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

CRIMINAL APPEAL NO.AAU 114 of 2020
[In the High Court at Suva Case No. HAC 149 of 2018]

BETWEEN	:	**ASHOK NARAYAN**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**12 June 2023**
Date of Ruling	:	**13 June 2023**

RULING

[1] The appellant had been charged in the High Court at Suva with two counts of rape (one penile rape and another digital rape) of his 13 year old biological daughter contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 and section 207(1) and (2) (c) and (3) of the Crimes Act, 2009 respectively and one count of sexual assault contrary to section 210(1) (a) of the Crimes Act, 2009. They are as follows:

'COUNT ONE
Representative Count
Statement of Offence

RAPE: *Contrary to Section 207(1) and (2) (a) and 3 of Crimes Act of 2009.*

Particulars of Offence

ASHOK NARAYAN *between the 1st day of March 2015 and the 5th day of April 2016 at Nasinu in the Central Division had carnal knowledge of* ***AN****, a child under the age of 13 years.*

COUNT THREE
Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of Crimes Act of 2009.*

Particulars of Offence

ASHOK NARAYAN *between the 1st day of March 2015 and the 31st day of March 2015 at Nasinu in the Central Division unlawfully and indecently assaulted* ***AN****, a child under the age of 13 years, by rubbing her vagina.'*

[2] At the close of the prosecution case the appellant had been acquitted of count 02 as the victim had given no evidence with regard to that count. After the summing-up, the assessors had expressed a unanimous opinion that the appellant was not guilty of the other two counts. The learned High Court judge had disagreed with the assessors' opinion on count 03, convicted him and sentenced the appellant on 18 June 2019 to a period of 05 years' **(**effective period – 04 years, 08 months and 22 days**)** imprisonment with a non-parole period of 03 years (effective period – 02 years, 08 months and 22 days).

[3] The appellant's appeal filed in person against conviction is out of time by less than 02 months and could be regarded as timely.

[4] In terms of section 21(1)(b) 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 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 complainant, WPC Sereima Radrodro and Dr. Bandana Priya Dharshani were the only witnesses summoned by the prosecution. The appellant had not given evidence; nor had he called any other witnesses on his behalf.

[6] The grounds of appeal urged against conviction are as follows:

> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law when he convicted the appellant on count no: 3 of sexual assault, a section that creates an offence of a sexual nature when all evidence of act presented at the trial failed to support the offence charged.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law when he took underweight the credibility of the appellant and totally ignored or disregarded the majority evidence in favour of the appellant.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law when he made his judgment on para 16 line 2 "considering all the evidence in the case" and the "complainant demeanour and manner she gave evidence" he accepted evidence to credible and reliable.*
>
> ***Ground 4***
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> *THAT the Learned Trial Judge erred in law in failing to consider the evidence observed by the complainant in the trial where she was cross-examined by the defence in regards to her evidence: the complainant accepted suggestions put to her by the defence during trial which was in conflict with the evidence which she gave to the prosecution in the box. The credibility and reliability of her evidence was at stake, thus, the trial judge failed and ignored the evidence observed in court.*

Ground 1

[7] The victim had said in her evidence that the the appellant spat on his hand and rubbed it on her vagina and when the appellant was rubbing his spit on her vagina, she felt

awkward and she told him not to do that. If this evidence is believed as the trial judge had done there is sufficient evidence to sustain the charge of sexual assault.

Ground 2

[8] There was no question of the appellant's credibility being underestimated by the trial judge as he opted not to give evidence. Similarly one cannot say that the trial judge had disregarded the evidence favourable to the appellant because it was after analysing such evidence that the trial judge decided to agree with the assessors to acquit the appellant of the second count of rape.

Ground 3 and 4

[9] Grounds 3 and 4 encapsulate the broad complaint that the trial judge was wrong to have overturned the assessors' opinion on count 03 by failing to adduce cogent reasons for doing so.

[10] In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) the Court of Appeal said:

> *[23] What could be identified as common ground arising from several past judicial pronouncements 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 the trial 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), **Kaiyum 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)]*
>
> *[24] 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 [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)]*

[25] In my view, in either situation the judgment of a 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.

*[26] 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)].*

[11] Though not required of him to do, the trial judge had analysed and evaluated independently in detail in the judgment as to why he was agreeing with the assessors with regard to the acquittal of count 01. His in-depth discourse is found at paragraphs 6-15 of the judgment. I would quote only the 6th and 15th paragraphs:

1. When the evidence is taken in its totality, I have noted that the account given by the complainant was not consistent.

15. Taking into consideration the above factors, that is, the inconsistencies in the evidence given by the complainant; the fact that there is doubt about the complainant's mother's involvement in this case; the inconsistency between the complainant's evidence and PE1 regarding the accused penetrating the

complainant's anus; and the fact that there were no injuries consistent with penetration of the complainant's vagina, I have a reasonable doubt as to whether the second element of the first count, that is, penetration of the complainant's vagina is established. All in all, I find that the prosecution has failed to prove the first count beyond reasonable doubt.

[12] The trial judge on the other had devoted only one paragraph in overturning the assessors' opinion on count 3 by stating that:

> *16. In relation to the third count, the complainant's evidence was that the accused spat on his hand and then rubbed her vagina. Considering all the evidence led in the case, the complainant's demeanour when she gave evidence and the manner she explained the said conduct of the accused, I accept that evidence to be credible and reliable. I find that the credibility and the reliability of that evidence on the third count is not affected by the issues I have highlighted above in relation to the first count. This conduct of the accused was unlawful, indecent and also sexual. Therefore, I find that the prosecution has proven the third count beyond reasonable doubt.*

[13] Reading the summing-up and the judgment (in the absence of the trial transcripts), one gets the impression that the act of sexual assault namely the appellant spitting on his hand and rubbing it on the victim's vagina had preceded the first act of alleged penile sexual intercourse of which the trial judge agreeing with the assessors acquitted the appellant. Some of the issues raised by the trial judge in the judgment with regard to victim's evidence on count 01 adversely affect not only the question of penetration but also her general credibility as a witness regarding count 03 as well. Therefore, the trial judge was expected to analyse and evaluate her evidence carefully rather than relying on the complainant's demeanor when she gave evidence and the manner she explained the conduct of the appellant, in disagreeing with the assessors.

[14] In my view, the trial judge's reasoning falls far short of the legal obligation on him when disagreeing with the assessors with regard to count 03. Without trial transcripts I cannot assess whether the victim's credibility could be compartmentalised (divisibility of credibility) between the act of sexual intercourse in count 01 and sexual assault in count 03. However, I am inclined to grant leave to appeal on this issue so that the full court with the aid of complete appeal record may more fully reconsider the appellant's conviction on count 03.

[15] The question is whether on the evidence available to them it was reasonably open to the assessors not to be satisfied of the guilt of the appellant beyond reasonable doubt on count 03 [vide: **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and whether the trial judge could have reasonably convicted the appellant on count 03 on the evidence before him [vide: **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)].

Order of the Court:

1. Leave to appeal against conviction is allowed on the 03rd and 04th grounds of appeal.

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent