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

CRIMINAL APPEAL NO.AAU 0037 of 2018
[In the High Court at Suva Case No. HAC 344 of 2016S]

BETWEEN	:	**RAJINESH KAMAL NARAYAN**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**01 December 2020**
Date of Ruling	:	**02 December 2020**

RULING

[1] The appellant, a taxi driver, had been indicted in the High Court of Suva on a single count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009, committed at Suva in the Central Division . The complainant was 16 years old at the time of the offence while the appellant was aged 33.

[2] The information read as follows.

> *'Statement of Offence*
>
> ***RAPE**: Contrary to section 207 (1) and (2)(a) of the Crime Act 2009.*
>
> ***Particulars of Offence***
>
> ***RAJINESH KAMAL NARAYAN** on the 13th of September, 2016 at Suva, in the Central Division penetrated the vagina of **A. A. P** with his penis without her consent.*

[3] At the conclusion of the summing-up on 06 April 2018 the assessors' opinion had been unanimous that the appellant was guilty of the charge of rape against him. The learned trial judge had agreed with the assessors in his judgment delivered on the same day, convicted the appellant and on 09 April 2018 sentenced him to 11 years of imprisonment with a non-parole period of 10 years.

[4] The appellant had filed timely notice of appeal/ application for leave to appeal on 02 May 2018 against conviction and sentence. He had tendered amended/additional grounds of appeal and written submissions from time to time in 2019 and 2020. Thereafter, the Legal Aid Commission on his behalf had filed an amended notice of appeal against conviction and sentence and written submissions on 07 October 2020. The state had tendered its written submissions on 22 October 2020. However, at the hearing into the leave to appeal application the appellant expressed his wish to abandon the sentence appeal and accordingly he filed an abandonment notice on 01 December 2020 in Form 3 on his sentence appeal.

[5] 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.

[6] The sole ground of appeal urged on behalf of the appellant against conviction is as follows.

Ground 1

The Learned Trial Judge had erred in law and in facts in not providing a fair, balanced and objective summing up between the case of the Stage and that of

the Appellant on crucial issues that is disputed having placed more emphasis on the prosecution's case and not the Appellant in a similar manner.

[7] The learned trial judge had summarized the evidence led by the prosecution and the defense in the summing-up as follows.

THE PROSECUTION'S CASE

13. The prosecution's case were as follows. On 13 September 2016, the accused (DW1) was 33 years old. He was married to Yogita Narayan (DW2). They had been married for 7 years. They had 3 young daughters aged 5, 3 and 1 year old. They reside at 3 Miles, Nabua. The accused drives taxis for a living, and is the sole bread winner for his family.

14. The complainant (PW1) was 16 years old on 13 September 2016. She resided at Wailea Street, Vatuwaqa with her parents. She is the eldest in her family, and had two younger sisters. Her father (PW2) drives taxis also for a living, and works in the same taxi company as the accused. DW1 and PW2 knew each other well. DW1 was familiar with PW1 and PW2's family.

15. On 13 September 2016, a Tuesday, PW1 was assisting her parents operate the family BBQ stall at Extension Street, Suva. According to PW1, the accused was her friend. After 9 pm on 13 September 2016, PW1 went to the Flagstaff Bowser to meet the accused. The accused allegedly drove PW1 in his taxi to 8 Miles, then to Sakoca and then to Suva Point. According to the prosecution, the accused was supposed to drive the complainant to her home at Wailea. However, they ended up under the ivi tree at Suva Point, 10 to 15 footsteps from the Suva Point Police Post.

16. According to the prosecution, the accused allegedly locked the doors and windows of his taxi when he parked the same at Suva Point. He allegedly went to the backseat of his taxi, where the complainant (PW1) was sitting. He allegedly punched PW1 on the rib, made her lie on both of her hands with her back, facing upwards. He then allegedly took her pants and panty off, lifted her legs and inserted his penis into her vagina, without her consent. PW1 allegedly told the accused to stop. However, he allegedly ignored her and had sexual intercourse with her for about 10 to 15 minutes. PW1 alleged pushed the accused away, and he allegedly told her to go away.

17. The matter was reported to police. An investigation was carried out. PW1 was medically examined at Medical Services Pacific in Suva by Doctor Elvira Ongbit (PW3). He appeared in the Suva Magistrate Court on 19 September 2016 charged with raping the complainant on 13 September 2016. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

THE ACCUSED'S CASE

18. On 3 April 2018, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the rape allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called his wife (DW2) as his witness. That was his right.

19. The accused's case was very simple. In his sworn evidence, he admitted he met the complainant (PW1) on 13 September 2016 at the Flagstaff Total Bowser. He admitted, she came in a taxi, and she later paid her taxi fare. He admitted, he was taking her home in his taxi, but said, she later wanted to go to Suva Point. He said, he later took PW1 to Suva Point, and at her request, left her there. He said, he did not rape the complainant at all, at Suva Point. He said, he later drove away from Suva Point.

20. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.'

[8] Medical evidence had revealed hymen laceration at the 3 o'clock, 5 o'clock and 6 o' clock when the complainant was examined on 15 September 2016.

01st ground of appeal

[9] The appellant relies on **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) in support of his sole ground of appeal where having examined a number of previous judicial pronouncements, the following *inter alia* were identified as possible defects in a summing-up leading to a miscarriage of justice.

(i) The summing up not tailored to the facts and circumstances of the case.

(ii) The weaknesses and defects of the prosecution evidence not appropriately highlighted.

(iii) Little weight given to the strong points for the defence and a fair picture of the defence not given to assessors *i.e.* not putting the defense fairly to the assessors.

(iv) The contentious issues put in a way favourable to the prosecution and unfavourable to the Appellant.

(v) The Judge at times appears to have usurped the fact finding function of the assessors.

(vi) As a whole the summing up is not a fairly balanced and a fair presentation of the case to the jury.

[10] The appellant contends that the trial judge having referred to the taxi being the crime scene in paragraph 22 of the summing-up was wrong and the reference in paragraphs 27-29 of the summing-up that the appellant saw the complainant as his girlfriend suggesting that they were in a relationship other than being just friends as claimed by the complainant, would have given the impression to the assessors that the appellant had in deed had sexual intercourse with her inside the taxi.

[11] The trial judge had basically dealt with agreed facts in paragraph 22. They were that the appellant's identity was not is issue, he was well known to the complainant's family and on 13 September 2016 the appellant picked up the complainant in his taxi and took her to Suva point. The judge had then referred to what the prosecution had alleged against the appellant namely that he had raped the complainant in his taxi (crime scene) at Suva point on the evening of 13 September 2016. Finally, the trial judge had informed as an inference to the assessors that the parties were not in dispute that the appellant and the complainant were present at the crime scene *i.e.* the appellant's taxi at the material time.

[12] Given that the appellant had admitted that he in fact took the complainant in his taxi in the evening on 16 September 2016 to Suva point but dropped her there, it is common ground that both the appellant and the complainant were in his taxi at or about the time relevant to the incident. The difference of the two versions is as to what happened thereafter. Whether the appellant simply dropped the complainant and left the scene or whether he raped the complainant inside the taxi and left her there.

[13] Therefore, there is nothing objectionable in the trial judge having referred to the taxi as the crime scene at Suva point because the alleged rape had happened in the taxi at Suva point. It is also common ground that both the appellant and the complainant were in the taxi at or about the relevant time.

[14] Therefore, it was eminently a matter for the assessors to decide to act upon the complainant's version that not only were they in the taxi but the appellant did proceed to rape her inside it at Suva point or to believe the appellant's version that he simply dropped the complainant at Suva point and departed from the scene.

[15] The appellant also complains that the trial judge had no material to tell the assessors that the appellant had seen the complainant as his girlfriend in paragraph 27 of the summing-up. It seems that the trial judge's assumption was based on the complainant's evidence that she went to meet the appellant who was her friend to Flagstaff Bowser and then agreed to go out in his taxi. Both of them had travelled to 8 Miles and then to Sakoca before ending up at Suva point. Previously, the appellant is said to have bought a phone for the complainant presumably for them to have contact with each other. It is in this context that the trial judge had assumed that the complainant and the appellant may have been in a relationship. However, the appellant's defense was not one of consent but a total denial of any act of sexual intercourse.

[16] While there appears to have been no hard evidence given either by the complainant or the appellant that they considered themselves as girlfriend and boyfriend, their conduct obviously was suggestive of them being more than mere friends. In the context of the whole of the evidence it was not unreasonable for the trial judge to have suggested a more intimate relationship between the complainant, 16 year old girl and the appellant, aged 33 and father of 03 children, than simply being friends.

[17] Having examined the summing-up as a whole, I find that the trial judge had placed the appellant's version of events clearly before the assessors and directed them that the appellant had nothing to prove but the burden of proof beyond reasonable doubt was on the prosecution (vide paragraph 4 and 5 of the summing-up). The trial judge had again directed the assessors in paragraph 33 and 38 that if they were to accept the appellant's version he must be found not guilty and even otherwise they should still consider the strength of the prosecution case and make a decision accordingly.

[18] This was not a case of the complainant's word against the appellant's word. There was medical evidence supportive of an act of sexual intercourse as alleged by the complainant but denied by the appellant. The complaint itself had been reasonably prompt. No sinister motive for false fabrication had been suggested by the appellant either. Both versions ran parallel to a great extent, the only point of departure being what happened at Suva point. Therefore, the directions to the assessors when there is a 'word against word' conflict between the prosecution and defence, as prescribed in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507 were strictly not required in this case, particularly because the appellant had denied having engaged in sexual intercourse with the complainant at all. The directions to the assessors in paragraphs 4, 5, 33 and 38 were adequate.

[19] Having considered the evidence against this appellant as a whole, I cannot say that the verdict was unreasonable or cannot be supported by evidence. There was clearly evidence on which the verdict could be based and therefore, there is no reasonable prospect of success of the appellant's appeal under section 23(1) of the Court of Appeal Act [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)]. The trial judge also could have reasonably convicted the appellant on the evidence before him (vide **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020) and **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)].

[20] The state has, not without merits, stated that the appellant's counsel should have sought redirections in respect of the complaints now being made by the appellant on the summing-up as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[21] Accordingly, there is no reasonable prospect of success in appeal on the first ground of appeal.

Order

1. Leave to appeal against conviction is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL