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

CRIMINAL APPEAL NO.AAU 0110 of 2017
[In the High Court at Lautoka Case No. HAC 151 of 2014]

BETWEEN	:	**ABDUL MANAN**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**02 September 2020**
Date of Ruling	:	**03 September 2020**

RULING

[1] The appellant had been indicted in the High Court of Lautoka on four counts of rape committed at Sarava, Ba in the Western Division on 18, 20, 22 and 27 October 2014 contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.

[2] The information read as follows.

> ***FIRST COUNT***
> *Statement of Offence*
>
> ***RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.*
>
> *Particulars of Offence*
>
> ***ABDUL MANAN,** on the 18th day of October 2014 at Sarava, Ba in the Western Division, had carnal knowledge of **FARIDA BEGUM**, without her consent.*

SECOND COUNT
Statement of Offence

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

Particulars of Offence

ABDUL MANAN, *on the 20th day of October 2014 at Sarava, Ba in the Western Division, had carnal knowledge of* ***FARIDA BEGUM,*** *without her consent.*

THIRD COUNT
Statement of Offence

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

Particulars of Offence

ABDUL MANAN, *on the 22nd day of October 2014 at Sarava, Ba in the Western Division, had carnal knowledge of* ***FARIDA BEGUM,*** *without her consent.*

FOURTH COUNT
Statement of Offence

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

Particulars of Offence

ABDUL MANAN, *on the 27th day of October 2014 at Sarava, Ba in the Western Division, had carnal knowledge of* ***FARIDA BEGUM,*** *without her consent.*

[3] The brief facts, as could be gathered from the judgment, are as follows. The appellant, aged 64 was the father-in-law of the complainant.

'[5] The complainant gave evidence that on four occasions that is on 18 October, 2014, 20 October, 2014, 22 October, 2014 and 27 October, 2014 the accused penetrated the vagina of the complainant with his penis without her consent.

[6] The complainant informed the court of four occasions the accused had forcefully taken her into his bedroom, removed her clothes and after touching all over her body, sucking her breast, licking her vagina, forcefully inserted his penis into her vagina. On all instances the accused after having sexual intercourse with the complainant ejaculated inside her.

[7] In respect of the first three incidents the complainant did not complain to anyone of what the accused had done to her since she was threatened by the accused that if she tells anyone he will kill her. After the last incident on 27 October, 2014 the complainant after waking her youngest daughter ran from the house of the accused to her aunt's house. At her aunt's house the complainant told everything to her aunt about what the accused had been doing to her.

[8] The complainant's aunt Movina called the complainant's husband who was in Rakiraki at the time. The matter was reported by the complainant's husband at the Rakiraki Police Station.

[9] The second witness was Dr. Anaseini Tabua, who had examined the complainant on 27 October, 2014.

[10] The Professional Opinion of the Doctor was:

> *"No sign of forceful entry. However, cervix looked bruised which may suggest recent contact. Also noted whitish fluid at adnexa which is possibly semen (specimen taken)."*

[11] The Doctor further informed the court that not every woman forcefully penetrated with a penis will show injuries. The bruised cervix was suggestive of recent contact and sometimes deep penetration which did not rule out that the patient was raped. The Doctor also stated that her findings were consistent with the history given.

[12] The third witness for the prosecution Movina Khan informed the court that on 27 October, 2014 the complainant came to her house crying, the witness asked her why she was crying the complainant told the witness that her father-in-law had raped her and also on three previous occasions.

[13] The final witness for the prosecution was Abdul Shahid. On 27 October 2014 he received a call from the complainant through Movina's phone. The complainant informed him that his father had raped her. He reported the matter at Rakiraki Police Station.

[14] The accused on the other hand took the position that he did not penetrate the vagina of the complainant as alleged and that she had lied about the allegations because she did not want to live in the farm or live at her in-law's house.

[4] At the conclusion of the trial on 12 June 2017 the majority of assessors had opined that the appellant was not guilty as charged and the remaining single assessor's opinion had been that the appellant was guilty of all counts. The learned trial judge had disagreed with the majority opinion of the assessors in his judgment delivered on 13 June 2017, convicted the appellant and sentenced him on 27 June 2017 to an

aggregate sentence of 09 years and 11 months of imprisonment for all four counts with a non-parole period of 08.

[5] The appellant's timely application for leave to appeal against conviction and sentence had been signed on 18 July 2018. However, he had not specified any grounds of appeal against sentence. The Legal Aid Commission had tendered a single amended ground of appeal only against conviction and written submissions on 19 June 2020. The state had tendered its written submissions on 17 July 2020.

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[7] Grounds of appeal urged on behalf of the appellant are as follows.

> *1. That the learned trial judge erred in law and in fact when he failed to give cogent reasons for overturning the assessor's majority opinion of not guilty.*

01st ground of appeal

[8] The appellant relies on **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) in support of his contention based on the duty of the trial judge when disagreeing with the majority of assessors.

[9] **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) the Supreme Court examined the trial judge's duty in disagreeing with the assessors and stated as follows.

> *'[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] 7 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:*
>
> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[10] In **Ram**, the appellant had been charged with murder under section 199 of the Penal Code and tried before three assessors who had unanimously found him guilty as charged, and the trial judge, agreeing with the assessors, had convicted him and sentenced him to life imprisonment. The conviction and sentence was affirmed by the Court of Appeal, but on appeal to the Supreme Court the conviction was set aside on the basis that the Court of Appeal had failed to make an independent assessment of the evidence before affirming the verdict of the High Court which was found to be unsafe, unsatisfactory and unsupported by the evidence, giving rise to a miscarriage of justice. Justice Marsoof said

> *'80. A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the*

ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case.'

[11] In **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014) the Supreme Court having examined several decisions remarked

'[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.'

[12] The Court of Appeal in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) referring to ***Ram*** and ***Mohammed*** said of the trial judge's duty under section 237 of the Criminal Procedure Act, 2009 as follows:

*'[13] While we accept that in **Ram** the Supreme Court did state that an independent analysis of evidence by the trial judge was necessary to ensure the verdict is supported by evidence, the remark is only an obiter dicta. We say this because the remark was made in the course of formulating the test when a guilty verdict is challenged on the basis that it is unreasonable or cannot be supported having regard to the evidence (see, section 23 (1) (a) of the Court of Appeal Act). In subsequent cases, the Supreme Court has clarified that **where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Decree does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment**. But the Supreme Court has endorsed that "a short written judgment, even where conforming with the assessors' opinions is a sound practice" (**State v Miller (unreported CAV 8 of 2009; 15 April 2011, Mohammed v State (unreported CAV 2 of 2013; 27 February 2014)**.*

[13] In ***Chandra***, Justice Marsoof clarified what His Lordship meant in paragraphs [79] and [80] in ***Ram*** as follows. In ***Chandra*** the trial Judge had agreed with the assessors and convicted the appellant for murder.

[24] In arriving at its decision, this Court examined in paragraphs [79] and [80] of its judgment the difference between the jury system and the system of trial with assessors that prevails in Fiji, and concluded that in terms of section 299(2) of the Criminal Procedure Code, Cap 21, which was in force at the time of the High Court trial in 2008, as well as under section 237 of the Criminal Procedure Decree, which is currently in force, the trial judge was required to make an independent assessment of the evidence to be satisfied

that the verdict of court is supported by the evidence and is not perverse. This Court also noted that if the trial judge disagrees with the unanimous or majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court". This Court was here simply setting out the requirements of the statutory law currently in force. In Praveen Ram, this Court did not, and did not have to in the circumstances of that case, express any view in regard to whether reasons have to be provided by the trial judge for agreeing with the opinion of the assessors.

