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

CRIMINAL APPEAL NO.AAU 126 of 2018
[In the High Court at Lautoka Case No. HAC 06 of 2018]

BETWEEN	:	**PENI QARO**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Ms. S. Ratu for the Appellant**	
	:	**Mr. S. Babitu for the Respondent**	
Date of Hearing	:	**12 March 2021**	
Date of Ruling	:	**22 March 2021**	

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009, one count of assault causing actual bodily harm ccontrary to section 275 of the Crimes Act, 2009, criminal intimidation contrary to section 375 (1) (a) and (i) (v) of the Crimes Act 2009 and breach of domestic violence restraining order contrary to section 77 (1) (a) of the Domestic Violence Act, 2009 committed on the 24 December 2017 at Sigatoka in the Western Division.

[2] The information read as follows.

COUNT 1
Statement of Offence

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

Particulars of Offence

PENI QARO *on the 24th of December, 2017 at Sigatoka in the Western Division had carnal knowledge with* ***UNAISI NARESIA*** *without her consent.*

COUNT 2
Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: *Contrary to section 275 of the Crimes Act 2009.*

Particulars of Offence

PENI QARO *on the 24th of December, 2017 at Sigatoka in the Western Division assaulted* ***UNAISI NARESIA*** *thereby causing her actual bodily harm.*

COUNT 3
Statement of Offence

CRIMINAL INTIMIDATION: *Contrary to section 375 (1) (a) and (i) (v) of the Crimes Act 2009.*

Particulars of Offence

PENI QARO *on the 24th of December, 2017 at Sigatoka in the Western Division without lawful excuse threatened to injure* ***UNAISI NARESIA*** *with a chair, with intent to cause alarm to the said* ***UNAISI NARESIA.***

COUNT 4
Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER: *Contrary to section 77 (1) (a) of the Domestic Violence Act 2009.*

Particulars of Offence

PENI QARO *on the 24th of December, 2017 at Sigatoka in the Western Division breached the Domestic Violence Restraining Order number 218/17 of the Sigatoka Magistrate Court dated 5th of December, 2017 by committing the above named offences against* ***UNAISI NARESIA,*** *a protected person.*

[3] At the conclusion of the summing-up on 26 September 2018 the assessors' majority opinion was that the appellant was guilty of rape and assault causing actual bodily harm and their unanimous opinion was that he was guilty of the third and fourth counts as well. The learned trial judge had agreed with the assessors in his judgment delivered on 28 September 2018, convicted the appellant and on 12 October 2018

imposed an aggregate sentence of 08 years and 02 months of imprisonment with a non-parole period of 07 years.

[4] The appellant had in person signed an untimely notice of appeal against conviction and sentence on 19 November 2018. The delay was, however, just 07 days and therefore, the delay could be excused as the appeal had been tendered in person. The appellant had filed submissions in person on 19 August 2020. Thereafter, the Legal Aid Commission had filed an amended notice of appeal against conviction and sentence along with written submissions on 06 November 2020. The state had tendered its written submissions on 16 December 2020.

[5] 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.

[6] 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.

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

Conviction

Ground 1

THAT the learned Trial Judge may have fallen into an error in fact and law by providing an inadequate and improper direction during the Summing Up on the issue of the credibility and reliability of the Affidavit dated 12th July, 2018.

Ground 2

THAT the Learned Trial Judge may have fallen into an error in law and fact to convict the Appellant without independently and adequately considering and assessing the totality of evidence regarding the reliability and credibility of the Complainant's Affidavit dated 12th July, 2018, thereby causing a substantial miscarriage of justice.

Ground 3

THAT the Learned Trial Judge may have fallen into an error in law and fact to convict the Appellant without independently assessing the evidence in its totality for the offence of rape when the State was not relieved of the burden of proving consent beyond a reasonable doubt, thereby causing a substantial miscarriage of justice.

Sentence

Ground 1

THAT the Learned Trial Judge may have fallen into an error in law and fact to impose a sentence deemed harsh and excessive without having regarding to the sentencing guideline and applicable tariff for the offence of rape (of an adult).

[8] The learned trial judge had summarized the evidence led by the prosecution in the judgment as follows.

2. The brief facts were as follows;

The victim Unaisi Naresia has been married to the accused for the past 10 years. On 24 December, 2017 at about 4am the victim was awoken by the accused shouting and trying to open the louvers of her house. To maintain peace of the neighbourhood the victim opened the door.

3. When inside the house the accused started swearing at the victim. The accused was drunk, he called the victim a "bitch" and that she was having an affair. When the accused was in the bathroom the victim ran out of the house because she was scared. The victim had run about 10 meters when the accused came and pulled her top and forcefully dragged her into the house.

4. In the house the accused punched her three (3) times on her back. After this, the victim was pulled and dragged on the floor the accused forcefully removed her panty and inserted his penis into her vagina and had sexual intercourse for about 5 minutes.

5. The victim did not consent to have sexual intercourse with the accused. After the victim had her shower the accused started forcing her to go to the Cuvu Police Post.

6. At the Police Post the victim informed the police officer that the accused had punched and swore at her. The accused lifted a chair and wanted to throw the chair at the victim. At this time he threatened the victim that he will kill her. The victim was frightened.

7. From Cuvu Police Post the victim went to Sigatoka Police Station to lodge her complaint thereafter she went for a medical examination at the Sigatoka Hospital.

8. Two weeks prior to this incident the accused was not staying with the victim as a result of the accused's swearing and threatening behaviour to kill her she was able to get a Domestic Violence Restraining Order (non-molestation) issued against the accused. The Domestic Violence Restraining Order was served on the accused which was acknowledged by him. The accused also admitted he was explained the contents of the order by WPC 4693 Akisi when the order was served on him. The complaint was investigated by the police and the accused was charged.

01st and 02nd grounds of appeal

[9] The appellant's complaint of inadequate directions refers to paragraphs 60-61 of the summing-up.

60. The complainant agreed she had prepared an affidavit on her own which she had taken to be witnessed by a Commissioner for oaths. The contents were read by the complainant in court.

61. The affidavit sworn by the complainant on 12 July, 2018 was marked and tendered as defence exhibit no. 1. The complainant maintained that she wrote the affidavit after she was told by the accused to write it and that she had voluntarily made the affidavit.

62. The complainant maintained that the accused forcefully had sexual intercourse with her on 24 December, 2017, also had assaulted her and threatened her with the chair and breached the DVRO issued against him.

63. The complainant stated that she did not make up a story against the accused although she was upset of the accused's affairs.

64. In re-examination the complainant clarified that when she went to visit the accused at the Prison he had told her what to write in the affidavit which was to withdraw the case, have him bailed out and to have the affidavit witnessed by a Commissioner for oaths. The complainant further clarified that the word voluntarily meant she was told to write the affidavit.

[10] The defense had produced an affidavit (DE1) dated 12 July 2018 attested by a commissioner for oath (Rosleen Devi) affirmed by the complainant where she had apparently stated that the appellant had not raped her and she had complained against him because she was angry and jealous with him. The complainant had read the contents of the affidavit in court and agreed that she had prepared it and taken it to the commissioner for oath. However, she had explained in court that she had prepared it as instructed by the appellant when she visited him in remand though she admitted to have made it 'voluntarily' meaning 'as she was told to write it'. Rosleen Devi had testified that she read the whole document and questioned the complainant and when asked whether her husband had really raped her the complainant had replied 'no' and said that she had complained against him in anger and jealousy but wanted to settle with him (vide paragraph 102 of the summing-up). However, according to the complainant's evidence at the trial these reasons were the exact reasons suggested to her by the appellant himself to put in the affidavit (see paragraph 49 of the summing-up).

[11] The appellant's argument is that the trial judge had not directed the assessors to consider the reliability and credibility of the complainant in the light of what she had affirmed to in the affidavit exonerating the appellant. The trial judge's directions on the affidavit are at paragraphs 48, 49, 60-64, 98, 99 and 101-106. His directions on inconsistency are at paragraphs 56-58 and they relate only to the complainant's police statement and not her affidavit. The appellant relies on **Ram v State** [2012] FJSC 12: CAV0001 of 2011 (09 May 2012) and **Swadesh Kumar Singh v The State** [2006] FJSC 15 to buttress his argument that the trial judge had failed to direct the assessors that they should be cautious before they accept a witness's sworn evidence that

conflicts with a sworn statement the witness previously made and regard the evidence as unreliable unless, firstly the explanation for the inconsistency is genuine and secondly that despite the previous contrary sworn statement, the witness is now telling the truth in evidence.

[12] The trial judge had not directed the assessors in accordance with ***Ram*** and ***Swadesh Kumar Singh***. However, as Calanchini PA said in **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015), the matter does not rest there and it has to be considered as to if and how the trial judge had dealt with it in the judgment.

> *'[6] How then should the learned trial judge have directed the assessors and himself on this issue. It must be noted that under the Criminal Procedure Decree, it is the task of the assessors to give an opinion to the court as to whether an accused is guilty or not guilty. That opinion is not binding on the trial judge. In his judgment he may either agree or disagree with the opinion of the assessors. His verdict should be accompanied by a brief statement as to why he agrees with the opinion of the assessors and a more detailed reasoning in the case where the judge disagrees with the assessors. In this case it would have been possible for the lack of directions in the summing up to have been rectified by a substantive judgment setting out the evidence that supported the decision to enter a conviction against the Appellant.*

[13] I have examined the judgment and find that the trial judge had given his mind fully to the evidence relating to the affidavit at paragraphs 12, 13, 33-36, 44 and 45 and concluded as follows.

> *'[44] I also accept the accused told the complainant what to write in the affidavit since he was desperate to be released on bail and for the complainant to withdraw the complaint which would be in his interest. Due to the difficult circumstances the complainant had found herself in, she was holding on to the document for a month before taking it to the Commissioner for Oaths which was what the accused had asked her to do.*
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> *[45] The complainant narrated to the Commissioner for oaths Rosleen Singh what the accused had dictated to her.*

[14] Thus, the trial judge having examined the effect of the affidavit had concluded that the affidavit contained only what the appellant had wanted the complainant to include therein in order for him to obtain bail.

[15] Further, the trial judge had believed the complainant's evidence given in court as truthful and reliable in the judgment.

> *'[42] I accept the evidence of the complainant as truthful and reliable I have no doubts in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty.'*

[16] Therefore, the trial judge had substantially been satisfied with both aspects referred to in ***Swadesh Kumar Singh:*** the explanation for the inconsistency is genuine and despite the previous contrary sworn statement, the witness is now telling the truth in evidence.

[17] The assessors are not the sole judge of facts in Fiji. 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). This unique legal position in Fiji clearly provides an additional layer of safeguard particularly to the accused. Therefore, any perceived deficiency in the summing-up does not carry the same weight or have the same effect on the outcome of the trial in Fiji as in other jurisdictions where jurors are the sole judge of facts and the contents of the summing-up become so critical as far as the final outcome is concerned.

[18] In any event the appellant's counsel should have sought redirections in respect of the complaints now being made on the summing-up under all three grounds of appeal 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). The deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[19] In addition the medical evidence where the doctor had seen injuries on the complainant consistent with blunt trauma such as a punch provide overall corroboration to the complainant's version of events which had been brought to the attention of the police very promptly by the complainant.

[20] Therefore, in my view there is no reasonable prospect of success of this ground of appeal.

03rd ground of appeal

[21] The appellant argues that the trial judge had not independently assesses the evidence particularly on the issue of consent. Regarding the charge of rape the appellant in his evidence had accepted the act of sexual intercourse but pleaded that it was consensual (vide 89 & 118 of the summing-up).

[22] The complainant's evidence on lack of consent is referred to at paragraphs 41- 44 and 109 & 110 of the summing-up. The trial judge had directed the assessors on how to evaluate the evidence at paragraphs 123-130. He had particularly said at paragraph 128 -130 as follows.

> *'128. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
>
> *129. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.'*
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> *130. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*

[23] Currently, the decisions relating to directions when there is a 'word against word' situation including on the aspect of *'consent'* are **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507

[24] I had the occasion to engage in a detailed discussion on this topic in **Bebe v State** AAU 165 of 2019; 18 March 2021 where after a full analysis of the above decisions and several other decisions, I remarked.

> *'[21] Coming back to the summing-up, it appears that the statement at paragraph 60 that 'It is up to you to decide which version is to believe .....' could have been avoided by the trial judge. However, the statement 'If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.' is in line with modified Liberato directions under (i) and (iii) expressed in **Anderson.** What is missing is a verbatim statement under modified Liberato direction (ii) stated in **Anderson.***
>
> *[22] However, in my view the trial judge's directions 'Remember, the burden to prove the accused's guilt on each count lies with the Prosecution throughout the trial, and never shifts to the Defence' and 'But if you do not believe the complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty' in paragraph 60 and 61 respectively is adequate to cover modified Liberato direction (ii) as Wheeler JA observed in **Johnson**, the expression "reasonable doubt" is apt to convey that a juror who is left in a state of uncertainty as to the evidence should not convict.*
>
> *[24] **De Silva** [35] and [36] also observed*
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> *'..... Nor did defence counsel seek a Liberato direction. The failure of counsel to seek a direction is not determinative against successful challenge in a case in which the direction was required to avoid a perceptible risk of the miscarriage of justice. The absence of an application for a direction may, however, tend against finding that that risk was present.'*
>
> *'The summing-up made clear the necessity that the jury be satisfied beyond reasonable doubt of the complainant's reliability and credibility. The Court of Appeal did not err in concluding that, when the summing-up is read as a whole, the trial did not miscarry by reason of the omission of a Liberato direction.'*

[25] Therefore, there cannot be a reasonable criticism of the directions in the summing-up on 'consent' as the trial judge had directed the assessors correctly on standard and burden of proof at paragraphs 9 and 10 and the elements of rape at paragraphs 15-22 and particularly 'consent' at paragraph 19 & 20.

[26] Having directed himself as per the summing-up, the trial judge had addressed his mind to the charge of rape and consent at paragraphs 7, 8 and 37 of the summing-up. The judgment of the trial judge cannot 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.

[27] 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 the trail judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaivum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]

[28] As I have already held that the trial judge's directions on the appellant's version which materially differed from that of the complainant on 'consent' cannot be found fault with and his judgment is in compliance with the legal requirements as the trial judge was agreeing with the assessors.

[29] Therefore, there is no reasonable prospect of success as far as the third ground of appeal is concerned.

Sentence

[30] The appellant argues that the trial judge had taken extraneous and irrelevant matters into account in the mater of sentence.

[31] The Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment following **State v. Marawa** [2004] FJHC 338.

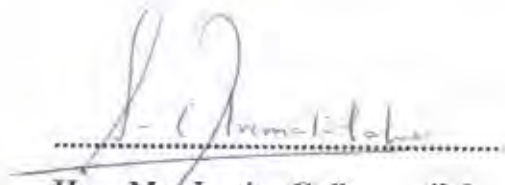
[32] The trial judge had taken 07 years, the lower end of the tariff to start the sentencing process and added 03 years for the aggravating factors and reduced 01 year mitigating circumstances. 09 months and 15 days had been taken into account as the period of remand. The ultimate sentence of 08 years and 02 months imposed on the appellant is at the lower end and well within the sentencing tariff.

[33] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and **Maya v State** [2017] FJCA 110; AAU0085.2013 (14 September 2017)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[34] I have no doubt that the ultimate aggregate sentence fits the crimes committed by the appellant. Therefore, there is no sentencing error or a reasonable prospect of success in the sentence appeal.

Orders

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



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL