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

CRIMINAL APPEAL NO.AAU 046 of 2020
[In the High Court at Lautoka Case No. HAC 74 of 2016]

BETWEEN	:	**TOMASI VAKALOLOMA**
	:	**SAVENACA VALU**
	:	**WATISONI BARO**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. S. Ratu for the Appellant**
	:	**Ms. R. Uce for the Respondent**
Date of Hearing	:	**20 December 2022**
Date of Ruling	:	**21 December 2022**

RULING

[1] The appellants (01st - 03rd accused) had been indicted [with another – 04th accused] in the High Court at Lautoka. The first appellant faced one count of rape (contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009) and one count of assault with intent to commit rape (contrary to section 209 of the Crimes Act, 2009), the 02nd appellant faced one count of rape, one count of assault with intent to commit rape and one count of assault causing actual bodily harm (contrary to section 275 of the Crimes Act, 2009) the 03rd appellant faced one count of rape committed on 04 March 2016 at Sigatoka in the Western Division.

[2] After the prosecution closed its case, the court acquitted the 02nd appellant of the count of assault causing actual bodily harm. At the end of the summing-up the assessors had in their majority opined that all appellants were guilty of rape, 01st and

02nd appellants were guilty of assault with intent to commit rape. The learned trial judge had agreed with the assessors' majority opinion, convicted all three appellants for rape and sentenced them on 08 June 2020 to 11 years and 9 months imprisonment for with a non-parole period of 9 years. The 01st and 02nd appellants were also sentenced to 02 years imprisonment for assault with intent to commit rape to be served concurrently with the sentence for rape.

[3] The appellants' appals against conviction and sentence is timely. 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. 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)].

[4] 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)].

[5] The grounds of appeal of the 01st and 03rd appellants are as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in his analysis of evidence and in convicting the Appellants when the evidence in totality does not support the charge of Rape in terms of the medical report.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to fairly and objectively make an assessment on the issue of penetration thus rendering the verdict unreasonable.*
>
> ***Sentence***
>
> *THAT the Learned Trial Judge erred in law and in fact in allowing extraneous matters to guide or affect him when sentencing the Appellants.'*

[6] The grounds of appeal of the 02nd appellant is as follows:

> *'**Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact in excepting the medical evidence when it contradicted the evidence of the complainant in relation to the count of rape.*
>
> ***Sentence***
>
> ***Ground 1***
>
> *THAT the sentence is harsh and excessive in all circumstances.'*

[7] According to the sentencing order the brief facts were as follows:

> *'2. .....On 3rd March, 2016 the victim at about 7pm went to the Deep Sea Nightclub to listen to music. In the nightclub the victim saw all the four accused persons drinking at a different table, she knows all the accused persons since she was living in their village.*
>
> *3. The nightclub closed at 1.00 am the next day, whilst standing outside the nightclub, the first accused Tomasi came in a 7 seater van and asked the victim to get in and that they will drop her home.*

4. *The first accused was with all the three accused persons and Tevita's cousin Namoumou. The van was driven past the Sigatoka Hospital into a gravel road and up a hill. When the van went into the gravel road, the victim asked Tomasi where they were going to. Tomasi replied that they were going to drink half bottle of gin before going home.*

5. *At the hill, the four accused persons and Tevita's cousin Namoumou started drinking the half bottle of gin, by this time it was about 2.30 am. The victim drank three nips in the bottle cap.*

6. *After a while Tomasi and the victim left the group and walked down the road, as they were walking Tomasi told the victim to hide since Namoumou was coming.*

7. *After sometime Savenaca came to where the victim and Tomasi were hiding. When Savenaca came, he started yelling and asking Tomasi if he had sex with the victim. At this time, Tomasi pushed the victim on the grass with both his hands making the victim lie on her back.*

8. *The victim tried to push Tomasi away and was struggling with him, at this time Savenaca started to pull both her legs, the victim continued to struggle with Savenaca who then punched victim on her right chin and removed her ¾ pants and underwear.*

9. *Tomasi after removing his ¾ pants and undergarments came on top of the victim and inserted his penis into her vagina and had forceful sexual intercourse with her for about 2 to 3 minutes.*

10. *After Tomasi had finished, Watisoni came and removed his pants the victim tried to stop Watisoni by screaming at him to stop and was trying to fight back and get up, however, Watisoni came on top of her and was able to insert his penis into her vagina and had forceful sexual intercourse with her for about 3 minutes.*

11. *After Watisoni had finished, Savenaca came on top of the victim after removing his pants and undergarments he inserted his penis into the victim's vagina and had forceful sexual intercourse for about 2 to 3 minutes. The victim was crying and lying down but the accused did not care and had sexual intercourse with her.*

12. *The victim did not consent to have sexual intercourse with any of the accused persons.*

13. *Savenaca then called out to Tevita who was standing at a short distance to come over. Tevita came, removed his pants came on top of the victim and tried to have sexual intercourse with her. The victim was crying and telling Tevita to stop otherwise she will tell the police. Tevita could not insert his penis into the victim's vagina since she was moving and twisting.*

14. After Tevita stopped, the victim stood up wore her pants and told Tevita that she was going to the police station to report the matter. The victim was crying and hurt. The victim walked with Namoumou to the Sigatoka Police Station and reported the matter to the police.'

[8] The appellants had totally denied the allegations but did not give evidence or call any evidence. They could have called Namoumou as a defense witness who were with her and even walked with the complainant to the Sigatoka Police Station to report the matter to the police, if they thought that no alleged incident happened in that night. The prosecution did not call him.

[9] The gist of all grounds of appeal against conviction is based on the medical evidence. The appellants argue that the medical evidence does not support acts of penetration and therefore the complainant's evidence cannot be relied upon to bring home a conviction for rape.

[10] The medical evidence according to the judgment is as follows:

'Paragraph 23

Vaginal Examination

(a) Speculum examination opening the vagina and visualizing the inside of the vagina. The cervix was normal including the vagina, there was no bleeding noted in the cervix or the vaginal walls. The doctor also did not see any vaginal laceration or any discharge, however, there were 1 or 2 grass particles noted on the side of the vaginal wall.

(b) There was a minor laceration less than 0.5cm at 5 o'clock position and there was no active bleeding. According to the doctor the injuries noted were less than 24 hours ago since the injuries looked fresh. The possible causes of the bruise/ laceration on the right cheek could be by blunt trauma or hitting something hard or a punch.

Paragraph 24

The doctor stated that with the history given by the patient it was possible that the patient could have been assaulted or punched or forced to do something she did not want to do. As for the grass particles seen in the vaginal walls the doctor stated that it could have been due to sex on the grass. The doctor had also observed that the back and front of the patient's pants were dirty with mud stains on it.'

[11] The appellants had contended that the doctor did not state anything at D14 of the complainant's medical report under the heading "professional opinion" suggesting that the doctor was unable to ascertain the cause and age of the injuries. Also they had argued that the doctor did not see any discharge in the complainant's vagina suggesting that there was no sexual intercourse at all and given the manner in which the complainant had described the alleged rape, a minor laceration to the vagina was not possible. These matters such as the difference between *'no vaginal laceration'* in the vaginal wall and *'minor laceration'* at 5 o'clock position should have been probed in detail at the trial. The complainant does not appear to have said that any of the appellants had discharged in her vagina. The doctor had, instead under D14, stated her opinion at appendix 1 of the medical report.

[12] The trial judge in agreeing with the majority of assessors had said in the judgment:

> *37. Dr. Ravasua also gave a detailed account of her examination of the complainant and there is no reason why the medical findings and observations of the doctor cannot be accepted by this court as credible.*
>
> *38. I reject the defence assertion that by not stating her professional opinion under D14 of the complainant's medical examination form the doctor was unable to ascertain the cause and age of the injuries. This court accepts the doctor's explanation that at appendix 1 of the medical report she had documented her opinion. A perusal of the medical examination form supports what the doctor had told the court.*
>
> *39. This court accepts the doctor's evidence that penetration by three men could leave a minor laceration as she had noted at appendix 1. This court also accepts that even though the doctor did not see any whitish discharge from the patient's vagina did not mean there was no sexual intercourse.*

[13] In addition the trial judge had given reasons as to why he believed the complainant.

> *33. I have no doubt in my mind that the complainant told the truth in court. All the accused persons and the complainant are known to each other as fellow villagers and friends.*
>
> *34. There was no suggestion by any of the accused persons that the complainant had any motivation to implicate them or make a false allegation against them.*

35. *The demeanour of the complainant was consistent with her honesty despite passage of time she was able to recall what had happened to her. I also accept her explanation that the reason why she was able to remember what the accused persons had done to her was because they had forceful sexual intercourse with her which she was not able to forget.*

36. *The complainant almost immediately reported the matter to the police.*

40. *The defence of denial is not plausible in view of the evidence adduced. All the prosecution witnesses were reliable and truthful. The defence has not been able to create a reasonable doubt in the prosecution case.*

[14] Medical evidence is led as expert evidence and not as a substitute for direct evidence of penetration. Nor corroboration of the complainant's evidence is necessary for a conviction (vide section 129 of the Criminal Procedure Act, 2009). In this case the complainant had provided direct evidence of penetration. Medical evidence does not appear to have excluded acts of penetration though it may not overwhelmingly support it on its own. That does not necessarily make the complainant's testimony unreliable or incredible. However, the medical evidence seems to lend slender corroboration of an act of sexual intercourse.

[15] The judge had been mindful of the alleged deficiencies in the medical evidence pointed out by the appellants, *vis-à-vis* the complainant's testimony. However, he had not considered them as casting a reasonable doubt on her testimony.

[16] The decision of the majority of assessors and the trial judge appears to have boiled down to accepting the complainant's evidence considering her overall credibility, very prompt complaint and lack of any motive for false allegation against the appellants whom she shared a drink with in the same night.

[17] In the circumstances, I am not inclined to grant leave to appeal on any of the grounds of appeal as at this stage without full trial proceedings I am unable to say that those grounds have a reasonable prospect of success. I cannot assess whether the verdict is unreasonable or cannot be supported by evidence without the complete transcript.

Ground of appeal on sentence

[18] The complaint here is that the trial judge should not have considered the complainant as a vulnerable person as an aggravating factor as she had gone to the spot where the alleged rape happened on her own accord.

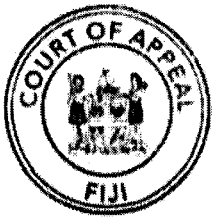
[19] While there does not appear to be any evidence of a pre-plan to rape her, it is in evidence that she was asked to get into the vehicle carrying the appellants on the pretext that the appellants would take her home. However, they drove her to an isolated area. When the van went into the gravel road, she asked the 01st appellant where they were going to and he replied that they were going to drink half bottle of gin before going home. In that situation, the appellants seem to have taken advantage of her vulnerable position in the early hours of the day at a place which was not disclosed to her at the beginning. This is undoubtedly an aggravating factor.

[20] The sentence of 11 years and 09 months imprisonment for the count of rape is within tariff of 07 to 15 years for adult rape [see **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018)] and not harsh or excessive. I see no sentencing error.

[21] 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). 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).

Orders of the Court:

1. Leave to appeal against conviction for all appellants is refused.
2. Leave to appeal against sentence for all appellants is refused.



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