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

CRIMINAL APPEAL NO. AAU 73 of 2022
[In the High Court at Suva Case No. HAC 343 of 2020S]

BETWEEN	:	**RONALD MUNESH GOUNDER**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. T. Kean for the Appellant**
	:	**Ms. S. Shameem for the Respondent**
Date of Hearing	:	**13 December 2023**
Date of Ruling	:	**14 December 2023**

RULING

[1] The appellant had been charged in the High Court at Suva with two counts of rape. The complainant was 15-year-old class 8 student at a local primary school while the appellant was 39 years old at the time of the offending. The charges are as follows.

*"**Count 1***
Statement of Offence

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

Particulars of Offence

RONALD MUNESH GOUNDAR *between the 11th day of September, 2020 and the 12th day of September, 2020 at Nasinu in the Central Division, had carnal knowledge of* ***S.B.*** *without the consent of the said* ***S.B****.*

Count 2
Statement of Offence

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

Particulars of Offence

RONALD MUNESH GOUNDAR *between the 11th day of September, 2020 and the 12th day of September, 2020 at Nasinu in the Central Division, penetrated the vagina of* ***S.B.*** *with his tongue, without the consent of the said* ***S.B****."*

[2] After trial before a judge alone, the trial judge had convicted the appellant and sentenced him on 05 August 2020 to 11 years of imprisonment on each count (both sentences to run concurrently) with a non-parole period of 09 years.

[3] The appellant's appeal only against conviction is timely. 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 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] The trial judge had summarized the facts in the sentencing order as follows:

> 2. *'The brief facts of the case were as follows. On 11 September 2020 (Friday), the date of the alleged rape, the complainant (PW1) was 15 years old. She was a class 8 student at a local primary school. The accused was 39 years old, at the time. He was a self-employed welder. The complainant and three of her friends went to the accused's house at Clifton Road, Valelevu. It was late Friday evening. On the way to the house, the accused bought three packets of Chinese whiskey from a nearby shop. The complainant, her three friends and the accused began to drink the whiskey at the accused's house. They were drinking in a room under the house.*
>
> 3. *The complainant said, she drank about 6 to 7 glasses of whiskey. In the early morning of 12 September 2020, the complainant said she was so tired that she*

fell asleep, on the floor. When she woke up, the complainant said she saw the accused sitting on her lap, and he was taking off her pants. She said, she told him to stop. She said, the accused then slapped her and warned her not to resist or he will kill her. He later pulled down her jeans and panty. The accused then inserted his tongue into the complainant's vagina, without her consent. Then he inserted his penis into her vagina, without her consent. The complainant told the accused to stop, but he ignored her. The accused, at the time, knew the complainant was not consenting to the above sexual acts, at the time.

[5] The prosecution had called the victim (PW1), PW2 Isikeli Waqavatu alias Ziggy, PW3 Jone Taleimainaivalu (complainant's father) and Dr. Losana Burua (PW4). The appellant gave evidence on his behalf.

[6] The grounds of appeal urged by the appellant are as follows:

Conviction:

Ground 1:

THAT whether the Learned Judge erred by failing to provide an independent assessment of evidence to determine that the conviction is supported by totality of evidence.

Ground 2:

THAT the Learned Judge erred by failing to properly consider the issue of delayed reporting of the complainant.

Ground 3:

THAT the Learned Judge erred by failing to address the inconsistencies in prosecution witness evidence.

Ground 4:

THAT the Learned Judge erred by interfering excessively during the trial process, causing substantial miscarriage of justice to the appellant.

Ground 1, 2 and 3

[7] The appellant argues that failing to provide an independent assessment of evidence by the trial judge to determine that the conviction is supported by totality of evidence is an error affecting the conviction. He also submits that the trial judge had not considered the effect of delay in reporting and the inconsistencies in the prosecution witnesses. In

effect, the appellant argues that the conviction is unreasonable or cannot be supported having regard to the evidence.

Legal test applicable

[8] When the above ground of appeal is raised, at a trial by the judge assisted by assessors the test has been formulated as follows. Where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021)]. The decisions in **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493) were relied upon by the court in formulating the above test.

[9] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a*

defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'

[10] It has been said many a time that the trial court has a considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and the appellate court should not lightly interfere and there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

[11] On a perusal of the judgment, it appears that the trial judge had devoted paragraphs 8 - 10 for only the evidence of the complainant (no discussion of other prosecution witnesses) and a single paragraph (no.12) to the appellant's denial. In a single paragraph (no. 13) the trial judge had determined the evidence of the complainant to be credible and the appellant's evidence incredible. It is as if the trial judge had acted on what he believed the demeanour of the complainant alone. There is hardly any analysis or evaluation of the totality of the evidence.

[12] The Supreme Court of Canada in **R. v. Sheppard** 2002 SCC 26; 2002] 1 SCR 869 (2002-03-21) made very pertinent pronouncements on the duty of a trial judge.

'Held: ……. The trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision.

The requirement of reasons is tied to their purpose and the purpose varies with the context. The present state of the law on the duty of a trial judge to give reasons, in the context of appellate intervention in a criminal case, can be summarized in the following propositions:

1. *The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.*

2. *An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear*

from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. *The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.*

4. *The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.*

5. *Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.*

6. *Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.*

7. *Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.*

8. *The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.*

9. *While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.*

10. *Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial. Such an error of law at the trial level, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.*

In the circumstances of this case, the majority of the Court of Appeal correctly concluded that the reasoning of the trial judge was unintelligible and therefore incapable of proper judicial scrutiny on appeal. There were significant inconsistencies or conflicts in the evidence. The trial judge's reasons were so "generic" as to be no reasons at all. The absence of reasons prevented the Court of Appeal from properly reviewing the correctness of the unknown, unexpressed pathway taken by the trial judge in reaching his conclusion and from properly assessing whether he had properly addressed the principal issues in the case. The trial judge's failure to deliver meaningful reasons for his decision was an error of law within the meaning of s. 686(1)(a)(ii) of the Criminal Code.'

[13] Binnie, J said:

'1. In this case, the Newfoundland Court of Appeal overturned the conviction of the respondent because the trial judge failed to deliver reasons in circumstances which "crie[d] out for some explanatory analysis". Put another way, the trial judge can be said to have erred in law in failing to provide an explanation of his decision that was sufficiently intelligible to permit appellate review. I agree with this conclusion……

5. At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges. The question before us is how this broad principle of governance translates into specific rules of appellate review.'

[14] Section 686 of Criminal Code referred to in ***Sheppard*** on 'Powers of the Court of Appeal' is similar to section 23 of the Court of Appeal Act including the proviso in Fiji.

[15] Binnie, J continued as to the test applicable:

'25. ……..If deficiencies in the reasons do not, in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the Criminal Code. That provision limits the power of the appellate court to intervene to situations where it is of the opinion that (i) the verdict is unreasonable, (ii) the judgment is vitiated by an error of law and it cannot be said that no substantial wrong or miscarriage of justice has occurred, or (iii) on any ground where there has been a miscarriage of justice.'

> *26. The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.*
>
> *28. It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.'*

[16] I am unable to look into the question of delay in reporting the incident or the alleged inconsistencies in the prosecution evidence as there is no mention of them in the judgment.

[17] As for the alleged delay in reporting, the record will reveal whether the victim's explanation, if any, for an unreasonable delay satisfies the 'totality of circumstances' test adopted by the Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018).

[18] Similarly, the existence of inconsistencies by themselves would not impeach the creditworthiness of a witness and that it would depend on how material they are – **Laveta v State** [2022] FJCA 66; AAU0089.2016 (26 May 2022). 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 [**Mohammed Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) & **Krishna v The State** [2021] FJCA 51; AAU0028.2017 (18 February 2021)].

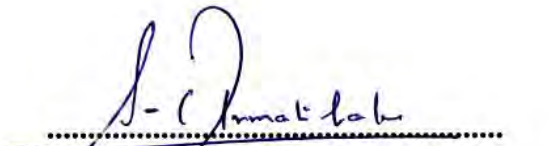
[19] In the light of the above discussion, I think there is a failure on the part of the trial judge to evaluate and analyse the totality of evidence and given adequate reasons for the conviction and therefore, the appeal should be left to the full court to examine the trial transcripts and decide whether the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision leading to an error of law (and a substantial miscarriage of justice) and whether the verdict is still reasonable or can be supported having regard to the evidence.

Ground 4

[20] The appellant complains of undue interference in the conduct of the case by the trial judge. Both counsel confirmed that it was indeed the case and the full court would do well to look into this issue. Therefore, I leave it to the full court to consider this matter with the aid of transcripts of trial proceedings in the light of legal principles set out in **Lal v State** [2022] FJCA 27; AAU047.2016 (3 March 2022).

Order of the Court:

1. Leave to appeal against conviction is allowed.



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

Solicitors:

Legal Aid Commission for the Appellant
Office for the Director of Public Prosecutions for the Respondent