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

CRIMINAL APPEAL NO. AAU 064 of 2022
[In the High Court at Lautoka Case No. HAC 211 of 2019]

BETWEEN	**:**	**PARBIND CHAND**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. Y. Kumar for the Appellant**
	:	**Mr. L. Burney for the Respondent**
Date of Hearing	**:**	**20 December 2023**
Date of Ruling	**:**	**22 December 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva with common assault (one count), sexual assault (two counts) and rape (one count). The appellant, aged 49, was the uncle of the complainant, aged 17 at the time of the offending. The charges were as follows.

*'**COUNT 1***
Statement of Offence (a)

***COMMON ASSAULT**: Contrary to Section 274 (1) of the Crimes Act.*

Particulars of Offence (b)

***PARBIND CHAND,** on the 7th day of April 2017, at Nadi, in the Western Division, unlawfully assaulted **PPK** by slapping her.*

COUNT 2
Statement of Offence (a)

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

Particulars of Offence (b)

PARBIND CHAND, *on the 7th day of April 2017, at Nadi, in the Western Division, unlawfully and indecently assaulted* ***PPK*** *by kissing her on her lips and sucking her breast.*

COUNT 3
Statement of Offence (a)

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

Particulars of Offence (b)

PARBIND CHAND, *on the 8th day of April 2017, at Nadi, in the Western Division, unlawfully and indecently assaulted* ***PPK*** *by kissing her and sucking her breast.*

COUNT 4
Statement of Offence (a)

RAPE*: Contrary to Section 207 (1) & (2) (b) of the Crimes Act.*

Particulars of Offence (b)

PARBIND CHAND, *on the 8th day of April 2017, at Nadi, in the Western Division, penetrated the vagina of* ***PPK****, with his fingers without her consent.*

[2] After trial before a judge alone, the trial judge had convicted the appellant on all counts and sentenced him on 15 July 2022 to imprisonments of 06 months (common assault), 05 years each (sexual assault) and 15 years (rape) respectively (all sentences to be served concurrently) with a non-parole period of 12 years. After deducting the period of remand, the final sentences were 14 years and 09 months with a non-parole period of 11 years and 09 months.

[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 and sentence 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] Further 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].

[6] The trial judge had summarized the facts in the sentencing order as follows.

[7] The prosecution had called 02 witnesses (complainant and her mother) and the appellant, his wife and daughter had given evidence on his behalf in support of the total denial. The defense evidence was to show that the incidents as alleged did not happen or could not have happened and they were fabricated; on 07 April 2017, the appellant had gone to bed around 11.00 pm and his wife and the complainant slept together in the living room and on 08 April 2017 the appellant drove to Nadi alone without the complainant.

[8] The grounds of appeal urged by the appellant are as follows.

Conviction:

Ground 1:

THAT the Learned Trial Judge erred in law and in fact in finding the appellant guilty on 1 count of Common Assault, 2 counts of Sexual Assault and 1 count of Rape, even though there were so many inconsistencies, discrepancies and contradictions and omissions in the evidence.

Ground 2:

THAT the Learned Trial Judge erred in law and in fact in convicting the appellant on the charges of rape when the testimony of the complainant compared to her mother's testimony was insufficient and inconsistent with each other and when compared to their police statements.

Ground 3:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider that the whole evidence of PW2 was based on hearsay evidence, her whole evidence was contradictory with her statement to police, there were omissions, discrepancies, contradictions and inconsistencies.

Ground 4:

THAT the Learned Trial Judge erred in law and in fact in rejecting the defence version of events when the defence witnesses clearly and no uncertain terms had given evidence in favour of the accused.

Ground 5:

THAT the Learned Trial Judge erred in law and in fact when he failed to appropriately observe the demeanor of the complainant and her mother as they were very evasive in their answers and was not cooperating throughout the trial.

Ground 6:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that there were two statements given by the complainant, one on the 19th April, 2017 and the other on the 7th December 2018 and there were differences in each version.

Ground 7:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the fact that the Medical Officer who examined the complainant stated that there was no abnormalities and bruise noted on the external genitalia of the complainant.

Ground 8:

THAT the Learned Trial Judge erred in law and in fact when he failed to believe the testimony of the appellant who was very forthright in his answers compared to that of the complainant.

Ground 9:

THAT the Learned Trial Judge erred in law and in fact in not finding the appellant's evidence together with the other defence witnesses to be credible but did not given cogent reasons for his findings.

Sentence

Ground 11:

THAT the sentence is manifestly harsh and excessive.

[9] The trial judge had stated in the sentencing order that

> ***'[5]*** *It was proved during the trial that, on 7 April 2017, at Nadi, you unlawfully assaulted PPK by slapping her.*
>
> ***[6]*** *It was proved during the trial that, on 7 April 2017, at Nadi, you unlawfully and indecently assaulted PPK, by kissing her on her lips and sucking her breast.*
>
> ***[7]*** *It was also proved during the trial that, on 8 April 2017, at Nadi, you unlawfully and indecently assaulted PPK, by kissing her and sucking her breast.*
>
> ***[8]*** *It was further proved during the trial that, on 8 April 2017, at Nadi, you penetrated the vagina of the complainant PPK, with your fingers, without her consent.*
>
> ***[9]*** *It is an agreed fact that the complainant is your niece and that complainant's father, namely Pradeep Kumar, had made arrangements with you for the complainant to stay at your place and attend Nadi Technical College.*

Ground 1, 2, 3 and 6

[10] All the above grounds of appeal in one way or another challenges the evidence of the complainant and her mother on the basis of alleged omissions, discrepancies, contradictions and inconsistencies. This means that the appellant challenges the verdict of guilty as being unreasonable.

[11] This court has formulated the test in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] where the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence as follows which is the same where the trial is held by judge alone - **Filippou v The Queen** (2015) 256 CLR 47:

> *'[23] ……* ***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 assessors to be satisfied beyond reasonable doubt of the commission of the offence. ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors'***

[12] The law on omissions, discrepancies, contradictions and inconsistencies is that 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 omissions, discrepancies, contradictions and inconsistencies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance [**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)].

[13] However, in Fiji the assessors were never the sole judges of facts. The judge was and is the sole judge of fact in respect of guilt, and the assessors were 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].

[14] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court.

[15] At the same time, it has been said many a time that the trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when 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)].

[16] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in order to satisfy itself whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt or as expressed by the Court of Appeal in another way, whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

[17] Regarding the omissions highlighted by the defence in the evidence of the complainant and her mother the trial judge had held that they had satisfactorily explained the omissions (see paragraphs 57-59 of the judgment). Therefore, I cannot say at this stage whether the appellant has a reasonable prospect of success in his appeal based on the above grounds of appeal. It is a task to be undertaken by the full court, if these grounds are renewed by the appellant.

Ground 5

[18] The trial judge's statement at paragraph 61 suggests that he had indeed considered the demeanour and deportment of the complainant.

Grounds 4, 8, 9

[19] The common ground in these grounds of appeal is inadequacy of reasons in the judgment for rejecting the evidence of the appellant and his witnesses.

[20] Important aspects of duty to give reasons may be summarised as follows.

- *Adequate Reasons are Fundamental: The delivery of reasoned decisions is fundamental to the judicial process as it provides clarity and understanding for the parties involved. Failure to give sufficient reasons can lead to a sense of grievance as the losing party may not understand why they lost.*

- *Role of Reasons in Judicial Legitimacy: Providing clear and reasoned judgments is crucial for the legitimacy of judicial institutions in the eyes of the public. It enables individuals to understand the basis of a decision and supports the accountability of judges in discharging their responsibilities.*

- *Overall, judges have a duty to articulate their reasoning in a manner that enables the parties involved to understand the basis of the decision and allows for meaningful appellate review, ensuring fairness and transparency in the judicial process.*

- *Reasonable Explanation for Decisions: Judges are expected to provide reasons that sufficiently reveal the basis of their decisions, especially on critical points in dispute between the parties. This includes explaining why one witness's testimony is preferred over another's, particularly in cases involving credibility issues.*

- *Variability in Reasoning Depth: The extent and content of reasons depend on the case and issues under consideration. While some cases may require detailed reasoning due to complex facts or unsettled law, others might suffice with more straightforward explanations.*

- *Reasons Vary According to Circumstances: The need for detailed reasons can differ based on the nature of evidence (e.g., eyewitness accounts vs. expert testimony) or complexity of the case.*

- *Importance in Appellate Review: Adequate reasons facilitate meaningful appellate review, allowing higher courts to assess the correctness of the trial judge's decision. Deficiencies in reasons may lead to errors of law or hinder the appellate court's ability to conduct a proper review.*

- *Functional Test for Appellate Review: The appellate court must determine if the trial judge's reasons are sufficient for meaningful appellate review. If the deficiency in the reasons prevents this review, it constitutes an error of law.*

[21] I examined a similar complaint in somewhat detail in two recent rulings (**Bala v The State** AAU 21 of 2022 (18 December 2023) and **Prasad v The State** AAU 45 of 2022 (18 December 2023) in the light of several decisions abroad and expressed a provisional view as follows

> *"Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the*

scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. 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."

"If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court i.e. to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an error of law within the meaning of section 23 of the Court of Appeal Act. 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 section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act."

[22] The respondent has conceded that the trial judge's reasons as to why he rejected the defence evidence on the alleged incident on 07 April 2017 based on apparent contradiction with an admitted fact is arguably flawed, and the judge has failed to address the conflicting evidence between the complainant and the defence witnesses as to events on the morning of 08 April 2017. In short, the respondent submits that while the trial judge may have had good reasons to reject the defence evidence, he had not explicitly said or said enough as to why he rejected the defence evidence.

[23] In **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) in the context of a trial judge disagreeing with assessors, the Supreme Court said

'[34] ……..At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events……'

[24] Therefore, it is for the full court to decide whether there is inadequacy of reasons constituting an error of law leading to a miscarriage of justice and if so, the error could be cured by the application of the proviso to section 23 of the Court of Appeal Act.

Ground 7

[25] The prosecution does not seem to have called or relied on any medical evidence as part of its case. Neither has the trial judge relied on any such evidence to convict the appellant.

Ground 11 (sentence)

[26] The appellant has not raised any ground of appeal on the sentence but made some submissions.

[27] The appellant seems to be complaining that the trial judge had not considered his past history of having no previous convictions. However, at paragraphs 35 and 37 the judge had considered this very fact and accorded him a discount of 02 years for being a first time offender.

[28] The trial judge was fully entitled to impose the impugned sentences and they do not offend the totality or proportionality principles. It is within and on the lower side of the permitted tariff of 11-20 years of imprisonment - **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018)]. I see no merits here.

[29] 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)]. The approach taken by the appellate court in an appeal against sentence 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)]; if outside the range, whether sufficient reasons have been adduced by the trial judge.

Orders

1. Leave to appeal against conviction is allowed on grounds 4, 8 & 9.
2. Leave to appeal against sentence is refused.

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