'[25] The confusion that surfaces in paragraphs [23] and [24] of the impugned judgment of the Court of Appeal arises from a failure to distinguish between (1) the requirement of making an independent assessment of the evidence; and (2) giving reasons for disagreeing with the opinion of the assessors. In every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. ***Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors****. However, as was observed by this Court in paragraph [32] of its judgement in Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014),"an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."*

[14] However, Justice Keith said in ***Chandra***

'[35] The majority of the assessors expressed the opinion that ***Chandra*** *was guilty of murder. The trial judge agreed with the majority, but in his judgment he did not say why. The form of his judgment is heavily criticised by* ***Chandra****'s legal team. They rely on Praveen Ram v The* ***State*** *[2012] FJSC 12 in which Marsoof JA said at [80]:*

> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the [entirety] of the evidence led at the trial ... In independently assessing the evidence in the case, it is necessary for a trial judge ... to be satisfied that the ultimate verdict is supported by the evidence and is not perverse ..."*

[36] I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that. I unreservedly endorse what Calanchini JA said in ***Sheik Mohammed v The State*** *[2013] FJSC 2 at [32]:*

"An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."

[37] But it is dangerous to elevate what should be best practice into a rule of law. The best practice about the form of the judge's judgment does not mean that the law compels the judge to do that in every single case. I do not think that the law requires the judge to spell out his reasons in his judgment in those cases in which (a) he agrees with the assessors (or at any rate a majority of the assessors) and (b) his evaluation of the evidence and his reasons for convicting or acquitting the defendant can readily be inferred from his summing-up to the assessors without fear of contradiction.

[15] When the trial judge affirms the opinion of the assessors his function was described by the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) in the following manner.

'[4] ..... Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under ***section 237(3) of the Criminal Procedure Act*** *2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See:* ***Mohammed –v- The State*** *[2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[16] In ***Singh*** the petitioner had been convicted of murder after trial by the High Court judge where the learned judge by his judgment dated 16 September 2014, had overturned the unanimous opinion of the assessors that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations of were made by Hon. Justice Saleem Marsoof.

'[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature. .....In other words, apart from the non-directions and mis-directions adverted to already, the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.

[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, ***it is evident on the available evidence that the trial judge had failed to effective discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors*** *that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision."*

[17] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.

[18] What could be ascertained as common ground 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 a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written 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 a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.

[19] On the other hand when the trial judge disagrees with the majority of assessors the trial judge should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors.

[20] In my view, in both situations, a judgment of a trial judge cannot not 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] This stance is consistent with the position of the trial judge at a trial with assessors *i.e.* in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).

[22] Further the test in Fiji for the appellate court in appeal is not whether a conviction is unsafe or unsatisfactory. As stated in **Sahib v State** AAU0018u of 87s; 27 November 1992 [1992] FJCA 24 by the Court of Appeal the correct criteria is as follows.

> *..... How is the Court to approach this?*
>
> *Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal -*
>
> > *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."*
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> *It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.*
>
> *Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide*

ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*

[23] On an examination of the summing-up, I find it to be a near complete address to the assessors. The trial judge had given directions on all relevant aspects in law and facts. He had left it to the assessors to assess and evaluate the evidence. In disagreeing with the majority of assessors the trial judge in the judgment had started by directing himself in accordance with the summing-up and the evidence which he had placed in sufficient detail before the assessors in the summing-up too.

[24] Then in the written judgment, the learned trial judge had once again narrated in brief the summary the evidence led against the appellant and his position taken up in cross-examination of prosecution witnesses which was a total denial. The appellant had neither given evidence nor called any other witnesses on his behalf. He had assessed the weight of the evidence and evaluated the credibility of the evidence of prosecution witnesses including the demeanour of the complainant. The trial judge had given cogent reasons why he disagreed with the majority of the assessors and agree with the minority view that the appellant was guilty. He had finally held that the prosecution had proved its case against the appellant beyond reasonable doubt. In my view, it was open on the evidence and its credibility to the trial judge to have arrived at the verdict of guilty against the appellant.

[25] Having examined the summing-up and the judgment I have no doubt that the trial judge's finding of guilty against the appellant is supported by the weight of evidence and there is little doubt of the credibility of the complainant.

[26] Therefore, this ground of appeal has no reasonable prospect of success.

Order

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL