Navua. The charges are as follows:

*'**COUNT 1***

Statement of Offence [a]

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

Particulars of Offence

ATESHWAR PRASAD*, on the 21st day of July 2018, at Navua in the Central Division had carnal knowledge of ANSHIKA RIYA KUMAR, a child under the age of 13 years.*

COUNT 2

Statement of Offence [a]

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) and (2) of the Crimes Act 2009.*

Particulars of Offence

ATESHWAR PRASAD*, on the 21st day of July 2018, at Navua in the Central Division unlawfully and indecently assaulted ANSHIKA RIYA KUMAR, a child under the age of 13 years by kissing her mouth and vagina.*

COUNT 3

Statement of Offence [a]

ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE: *Contrary to Section 211 (1) of the Crimes Act 2009.*

Particulars of Offence [b]

ATESHWAR PRASAD*, on the 21st day of July 2018, at Navua in the Central Division abducted ANSHIKA RIYA KUMAR, a child under the age of 13 years, with intent to have carnal knowledge of the said* ***ANSHIKA RIYA KUMAR****.*

COUNT 4

Statement of Offence [a]

WRONGFUL CONFINEMENT: *Contrary to Section 286 of the Crimes Act 2009.*

Particulars of Offence [b]

ATESHWAR PRASAD*, on the 21st day of July 2018, at Navua in the Central Division wrongfully confined* ***ANSHIKA RIYA KUMAR****, a child under the age of 13 years.'*

[2] The High Court judge found the appellant guilty and on 07 July 2023 sentenced him to an aggregate sentence of 13 years' and 10 months of imprisonment with a non-parole period of 10 year. Before the remand period was deducted, the sentence stood at 18 years of imprisonment.

[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 led the evidence of the victim (12 years of age at the time of offending), her sister, her mother, a driver called Tomasi Tabua, Dr. Lee and the investigating officer WDC Sylvia. The defence only called Dr. Pushpa Wati. The appellant was in his early forties at the relevant time. He did not give evidence but his defence was a denial and fabrication because of money.

[6] The trial judge had summarised the evidence as follows in the sentencing order:

> *[5] 'The facts are as follows. At the time of the offending, the complainant was 12 years old. She lived with her mother in Navua. The accused is from the same community. He is a businessman and owns a family service station.*
>
> *[6] On 21 July 2018, the complainant was walking back to her home from Navua town with her sister when the accused stopped his vehicle and offered them a lift. The vehicle was being driven by the accused's friend.*
>
> *[7] The complainant and her sister knew the accused as a family friend. They took the offer for a lift and got into his vehicle. They drove to a shop and the accused bought them fish and chips. After buying them fish and chips the accused invited them to show his farm.*
>
> *[8] They drove to a remote location. The two men were seen drinking beer in the vehicle. When they arrived at the remote location the complainant's mother called and told the accused to bring the girls home.*

[9] As they were driving, the accused pretended that his vehicle was stuck. He made the complainant's sister and his friend get out of the vehicle and give it a push. On the third occasion when the vehicle got stuck the complainant wanted to get out of the vehicle as well but the accused insisted she remain inside. As soon as the complainant's sister and the accused's friend got out of the vehicle, the accused drove off with the complainant leaving behind the complainant's sister and his friend at the remote location.

[10] The accused took the complainant to his house and got her inside the house to help him pack his bag. When the complainant entered a room the accused locked the room and prevented the complainant from leaving. He pushed her on a mattress and forcefully removed her clothes. He sexually assaulted her by kissing her on her lips, breast and vagina and then penetrated her vagina with his penis.

[11] The complainant resisted him but he managed to restrain her by taking a knife and placing it on her neck. While the complainant was inside the accused's house, her sister came and confronted the accused and threatened to report him to police when she saw the complainant half naked and in a distressed condition inside the house.

[12] The accused tried to settle the matter but the complainant's sister went ahead and reported the accused to police. On the same night the complainant was medically examined and the doctor found a lesion on the complainant's breast and redness on her perineal.

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

*'**Conviction:***

Ground 1:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the medical report in its totality as it did not speak about vagina penetration for the charges of rape to be sustained.

Ground 2:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider that the doctor who examined the complainant did not specify the age of injuries or the probable age of injuries thus creating a doubt in the prosecution case.

Ground 3:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider that no proof of the complainant's age before or during the alleged offence was known to the appellant and this has again created doubt on the prosecution case.

Ground 4:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the Police failed to assist the complainant's sister when she approached them thus rendering her testimony as unworthy of belief.

Ground 5:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that when the complainant boarded the vehicle, it was one Munesh who was driving and not the appellant.

Ground 6:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the mother of the complainant spoke to the appellant before the alleged offence, therefore she had knowledge of the fact that the complainant was in the company of the appellant and others.

Ground 7:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact the complainant allegedly went to the appellant's house on her own free will and at that time the appellant did not know her age as no evidence to that effect was presented to court.

Ground 8:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the complainant only reacted when her sister came to pick her up.

Ground 9:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the complainant's sister had said on oath that the appellant was jealous when he found her talking to Munesh thus her reaction to her sister being with the appellant.

Ground 1

[8] It is wrong to say that the trial judge had not considered the medical report in its totality *vis-à-vis* vaginal penetration. The judge had dealt with the medical evidence of Dr. Lee at paragraphs 32, Dr. Pushpa's evidence at paragraphs 35 and analyzed both at paragraph 47 and 48. His conclusion at paragraph 50 that the appellant had penetrated the victim's vagina is not entirely based on medical evidence but primarily on the victim's evidence coupled with medical evidence. Medical opinions of both doctors do

not rule out penetration. In fact, the injuries found in her genitalia clearly support an act of penetration.

[9] 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.'*

[10] The trial judge was entitled to take the view that there had been penetration and it was a view he could have reasonably taken on the totality of evidence. No other reasonable view was possible on evidence.

Ground 2

[11] It is clear from paragraph 48 of the judgment that the small bruise like reddish lesion on her the left breast was fresh and there was redness inside the vaginal area which demonstrate that the injuries were recent. The victim was examined at 9.30 pm and the incident had happened between 1.30 pm and 7.30 pm on the same evening. Thus, naturally the freshness of the injuries are to be expected and the testimony of the victim tallies with medical evidence.

[12] The appellant's position is a denial of the incident and not that it happened several days earlier. Thus, a definitive determination by medical evidence of the age of injuries is quite unnecessary in this case.

Ground 3

[13] There was no question of defilement instead of rape in this case in the light of the appellant's total denial of sexual intercourse. The appellant's knowledge of the victim's age did not matter for the charge of rape. Nor was it a trail issue raised by the appellant. There was ample evidence that the victim was under 13 years at the relevant time. For the charge of abduction the appellant never took up the position that the victim was over 18 years of age or he believed her to be above 18 years. It would have been as clear as daylight to him that she was a minor. The victim's age had no bearing on the other charges in any way. This ground of appeal is without any merit.

Ground 7

[14] Circumstances of the offending as described by the victim, her sister and her mother very clearly establish that the victim was taken out of the possession and against the will of her mother or her sister who was the temporary guardian or the person having the lawful care or charge of the victim at the relevant time. It was also clear from evidence that the victim was wrongfully confined against her will. This ground of appeal is without any merit.

Ground 4

[15] The fact that the police failed in their legitimate duty and obligation to help the victim's sister who brought to their attention the abduction of the victim, does not affect the prosecution at all. Nor does it render the sister's testimony unworthy of belief. This ground of appeal has no merit.

Ground 5

[16] The evidence is as clear as it could be that after the vehicle got stuck for the third and last time on the road, it was the appellant and not his driver Munesh who drove the vehicle away with the victim inside leaving behind Munesh and the victim's sister on the road. Until that point Munesh who drove the vehicle with both the victim and her

sister inside was under the control and command of the appellant who was seated on the front seat. This ground of appeal has no merit at all.

Ground 6

[17] Again it is clear from the victim's mother's evidence that when the she spoke to the appellant on the complainant's phone he offered to drop them to Nadi in his vehicle but she refused that and told the him to drop off her daughters at her home. This evidence is corroborated by the victim. Even before that her sister also had asked the appellant to drop them at their home. There was no permission given by the mother at any time for the appellant to take the victim and her sister on the journey to his place in his vehicle. This ground of appeal is without merit.

Ground 8

[18] It is a fallacy to suggest that the victim only reacted when her sister came over to the appellant's house. There is clear evidence that she resisted inside the room but was overpowered by the appellant and sexually abused by the appellant and at one point he took out a knife from a basket next to the mattress and placed it on the neck of the victim. Only when her sister called out to the appellant to let the victim out of the house did he get off her and opened the door to the room and the victim escaped in a distressed condition crying as spoken to by her sister and Tomasi. This appeal ground has no merit.

Ground 9

[19] The mater raised by the appellant under this ground of appeal is irreverent to the issues for determination before the trial judge. This ground of appeal is without any merit.

[20] 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.

[21] 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.**'*

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

[23] 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:

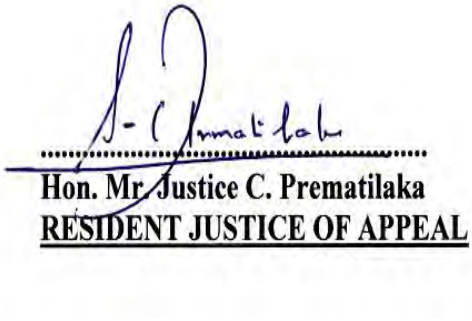
> *35. Praveen Ram Vs Sate (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors 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)).*

[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 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.

[25] Upon a perusal of the judgment, I have no doubt that verdict of guilty is reasonable and entirely supported by evidence.

Order of the Court:

1. Leave to appeal against conviction is refused.



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

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