

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

CRIMINAL APPEAL NO.AAU 0142 of 2017
[In the High Court at Lautoka Case No. HAC 123 of 2013]

BETWEEN : **WAISAKE WAININIMA**

AND : **THE STATE**

Appellant

Respondent

Coram : **Prematilaka, RJA**
: **Bandara, JA**
: **Kulatunga, JA**

Counsel : **Appellant in person**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **07 & 10 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka on a single count of rape committed at Fiji Sugar Corporation Quarters, Rakiraki in the Western Division between 01 December 2012 to 30 December 2012 contrary to section 207(1) and (2) (a) and 3 of the Crimes Act, 2009 respectively.

[2] The information read that the appellant penetrated the vagina of 'LD', a child under the age of 13 years, with his penis.

- [3] At the conclusion of the trial the assessors had unanimously opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors in his judgment, convicted the appellant and sentenced him on 18 July 2017 to 12 years and 7 ½ months of imprisonment with a non-parole period of 09 years.
- [4] The appellant had not pursued the sentence appeal and the appellant’s application for leave to appeal against conviction was refused by the single judge of this court. The appellant has renewed his appeal against conviction before the full court.
- [5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is ‘**reasonable prospect of success**’ (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Wagasaga v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.
- [6] The grounds of appeal urged on behalf of the appellant are as follows. The first two grounds of appeal were urged before the single judge and the rest are new grounds of appeal some of which are repetitive and overlap with others.

Ground 1

1. *THAT the learned trial judge erred in law and in fact when he failed to thoroughly and properly and independently assess the complainant’s evidence and its own contradictions which raised a reasonable doubt in the State case and the learned trial judge’s failure in relying on the complainant’s contradictory evidence caused a miscarriage of justice against the appellant*

Ground 2

2. *THAT the learned trial judge erred in law and in fact when he convicted the appellant without giving cogent reasons for disagreeing with the unanimous opinion of the assessors.'*

Ground 3

3. *THAT the Learned Trial Judge erred in law and in fact in accepting PW3 as a reliable witness despite PW3's being grossly evasive under cross-examination and that PW3 had also admitted that she and her hot – headed husband had aggressively questioned the accused and that the accused had confessed to the rape in their home at FSC quarters Rakiraki.*

Ground 4

4. *THAT the Learned Trial Judge erred in law and in fact in accepting PW3's evidence that the accused had confessed to the allegation of rape in their home at the material time; despite PW3 admitting under cross-examination that there was no independent persons present at their home at the material time to verify the supposed confession of the accused.*

Ground 5

5. *THAT the Learned Trial Judge erred in law and in fact when he continued to accept PW3's shaky, illogical answers – which had been earlier rejected unanimously by the assessors – and continued to convict the accused even though PW3 had agreed under vigorous cross-examination that the presence of her very hot-tempered husband and their aggressive accusations had intimidated the accused.*

Ground 6

6. *THAT the further to the Learned Trial Judge erred in law and in fact when he failed/and or refused/to give any cogent and plausible explanations why he accepted the vastly shaky evidence given by PW3 that was unanimously discarded by the assessors who in a relatively quick and short deliberation of about 15 minutes only unanimously agreed the prosecution evidences was so faulty that it was far too risky to reach any other decision, except to find the accused not guilty.*

Ground 7

7. *THAT the Learned Trial Judge erred in law and in fact when he failed/and or refused/to give any cogent and plausible explanations why he differed with the unanimous not guilty plea reached by the assessors given the untruth, evasive ways the prosecution witnesses displayed under cross-examination.*

Ground 8

8. *THAT the Learned Trial Judge fell into error when he misdirected himself on the weight to be given to the opinion of the assessors when he gave his judgment.*

Ground 9

9. *THAT the Learned Trial Judge erred in law when his Lordship shifts the burden of proof to the appellant by requiring the appellant to prove his innocence.*

Ground 10

10. *THAT the Learned Trial Judge verdict is unreasonable and not supported by the totality of the evidence.*

[7] The brief facts, as could be gathered from the sentencing order, are as follows:

[2]

The complainant who was 11 years of age and a class 5 student resided with her parents and two elder brothers at FSC Compound in Rakiraki. She knew the accused who was a distant cousin.

[3] *On a day between 1 December, 2012 and 30 December, 2012 whilst the complainant's parents were in Suva the accused and his friends came to the house of the complainant, together with her two brothers they all went to the river for a swim.*

[4] *The complainant was alone at home after a while the accused came back at this time the complainant was in her bedroom. In the bedroom the accused started kissing the complainant and then forcefully grabbed her and told her to take off her clothes. The complainant did as she was told since she was not strong enough to resist.*

[5] *The accused made the complainant lie on the bed took out his penis and inserted it into her vagina. The complainant felt pain so she told the accused to go away which he did.*

[6] *The complainant was frightened and shocked she did not know what to do. The complainant's aunt one evening saw the accused putting his hands around the buttocks of the complainant. The aunt of the complainant suspected something was happening to the complainant. The complainant's father was informed and the matter was reported to the police.'*

01st ground of appeal

[8] The appellant's complaint is partly based on the victim's evidence as narrated in paragraphs 31 and 32 of the summing-up:

[31] In the bedroom the accused started kissing the complainant and then forcefully grabbed her and told her to take off her clothes. The complainant did as she was told since she was not strong enough to resist.

[32] The accused made the complainant lie on the bed took out his penis and inserted it into her vagina. The complainant felt pain so she told the accused to go away which he did.'

[9] The appellant argues that the trial judge had not drawn his attention to the 'inconsistency' and 'contradiction' as appearing from the above two paragraphs in disagreeing with the assessors. The judge had set out the same in paragraphs 6 and 7 of his judgment too.

[10] In the first place, I do not see such a material 'inconsistency' or 'contradiction' in the two statements of the complainant. To me, they are not mutually exclusive, inconsistent or contradictory. The complainant was 11 years of age (as opposed to that, the appellant was 20 years of age) at the time of the alleged rape and therefore, it was quite possible that she was not physically strong enough to resist the appellant and simply asked the appellant to go away after he inserted his penis into her vagina causing her pain.

[11] The alleged 'inconsistency' or 'contradiction' may have been somewhat important if the appellant's position had been that the complainant had consented which, of course, was immaterial given her age. The appellant had totally denied the incident and attributed a sinister motive to the complainant's father and aunt for having falsely implicated him.

[12] The appellant also complains that the trial judge had not considered the contradiction and inconsistency on the victim's evidence under cross-examination where she denied that the appellant with some of his friends came to her house on a Sunday or her having seen him in December 2012 or he raped her on that occasion. However, when one examines the entirety of her evidence, it becomes clear that she has a peculiar way of answering in the negative or 'no' when she actually meant 'yes'. Given her young age, she had answered how she understood the questions under cross-examination. This is partly due to manner in which those questions had been framed by the defense counsel. However, upon a closer scrutiny, it becomes clear that what she was trying to say is that the appellant and his friends did not come on a Sunday but on a weekday during school holidays in December 2012. In fact, the appellant himself admitted in his evidence that he and his friends went to the victim's house in December 2012 before going to the river. Thus, it is common ground that the appellant had visited the victim's house in December 2012, be it on a Sunday or a week day. On the question whether her brothers were at home when the appellant raped her, her answer was that the brother were with her at home but they also went to the river with the appellant and his friends. Thus, when the appellant returned alone, only she was at home.

[13] There may sometimes be minor variations in the manner in which a victim describes the incident, but the question is whether such variations affect the credibility of the witness [vide **Koroitamana v State** [2018] FJCA 89; AAU0119 of 2013 (05 June 2008)]. I do not think that these allegedly and seemingly contradictory answers were in fact material contradictions or inconsistencies that go to the root of the victim's evidence and shake the foundation of her testimony. As stated in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015):

*[13] 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 (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).'*

[14] In **Laveta v State** [2022] FJCA 66; AAU0089.2016 (26 May 2022) the Court of Appeal succinctly stated reasons why inconsistencies are inevitable in a case of this nature.

*[65] Inconsistencies are bound to occur when witnesses recount a certain incident and more so when it relates to a sexual assault and the victim is a teenager. Thakkar J in the case of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (1983) SCC 217, has succinctly explained as to why inconsistencies are bound to occur in the testimony of witnesses and their effect. He stated: ‘We do not consider it appropriate or permissible to enter upon a reappraisal or reappraisal of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious’ and went on to identify them. He said ‘The powers of observation differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person’s mind, whereas it might go unnoticed on the part of another. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder’. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment.’*

[15] Having considered the evidence against the appellant as a whole, I cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can I, after reviewing the various alleged discrepancies in the evidence of the victim and prosecution witnesses, consider that there had been a miscarriage of justice [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)].

02nd, 06th and 07th grounds of appeal

[16] Having analyzed several previous decisions the Court of Appeal in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) succinctly stated as follows:

‘[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.’

[17] However, lack of cogent reasons alone is not a basis on which a verdict could be set aside. In terms of section 23(1)(a), a verdict should be set aside if it is unreasonable or cannot be supported having regard to the evidence or on a wrong decision on any question of law or on any ground amounting to substantial miscarriage of justice (read with the proviso) [vide **Fraser v State** (supra)]. In **Johnson v State** [2013] FJCA 45; AAU90 of 2010 (30 May 2013) the state had not disputed the proposition that a failure to comply with the statutory requirement, whether because the reasons are inadequate or they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors. However, it was subsequently argued by the state [for e.g. **Raj v State** [2020] FJCA 254; AAU008.2018 (16 December 2020)] that the consequence of failure to give ‘cogent’ reasons would not necessarily guarantee success for the appellant in appeal, for this court can adequately discharge its appellate function independent of the said failure on the part of the trial judge. The state’s argument goes further to state that section 237(4) is silent on the consequence of failure to adhere to the section by the trial judge *i.e.* to give reasons in differing with the assessors and that while such a failure may constitute an error of law it does not follow that such

failure would necessarily amount to a miscarriage of justice or for that matter a substantial miscarriage of justice. In other words, it is argued that lack of cogent reasons alone cannot found a successful appeal unless there has been a substantial miscarriage of justice.

[18] In order to determine whether the reasons are capable of withstanding critical examination in the light of the whole of the evidence presented in the trial, the appellate court has to necessarily examine the record of the case. A trial judge's decision to differ from the opinion of the assessors involves an evaluation of the entirety of the evidence led at the trial, and so does the decision of the Court of Appeal where the trial judge's decision is challenged by way of appeal. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence.

[19] In Singh v State [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020), the petitioner had been convicted of murder after trial by the High Court judge where the learned judge by his judgment dated 16 September 2014, had overturned the unanimous opinion of the assessors that the petitioner was not guilty of the crime. Upon conviction, the petitioner was sentenced to life imprisonment with a non-parole period of 20 years. The Court of Appeal had affirmed the decision of the High Court judge. The Supreme Court disagreed and the following observations were made by Hon. Justice Saleem Marsoof.

[24] It is always necessary to bear in mind that the function of this Court, as well as the Court of Appeal, in evaluating the entirety of the evidence led at the trial and making an independent assessment thereof, is of a supervisory nature., the learned trial judge has also fallen into error in the effective discharge of his duty of independently evaluating and assessing the evidence led in the High Court in the course of his judgment.

[25] I am therefore of the opinion that the Court of Appeal has in all the circumstances of this case, failed to discharge its supervisory function of considering carefully whether the trial judge had adequately complied with his statutory duty imposed by section 237(4) of the Criminal Procedure Decree. Though an appellate court such as the Court of Appeal and this Court does not have the advantage of seeing the witnesses testify so as to appreciate their demeanour, it is evident

on the available evidence that the trial judge had failed to effectively discharge his statutory duty of evaluation and independent assessment of the evidence when differing with the unanimous opinion of the assessors that the petitioner is not guilty of murder, and the Court of Appeal erred in affirming the said decision.'

[20] The Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) examined the trial judge's duty in disagreeing with the assessors where the accused had also given evidence and stated as follows.

'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. 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. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.'

[21] The appellant's contention is that the trial judge had not given cogent reasons for disagreeing with the assessors. On an examination of the summing-up, I find it to be a comprehensive address to the assessors not only the prosecution evidence but also the appellant's evidence and an analysis of both versions. The trial judge had given directions on all relevant aspects of law and facts. He had left it to the assessors to assess and evaluate the evidence. The summing-up is clearly a part and parcel of the judgment being challenged.

[22] In disagreeing with the majority of assessors the trial judge had started by directing himself in accordance with the summing-up and the evidence which he had placed in detail before the assessors therein.

- [23] Then in the written judgment, the learned trial judge had once again adverted in brief to the summary of the evidence led against the appellant and the position taken up by the appellant in his evidence and his sole witness in support of the total denial of the accusation.
- [24] The appellant points out that the trial judge had not considered the fact that the victim had not seen him on the material date and time, why her screams were not heard by her family members swimming in the river which was only 06 steps away, the fact that PW3 (Ana Lewanavanua) continuously asked the victim to admit that she had been raped by the appellant and that the assessors needed only 15 minutes to express a not guilty opinion.
- [25] I shall examine each of these complaints with reference to the evidence. It is clear that the victim had stated that on a weekday in December 2012 the appellant came home with friends and along with her brothers they went to the river to swim. Later, without others the appellant returned home around lunch time when the victim was alone and raped her. According to her, this was not the only time the appellant done similar things to her. She had admitted that on 28 March 2012 she and the appellant were watching phonographic movie at his house. However, the consent was not in issue in the case as the victim was still under 13 years at the time of the incident on 01 December 2012. The appellant himself admitted in evidence that he with two of his friends went to the victim's house in December 2012 and then to the river for swimming.
- [26] The victim had not said in her evidence that she screamed but she only felt pain for a short time. However, it was pointed out to her under cross-examination that she had told the police that she yelled out because it was paining. The question as to why her brothers swimming in the river could not have heard it was not even put to her. It could be due to many reasons such as the pitch of screaming, how far the brothers were in the river and how attentive they were etc. She had also explained why she did not tell the brothers of what the appellant had done to her (she was afraid of them and did not know what to do) and why she decided to go to the river after the incident (she went there in order to forget what had happened).

[27] Upon a closer examination of the evidence of PW3 Ana Lewanavanua also referred to as Ana Domoni (the victim was her younger brother's daughter), it appears that the latter had seen the appellant touching the victim's buttocks by putting his arms around her buttocks in April 2013 in her house and she realized later that her husband too had seen it because he questioned her about it at dinner. Having realized that there may be more to it than they knew she had questioned the victim subsequently on a Saturday. After some hesitation the victim had said that the appellant was only fondling her breasts down to her private parts. She had then told what she learned from the victim to her husband and the victim's father (and PW3's brother) Josua that it could be worse. Then on Saturday evening she had gone alone and told this to the appellant's parents and on Sunday she had taken the appellant to the victim's parents. The meeting took place at Josua's house where the appellant confessed to fondling the victim for some time and having had sex with her on her bed during school holidays in 2012, in the presence of Josua Domoni, the victim, the witness and another. After the meeting Josua had reported the matter to the police. Therefore, I do not see any merits in the appellant's complaint that the victim was coerced by PW3 to come out with the allegation of rape against him.

[28] It appears from the victim's evidence that due to these developments PW3's husband (victim's uncle) had asked the appellant not to take part in church services as the appellant had confessed to him too that he had raped her. PW3 also had confirmed that the appellant had first admitted to her husband of the rape allegation and then to her in the absence of the victim's father Josua Domoni. The defense counsel had suggested to PW3 that the appellant admitted the allegation of rape at the meeting because he was frightened and felt threatened by victim's father Josua Domoni. However, PW3 had made it clear that before the meeting at Josua Domoni's place the appellant had already confessed to her and her husband. PW3 appears to have handled the whole affair in such a way as to prevent any open hostility between the appellant and the victim's father Josua Domoni.

[29] The fact that the assessors took only 15 minutes to come up with their opinion does not merit much consideration. That also might mean that they had not given due and adequate consideration to the totality of evidence or properly considered the matter before expressing their opinion of not guilty.

03rd, 04th, and 05th grounds of appeal

[30] I have already dealt with the evidence of PW3 Ana Lewanavanua.

[31] Though the defense counsel had suggested to PW3 that the appellant admitted the allegation of rape because he was frightened and felt threatened by victim's father Josua Domoni, the appellant had totally denied admitting the allegation of rape at Josua Domoni's place but admitted only seeking forgiveness for the rumors that he had raped the victim. He had not spoken to any threatening behavior coming from Josua Domoni either. In fact he had not denied having made admissions of rape to PW3's husband previously or to PW3 near the church though he had denied admitting the allegation of rape to her at her house. Nor had he attributed any sinister motive to the victim as to why she had made the allegation of rape against him.

[32] In my view, PW3's evidence taken as a whole suggest that she was a truthful witness and she had not fabricated or exaggerated anything deliberately against the appellant. In fact, the appellant's evidence corroborates several parts of PW3's evidence particularly the meeting at Josua Domoni's place.

08th ground of appeal

[33] In **Fraser** the Court of Appeal reaffirmed the following legal proposition:

[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)].’

- [34] Therefore, the trial judge need not have given any particular weight to the opinion of the assessors in deciding the guilt or otherwise of the appellant, for the assessors only express a non-binding opinion as a matter of assistance.

09th ground of appeal

- [35] The appellant’s concern centers on paragraphs 31 and 32 of the judgment which are as follows:

[31] I do not believe the accused told the truth in court when he stated that the complainant lied in Court and then allegation was a fabrication.....

[32] I do not believe the defense witness Cristopher Rakai told the truth in Court....’

- [36] The appellant had selected just the first sentence in both paragraphs for his criticism of the trial judge who had given reasons as to why he would not believe either the appellant or his witness in the rest of the said paragraphs.

- [37] The appellant in his evidence had admitted that he went to the victim’s house in December 2012 with DW2 and one Jone but denied having come back to the victim’s house while others were swimming and raped her. He also admits the meeting at Josua Domoni’s place in June 2013 and found Josua Domoni’s behavior different in that he did not speak to him nicely but when he spoke he was angry. Others including PW3, her husband Joji and the victim displayed no angry behavior towards him. According to him, he went there to dispel the rumors that he had raped the victim and seek forgiveness but not made any confessions as to raping the victim at her house. He attributed a sinister motive to Josua Domoni and Ana Domoni in that they wanted to defame him and his father to force them to resign from their positions in the church namely youth secretary and church elder respectively.

[38] The defense counsel had suggested to PW3 that the appellant admitted the allegation of rape because he was frightened and felt threatened by victim's father Josua Domoni. However, the appellant had totally denied admitting the allegation of rape at Josua Domoni's place.

[39] DW2 Cristopher Rakai had contradicted the appellant and said in his evidence that they did not go to the victim's house on that day at all. The evidence of the appellant and that of DW2 in my view lacks credibility.

10th ground of appeal

[40] The Court of Appeal set down in **Kumar v State** AAU 102 of 2015 (29 April 2021) the test on 'unreasonable or cannot be supported having regard to the evidence' in section 23 (1)(a) as follows [also see **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)]:

'[23]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. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.'

[41] Thus, as stated by the Court of Appeal in **Kumar** and **Naduva**, 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 including defense 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.

[42] The assessors *might* have entertained a reasonable doubt about the appellant's guilt. But, it cannot be said that on the record of evidence they *must* have entertained a reasonable doubt about the appellant's guilt, for it was reasonably open to the assessors to be satisfied beyond reasonable doubt of the commission of the offence. When a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. I think that the trial judge could have reasonably convicted the appellant of rape. In my view, acting rationally, the assessors ought not to have entertained a reasonable doubt as to proof of guilt.

[43] The appellant also complains that the trial judge had not based his disagreement with the assessors on the prosecution evidence but rather he had disbelieved the appellant's evidence in disagreeing with the assessors. I do not think that criticism is valid. Having reminded himself of the evidence of the complainant, Dr. Sharma and Ana Lawanavanua from paragraphs 5-14 of the judgment, the trial judge in paragraphs 24-27 given reasons as to why he believed the complainant's version. Then the judge had accepted the doctor's opinion that the complainant's hymen was not intact and been penetrated. Finally he had stated in paragraphs 29, 30 and 35 as to why he believed Ana Lawanavanua.

[44] The trial judge had equally considered the evidence of the appellant and his close friend Christopher Rakai in paragraphs 15-23 of the judgment and given reason including their poor demeanor and lack of candor as to why he did not believe their evidence in paragraphs 31-34. The trial judge had in particular drawn his attention to the contradiction between the evidence of the appellant and Christopher Rakai in that the appellant had said that on the day of the alleged incident he had in fact gone to the complainant's house situated about six feet away from the river bank, with Rakai and another and from there to the river joined by the complainant's two brothers to swim whereas according to Rakai they never went to the complainant's house on that day. Had the appellant visited the complainant's house on that day as claimed by her he would have got to know that her parents had gone away and with her brothers joining the group to swim in the river, the complainant was alone at home. Thus, the trial

judge had not believed Rakai when he also said that he did not see the appellant going anywhere while they were swimming. In any event it is unbelievable that Rakai kept an eye on the movements of the appellant all the time for 02 hours whilst swimming with the friends. It would have been quite possible for the appellant to go to the complainant's house which was 06 steps away from the river bank unnoticed by Rakai, sexually violated the complainant and come back.

[45] Similarly, the trial judge had disbelieved the appellant's position that the allegation of rape was the result of a fabrication by the complainant's father and aunt (Ana) due to a dispute her father had with him relating to his position in the church. This appears to be a far-fetched conspiracy theory and it cannot be believed that a father and an aunt would jeopardize the entire future of an 11 years old the daughter by dragging her into an act of rape by a man to take revenge on him.

[46] The appellant had admitted having gone to see the complainant with her aunt Ana (who had on an earlier occasion seen him putting his hands around the buttocks of the complainant and later elicited from her what had happened between the two) where (according to Ana) he had admitted fondling the complainant for some time and having had sex with her on her bed at home during school holidays in 2012. In fact Ana had further stated that the appellant had also confessed to her in the church that he had engaged in sexual intercourse with the complainant. The trial judge had disbelieved the appellant's denial of both instances, who nevertheless admitted having gone to the complainant's house to seek forgiveness from her family for the rumors that were spreading of his having raped the complainant. The trial judge had stated that there was no reason for the appellant to go to the complainant's house to seek forgiveness if the rumors had been false and he had nothing to do with the complainant.

[47] The trial judge had thus considered the weight of the evidence and evaluated the credibility of the evidence of prosecution witnesses including the demeanor of the complainant. The trial judge had given convincing reasons why he disagreed with the assessors and decided that the appellant was guilty. He had finally held that the prosecution had proved its case against the appellant beyond reasonable doubt. In my

view, it was open on the evidence coupled with its credibility for trial judge to have arrived at the verdict of guilty against the appellant.

[48] Having examined the summing-up and the judgment I am convinced that the trial judge's finding of guilty against the appellant was supported by the weight of evidence and nothing had seriously affected the credibility of the complainant. The trial judge had discharged the burden cast on him in overturning the assessors' opinion. The verdict of guilty is reasonable and can be supported having regard to the evidence.

[49] Since there is no reasonable prospect of success with regard to the appellant's conviction appeal, leave to appeal should be refused. Since this court in this process has now fully considered the appellant's appeal against conviction, the appeal against conviction should be dismissed in terms of section 23(1)(a) of the Court of Appeal Act.

Bandara, JA

[50] I have read the judgment of Prematilaka, RJA in draft and agree with his reasons and proposed orders.


Kulatunga, JA


[51] I have perused the judgment in draft of Prematilaka, RJA and is in agreement with his reasons and orders as proposed.


Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Appeal against conviction is dismissed




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


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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL


.....
Hon. Mr. Justice G. Kulatunga
JUSTICE OF APPEAL

Solicitors:

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