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

CRIMINAL APPEAL NO.AAU 0079 of 2019
[In the High Court at Lautoka Case No. HAC 7 of 2016]

BETWEEN	**:**	**SOSICENI VATUNITU NAULU**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Mr. M. Fesaitu and Ms. L. Volau for the Appellant**
	:	**Mr. A. Singh for the Respondent**
Date of Hearing	**:**	**25 February 2021**
Date of Ruling	**:**	**08 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Lautoka with one count of rape contrary to section 207(1) & (2) (b) of the Crimes Act, 2009 committed on 19 March 2015 at Nadi in the Western Division.

[2] The information read as follows:

'Statement of Offence

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

Particulars of Offence

***SOSICENI VATUNITU NAULU,** on the 19th day of March, 2015 at Nadi in the Western Division penetrated the vagina of **TORIKA TABUA** with his fingers without her consent.*

[3] The trial judge had summarized the prosecution evidence as follows in the sentencing order:

> 6. *'On 19th March, 2015 the complainant Torika Tabua after a grog session at Narewa Village was asked by her uncle to buy some grog and a packet of cigarette from the house of Mesake in the village.*
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> 7. *It was 3 am in the morning when the complainant went past the house of the accused she saw him sitting beside his house. The complainant knows the accused since they are from the same village. The accused called out to the complainant and asked for a cigarette roll. The complainant went to the house of an uncle to buy a cigarette roll when there was no answer the complainant opened the packet of cigarette she had with her and gave one roll to the accused. The accused smelt of liquor.*
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> 9. *Both went to smoke on the footpath near her grandfather's house. After a while the accused pushed the complainant on the footpath and forcefully removed her pants and inserted his finger into her vagina for about 2 minutes. When the accused did this the complainant was afraid of him.*
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> 10. *When the accused was inserting his fingers into her vagina she had shouted by calling her grandmother but there was no response. At this time the accused was holding her hand she did not kick the accused but had pushed him.*
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> 11. *The accused after removing the complainant's shorts took it with him as a result she wrapped a towel around her waist which she was able to get in the village.*
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> 12. *When the complainant reached home her uncle Seremaia Teka asked her what had happened, she told him everything the accused had done to her that morning. The complainant was wearing a ¾ shorts and a white t-shirt. The matter was reported to the police.*
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> 13. *Seremaia Teka the uncle of the complainant informed the court he was having a grog session at one of his grandfather's house. The grog and the cigarette had finished so he sent the complainant to buy some more at about 2 am in the morning.*
>
> 14. *The complainant was late in coming back but when she arrived the witness saw her clothes were dirty and she was wearing a towel. The witness asked the complainant what had happened to her the complainant told him that the accused had called her and asked for a cigarette, after both had smoked the cigarette the accused pulled her, removed her shorts and touched her vagina. When the witness asked the complainant why she did not shout, the complainant mentioned that she had called one of the witness aunts but there was no response.*

[4] The appellant had remained silent and not called any witness at the trial. However, according to the summing-up he had taken up the position *via* cross-examination of prosecution witnesses that he was at the scene with the complainant but not indulged in any act of penetration of her vagina.

[5] At the end of the summing-up on 15 May 2019 the majority of assessors had opined that the appellant was not guilty of rape but guilty of sexual assault and the minority assessor had opined that he was guilty of rape. The learned trial judge had disagreed with the majority of assessors in his judgment delivered on 16 May 2019, convicted the appellant of rape and sentenced him on 30 May 2019 to 11 years and 07 months of imprisonment with a non-parole period of 10 years.

[6] The appellant had expressed his intention to appeal against conviction and sentence on 18 June 2019 and submitted grounds of appeal on 20 September 2019 followed by amended grounds of appeal against conviction on 09 September 2020. He had filed a notice of abandonment of his sentence appeal in Form 3 on 10 September 2020 and 25 February 2021. The Legal Aid Commission had filed amended notice and grounds of appeal against conviction and written submissions on 26 October 2020. The state had tendered its written submissions on 07 December 2020.

[7] 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.

[8] Grounds of appeal urged on behalf of the appellants are as follows:

> ***Ground 1***
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> *The learned trial Judge had erred in law and in facts not providing cogent reasons when overturning the majority opinion of assessors who had opinioned that the appellant was not guilty of rape.*
>
> ***Ground 2***
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> *The learned trial Judge had erred in law and in facts by directing the assessors to consider whether there is an inconsistency in Seremaia Toka's evidence on oath which he stated the complainant had told him that the appellant had touched her vagina as opposed to him stating in cross-examination when shown his police statement that he had not informed in police , that in such situation, is a misdirection by the learned trial Judge, which does not amount to inconsistency but that of an omission.*

01st and 02nd grounds of appeal

[9] Both grounds of appeal could be considered together as they are interlinked. I had embarked on an analysis of the aspect of *'cogent reasons'* before in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020), **Waininima v State** [2020] FJCA 159; AAU0142 of 2017 (10 September 2020), **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and a few other rulings. I concluded *inter alia* as follows:

> *'There still appears to be some gray areas flowing from the past 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.'*
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> *'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 and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209; AAU58.2015 (3 October 2019) and **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020)]'*
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> *'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.'

