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

CRIMINAL APPEAL NO. AAU 99 of 2022
[In the High Court at Lautoka Case No. HAC 81 of 2019]

BETWEEN	:	**ASIF IQBAL AHMED**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	:	**26 March 2024**
Date of Ruling	:	**27 March 2024**

RULING

[1] The appellant had been changed at Lautoka High Court on the following counts:

'***FIRST COUNT***
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2014 to the 31st day of December, 2014 at Nadi in the Western Division penetrated the vagina of "SS", a child under the age of 13 years, with his penis.

SECOND COUNT
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2015 to the 31st day of December, 2015 at Nadi in the Western Division penetrated the vagina of "SS", a child under the age of 13 years, with his penis.

THIRD COUNT
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2016 to the 31st day of December, 2016 at Nadi in the Western Division penetrated the vagina of "SS", a child under the age of 13 years, with his penis.

FOURTH COUNT
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2016 to the 29th day of February, 2016 at Nadi in the Western Division penetrated the vagina of "SZ", a child under the age of 13 years, with his fingers.

FIFTH COUNT
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2017 to the 31st day of December, 2017 at Nadi in the Western Division penetrated the vagina of "SS", a child under the age of 13 years, with his penis.

SIXTH COUNT
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of June, 2018 to the 31st day of July, 2018 at Nadi in the Western Division penetrated the vagina of "SS", a child under the age of 13 years, with his penis.

SEVENTH COUNT
Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (b) and (3) of the Crimes Act, 2009.*

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of March, 2019 to the 31st day of March, 2019 at Nadi in the Western Division penetrated the vagina of "SZ", a child under the age of 13 years, with his fingers.'

[2] The High Court judge convicted the appellant of all counts and on 01 August 2022 sentenced him to a final aggregate sentence of 16 years, 8 months and 16 days imprisonment with a non-parole period of 14 years and 8 months.

[3] The appellant's appeal against conviction and sentence is timely. However, the appellant sought to abandon his sentence appeal by filing a Form 3 dated 26 March 2024 and the court following guidelines in **Masirewa v the State** [2010] FJSC 5; CAV 14 of 2008 (17 August 2020) allowed the appellant's application to abandon his sentence 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 prosecution evidence had been summarised by the trial judge in the sentencing order as follows:

> 2. *The brief facts were as follows:*
>
> > *The two victims are sisters, at the time of the alleged incidents the accused was renting in the house of the victims. The victims and the accused are known to each other he is the paternal uncle of the victims. Both victims were under the age of 13 when all the incidents happened. The victims called the accused "Dada" meaning paternal grandfather out of respect for him.*
>
> 3. *The first victim (S.S) was 9 years in 2014 the year of the first incident of rape. There are five counts concerning this victim.*
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> 4. *In the year 2014 the first victim was a year 3 student. The accused went into her bedroom forcefully laid her on her bed removed her clothes and had forceful sexual intercourse.*
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> 5. *In the year 2015 the victim was a year 4 student the accused called the victim to his house by saying that his wife had called her. As soon as the victim went inside the house the accused closed the door, made the victim lie on his bed and blocked her mouth with his hand. He then forcefully removed her clothes unzipped his pants and had forceful sexual intercourse.*
>
> 6. *In 2016 the victim was 11 years of age and a year 5 student. The accused once again told the victim that his wife had called her. When the victim went in the house of the accused he closed the door forcefully made her lie on the bed blocked her mouth with his hand unzipped his pants removed her clothes and had forceful sexual intercourse.*
>
> 7. *In 2017 the victim was a year 6 student. The accused called her saying his wife was calling her. When she was inside the accused closed the door, forcefully made the victim lie on the bed and blocked her mouth with his hand. Thereafter, he unzipped his pants, removed her clothes and had forceful sexual intercourse.*
>
> 8. *Finally in June or July, 2018 the victim was alone at home by this time she was 12 years of age. All her family members had gone to distribute Eid sweets the accused went into her room forcefully made her lie on the bed removed her clothes and then had forceful sexual intercourse.*
>
> 9. *The victim did not want the accused to do all these things to her and it was painful. She was scared so she did not tell anyone about what the accused was doing to her.*
>
> 10. *The second victim (S.Z) was 9 years and in year 3 in 2016 the year of the first incident of rape on her. There are two counts concerning this victim. In*

February 2016, the accused called the victim to his house to massage his legs. The accused was alone in his house lying on his bed. He called the victim on his bed and told her to remove her clothes, when she was naked he inserted his finger into her vagina. She knew the finger had penetrated her vagina because it was painful to her. She went home but did not tell anyone about what had happened to her because she was scared that the accused would kill her.

11. *In March 2019, the accused called the victim to massage his legs and back, after she finished massaging, the accused started touching her body. The victim was wearing a dress the accused told her to remove her panty and then inserted his finger into her vagina. The victim knew the accused had inserted his finger into her vagina because it was painful. At home she didn't tell anyone because she was scared.*

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

*'**Ground 1:***

THAT the Learned Trial Judge had failed to give necessary direction regarding the inconsistencies of the evidence and the contradiction between the evidence.

Ground 2:

THAT the Learned Trial Judge had made improper directions on the circumstantial evidence and relating to contradictory statements made by the witness.

Ground 3:

THAT the Learned Trial Judge erred in law in fact he failed to summon the witnesses to call in the trial.

Ground 4:

THAT the Learned Trial Judge erred in law and in fact when he failed to consider in his judgment the inconsistent evidence in any forced sexual intercourses resulting in a substantial miscarriage of justice.

Ground 5:

THAT the Learned Trial Judge erred in law and in fact when he did not properly consider the medical evidence in considering the credibility of both the complainants.'

[7] The prosecution case was by and large based on the testimonies of the two victims under the age of 13 at relevant times and that of the doctor Marica. The appellant gave

evidence on his behalf and denied all accusations and said *"there was something between the families that's why they were blaming me"*.

Ground 1

[8] The inconsistency pointed out by the appellant is the evidence of SS that the first incident happened when she was alone at home (paragraph 15 of the judgment) and whereas her evidence under cross-examination was that from 2014-2019 her mother was staying home while her father was away as the sole bread winner. During 2014-2019, SS was staying with her grandparents while the appellant was renting out a room in her parent's house 20 meters away.

[9] It appears from the totality of SS's evidence that all the incidents relating to her had happened either at her grandparents' place or her parents' place when no one was around. I see no contradiction or inconsistency in her evidence. In any event, 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 [**Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]. See paragraph 36 of the High Court judgment also.

Ground 2

[10] The appellant submits that SS being a year 3 student would not have known the word 'sperm' (see paragraph 15 of the judgment) and if he being a man of 38 years of age at that time had penetrated SS she would have bled from her vagina and would not have been able to walk properly but she had not said so.

[11] These are essentially trial issues and should have been canvassed in the High Court. None of the matters pointed out by the appellant are so inherently improbable as to make her testimony untrustworthy and unreliable. She had admitted that her own father had been charged of rape upon her complaint. She had become pregnant at the age of 08 – Form 3/Year 9. If so, she would have had some experience in sexual intercourse though she was 08 years old when the first incident took place. It was in medical

evidence that in both SS and SZ hymen were not intact and thus, they were sexually active.

Ground 3

[12] The appellant's complaint of his wife not being called by the prosecution (according to SS, his wife had seen them together and started swearing at SS and her mother– paragraph 25 of the judgment) has no merit at all as the appellant had every opportunity of calling her as his witness, if he so desired. In any event, it was no part of the trial judge's responsibility to summon witnesses. It was the prerogative of parties.

Ground 4

[13] The appellant complains of lack of evidence of 'forced sex'. 'Forced sex' was irrelevant as SS (and SZ) were under the age of 13 and consent was immaterial for all counts in the information. In any event, the appellant's defence was not 'consent' but 'denial'.

[14] As per his argument that he had been implicated by SS to protect her father who allegedly had been charged for rape on her complaint. He also suggests that he was falsely implicated to take him and his family out of the house. She had flatly refused this suggestions although she readily admitted that her father was not responsible for her pregnancy and specifically said that her father was not the one who raped her on all five occasions mentioned in the information but it was the appellant.

Ground 5

[15] Considering the totality, there is nothing legally wrong in what the trial judge had stated at paragraph 55-57 of the judgment that he does not and does not have to accept the evidence of the expert and act upon it; indeed, he does not have to accept even the unchallenged evidence of the doctor and whilst it may be of assistance to the judge in reaching his decision, he must reach his decision having considered the whole of the

evidence. In any event, I do not find medical evidence that came after an examination done a year or so after the last incident relating to SS and a month or so after the SZ's last incident adversely affecting the testimonies of SS and SZ in any material particulars.

[16] For any concern whether the verdict is unreasonable and unsupported by evidence, this court has elaborated the test under section 23 of the Court of Appeal again 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 test where the trial is held by judge alone – see **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****'*

[17] 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.

[18] 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)].

[19] 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.'*

[20] 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 carry 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, to decide 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).

[21] Having considered the comprehensive judgment, I do not encounter any concern which makes me feel that the verdict is unreasonable or unsupported by the totality of evidence.

Order of the Court:

1. Leave to appeal against conviction is refused.

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

Solicitors:

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