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

CRIMINAL APPEAL NO. AAU0079 OF 2019
[Lautoka Criminal Action No. HAC 07 of 2016]

BETWEEN **SOSICENI NAULU**

Appellant

AND **THE STATE**

Respondent

Coram Mataitoga, RJA
Qetaki, JA
Morgan, JA

Counsel Mr M. Fesaitu and Ms L Volau for the Appellant
Ms S. Shameem for the Respondent

Date of Hearing 7 November, 2023

Date of Judgment 29 November, 2023

JUDGMENT

Mataitoga, RJA

[1] I have read the reasons and the conclusions in the judgment and I concur.

Qetaki, JA

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

[3] 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 Vatanitu 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."*

[4] The trial judge had summerised the prosecution evidence as follows in the judgment delivered on 16 May 2019:

> *"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 Measke 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.*

> 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 her 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.*
>
> 13. *Seremaia Teka the uncle of the complainant informed the court he was having 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 appellant 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 aunts but there was no response."*

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

[6] At the end of the summing up the assessors had expressed mixed opinion with the majority having opined that the appellant was not guilty of rape but guilty of the lesser charge of sexual assault. The learned trial judge (in his judgment dated 16 May 2019), disagreed with the majority opinion of the assessors and convicted the appellant for the offence of rape. The appellant was sentenced on 30th May 2019 to 11 years and 7 months imprisonment with a non-parole period of 10 years.

[7] 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. This was followed by amended grounds of appeal against conviction on 9 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 filed an amended notice and grounds of appeal against conviction and written submissions on 26 October 2020. The State had tendered its written submissions on 7 December 2020.

[8] The appellant's grounds of appeal are as follows:

Ground 1

The learned trial judge erred in law and in facts by not providing cogent reasons when overturning the majority opinion of assessors who had opined that the appellant is not guilty of rape.

Ground 2

The learned trial judge had erred in law and in facts by directing the assessors to consider whether there is 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 the police, that in such situation, is a misdirection by the learned trial Judge, which does not amount to inconsistency but that of an omission.

[9] The learned single judge, having fully considered the grounds of appeal refused the leave application however, he cannot at that stage say 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.

[10] A renewal notice of appeal containing the same above two appeal grounds was lodged with the court registry on 17th March 2021 as at pages 1 to 4 of the appeal record. Section 35(3) of the Court of Appeal Act provides that:

"If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant's favour, the appellant may have the application

determined by the Court as duly constituted for the hearing and determining of appeal under this Act.

The Law

[11] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of the court. The test for leave to appeal is **'reasonable prospect of success': Caucau v State** [2018] FJCA 171; AAU0029.2016 (4 October 2018); **Navuki v State** [2018] FJCA 172; AAU0038.2016 (4 October 2018); **State v Vakarau** [2018] FJCA 173; AAU0052.2017 (4 October 2018); **Sadrugu v State** [2019] FJCA 87; AAU0057.2015 (6 June 2019).

Appellant's submissions

[12] The appellant through his counsel (Legal Aid Commission) had filed a comprehensive written submissions for renewal application for leave to appeal against conviction. Counsel also made oral submissions at the hearing.

[13] With respect to Ground 1, the appellant's submissions are summerised below, as follows:

(a) The principles to be considered when disagreeing with the opinions of the assessors was discussed by the Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) at paragraphs [24] to [34]. Section 237(2) of the Criminal Procedure Act recognizes that a judge has the power and authority to disagree with the majority opinion of the assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge's power and authority in this regard is subject to three important qualifications. First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have 'cogent reasons' for differing from their opinion. The reasons must be founded on the weight of the

evidence and must reflect the judge's views as to the credibility of the witnesses: **Ram Bali v Regina** [1960] FLR 80 at 83 (FCA), affirmed **Ram Bali v The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad v Reginam** [1972] 18 FLR 70, at 73 (FCA). Secondly, a judge must comply with the requirements of section 237(4) of the Civil Procedure Act to pronounce his or her reasons in open court. Thirdly, which is related to both the two qualification raised above. A person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone: Cap 12, section 21 ((1) (a); he may also appeal on questions of mixed law and fact under section 21(1) (b) of the same Act.

(b) In Fiji, the responsibility for arriving at a decision and giving judgment in a trial by the High Court sitting with assessors is that of the trial judge, who is the sole judge of facts and the assessors' duty is to offer opinions which might help the trial judge and does carry great weight, but he is not bound to follow their opinion: **Joseph v The King** [1948] AC 215; **Ram Dulare & Others v R** [1955] 5 FLR, and **Sakiusa Rokonabete v The State,** Criminal Appeal No. AAU 0048/05, which were cited with approval by this Court in **Baleilevuka v State** [2019] FJCA 209; AAU 58.2015 (3 October 2019). The reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding, critical examination in the light of the whole of the evidence presented at the trial: **Ram Bali v Regina** (supra), **Ram Bali v The Queen** (supra),**Shiu Prasad v Reginam** [1972] 18 FLR 70 at 73, and **Setevano v State** [1991] FJA 3 at 5.

(c) In **Bavesi v The State** [2022] FJCA 2, AAU 044.2015 (3 March 2022), his Lordship Gamalath, JA, had made the following remarks:

"[31]In my opinion in relation to this, what matters is not the volume but the essence, in the sense if the reasons for the disagreement with the opinion of the assessors can be distilled into a comprehensive articulation which is consonant with the evidential base upon which the case has been built up, in which there isn't any perceivable discordance based on insufficient, insecure and prejudicial grounds, that in my opinion could be considered as providing sound basis to justify the trial judge's disagreement with the assessors. The test of cogency has to be an objective analysis of the facts in which a holistic view is required with a special emphasis being attached to the nature of the evidence transpired in the trial. In the final analysis, it is the matrix of evidence that becomes the wattle and daub of a case. Having said, I shall now turn to the grounds of appeal." (Underlining added)

[14] With respect to **Ground 2** of the conviction appeal, the appellant's submissions are summerised as follows:

(a) The direction to the assessors at paragraphs [52] to [54] of the summing up (pages 58-59) of the record was for the assessors to assess the inconsistency regarding the complainant's uncle's (PW2's) evidence on oath as opposed to his police statement on oath . That the learned trial judge erred in viewing that as 'inconsistency' when it is in fact an 'omission' on PW2's part to inform the police.

(b) The principles of assessing the discrepancy, whether an 'inconsistency 'or an 'omission', are the same, as observed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), a decision of this Court.

(c) The omission is vital as PW2 had made a statement to the police on the same day the complainant informed him of what happened to her, that is,

immediately after the alleged incident. It is difficult to follow the logic as to PW2 failing to inform the police, particularly a crucial information that makes up the heart of the allegation (sexual act) when he had given his statement to the police. PW2 only gave the information four years later at the trial.

(d) Should this Court accept the finding of the trial judge that the omission does not affect the credibility of PW2's evidence, it remains that all that was told to him by the complainant was that the appellant touched her vagina. This has a bearing on the learned trial judge's reasoning to overturn the majority assessors' opinion, which is relevant to Ground 1.

Respondent's submissions

[15] The respondent filed a written submissions in this Court on 30 November 2022, and also made oral submissions at the hearing. The submissions addressed both grounds together as the grounds relied upon by the appellant are interrelated. The submissions are summerised below:

(a) In terms of section 237(2) of the Criminal Procedure Act, the judge in giving judgment shall not be bound to conform to the opinion of the assessors. Section 237(4) compels the judge to give reasons for differing with the majority opinion of the assessors if he does not agree with the majority opinion.

(b) In **Shiu Prasad v Reginam** (supra), this Court said *"if a Judge is to differ from the opinions of the assessors he must have cogent reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment."*

(c) This Court also dealt with a very similar ground in **Penaia Valevesi v State** [2020] AAU 39.2016 (22nd June 2020). The issue is whether the trial judge

clearly dealt with the weight of the evidence and his view on the credibility of the victim and the appellant. The Supreme Court has also noted it is ultimately the trial judge that will decide whether or not an accused is guilty. The opinion of the assessors is not decisive: **Noa Maya v State** [2015] FJSC 30; CAV009 of 2015 (23rd October 2015).

(d) The Court will not set aside a conviction that is supported by the totality of the evidence and is not perverse: **Singh v State** [2020] FJSC 1; CAV0027.2018 (27 February 2020).

(e) The prosecution had called 3 witnesses to give evidence. The appellant did not give evidence and opted to remain silent, which is his right. Nor did the appellant call any witness.

(f) The appellant had admitted what he had done to the complainant after he saw her during the identification parade and wished to apologise for what he had done to her and everyone he has hurt after he saw her during the ID parade. He also apologized to the Court for his actions.

(g) The case was not one where it was the victim's words against the appellant. The case rested on the credibility of the victim's evidence.

(h) The victim in this case made the complaint soon after she met her uncle, PW2. The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to enhance and support the credibility of the complainant.

(i) The complainant need not disclose all the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct,

provided it is capable of supporting the credibility of the complainant's evidence.

(j) The victim had returned back to her uncle, PW2 in a towel and her clothes were dirty. The victim had told her uncle, PW2 that the appellant had touched her vagina. During cross examination by the defence counsel, the following questions and answers are noted at page 188 of the high Court record:

"Q: ***I put it to you that Sosiceni did not forcefully inserted his fingers into your vagina.***

A: ***He forced his fingers into my vagina.***

Q: ***I also put to you that, that morning your uncle saw you with a towel wrapped and no cigarettes with you, you made it up.***

A: ***No my lord I did not make it up."***

The above questions and answers shows that the victim was not moved when the main allegation was put to her. She was consistent with her evidence and she told the next available person she met what had happened to her.

(k) The trial judge had properly directed the assessors in paragraphs 44 to 51 of the summing up.

(l) The case **Bharwada Bhoginbhai Hiribhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280), often noted by the Courts, is relevant to resolving the discrepancy identified in the evidence.

(m) That paragraphs 20 to 27 of the learned trial judge's judgment was quoted, in response to the appellant's argument that the trial judge did not give cogent reasons as to the element of penetration, the evidence of the victim's uncle (PW2) in court and the statement he had given to police and the statement made by the appellant in his charge statement. The State submits that the

learned trial judge had given cogent reasons for finding the appellant guilty for the offence of Rape that he was charged with.

(n) In conclusion, the respondent submits,

"In totality the learned judge did not believe the position of the appellant at trial. There was no error for the learned judge to come to such a conclusion based on the evidence before the court. The State submits that the grounds do not have merits and should be dismissed."

Discussion

[16] Did the appellant commit the alleged rape? Does the evidence at the trial adduced by the witnesses for the prosecution establish the elements of rape allegedly committed against the complainant? Did the appellant penetrate the complainant's vagina? Was there a discrepancy in PW2's evidence, and, if so, what effect does it have? The majority opinion of the assessors is that the appellant is guilty of sexual assault, implying that the prosecution had not proven the commission of rape as charged, and opined that the appellant is guilty on a lesser charge of sexual assault. In disagreeing with the assessors, and in convicting the appellant of rape, and sentencing him to 11 years and 7 months imprisonment, did the learned trial judge provide *'cogent reasons'* in accordance with statute and recognized legal principles established through case law? For instance, were his reasons founded on the weight of the evidence adduced at trial, and were the reasons reflective of the learned trial judge's view of the credibility of witnesses?

[17] The appellant's submissions on Ground 1 are captured in paragraph [13] above. In the Legal Aid Commission's written submissions for the appellant, at page 4, under "*The Defence Case*", paragraphs 11 and 12 state that:

"At the trial the appellant had opted to remain silent and neither was any other witness called on his behalf to testify during the trial. The position taken up by the appellant in his Defence against the prosecution case, in light of the defense's cross examination at paragraph 72 of the summing up, page 62 of the Record, was that he had not penetrated the complainant's vagina as alleged and that the

allegation was made up by the complainant as she did not have her uncle's cigarettes when she got home. Furthermore, the admissions in the charge interview statement are not admissions seeking an apology for committing rape.

[18] Paragraph 72 of the summing up states:

"72.The accused on the other hand denies the allegation he takes up the position that he did not penetrate the vagina of the complainant as alleged. The accused and the complainant had smoked at the footpath in the village. The complainant could have shouted or called for help if the accused had done what she alleged. The complainant made up a story against the accused since she did not have a packet of cigarette to give to her uncle. In respect of the admission to the charge statement the defence position is that the accused did not seek apologies for raping the complainant as alleged." (Underlining added)

[19] It is common ground that a judge has the power and authority to disagree with the majority opinion of the assessors. When the judge disagrees with the majority assessors his or her reasons are deemed to be the judgment of the court. However, the judge's powers and authority in this regard is subject to three important qualifications: (1) The judge must pay careful attention to the opinion of the assessors and must have 'cogent reasons' for differing from their opinion .The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses : **Ram Bali v Reginam** (FCA) (supra), **Ram Bali v The Queen** Privy Council (supra), **Shiu Prasad v Reginam** (FCA) (supra); (2) A judge must comply with section 237 of the CPC to pronounce his/her reasons in open court, and, (3) Related to both (1) and (2), that a person convicted of a criminal offence in the High Court has the right to appeal to the Court of Appeal on any question in line with section 21(1) (a) and (b) of the Court of Appeal Act. See also paragraphs [13] (a), (b) and (c) above. (Appellant's submissions), and paragraphs [15] (a) to (n) above (Respondent's submissions.)

[20] The major contention here center's on whether the learned trial judge had provided *'cogent reasons'* when overturning the majority decision that the appellant was not guilty of rape. The appellant contends that the learned trial judge erred in law and in facts in not providing cogent reasons when overturning the majority opinion of the assessors. Further, that, the judge must do so based on the three important qualifications above-mentioned, the reasons for differing with the opinion of the assessors must be cogent and clearly stated, founded on the weight of the evidence, reflect the trial judge's view as to the credibility of witnesses and be capable of withstanding, critical examination in the light of the whole of the evidence presented in the trial: **Setevano v State** (supra). Further, the reasons must be consistent with the principles in **Bavesi v State** (supra), see paragraph [13](c) above.

[21] A comprehensive summary of the prosecution's evidence is set out in paragraph [6] to 14] of the learned trial judge's sentencing order, and which was reproduced in paragraph [3] of the Ruling of the learned single judge dated 8 March 2021 at page 6 of the record. The same is reproduced at paragraph [4] above, of this judgment.

[22] Both the appellant and the respondent have provided their versions of the evidence adduced by the prosecutions, which do not significantly differ from each other in content and substance. For my purpose, I am adopting the summary of evidence before the trial judge as provided by the respondent at paragraph 13 of its written submissions, as follows:

> *"The prosecution had called 3 witnesses to give evidence. The appellant did not call any witness and remained silent. The complainant had gone to buy some grog and cigarette at the request of her uncle at about 3am on the said day of the offence. The appellant had been sitting outside his house and had asked the victim for 1 cigarette roll. The victim had smoked the roll of cigarette with the appellant who smelt of liquor. While smoking the appellant pushed the victim on the footpath they were on and penetrated the victim's vagina with his finger for about 2 minutes. The victim was afraid of the appellant when he was raping her. The appellant thereafter took the victim's clothes with him. The victim had cried*

out for help but no one came for her help. She thereafter managed to wrap a towel from the village and reported what the appellant did to her to Seremaia Teka. Seremaia Teka gave evidence and told the court what the victim had told him. He agreed during cross examination that he did not tell the police everything. He said he did not tell the police in detail and that he only told police what happened to Torika. The charging officer also gave evidence in terms of the statement made by the appellant. The appellant had admitted what he had done to Torika after he saw her during the ID Parade and wished to apologise for what he had done to her and everyone he has hurt. He also apologized to the court for his actions. The witness noted that it was not clarified what the appellant was apologizing for. The appellant did not give evidence at trial and remained silent."

Note also that the above summary is not inconsistent with the summary of evidence in paragraph [4] above.

[23] As the element of penetration of the victim's vagina has to be present before a conviction on a rape charge can be sustained, with the other elements of the offence, a review of the victim's evidence at the trial (Questions and Answers) is necessary, in view also of the opinion of the majority assessors which was overturned by the learned trial judge. The victim, Adi Torika Tabua (PW1), in examination in chief, responded as follows:

(i) At page 178 of record:

"Q. ***What about Sosi?***

A. ***We had grog one night and I was sent to go and buy grog from Mesake's house and also to buy a packet of cigarette. I came past Sosiceni house and Sosiceni was sitting there, he called me I stopped and he asked for a cigarette, I went to the house of one of my uncle I knocked and no one answered, we had gone there for Sosi for Sosi to go and buy the roll but no one answered so I opened the packet of cigarette that I had and gave one to him.***

Q. ***What happened after that Torika?***

A. ***We then went to smoke at one of my grandfather's footpath <u>he then took off my pants</u> and <u>he fingered me my lord,</u> when he did that I called my grandmother after that I wrapped a towel on me and then I went home.***

Q. **You *said Sosiceni <u>took off your pants and ten fingered you.</u>***

A. ***<u>Yes my lord.</u>***

Q. ***Where did that actually happened?***

A. ***On the footpath just beside my grandfather's house, I smelt liquor on him*** **"**(Underlining added)

(ii) At page 179 of record:

"Q. ***What were you wearing?***

A. ***A red ¾ shorts and a white t-shirt***

Q. ***<u>For how long Sosiceni had fingered you</u>***

A. ***<u>For 2 minutes.</u>***

Q. ***How did he do that?***

A. ***<u>My vagina</u>***

Q. ***What was your reaction?***

A. ***<u>He did that forcefully to me and I was afraid.</u>***

Q. ***What happened after that?***

A. ***<u>After that I came then my uncle asked me what happened</u>*** **"**

(iii) In cross examination by Ms Singh, top of page 184 of record:

"Q. ***<u>So you told your uncle that Sosiceni forcefully inserted his fingers into your vagina</u>***

A. ***<u>Yes my lord</u>***

Q. ***I put it to you that you never told Seremaia Teka that Sosiceni had forcefully inserted his fingers into your vagina***

A. ***<u>I told him my lord"</u>***

(iv) In cross examination at page 188-see paragraph [15] (j) above (Respondent's submissions).

[24] In my view the evidence of the victim/complainant (PW1) had proven beyond reasonable doubt that the appellant had penetrated the vagina of the complainant Torika Tabua with his fingers. The penetration was without her consent.

[25] The learned trial judge had adjourned overnight to consider his judgment. It his judgment the learned trial judge disagreed with the majority assessors, but agreed with the minority opinion of the assessors that the accused is guilty of the offence of rape as charged. He found the accused guilty as charged and convicted the accused accordingly. What was the learned trial judge's reasons for disagreeing with the majority assessors who found the accused guilty of sexual assault, a lesser crime?

The Judgment delivered on 16 May 2019

[26] ***Evidence of the complainant.*** The learned trial judge accepted:

(a) The evidence of all the prosecution witnesses as truthful and reliable. He held that the complainant was able to recall and narrate what the accused had done to her some four years ago. (Paragraph 20)

(b) That the complainant was afraid of the accused when he forcefully removed her shorts and inserted his fingers into her vagina. The complainant shouted for help but there was no one around during the early hours of the morning to help her. The learned trial judge rejected the contention of the defence that the complainant did not shout for help inferring nothing happened. He stated that there is no requirement of the law for a complainant to shout or yell to show her or his resistance towards an unexpected sexual encounter. (Paragraph 21)

(c) That the complainant had told her uncle Seremaia Teka what the accused had done to her. (Paragraph 22)

(d) That the complainant told the truth in court her demeanour was consistent with her honesty. She was a straight forward witness who was not discredited during the cross examination. (Paragraph 22)

[27] ***Evidence of Seremaia Teka (uncle) and alleged discrepancies (inconsistencies and omissions) in his evidence.*** The learned trial judge believed in and accepted the evidence of Seremaia Teka (PW2).He told the truth in Court when he did not tell everything in detail to the police. Seremaia did tell the Court about relevant and material information pointing to the unlawful sexual conduct of the accused.

> *"The inconsistency between the evidence of the complainant and the witness Seremaia in this regard does not adversely affect the reliability of the complainant's evidence."* (Paragraph 23)

[28] Additionally, in paragraphs 24 and 25 of the judgment, the learned trial judge elaborated as follows:

> *" 24. Furthermore, the inconsistencies between the evidence of Seremaia and his Police statement wherein he was mentioned as saying that he was told by the complainant that the accused had force fullyassaulted her also does not affect the reliability of the complainant's and Saaremaa's evidence. A police statement does not necessarily reflect the truth of the matter compared to evidence given under oath. Seremaia was cross examined at length he was not shaken or discredited.*
>
> *25. The discrepancies between the prosecution witnesses did not go to the root of the matter and shake the basic version of their evidence. The alleged incident happened in 2015 and after 4 years they were giving evidence considering the delay, discrepancies are bound to happen but not enough to render their evidence unreliable."*

[29] ***Accused's/Appellant's admission and assertion.*** The learned trial judge did not accept the appellant's contention that the accused was not apologizing for raping the complainant, and rejected the assertion by the defence that the complainant had made up a story.

> "26. *..the admission by the accused in the charge statement was given voluntarily without any force, pressure, unfairness or assault by the police. The accused was aware that the charge statement was in respect of the offence of rape and he had signed an acknowledgement that he understood the charge and the caution put to him. This court is unable to accept the defence contention that the accused was not apologizing for raping the complainant.*
>
> 27. *I also reject the assertion by the defence as unbelievable that the complainant had made up a story to implicate the accused since she did not have with her the packet of cigarette she was supposed to buy for her uncle."*

[30] ***Satisfied beyond reasonable doubt.*** The learned trial judge held that (1) the defence has not been able to create any reasonable doubt in the prosecution case; (2) Court is satisfied beyond reasonable doubt that the accused on 19th March, 2015 had penetrated the vagina of the complainant with his fingers without her consent. The Court also accepted that the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time. He agreed with the minority opinion of the assessors that the accused is guilty of the offence of rape as charged. (Paragraphs 28, 29, 30 and 31)

Conclusion

[31] Having considered the grounds of appeal against conviction, the facts of the case, the applicable law and relevant legal authorities and legal principles, and having analyzed the evidence of the prosecution, and the defence, I am satisfied that the learned trial judge had not offended against, but complied with , section 237 (4) of the Criminal Procedure Act. The reasoning are cogent and consistent with the requirements of the relevant legal authorities raised by the parties and discussed in this judgment. The appeal is dismissed as it lacks merit. The appellant's conviction is affirmed.

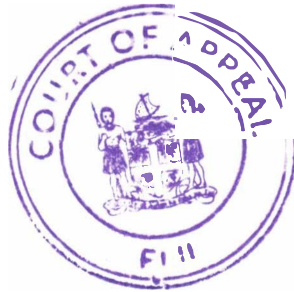
Morgan, JA

[32] I have read and concur with the reasoning and conclusions of the judgment.

Order of the Court:

1. *Appeal against conviction is dismissed.*
2. *Conviction is affirmed.*

Hon Mr Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL



Hon Mr Justice lipate Qetaki
JUSTICE OF APPEAL

Hon Mr Justice Walton Morgan
JUSTICE OF APPEAL