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

CRIMINAL APPEAL NO.AAU 133 of 2020
[In the High Court at Labasa Case No. HAC 52 of 2019]

BETWEEN	:	**ALIFERETI LAGOLEVU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**05 December 2022**
Date of Ruling	:	**06 December 2022**

RULING

[1] The appellant had been indicted in the High Court at Labasa and found guilty of one count of rape [section 207(1) and (2)(b)] and one count of sexual assault [section 2010(1)(a)] in 2018 but acquitted of the third count on indecently insulting or annoying any person [section 213(1)(b)] of the Crimes Act, 2009] in 2016. The offences were allegedly committed at Navunievu, Bua in the Northern Division.

[2] After trial, the assessors had expressed a unanimous opinion that the appellant was not guilty of count 01 but guilty of count 02. The learned High Court judge had agreed with their opinion on count 02 but overturned the assessors' opinion on count 01 and convicted the appellant of both counts. The appellant had been sentenced on 25 September 2020 to 15 years with a non-parole period of 14 years of imprisonment but

the actual period to be served is 14 years, 08 months and 10 days with a non-parole period of 13 years, 08 months and 10 days.

[3] The appellant's appeal against conviction and sentence is timely.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The case against the appellant was based on the sole evidence of the victim who was 14 years of age at the time of the incident and the appellant, then aged 55, was the sole witness for the defence. Her testimony has been summarised by the trial judge as follows at paragraph 24 of the summing-up:

> a. *She is 16 years old. Between 11/08/18 and 26/08/18, during school holidays, while she was swimming in the river, the accused jumped into the river and pulled her legs. At that time she was floating on the water, facing upwards. She said the accused parted her legs and pulled her towards his private part. Thereafter the accused held one of her legs with one hand and put the other hand inside the clothes she was wearing and put his fingers inside her vagina. She said she was wearing an underwear, tights and then shorts apart from her tight west. The tights and the shorts she was wearing that day were not that tight. She felt the accused's fingers inside her vagina and the accused was moving his finger.*
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> b. *Whilst the accused was doing this she kicked him and then questioned him "what are you doing?" The accused said "no, I just pulled your leg" and then*

he stood up and left. She said she did not agree for the accused to do what he did. She was afraid and shocked. She did not inform any one about this incident because she thought about the accused. She said earlier that the accused is her uncle and also her grandfather and the accused loves her a lot.

c. *She recalled that, during the period between 01/01/18 and 31/12/18, one day when she was frying pancake at home, the accused came to her house. He sat down and smiled with her. When she asked what he wants, he told her that he wants to drink water and then he stood up and came to her. She said that the accused came behind her and touched both her breasts from behind. She did not agree for the accused to touch her breasts. Then he slid his hands downwards and made her lie down. Thereafter the accused inserted his hand inside her skirt and touched her vagina, outside. She said that the accused was lying on top of her when he did that and that she screamed.*

d. *She said that her younger sister had seen what happened and had informed her mother. Last year her mother had informed the village-headman about the matter and the village-headman instructed them to report the matter. She told the village-headman whom she referred to as Uncle Joti that she had forgiven the accused and she cannot report him.*

e. *During cross-examination she said that the accused pulled her towards him in the river causing her to submerge in the water and that was the time he inserted his hand. She explained that the accused pressed his hand on her stomach area tightly and then inserted it forcefully through her clothes.*

[6] The appellant's evidence had been as follows:

a. *His sister is married to PW1's family. In relation to the first allegation, he said that, on that particular day, he came to the river to have a bath after working in the farm. He saw PW1 and another in the river which he referred to as 'pool' and PW1 told him to come and bathe. He told her that he will have his turn after PW1 and the other finish bathing. PW1 then insisted for him to join them.*

b. *He said that PW1 was floating in the 'pool' which was structured in 'V' shape. He said that you cannot rush into the pool and therefore he was cautious when he went into the pool. When he stepped in, he had to brace himself by holding onto PW1's feet. After that he went to the center of the pool. PW1 was swimming side to side but she did not come into contact with him. After having his bath he left while PW1 and the other were still in the river. He said that he only touched PW1's feet in order to balance himself and PW1 had made up a story that he touched her in the pool. He said that he is not admitting the allegation that he pulled PW1 towards him and penetrated her vagina with his fingers.*

c. *He said that he is also not admitting the allegation that he grabbed PW1's breasts while she was frying pancakes during the period between 01/01/18 and 31/12/18. He said that it was not his intention to go there, but because PW1 took 40 cents he had in his hands in coins after she tapped his hands causing the coins to fall, he went after her to ask for that money. He said that PW1 took the coins which fell and put them in her pocket.*

d. *He said that before that day he had given $10 to PW1 and her mother for their fare to go to Labasa and at that time no one else wanted to assist them. He said that PW1 and her mother asked him for that money at that time but this second time PW1 took the money from him by force and in a manner he did not like. So he went to PW1 and asked her for the money she took and he also told her that he is the only person who assisted her and her mother when they were looking for money to go to Labasa. He said that he told PW1 that if he knew that she would take the 40 cents in that manner, he would not have given the money for her and her mother to go to Labasa on the previous occasion. He said that he is not admitting that he got on top of PW1 and that he that touched her private part.*

[7] The appellant had urged the following grounds of appeal against conviction and sentence.

Conviction:

Ground 1

THAT the Learned Trial Judge erred in law and fact by not taking into consideration the unanimous not guilty opinion of the assessors on count one.

Ground 2

THAT the Learned Trial Judge erred in law by not allowing the church missionary Mr Orisi Vuibulu, an objective witness to appear in court and present his evidence.

Ground 3

THAT the Learned Trial Judge erred in law by assuming that the petitioner intended to commit rape.

Ground 4

THAT the Learned Trial Judge erred law and fact by ignoring the unlikelihood of penetration.

Sentence:

THAT the Learned Trial Judge erred in principle in imposing a non-parole period which was excessive and erred in failing to take into account the following relevant consideration when arriving at the non-parole period of the petitioner:

i. It was not pre-planned
ii. The age of the petitioner
iii. The rehabilitation of the petitioner

01st ground of appeal

[8] The appellant joins issue with the trial judge directing the assessors that *"Children can be confused about what happened to them", "Inconsistencies may lead you to question the reliability of the evidence given by a witness" and "Memory is fallible and you might not expect every detail given by a witness to be the same from one account to the next."*. I do not see any objection to these directions.

[9] 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 **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and there are no inconsistencies highlighted by the appellant that adversely affect the very foundation of the complainant's version of events. It is more so, when the all-important 'probabilities- factor' echoes in favour of the version narrated by the witnesses [see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280]. The trial judge had analyzed the probability of the victim's version and coupled with her positive demeanor and deportment accepted her evidence as credible and truthful.

[10] When the trial judge disagrees with the majority of assessors he 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 [**Fraser v State [2021]** FJCA 185; AAU128.2014 (5 May 2021)]. The trial judge had indeed taken into account the not guilty verdict by the assessors and given cogent reasons in the judgment as to why he was overturning that verdict.

02nd ground of appeal

[11] The appellant submits that church missionary Mr Orisi Vuibulu was an objective witness to appear in court and present his evidence which was to be an important piece of his case as the said Mr Orisi Vuibulu in his statement had identified some young girls in the village including PW (1) being possessed by an evil. The fact that he was not summoned by prosecution to appear in court is a gross miscarriage of justice for the appellant as his evidence would have established the claim that the victim (PW1) was not in the right state of mind. This evidence would have been vital in the appellant's defence of innocence.

[12] I do not find from the summing-up or the judgment that there was any case theory advanced by the appellant's trial counsel on the basis that the victim was not in a right frame of mind. Secondly, there was nothing to prevent the defence from calling Mr Orisi Vuibulu as a witness. The prosecution was entitled to exercise its prosecutorial discretion to select whom to call as its witnesses.

03rd ground of appeal

[13] The appellant contends that the trial judge in his judgment had found the victim to be credible and that she was unable to fabricate a story. He argues that the judge had relied heavily on the victim's testimony when making his assumptions on the intentions of the appellant.

[14] The trial judge had analysed the entire version of the victim and had come to the conclusion that she being a 14 year old girl was not in a position to fabricate a story as descriptive as she narrated in court unless she had experienced it. I do not see anything wrong in the trial judge's conclusion.

[15] The judge had carefully directed the assessors on the fault element of recklessness and not emphasised much on the intention. It is clear from the victim's evidence that even if the appellant did not intend to rape the victim, he certainly had been reckless in doing so against her consent.

[16] **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) the Court of Appeal stated that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21 (1) and proof of intention, knowledge or recklessness will satisfy that fault element.

04th ground of appeal

[17] The appellant contends that the victim had mentioned in her evidence under oath that she was wearing an underwear, tights and shorts apart from her tight vest and she felt the appellant's hand in her vagina forcefully through her clothes. He submits that the trial judge had not taken into consideration that the victim was wearing three types of pants and a tight vest which would made penetration improbable.

[18] The trial judge had indeed dealt with this alleged improbability of inserting the appellant's finger into the victim's vagina at paragraph 18 of the judgment and stated that there was no improbability or unlikelihood. In any event these are matters that should have been more fully ventilated at the trial as trial issues.

05th ground of appeal (sentence)

[19] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

[20] Having gone through the very comprehensive sentencing order, I do not find that the non-parole period of 13 years, 08 months and 10 days amounts to a sentencing error or having caused a miscarriage of justice. Though, this may be an opportunistic rape, the sexual assault appears to be pre-planned. Given the appellants' antecedent in

indecently assaulting another child in 2017, rehabilitation for the appellant at 55 has to take a back seat. He seems to have preferred young victims for sexual abuse and should be prevented from repeating similar offending in the foreseeable future.

[21] In my view, none of the grounds of appeal has a reasonable prospect of success in appeal.

Orders of the Court:

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

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL