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

CRIMINAL APPEAL NO. AAU 87 of 2022
[In the High Court at Suva Case No. HAC 144 of 2020s]

BETWEEN	:	**JOELI CAGILABA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. M. Fesaitu for the Appellant**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**18 March 2024**
Date of Ruling	:	**19 March 2024**

RULING

[1] The appellant had been changed and found guilty at Suva High Court on the following two counts.

"Count 1

Statement of Offence

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

Particulars of Offence

JOELI CAGILABA *between the 6th day of March 2019 and the 7th day of March 2019 at Navutulevu in Navua in the Central Division had carnal knowledge of* ***T.L.*** *without her consent.*

Count 2

Representative Count

Statement of Offence

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

Particulars of Offence

JOELI CAGILABA *between the 1st day of April 2019 and the 10th day of April 2020 at Navutulevu in Navua in the Central Division had carnal knowledge of* ***T.L.*** *without her consent.*

[2] The High Court judge found the appellant guilty and on 23 September 2022 sentenced him to a period of 11 years' imprisonment (on both counts to run concurrently) with a non-parole period of 09 years.

[3] The appellant's appeal against conviction is timely.

[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 facts had been summarised by the trial judge in the sentencing order as follows.

> *2. The brief facts of the case were as following. The female complainant, at the time of the rapes, was 15 years old. The accused appeared to be 29 years old, at*

the time of the offence. There was a 14 years age gap between the two. The accused, at the time of the offences, was married to the complainant's first cousin. On the first count, between 6 and 7 March 2019, the complainant was sleeping at her auntie's house. She was sleeping on a mat on the floor. She wore a shorts, panty and t-shirt to bed. The accused came to her, laid on top of her so as to pin her to the floor with his weight, block her mouth with his palm to stop her raising the alarm, then used his other hand to take off her shorts and panty. He then parted her legs and inserted his penis into her vagina for about 2 minutes. He later threatened the complainant not to tell anyone about the incident.
3. Between October to November 2019, the complainant was again sleeping in the living room in her house on the floor, at night. She was lying on her back facing up. The accused came to her and repeated what he did above to her. His modus operandi was similar. The complainant said, the accused repeated the above episodes to her again in April 2020.

[6] The ground of appeal urged by the appellant is as follows.

Conviction:

Ground 1

THAT the Learned Trial Judge had erred in law and in facts having not independently assessed the totality of the evidence when deciding on the verdict resulting in a miscarriage of justice.

Ground 1

[7] 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. In **Vulaca v State** [2012] FJSC 22; CAV0005.2011 (21 August 2012) the Supreme Court elaborated the pronouncement in ***Ram*** as follows.

35.Praveen Ram Vs Sate (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors or differ from the opinion of the assessors. If the Judge differs he has to give his reasons.

> *36…….. As the appellate courts have not seen and heard the witnesses it cannot independently assess and evaluate the evidence led at the trial to the extent of a trial court judge. But an analysis of evidence is necessary for two reasons one is to ascertain whether there is evidence to convict the accused. If there is no evidence it is a question of law, the Court of Appeal have to take into consideration in arriving at its finding. The other is to ascertain whether on the given facts if a properly directed panel of assessors would have come to the same decision. This is to ascertain whether the assessors were properly directed in the application of law on the given facts. However the Court of Appeal will not set aside a verdict of a High Court on a question of law (s.21(1)(a)) or fact (s.21(1)(b)) unless a substantial miscarriage of justice has in fact occurred (s.22(6)).*

[8] 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.*

[9] 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 the verdict is reasonable and supported by evidence ***and*** whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt; 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). This exercise involves both subjective and objective elements which, however, do not exist in watertight compartments.

[10] The appellant argues that instead of an independent evaluation and assessment of the totality of the evidence, the trial judge at paragraph 14 of the judgment had focused on morality of the appellant's actions in determining whether the prosecution had established the case against him beyond reasonable doubt. He also argues that the trial judge had unnecessarily referred to Turnbul guidelines when the issue was not one of mistaken identity but of denial regarding count 01 and consensual sex on count 2.

[11] While these submissions are not without merit, it cannot be said that the trial judge had not independently evaluated and assessed the evidence, although and perhaps not in adequate measure.

[12] The more pressing and the real concern, to my mind, is the inadequacy of reasons in the judgment for the guilty verdict.

[13] I had the occasion to consider the issue of inadequate reasons in somewhat detail in **Bala v State** [2023] FJCA 279; AAU21.2022 (18 December 2023) and **Prasad v State** [2023] FJCA 280; AAU45.2022 (18 December 2023) and the proposition of law, I arrived at is 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.'*
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> *'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.'

[14] Having perused the judgment in this case and applying the above proposition of law, I am not satisfied that there is adequate reasons for the verdict of guilty by the trial judge as to not amount to an error of law. For example, there is hardly any discussion as to why the trial judge disbelieved the appellant's version that there was a birthday party on the day referred to in the first count (not found in the complainant's evidence at all as per the judgment) where he and his wife participated and no such sexual abuse took place. Similarly, there is no adequate justification on paper as to why the appellant's defence of consensual sex (however implausible it may sound) on cunt 2 was discredited by the trial judge. Again, this being a case of word against word, there is no mention of the legal principles applied [for example the modified ***Liberato*** directions as formulated in **Anderson** [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 adopted in Fiji in **Naidu v State** AAU 0158 of 2016 (24 November 2022)] in rejecting the appellant's version. In my view, *'Looking at the totality of evidence, I find the accused was not a credible witness'* is not sufficient reasoning.

[15] However, whether the inadequacy of reasons has resulted in a substantial miscarriage of justice as opposed to a mere error of law amounting a miscarriage of justice, is a matter for the full court to decide upon reading the transcript of trial proceedings.

Order

1. Leave to appeal against conviction is allowed.

COURT OF APPEAL FIJI

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