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

CRIMINAL APPEAL NO.AAU 48 of 2018
[In the High Court at Lautoka Case No. HAC 016 of 2013]

BETWEEN	:	**SAJNEEL RITESH RAO**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Mr. D. C. Naidu for the Appellant**	
	:	**Ms. P. Madanovosa for the Respondent**	
Date of Hearing	:	**03 February 2021**	
Date of Ruling	:	**04 February 2021**	

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of sexual assault contrary to section 210 (1) of the Crimes Act No. 44 of 2009 and one count of rape contrary to section 207(1) and (2) (b) of the Crimes Act, 2009 committed at Nadi in the Western Division on 16 January 2013.

[2] The information read as follows.

'First Count

Statement of Offence

***SEXUAL ASSAULT**: Contrary to Section 210 (1) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SAJNEEL RITESH RAO *alias ASHNEEL on the 16th day of January, 2013, at Nadi in the Western Division, unlawfully and indecently placed his hands on the breasts of* ***KARTIKA NAIR****, without her consent.*

Second Count

Statement of Offence

RAPE*: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

SAJNEEL RITESH RAO *alias ASHNEEL on the 16th day of January, 2013, at Nadi in the Western Division, inserted his finger into the vagina of* ***KARTIKA NAIR****, without her consent.*

[3] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

> *'3. The facts of the case were that, on the 16th of January, 2013, Complainant's husband, left home for work at about 7.30 a.m. Complainant was lying down on her bed after cooking. You came to her room and sat beside her. Then you told her that you want to kiss her and suddenly put your hands on her back. Complainant asked you to leave the room but you were still sitting there. When she tried to get up, you pushed her down on the mattress. Then you put your both hands on her breast and pressed her down. You stretched her dress and pushed your fingers in her vagina without her consent. She felt the pain because she was three months pregnant. When she slapped you, you left the room and told her not to tell anything what happened to anyone."*

[4] At the end of the summing-up on 03 April 2018 the assessors had by a majority opined that the appellant was guilty of both counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on 04 April 2018, convicted the appellant on both counts and sentenced him on 20 April 2018 to 02 years of imprisonment on the first count and 06 years, 10 months and 20 days of imprisonment on the second count (both to run concurrently) with a non-parole period of 05 years.

[5] The solicitors for the appellant had filed a timely notice of appeal/ application for leave to appeal on 18 May 2018 against conviction and sentence. The appellant's written submissions had been tendered on 20 August 2020. The state had tendered its written submissions on 17 November 2020 and 02 February 2021.

[6] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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.

[7] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

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

'Conviction

Ground 1 — *THAT the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellants.*

Ground 2 — *THAT the Learned Trial Judge erred in law and in fact in not adequately directing the Assessors the significance of Prosecution Witnesses conflicting evidence during the trial.*

Ground 3 — *THAT the Learned Trial Judge erred in law and in fact in convicting the Appellant/Applicant after relying on inadmissible evidence*

Ground 4 — *THAT the Learned Trial Judge erred in law and in fact in not taking into account serious conflict of evidence in the Prosecution case.*

Ground 5 — *THAT the Learned Trial Judge erred in law and in fact in relying on and/or considering and/or taking into account inadmissible and/or prejudicial evidence in finding the Appellant/Applicant guilty.*

Ground 6 — *THAT the Learned Trial Judge erred in law and in fact in discounting the evidence of DW2 and directing the assessor to disregard her evidence despite the Prosecution not being able to discredit the said Defence witness as to her veracity and credibility.*

Ground 7 — *THAT the Learned Trial Judge failed to direct the Assessors and himself that the manner of commission of the offense by the Appellant was near impossible having regard to all the circumstances of the case.*

Ground 8 — *THAT the Learned Trial Judge failed to consider the evidence of the Complainant (PW1) when she stated that in her written statement stated that the Appellant put his second finger into her vagina but whilst given evidence under Oath stated that the Appellant put four fingers into her vagina and confirmed the same under cross examination.*

Ground 9 — *THAT the Learned Trial Judge erred in law and in fact by not believing the evidence of DW 1 over that of the Complainant (PW1) when PW2 also discredited the evidence of PW 1 as to*

her whereabouts on the morning the alleged offense was committed.

Sentence

Ground 1- *THAT the Appellant appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.*

Ground 2 - *THAT the Learned Judge took relevant matters into consideration when sentencing the Appellant/Applicant.*

01st ground of appeal

[9] The appellant criticizes the trial judge's directions on two alleged contradictions in the evidence of the complainant as inadequate or amounting to misdirection. The complainant had told the police that the appellant had used the second finger to penetrate her vagina whereas in evidence she had testified that she felt the appellant's all four fingers inside her vagina. In another instance the complainant had said in evidence that she was lying down on the bed when the appellant had committed the two offences but according to the written submissions of the appellant she had later changed her stance to the effect that she was on a mattress on the floor when the appellant sexually violated her.

[10] On the perusal of the summing-up, I find that the trial judge had referred to the inconsistency regarding the first instance at paragraph 41 but do not find any reference to the complainant changing her position as to where she was lying down. Paragraph 36 of the summing-up only records her evidence that she was lying down on the bed after cooking. Thus, I cannot ascertain whether in fact the complainant had changed her position as alleged by the appellant regarding where she was when the sexual assault and rape took place.

[11] Be that as it may, the trial judge had given his mind to the apparent inconsistency as to how many fingers had penetrated her vagina at paragraph 14 of the judgment and given the fact that her evidence was based not on what she saw but what she felt the judge had considered the variation in her evidence as not material on the premise that what mattered was whether there had been any penetration of the complainant's vagina by the appellant with one finger or four fingers. There is no reference to the

second issue on whether the incident happened on the bad or on the mattress on the floor in the judgment.

[12] Some omissions also have been highlighted by the trial judge at paragraph 40 in the summing-up and they could be summarized as follows. The complainant had not told the police that the appellant had tried to kiss her, she had slapped her, she had called her husband on one of his friend's mobile phone and the appellant had told her not to tell anyone and after the two acts of sexual abuse she had gone to the toilet and locked it. These had been revealed by her in her evidence at the trial.

[13] The trial judge had earlier directed clearly at paragraph 24 and 25 as to how the assessors should consider variations, contradictions, omissions etc. in the evidence of witnesses and directed them at paragraph 77 to consider and assign weight accordingly to the inconsistencies and omissions in the complainant's evidence in the light of his said directions.

[14] The judge had given his mind to them at paragraph 13 of the judgment and decided that they were peripheral to the real issue and not material enough to discredit the complainant.

[15] In the circumstances, there is no reasonable prospect of success in the first ground of appeal.

02nd ground of appeal

[16] The appellant's submission under this ground of appeal is that the trial judge had failed to take into consideration the inconsistencies between the evidence of the complainant and her husband Sanjay Vikas Nath (PW2).

[17] Those inconsistencies have been highlighted by the trial judge in the summing-up. They could be summarized as follows.

(i) The complainant had told in evidence that after she left a massage with her husband's working mate, the husband had called her on that

friend's phone at 3.00 p.m. and she had told everything that happened in the morning to him.

(ii) The complainant's husband Sanjay Vikas Nath (PW2) had said in evidence that he called her at 8.00 p.m. and she only said that there was a problem and not about the incident that happened between her and the appellant.

(iii) According to the complainant's testimony at the trial Sanjay came home around 4.00 pm but later admitted that her husband came home around 9.00 p.m.

(iv) According to Sanjay he came home around 10.30 p.m.

[18] The trial judge had given his mind to the above inconsistencies at paragraphs 11 and 12 of the judgment and determined them to be not material to discredit the complainant's version.

[19] The appellant also alleges that PW1 and PW2 being husband and wife may have coached each other. However, this surmise has no foundation at all, for had they coached each other those inconsistencies, contradictions and omissions could not have happened.

[20] As pointed out earlier the trial judge had directed clearly at paragraph 24 and 25 as to how the assessors should consider variations, contradictions, omissions etc. in the evidence of witnesses and directed them at paragraph 77 to consider and assign weight accordingly to the inconsistencies and omissions in the complainant's evidence in the light of his previous directions.

[21] Therefore, there is no reasonable prospect of success in the second ground of appeal.

03rd ground of appeal

[22] The appellant complains that the trial judge was wrong to have relied on recent complaint evidence as admissible evidence. The prosecution had relied on Sanjay's evidence as recent complaint evidence.

[23] The trial judge had directed on delay and particularly on recent complaint evidence at paragraphs 28-30 of the summing-up and referred to the same at paragraph 7 of the judgment and accepted the complainant's explanation as to why she had not told her husband about the incident of sexual abuses over the phone (see paragraphs 8-10). The directions on the recent complaint evidence is in compliance with law and procedure laid down in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) and later in **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017).

[24] Therefore, I do not think that there is any merit in this ground of appeal.

04th ground of appeal

[25] The appellant's submissions under this ground of appeal are the same as his complaints on conflicts between the complainant's evidence and that of her husband, which he made under the first and second grounds of appeal already dealt with.

05th ground of appeal

[26] The appellant seems to complain that the trial judge was biased in as much as he had failed to analyze the not guilty verdict of a single assessor while agreeing with the majority of assessors. This argument constitutes a complete misapprehension of the role of trial judge in Fiji where assessors are not expected to give reasons for their opinion and the majority opinion for all purposes is considered to be the opinion of the assessors.

[27] I had the occasion to analyze several previous decisions of the Supreme Court and the Court of Appeal on the duty of a trial judge in **Waininima v State** [2020] FJCA 159; AAU0142.2017 (10 September 2020) and I concluded as follows.

> *'[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 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 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 given 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 judges of facts. The judge is the sole judge of facts 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).*

[28] Despite being under no legal obligation the trial judge had embarked on an evaluation and analysis of the evidence for the prosecution and defense in detail as to why he was agreeing with the majority of assessors. He was under no legal obligation to analyze the opinion of the single dissenting assessor.

[29] As for the allegation of bias against the trial judge, it appears that the appellant's counsel has shown little understanding of the principles of law relating to 'bias' in a judicial officer as propounded in **Koya v State** [1998] FJSC 2; CAV0002.1997 (26 March 1998) and more recently in **Raikadroka v State** [2020] FJCA 12; AAU80.2014 (27 February 2020). It is hilarious to argue that the trial judge was biased because he had not analyzed the opinion of the single assessor who had

expressed an opinion of not guilty. This goes only to show poor knowledge of the basic principles of law of the counsel who had drafted and pursued this ground of appeal before this court.

[30] This ground of appeal is frivolous and vexatious.

06th ground of appeal

[31] The appellant submits that the trial judge had directed the assessors to disregard the evidence of DW2 Ranjita Devi, the *de facto* partner of the appellant who had heard the allegation against the appellant at least after 03 months of the incident and had testified that the complainant visited her on the day of the incident but not disclosed any incident of sexual abuses involving the appellant. The complainant had of course denied having made such a visit. The counsel for the appellant admitted at the hearing that DW2 had not given any previous statement to the police and therefore had come out with the evidence of the alleged visit by the complainant for the first time at the trial after 05 years.

[32] The trial judge had highlighted DW2's evidence at paragraph 66 of the summing-up and analyzed her evidence at paragraph 79 and 80 and directed the assessors that it was for them to attach whatever the weight chosen by them to her testimony. The trial judge had not directed the assessors to disregard her evidence.

[33] On the other hand, the trial judge in his judgment had analyzed DW2's evidence at paragraph 20 and 21 ad stated as to why he could not believe her.

[34] In the above circumstances, this ground of appeal has no reasonable prospect of success.

07th ground of appeal

[35] As alleged by the appellant under this ground of appeal the trial judge had not directed the assessors to disbelieve DW2 and also he had not failed to accurately, fairly and objectively and in a well-balanced manner to summarize the defense case in the summing-up. Paragraphs 58- 68 and 77-82 bear ample testimony to this.

[36] Thus, this ground of appeal has no reasonable prospect of success.

08th ground of appeal

[37] The appellant had agitated the same matters under this ground of appeal that he raised under the first and second ground of appeal and they have already been dealt with.

09th ground of appeal

[38] The appellant once again reiterates the same arguments made under the first and second ground of appeal and they have already been dealt with.

[39] The Court of Appeal in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019) dealt extensively how to deal with omissions, contradictions and discrepancies in the evidence. The same principles are applicable to the appellant's case as well. In ***Chand*** the Court of Appeal stated:

> *'[23] The Court of Appeal examined the law relating to omissions, contradictions and discrepancies in Nadim v State AAU0080 of 2011: 2 October 2015 [2015] FJCA 130 and stated*
>
> > *'[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.'*
>
> *[24] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)*
>
> > *'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video*

tape is replayed on the mental screen: ..... (3). ..... It is unrealistic to expect a witness to be a human tape recorder;'

[25] In Abourizk v State AAU0054 of 2016: 7 June 2019 [2019] FJCA 98 the Court of Appeal once again quoted from the following judgments of the Indian Supreme Court in relation to the importance attached to discrepancies, deficiencies, drawbacks, embellishments or improvements and other infirmities in evaluating the evidence.

*'[107] **State of UP v. M K Anthony** (1985) 1 SCC 505*

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'

*[108] **State of UP v. Naresh** (2011) 4 SCC 324*

'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.'

[40] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take in the face of an argument that the verdict was unreasonable or cannot be supported having regard to the evidence in a situation where the assessors or majority of them finds the accused guilty and the trial judge also agrees with them in entering a conviction.

'That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. 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."

The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.

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.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion. The appeal is dismissed.'

[41] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable: whether there was admissible evidence on which the verdict could be based [see for a detailed discussion **Ravawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[42] In my view, having considered the evidence against the appellant as a whole, it cannot be said that the verdict was unreasonable. There was clearly evidence on which the verdict could be based. There was undoubtedly evidence before the High Court that, if accepted, would support the verdict of guilty. Neither could it be said that after reviewing the various discrepancies between the evidence of the prosecution witnesses that there was a miscarriage of justice. However, the full court would be in the best position to undertake this task with the benefit of the complete appeal record if the appeal comes up before it.

10th and 11th ground of appeal (sentence)

[43] The appellant's written submissions have not elaborated the above grounds of appeal at all and upon a perusal of the sentencing order I do not find any sentencing error in the sentence imposed on the appellant. On the contrary the trail judge had taken extreme care in dispensing a lesser sentence on the appellant *i.e.* 06 years, 10 months and 20 days below the lower threshold of sentencing tariff of 07 years for adult rape. Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) took the tariff for adult rape to be between 07 and 15 years of imprisonment following **State v. Marawa** [2004] FJHC 338.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL