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

CRIMINAL APPEAL NO. AAU 113 of 2023
[In the High Court at Lautoka Case No. HAC 80 of 2019]

BETWEEN	**:**	**ELIKI KAE**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. M. Fesaitu and Ms. L. Volau for the Appellant**
	:	**Ms. R. Uce for the Respondent**
Date of Hearing	**:**	**12 August 2024**
Date of Ruling	**:**	**14 August 2024**

RULING

[1] The appellant had been charged with a single count of adult rape under the Crimes Act 2009. The charge was as follows:

> *'**Statement of Offence***
>
> ***RAPE**: Contrary to section 210 (1) and [2] [a] of the Crimes Act, 2009*
>
> ***Particulars of Offence***
>
> ***ELIKI KAE** on the 21st day of December 2018, at Lautoka in the Western Division penetrated the vagina of **TAVAITA SENIBAI**, without her consent.'*

[2] The High Court judge found the appellant guilty of rape. On 31 October 2023, the appellant was sentenced to a sentence of 09 years of imprisonment with a non-parole period of 07 years.

[3] The appellant's appeal in person against conviction and sentence is timely. However, the appellant had tendered an application for abandoning the sentence appeal in Form 03 on 22 March 2024. At the leave to appeal hearing on 12 August 2023, I made relevant inquiries from the appellant in keeping with ***Masirewa*** guidelines (**Masirewa v State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2010) and allowed his application to abandon his sentence appeal and proceeded only with his conviction appeal.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The trial judge had referred to the complainant's evidence in the sentencing order as follows:

> 2. *The facts of the case are that the victim was residing at her uncle's house as her parents were abroad. You had been a frequent visitor to her house. You had reasons to believe that the victim is a person with slow mentality. Having waited for her uncle and aunt to leave for church you entered her house drunk without permission. You pulled her into her uncle's room and started to torture her by slapping and closing her mouth. You forcefully took her clothes off holding her down tightly. You penetrated her vagina with your penis forcefully. When she started crying you told her to be quiet. You tightly*

covered her mouth and warned her not to respond when her cousin was calling from outside.

[6] The appellant's evidence as narrated in the judgment is as follows:

> *26. In December 2018, Eliki was working at FSC. On 21 December 2018, he was drinking with Fido by the beach. After they finished having drinks, he was going home. When he was going past Fido's house Tavaita spoke to him. He started joking with her. He told Tavaita that he wanted to have sex with her. She then told her to wait until her uncle and aunt left then he could come back to her. He did not go home. He turned back and went back to the beach where Fido who was on Facebook.*
>
> *27. From the beach, he could see Tavaita's house. After he had seen Tavaita's uncle and aunty leave, he went to Tavaita's house. As he entered the house, he saw someone sitting inside the house. Eliki told this person that he wanted to see Tavaita. This person told him to go and see Tavaita inside her room.*
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> *28. He went into the room and kissed Tavaita. Tavaita also kissed him back. He laid her down on the bed and took off his clothes. She took off her own clothes. He then came on top of her and inserted his penis inside her vagina and had sex with her for about five minutes. Tavaita was just lying down still on her bed when they were having sexual intercourse as if she could not feel anything. He did not know that Fido had entered the house and was videoing while they were having sex until her mother said that somebody was recording. That was when Tavaita started crying.*
>
> *29. He stopped when he heard his mother calling from outside. He went underneath the bed and was hiding there. When he came out, his mother asked Tavaita if she had liked him. Tavaita did not respond. His mother took her home. There were two people inside the house when this incident happened. Fido was in the other room and the other person was still lying in the living room. He just heard some people calling but did not know who they were. He did not care about the calls as they were having sexual intercourse. He denied slapping, punching, blocking Tavaita's mouth and having had forceful sexual intercourse with her. The two ladies took Tavaita and that is when Tavaita said that the sex was not consented.*

[7] The grounds of appeal urged by the appellant against conviction are as follows:

> ***Ground 1***
>
> ***THAT*** *the Learned Trial Judge erred in law and in facts in holding that the inconsistencies in the complainant's evidence did not affect the weight of her evidence given her mental capacity of being a slow person whereas.*

i) *The prosecution did not try it's case on the basis that the complainant did not have the necessary mental capacity to give consent;*
ii) *The complainant's conduct as to the events should not be taken as relevant to her being a mentally slow person;*
iii) *The manner in how the complainant responded to being questioned in the trial is inconsistent to such finding of her being mentally slow; and*
iv) *The observation made by the learned trial judge is not supported by expert evidence.*

Therefore, causing a substantial miscarriage of justice.

Ground 2

THAT *the Learned Trial Judge had not properly accounted and evaluated the inconsistencies and implausibility in prosecution's case therefore making the conviction unreasonable.*

Ground 3

THAT *the Learned Trial Judge erred in finding that the complainant and the two prosecution witnesses had testified to the truthfulness of the complaint.*

Ground 1

[8] The only material issue at the trial was 'consent'. The appellant argues that the trial judge had erred in explaining what could be regarded as the complainant's admissions under cross-examination suggesting consensual sexual intercourse by referring to her mental capacity as a slow person and her demeanor as that of a clumsy person in the witness box. She admitted that she had removed her own cloths, laid down on the bed before the appellant inserted his penis into her vagina, and did not push the appellant away. Neither did he block her mouth with his hand or slap her. However, she denied even under cross-examination that sexual intercourse was consensual which shows that she was aware of her case before court. Nevertheless, she had said that in order to save the reputation of her uncle (Turaga-ni-Koro/village head) she told PW2 and PW3 that the appellant forced her to have sexual intercourse. Earlier in her evidence-in-chief the complainant had said that she could not shout as the appellant had covered her mouth and she was pulled, slapped and forced by the appellant and could not escape as he held her down tightly.

[9] In order to overcome the difficulties for the prosecution arising from these answers indicating that the appellant and she had consensual sex, the trial judge had relied on his finding that the complainant was a slow person based on his observations in court and evidence. The trial judge may have had in his mind the evidence of PW3 that the complainant was a slow-minded person with a weak mentality and the evidence of PW2 and PW3 that when the appellant's mother came and chased him away, she was crying while she exited the room. According to PW2, the complainant looked scared because a group of people had gathered outside her house.

[10] The prosecution had not put the trial judge and the defense on notice at any stage prior to the trial that they would run the case on the basis that the complainant was incapable of giving free and voluntary consent due to any mental incapacity. Thus, the trial judge seems to have placed a heavy reliance on her demeanor and deportment in court in order to arrive at the finding that somehow she most likely did not have the mental capacity to consent to sexual intercourse. The Court of Appeal said of demeanor and how to make use of it at the trial in **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024):

> *Demeanour can hardly even be decisive in determining the outcome of a case. Demeanour is merely one factor to be taken into account. 'in addition to the demeanour of the witness', 'one should be guided by the probability of his story, the reasonableness of his conduct, the manner in which he emerges from the test of his memory, the consistency of his statements and the interest he may have in the matter under enquiry'.*
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> *'.... A trial court is obviously in a better position than the court of appeal to make a finding on demeanour; and the court of appeal "must attach weight, but not excessive weight" to the trial court's finding. It is as a general rule important that a trial court should record its impression of the demeanour of a material witness.*

[11] It looks as if the trial judge had over relied on the complainant's demeanor and deportment to conclude that she most probably lacked the mental capacity to give consent. As for the evidence of PW2 and PW3, even if one assumes that the complainant was indeed a slow person, that alone will not necessarily make her incapable of giving consent freely and voluntarily and the evidence presented at the trial does not seem sufficient to conclude that she was 'intellectually handicapped' as

the trial judge had argued. Even the complainant's own evidence taken as a whole does not seem to suggest unequivocally that she was mentally or intellectually handicapped. Similarly, no plain finding could be arrived at by her crying while existing the room or the house as it was not clear whether she started crying because the appellant's mother growled at her coupled with the presence of a group of people that gathered near the house. It does not seem justified to elevate her crying while leaving the house to some kind of distress evidence of absence of consent[1].

Ground 2

[12] The gist of the appellant's argument is that the trial judge had not engaged in a proper evaluation and analysis of the totality of the evidence on the issue of consent. He argues that the only reason why the incident came to light was the live Facebook feed of the act of intercourse which PW2 and PW3 started watching and proceeded to the complainant's house. PW2 and PW3 had not seen anything suggestive of forceful intercourse in the live broadcast over Facebook, particularly any of the acts such as slapping, punching described by the complainant or crying during the act of sexual intercourse. He also argues that the conduct and behavior of PW2 and PW3 do not show that they were concerned with an act of forceful sexual abuse of the complainant by the appellant but rather with the fact that it was going live on Facebook. Even after the complainant failed to respond to her calls outside the house, PW2 had simply gone back to save the video. She had only informed the appellant's mother to talk to the appellant and not to stop the forceful sexual abuse of the complainant. PW3 had also been concerned with telling the complainant that she was being videoed having sex with the appellant. Thus, he argues that the conduct, behavior and evidence of PW2 and PW3 do not substantiate that sexual intercourse was not consensual. On the contrary, he submits, that their actions show that sexual intercourse was not forceful. Even the manner in which the appellant's mother responded as described by PW2 and

[1] **See Bebe v State** [2021] FJCA 75; AAU165.2019 (18 March 2021) & **Tuagone v State** [2021] FJCA 86; AAU136.2018 (31 March 2021) for a discussion on distress evidence

PW3 do not show that she thought that her son engaged in some form of sexual abuse of the complainant. She growled at the complainant and chased the appellant away.

Ground 3

[13] This concerns more of a question of law (for which leave to appeal is really required) in that the appellant argues that the trial judge had used recent complaint evidence of PW2 and PW3 to arrive at a finding not permitted by law. He submits that the trial judge had overextended the use to which a recent complaint could be put where the judge had said that the evidence of PW2 and PW3 had testified as to the *truthfulness of the complaint* (see paragraph 47 of the judgment). The truthfulness must be regarding the issue of consent as the act of sexual intercourse was admitted by the appellant. He relies on **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). Recent complaint evidence is not evidence of the facts complained of and cannot be regarded as corroboration of the complainant's evidence but goes only to the consistency of the conduct of the complainant with her evidence given at the trial. In other words, recent complaint evidence would only support and enhance the credibility of the complainant *via* her consistency. It was held in **Senikarawa v State** [2006] FJCA 25; AAU 0005 of 2004S (24 March 2006)] that it would be a misdirection to say that recent complaint evidence would strengthen the *complainant's evidence* but to state that it would strengthen the *complainant's credibility* will not be regarded as a misdirection.

[14] When examining whether a verdict is unreasonable or cannot be supported by evidence , as stated by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) 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 defence 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 reasonably 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. The same test could be applied *mutatis mutandis* to a trial by a Judge alone (without assessors) or a Magistrate.[2]

[15] While giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses[3], the Full Court has to evaluate the evidence and make an independent assessment thereof[4] to decide whether the trial judge could have reasonably convicted the appellant on the evidence before him[5].

Order of the Court:

1. Leave to appeal against conviction is allowed on all grounds of appeal.

COURT OF APPEAL FIJI

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

Solicitors:

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

[2] **Filippou v The Queen** (2015) 256 CLR 47
[3] **Dauvucu v State** [2024] FJCA 108; AAU0152.2019 (30 May 2024); **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)
[4] **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012)
[5] **Kaiyum v State** [2013] FJCA 146; AAYU 71 of 2012 (14 March 2013)