'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).'*

[10] **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:

'[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.'

[11] In **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) where the trial judge had overturned the unanimous opinion of 'not guilty' by the assessors, the Supreme Court reiterated that:

'*[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.'*

[12] The appellant's complaint hinges on the trial judge's overturning the verdict of not guilty of rape but guilty of sexual assault. His argument is that the trial judge had not given cogent reasons as to the proof of element of penetration.

[13] The direct evidence of penetration came from the complainant. She had also maintained that she had told her uncle Seremaia Teka everything that the appellant had done to her and particularly the fact that the appellant had inserted his fingers into her vagina. However, the defense had not demonstrated that the complainant had failed to mention in her police statement made on the same day about the appellant's act of penetration.

[14] Seremaia Teka had said in his evidence that the complainant had told him that the appellant had pulled her, removed her shorts and touched her vagina. The defense had demonstrated that Seremaia Teka had not told the police that the complainant had told him that he appellant had touched her vagina. He had explained that he did not tell the police everything. It appears that according to his police statement what Seremaia Teka had told the police on the same day was that the complainant had told him that she was forcefully assaulted by the appellant.

[15] In those circumstances the defense had argued that the complainant should not be believed on the allegation of penetration of her vagina by the appellant.

[16] It is clear that the majority of assessors had entertained some doubt as the element of penetration but generally believed the complainant's version of events and rejected

the denial of the appellant. The majority of assessors seem to have believed Seremaia Teka when he said under oath that the complainant had told him that the appellant had pulled her, removed her shorts and touched her vagina. That explains their decision to find the appellant not guilty of rape but guilty of sexual assault.

[17] The fact that it is not clear in what respect the appellant had apologized to the complainant in his charge statement *i.e.* whether it is for act of rape, sexual assault or anything else, would have contributed to the decision of the majority of assessors. However, the appellant had admitted neither rape nor the sexual assault in his charge statement.

[18] In his judgment, the trial judge had completely believed the complainant and treated her as a truthful and reliable witness as to the act of penetration and her raising cries though no one was around to help her. The judge had been impressed by her demeanor and honesty.

[19] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal sets down the law on inconsistencies as follows:

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

[20] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

> *'[35]…….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; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so*

often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder;"

[21] The Court of Appeal followed the above decisions in **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019). It is, of course, a paramount duty of the trial judge to direct and guide the assessors on how to act on the inconsistencies or contradictions or omissions (*vide* **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017). The trial has adequately directed the assessors on the alleged discrepancies, inconsistencies and omissions in the summing-up and dealt with them independently in the judgment.

[22] The judge had accepted as truthful Seremaia Teka's evidence that he did not tell everything to the police and treated the inconsistency between his evidence under oath and the complainant's evidence as not affecting the reliability of her evidence. The inconsistency here is that Seremaia Teka had testified that the complainant had told him of the appellant having touched her vagina whereas the complainant had said in her evidence that he penetrated her vagina with his fingers. Similarly, the trial judge had considered the discrepancy between Seremaia Teka's police statement ('forceful assault') and his evidence under oath ('touching the vagina') as not affecting the reliability of his evidence or that of the complainant.

[23] The trial judge had not treated the discrepancies or inconsistencies or omissions as going to the root of the mater and shakes the basic version of the prosecution evidence. He had also not accepted that the appellant was not apologizing for the rape charge in his charge statement as he knew that he was being charged for rape of the complainant.

[24] Accordingly, the trial judge had been satisfied that the prosecution had proved beyond reasonable doubt that the appellant had penetrated the vagina of the complainant with his fingers without her consent.

[25] In the circumstances, it cannot be reasonably argued that the trial judge had not given cogent reasons for his decision to overturn the majority of assessors or not considered the contentious issues himself in the judgment. He had discharged his duty of

evaluation and independent assessment of the evidence on its weight reflecting his views as to the credibility of witnesses for differing from the opinion of the assessors and deciding that the appellant was in fact guilty of rape.

[26] 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 when it considers as to whether verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act:

> *'……..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.'*

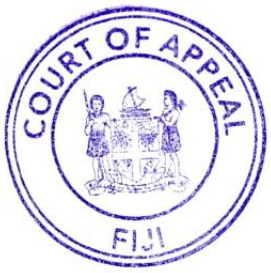
[27] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[28] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[29] I cannot say at this stage that the appellant's appeal against conviction has a reasonable prospect of success or reaches successfully the threshold under section 23(1)(a) of the Court of Appeal Act.

Order

1. Leave to appeal against conviction is refused.



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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL