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

CRIMINAL APPEAL NO.AAU 127 of 2014
[High Court Criminal Case No. HAC 077 of 2013)

BETWEEN	:	**DENNIS MARK HAZELMAN**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Gamalath, JA** **Prematilaka, JA** **Bandara, JA**
Counsel	:	**Mr. M. Fesaitu and Ms. L. David for the Appellant** **Mr. M. D. Korovou for the Respondent**
Date of Hearing	:	**12 November 2018**
Date of Judgment	:	**29 November 2018**

JUDGMENT

Gamalath, JA

[1] I have read the reasons in the draft judgment of this appeal and the conclusions. I agree with both, by Bandara JA.

Prematilaka, JA

[2] I have read in draft the judgment of Bandara JA and agree that the appeal against conviction should be dismissed.

Bandara, JA

[3] The Appellant was charged before the High Court of Suva under the following offences:-

1) Rape: Contrary to Section 207(1) and 2(a) of the Crimes Decree No.44 of 2009;
2) Defilement: Contrary to Section 215 (1) of the Crimes Decree No.44 of 2009.

[4] At the conclusion of the trial before the High Court, the Assessors returned unanimous opinions that the Appellant was not guilty of the charge of rape. In regard to the alternative charge of defilement the majority had found the Appellant not guilty with the minority finding him guilty. The Learned High Court Judge did not concur with the findings of the assessors and found the accused guilty of the charge of rape, and sentenced him to an imprisonment term of 11 years with a non-parole period of 9 years.

[5] The appellant being aggrieved by the said decision of the High Court filed a timely application for leave to appeal against conviction and sentence.

[6] A single Justice of Appeal on the 5th August 2015 granted leave only on ground 3 of the appeal which was to the effect that, "(iii) *the learned Trial Judge erred in law by not providing cogent reasons for departing from the opinion of the assessors*".

[7] At the Leave to appeal ruling leave was not granted for the appeal against the sentence and no renewal application has been filed before this court against the same.

[8] In the written submissions dated 23rd October 2018 filed on behalf of the Appellant, it has been stated that he will not be renewing his appeal against sentence.

[9] On the 4th day of October 2018 the Appellant filed an additional ground of appeal against conviction which is as follows:-

"The verdict is unreasonable and cannot be supported by the evidence"

At the hearing before this Court the above two grounds of appeal were urged on behalf of the Appellant as the first Ground of Appeal and the second Ground of Appeal respectively.

The Facts of the Case Briefly

[10] The victim E.W was living with her adopted parents since her birth and at the time of the offence was living at Lautoka. At the time of the incident the victim was 13 years old and was in class 7. She was born on 18/3/1999 as per her original birth certificate marked 'P2' at the trial and had turned 13 years on 18 March 2012.

[11] Between 17 August 2012 and 3rd September 2012 the victim was spending her school holidays in Samabula at her biological parent's home, celebrating Hibiscus festival. According to her own words the second week at Samabula had been a *'terrible holiday'* because of what the accused had done to her.

[12] It all happened during a night in the said period when her cousin brother told her to go to a shop to buy cigarettes. Since it was dark she asked her female cousin, Senimili Boi to accompany her to the shop. Seinimili was between 16-17 years old at the time.

[13] They went to the shop when and the complainant came out of the shop having bought cigarettes she saw the accused talking to Senimili. However, the victim had not taken any interest in their conversation and remained standing near a rubbish dumping place at the roundabout. Then Senimili had come to her and had told her that the accused had wanted to talk to her. The complainant was not interested in talking to the accused and returned home along with Senimili and had given the cigarettes to the cousin. Later when

the complainant was lying down, Senimili had come to her and had asked her to join for a walk to breathe fresh air. The victim had agreed and both of them had walked towards the garbage dump again. The accused had come there in a taxi and had talked to Senimili. Thereafter the three of them had walked towards the ground. Whilst walking the accused had introduced himself to the victim and Senimili had fallen behind. The victim was scared but thought that the accused would protect her. Having passed several houses, they had approached an empty half built house. The accused had gone inside the house first and then the victim had entered the house following him. Senimili had remained outside. Then the complainant and the accused had entered a room. Inside the room the accused had laid a T-shirt on the floor and had asked the victim to sit down. She had sat down and had thought that Senimili too had come inside. Thereafter the accused had started to kiss the victim which she resisted. The accused then had proceeded to touch her breasts and vagina. At that point Senimili had entered the house and had remained in the living room. The accused called Senimili and told her to tell the victim to agree to have sex with him. Senimili thereupon had requested the victim to have sex with the accused which the victim refused. However, when Senimili had asked the complainant to kiss the accused she had obliged, since Senimili had assured her that it would be all over once she kissed him. When the victim rose to leave, having kissed the accused the latter had forced her to take her clothes off and she had removed them. In relation to the rape that took place thereafter, it is pertinent to note the complainants own words as set out in paragraphs 23, 24 and 28 of her evidence.

> *"23. I stood up to get away but he forced me to take off my clothes; I took off my clothes, Senimili was just out of the room. I did not call Senimili as the accused was on top of me. I was scared. He was heavy I couldn't see any light at the house. He put his penis into my vagina and had sex with me.*
>
> *24. I said not to do, but he was very heavy. I couldn't resis him. At that time I was small.*

28. I was weak and struggled. The accused took his penis out of my vagina and told me to dress. Prior to the incident I did not have sex with anybody."

She had not run out of the house since it was dark.

[14] It would be a point of interest here to note the age difference between the victim and the accused. The victim was 13 years old at the time and the accused was 25 years old.

[15] After the incident the victim reached home between 10.30 pm to 10.45 pm, and saw her biological parents partaking of grog. She had not disclosed the incident to her biological parents, or adoptive parents through fear. However weeks after the incident when stretch marks appeared on her stomach her aunt had asked what had happened and she had disclosed the incident to her.

[16] Consequent to the alleged rape she had given birth to a baby boy on 30/5/2013. She had made her first statement to the police on 29/1/2013, about 5 months after the incident. She had categorically stated in her evidence that she had not had sex with anyone else before or after the incident.

[17] The incident had happened sometime between 17/8/2012 to 3/9/2012 after the Hibiscus Festival in Suva. It is also pertinent to note here the Question no. 61 put to the witness in the cross-examination by the defence which reads as follows:-

"Q61 : I put it to you that there was no sexual intercourse with the accused after that night?

A : Yes."

[18] In re-examination the witness had stated that she voluntarily went inside the vacant house thinking her cousin would protect her since she was small.

Version of the accused as narrated in his evidence

[19] Accused giving evidence from the witness box had stated that during the Hibiscus Festival in 2012, he had come to stay with his cousin in Suva. On the day of the incident around 10 p.m. his cousin had sent him to buy kava. On the way to buy kava, he had met the victim and her cousin, Senimili. The accused had asked Senimili whether he could have sex with her. Senimili had said yes and then the accused had proceeded to buy kava. On his way back he had met the victim and Senimili again. At that point of time Senimili had told him that the victim was ready to have sex with him. He had told them that he wanted to drop kava at his cousin's place and come back. The victim and Senimili too had agreed to come back and wait there. The accused having dropped kava at his cousin's place had met the victim and Senimili again near the rubbish dump. Giving further his version of the events, the Appellant had stated the following in his evidence:-

1) That, the three of them walked towards the ground.
2) They came near the partly constructed empty house.
3) The accused walked into the empty house and the victim too had walked in following him. Thereafter he entered a room and the victim too had entered the room and both of them started to talk.
4) Thereafter both of them started kissing and the accused had taken off his t-shirt in preparation to have sex.

In answer to Question 9, the accused states: "...I walked in and victim came in. Thereafter I went to the bed room. Victim came. We talked, we kissed ...to have sex, I took off my t-shirt".

[20] At that point of time the victim had told the accused that she was not feeling comfortable since Senimili was staying around. Therefore the accused had gone out of the room and asked Senimili to leave but she had insisted that she should be there. Since the accused

felt uneasy to have sex when another person is watching he did not have sex with the victim and left the scene with two of them.

[22] In re-examination the accused had further stated that the agreement was for him to have sex with Senimili, but when he went into the room the victim on her own had come there.

First Ground of Appeal

[23] Now I advert to the 1st Ground of Appeal, which is to the effect;

> *"That the learned Trial Judge erred in law by not providing cogent reasons for departing from the opinion of the assessors."*

[24] The procedure a Judge should follow when he does not agree with the opinion of assessors is set out under section 273 (4) of the Criminal Procedure Act, 2009 which states; (4) "when the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion which shall be:-

(a) written down; and
(b) pronounced in open court.

In every such case the Judge's summing up and the decision of the court together with (where appropriate) the Judge's reasons for differing with the majority opinion of the assessors shall collectively be deemed to be the judgment of the court for all purposes.

[25] The learned High Court Judge seems to have complied with the above statutory provision.

[26] In **Johnson v State** [2013] FJCA 45; AAU90.2010 (30 May 2013) the Court of Appeal stated the following:-

> *"[23] The principles relating to the overturning a verdict of the Assessors by the trial Judge as set out in S.299 of the CPC were laid down by the Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009).*
>
> *"[28] S 299 of the CPC recognizes that a judge has the power and authority to disagree with the majority opinion of the Assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge's power and authority in this regard is subject to three important qualifications.*
>
> *[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses: **Ram Bali v. Regina** [1960] FLR 80 at 83 (Fiji CA), affirmed **Ram Bali v. The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad v. Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano v. The State** [1991] FJA 3 at 5, the reasons of a trial judge: "must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*

[27] The 1st ground of appeal is totally without merits since the learned High Court Judge in his judgment at paragraphs 2,3,4,5, 6 and 7 had amply provided cogent reasons for departing from the opinion of the assessors (page 48 and 49 of the Court proceedings).

[28] At paragraph [2] of the Judgment the learned High Court Judge states: "I find the decision in respect of the charge and the alternative charge of the assessors appears to be perverse.

[29] Indicating the cogent reasons for him to differ from the opinion of the assessors, the learned High Court Judge in paragraphs [4] – [7] states :-

"[4] In this case the victim EW gave evidence first. According to her she never consented for sex with the accused. It was Senimili who agreed to have sex with the accused. But the victim was craftily took to the spot by Senimili. It was the 1st time the victim met with the accused. She had never met the accused before the incident. The victim was a small girl at the time of the incident. Due to the insistence the victim only agreed to kiss the accused. As she was small she always thought that she would be protected by the adults. The house where the alleged incident happened was dark at the time of the offence. Victim could not run from the house as Senimili was blocking the entrance. Further the accused was too heavy for her to resist at that time. Victim could not shout as her mouth was blocked by the accused's chest. As a result of this incident she become pregnant and delivered a baby boy. When she was studying in Class 8. The photograph which was marked "P1" shows her appearance in 2012.

[5] Medical Examination form of the victim was tendered to this court through the doctor. As per report she was pregnant at the time of the examination. In the history the doctor had written that the accused had sexual intercourse with the victim.

[6] The accused in his evidence admitted meeting the victim and Senimili taking the victim to a partly constructed house in the night, removing her clothes, requesting for sex and kissing her. He denied having sexual intercourse with the victim. He was 25 years and 11 months old at the time of the offence.

[7] After careful consideration of the evidence presented by the prosecution I find that the prosecution had proved the Rape charge against the accused beyond reasonable doubt.

[30] The above reasoning of the learned High Court Judge amounts to providing of cogent reasons for departing from the opinions of the assessors and hence the 1st ground of appeal fails.

[31] There are two contrary positions placed before this court by the complainant and the accused for its determination of which version is true;

(1) Could the version given by the victim that a non consensual sexual intercourse took place is true? or;

(2) Could the version given by the accused that a sexual intercourse did not take place at all is true?

The accused had not taken up the defence of consent either before, the High Court or before this Court.

If the accused and the victim had consensual sex the accused had no reason to conceal it since it would have been the best defence available for him.

[32] Furthermore, the defence taken up by the accused is not consistent with the suggestion made to the witness by the defence counsel at the cross examination.

[33] Q61. "I put it to you that there was no sexual intercourse with the accused after that night?" - (Answer) Yes.

Second Ground of Appeal

[34] Now I turn to consider the second ground of appeal which is to the effect:

"That the verdict is unreasonable and cannot be supported by evidence."

[35] The evidence suggests that at the time the victim went into the empty house the victim did not believe that she would be in any danger. She trusted that the Appellant would

protect her. When they were walking towards the empty house and when Senimili fell behind she still believed she would be safe as the Appellant would protect her.

[36] Although the Appellant had taken up the position that the agreement was for him to have sex with Senimili, the evidence discloses that right throughout the whole occurrences there was craftily planned scheme by both of them, in order to force the victim to have sex with the appellant.

[37] Senimili had been standing guard while her young cousin sister was being accosted by a grown man in the next room. Moreover the victim testified that Senimili had instructed her to agree to the sexual advances the Appellant was making. Consequent to the authority Senimili held over the young child victim, the latter agreed to kiss the appellant as the assurance given by Senimili was that if she kissed the appellant, it would be over immediately.

[38] Dr. Nitik Ram who had examined the victim on 30/1/2013 had submitted the Medical Examination Form to the Court disclosing that the victim had been 24 weeks pregnant at the time of the examination and that the victim has given a short history stating that she was defiled in August 2012 by a person named Dennis in Samabula.

[39] There is no requirement in law for a person who is sexually imposed upon to struggle or resist, to exhibit injury or injuries, or to show unwillingness or physical resistance in order for rape to be proven, **Senikudra v State** [1988] 34 FLR 114.

[40] When evaluating the totality of evidence, the following factors become apparent:

1. The narration given by the complainant is almost consistent with the narration given by the accused in his evidence up to the point of them getting ready to have sex.

2. The victim made acquaintance with the accused for the first time in the night of the incident and she had no apparent reason to fabricate a false case against the accused of this magnitude. No such suggestion has been made to the victim in the course of the cross examination.

[41] Having regard to the above analysis of evidence I would hold that the second round of appeal (the additional ground of appeal) fails.

[42] Accordingly, I would hold that the conviction is supported by the evidence and would dismiss the appeal affirming the conviction imposed by the learned High Court Judge.

Order of the Court:

Appeal against the conviction is dismissed.

.....
Hon. Mr. Justice S .Gamalath
JUSTICEOF APPEAL

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

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL