

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

CRIMINAL APPEAL NO.AAU 0020 of 2017
[In the High Court at Suva Case No. HAC 082 of 2016]

BETWEEN : **MICHAEL SHAILENDRA PRATAP** **Appellant**

AND : **STATE** **Respondent**

Coram : **Prematilaka, JA**

Counsel : **Mr. J. Reddy for the Appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **10 November 2020**

Date of Ruling : **11 November 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on three counts of rape contrary to section 207 (1) and (2) (a) and (b) of the Crimes Act, 2009 and a single count of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 committed on 22 January 2016 at Suva in the Central Division.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

RAPE: contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his penis without her consent.

SECOND COUNT

Statement of Offence

RAPE: contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his finger without her consent.

THIRD COUNT

Statement of Offence

RAPE: contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his tongue without her consent.

FOURTH COUNT

Statement of Offence

SEXUAL ASSAULT: contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, unlawfully and indecently assaulted IM by sucking her breast.

- [3] After the summing-up on 27 January 2017 the assessors had unanimously opined that the appellant was guilty of the charges of rape but not guilty of sexual assault. They found him guilty only of indecent assault alternatively. In the judgment delivered on 30

January 2017 the learned trial judge had agreed with the assessors with regard to rape counts but disagreed with them on count 4 and convicted the appellant of sexual assault as charged. On 31 January 2017 the appellant had been sentenced to 12 years and 11 months of imprisonment with a non-parole period of 11 years and 11 months.

- [4] The appellant through its lawyers had filed a timely application for leave to appeal against conviction and sentence on 14 February 2017. Though an application for bail pending appeal had been tendered on 03 November 2017 it had not been served on the respondent. No written submissions had been filed on the bail pending appeal application by both parties and the counsel for the appellant indicated at the leave to appeal hearing that he would not pursue the bail pending application. Written submissions on behalf of the appellant on leave to appeal application had been filed on 07 July 2020. The state had responded by its written submission on 20 August 2020.
- [5] 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. The test for leave to appeal is ‘**reasonable prospect of success**’ (see Caucu 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] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No. AAU0015 and Chirk King Yam v The State Criminal Appeal No. AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case. **For a**

ground of appeal filed within time to be considered arguable there must be a reasonable prospect of its success in appeal. The aforesaid guidelines are as follows.

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.*

[7] Grounds of appeal against conviction and sentence urged on behalf of the appellant are as follows.

Against conviction

Ground 1 *That the learned Judge erred in law and in fact when he failed to give adequate and sufficient weight to the evidence adduced by the Appellant and the other defence witnesses.*

Ground 2 *That the learned trial Judge erred in law and in fact when he failed to give reasons for declining the alibi evidence adduced on behalf of the Appellant.*

Ground 3 *That the learned trial Judge erred in law and in fact when he stated that the inconsistencies in the complainant's evidence highlighted by the defence are significant when the inconsistencies went to the root of the matter.*

Ground 4 *That the learned trial Judge erred in law and in fact to sabotage the minds of the assessors when in the summing up, he read "Experience shows that children do not all react the same way to sexual acts as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned" causing substantial prejudice to the Appellant.*

Ground 5 - *That the learned trial Judge erred in law and in fact when he failed to direct the assessors to consider the complainant's evidence that the Appellant has a tattoo of rose on his leg but in reality there was no rose tattooed on either leg of the Appellant.*

Ground 6 - *That the learned trial Judge erred in law and in fact to accept the evidence of the third prosecution witnesses as reliable when there was evidence before him showing that this witness has made false entries in the official police register.*

Ground 7 - *That the learned trial Judge erred in law and in fact to accept the evidence of the fourth prosecution witness as reliable when this witness clearly said in cross examination that:*

- (i) He was not sure what was the time because he was not wearing a watch;*
and

- (ii) *He was not sure where the Appellant was calling from when the call was received at 5.56 pm.*

Ground 8 - *That the learned trial Judge erred in law and in fact to accept the evidence of the fourth prosecution witness as reliable when prosecution failed to provide other supportive documents to prove that in fact the Appellant was in Nasese at that particular time.*

Against Sentence

Ground 9- *The learned trial Judge erred in principle to mis-interpret the meaning of Section 18(2) of the Sentencing and Penalties Decree 2009 when he said “my reading of the above section is that the said section is to be applied if the sentencing court considers that an offender should not be released on parole and should serve the full sentence, given the nature of the or the past history of the offender.”*

Ground 10 - *That the sentence is harsh and excessive taking into consideration all circumstances of the matter.*

- [8] The trial judge had summarised the evidence of the complainant as follows in the summing-up.

17. *The complainant said that she is 16 years old. In 2016 she was living in the Police Band Barracks. She had been living there for 15 years. On 22/01/16 around 5.15pm, her mother sent her to meet her father. On her way, she saw Michael beside a container. She said that he pulled her hand and dragged her to the police gym which was about 6 metres away. She screamed for help and tried to free herself but she couldn't.*

18. *Inside the police gym he tied her hands behind her back to a door with a computer code and went to close the door. She said she screamed but no one was there to hear her. After he locked the door he came and untied her hands. Then they went through another door where he took another electrical code and tied her hands behind her back. Then he laid her down facing upwards and took her clothes off. She asked him what he is going to do to her and he told her not to be afraid or scared of what he is going to do. She was wearing her School uniform at that time. When he was removing her clothes, she was scared. She struggled, she kicked him and screamed.*

19. *She said, after he took her dress off, he touched her vagina. She said he was touching inside her vagina and used a finger. After putting his finger inside her vagina, he licked her vagina. She said that his tongue was inside her vagina. She struggled and was trying to close her legs but he kept on parting her legs. After that he put out his penis and inserted it to her vagina. She felt his penis for about 3 minutes. After that he sucked her nipples. She said she did not agree for him to do this and she screamed and struggled.*

20. *Then she lied to him saying that a car was parked in front of the gym and told him to untie her hands. When he went to check the car, she got dressed and went home. Her mother asked her where she was and she told the mother that she was with a friend at Nasova. She was scared to tell her mother and father thinking they may beat her up.*

21. *After one week she went to the police medical centre because of heavy bleeding. She asked from one Teresia at the medical centre whether it is allowed for police officers to indecently assault young girls. Then Teresia asked her whether anyone sexually assaulted her and she told her the story about the police officer who worked at the store. She said she told Teresia that one day this police officer was half naked in his office and showed her his penis. She also told Teresia that he came to her school one day with fish, chips and juice saying that her parents sent him. She saw that there was some medicine in the juice. She threw that lunch. She said she told Teresia that on another day when she was walking with Teresia's daughter, he was calling them and she told Teresia's daughter to ignore him.'*

[9] Apart from the complainant, Teresia Vakayaru, ASP Sunil Dutt, Kaliova Nadumu had been called by the prosecution.

[10] The trial judge had summarised the appellant's evidence as follows.

37. *The accused said that he is 43 years old, married and has 3 daughters. He had completed his Master's in Business Administration in 2016. He said he was serving as a Corporal in the Police Force attached to the police stores at Nasease and was interdicted last year. He had been working in the police store from June 2014 till 2nd February 2016. He said two others worked with him in the stores. That is IP Jayant Kumar and SC Anuresh. He said there was a special arrangement made for him to stay back in the office on Mondays and Wednesdays and to pick his wife on the other days. He said, he traveled to work by car and it is a green Toyota Corolla where the name 'Michael the archangel' is printed on the bonnet. His daughters' names are printed on the front and rear windscreens.*

38. *On 22/01/16, he started work little after 8am. IP Jayant Kumar and Special ASP Sunil were there with him on that day. He said those officers finished work little after 4pm on that day and they left before him. He said he finished work around 5 past or 10 past 4 that day. He called his wife and informed her to be ready before he left the office. He checked the buildings whether they are securely locked before leaving. On that day he received a call from Kaliova Nadumu after 10.30am and was informed that he (Mr. Nadumu) is coming to Suva for the enrolment of his daughter at Fiji School of Nursing and also that he is bringing mango and sugar. Mr. Nadumu called him again after 4.20pm the same day when he was leaving the office. He informed Mr. Nadumu that he is just leaving the office, he is going to pick his wife from*

Hoodless House in Brown Street and also told Mr. Nadumu to meet him at his house. He said the first time he called Mr. Nadumu was after 4.22pm. When he made that call he was leaving the office. After that he called Mr. Nadumu again around 6pm. He said he was at his residence when this call was made. According to him, Mr. Nadumu came to his house little after 9pm.

39. *He said his wife works at the Fiji School of Nursing in Tamavua. On 22/01/16, he picked his wife little after 4.30pm. On that day, one Ms. Zara also came with them and he dropped Ms. Zara at the bus stop near FNU, Nasinu. He said they reached home after 5.30pm. He met his neighbor, Mr. Vijay Lal when he reached home. When he went inside the house, his three daughters, father-in-law, mother-in-law and his niece were there. He went to see Mr. Vijay Lal again around 6.30pm. Just before meeting Mr. Vijay Lal, he met one Ms. Fozia.*

40. *He said ASP Sunil spoke to him before leaving the office that day, and told him that he (ASP Sunil) is leaving. He told ASP Sunil "it's ok". At that time he was logging off from his lap-top.*

41. *He said on his right leg, there is a tattoo of an angel with his name and on the left leg, there is a tattoo of an arrow and the met sign. He said there is no other tattoo on his legs.*

42. *He said he does not know IM. He also said he had seen her when she goes past the stores to the residence or the shop. He said he had not spoken to IM and he does not know her parents. He denied all the allegations made against him by IM and said that they are not true. He tendered the call records for his wife's mobile number 9345028 for the period between 22nd January 2016 and 2nd April 2016 as DE01. He said after making that call to the wife, he went to close the office and to check that the bulk store and the stationery are securely locked. He left the office that day a little after 4.20pm. He said he dropped Ms. Zara at FNU Nasinu around 5.15pm.*

- [11] The appellant had also called Viniana Yauva, his wife Asenaca Pratap and Vijay Lal as his other witnesses. It appears that the appellant's defence was one of *alibi* and he had called other witnesses to buttress that position.

01st ground of appeal

- [12] The appellant submits that the trial judge had not given adequate and sufficient weight to the evidence adduced by the appellant and his witnesses. On a perusal of the summing-up, I find that the judge had explained in detail to the assessors the appellant's evidence from paragraphs 37-44, Viniana Yauva's evidence in paragraphs 45 and 46, Asenaca Pratap's evidence from paragraphs 47 to 49 and Vijay Lal's evidence from

paragraphs 50 to 52. The trial judge had adverted to the appellant's position in a gist in paragraph 88 as follows

'[88] Defence says that the accused was not at the aforementioned old gym around 5.15pm on 22/01/16 as he left his office around 4.20pm that day and he was near the Valelevu bus stop opposite the FNU ground.'

- [13] The High Court judge had also informed the assessors of their task to consider all the evidence in paragraph 16.

'[16] Now I will summarise the evidence led in this case. Please remember that I will not be reproducing the entire evidence of the case. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.'

- [14] In the judgment, the trial judge had directed himself in accordance with the summing-up. I had the occasion to analyse several previous decisions dealing with the role of a trial judge in agreeing or disagreeing with the assessors in **Eroni Cevamaca v State** AAU 0060 of 2017 (22 September 2020). The judgments considered were **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018), **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).

- [15] Having examined those decisions, I expressed the following views in **Eroni Cevamaca v State** (supra).

'[32] Therefore, there still appears to be some gray areas flowing from the above judicial pronouncements as to what exactly the trial judge's scope of duty is when he agrees as well as disagrees with the majority of assessors.'

'[33] However, what could be identified as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts'

to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter.

[34] On the other hand when the trial judge disagrees with the majority of assessors the trial judge 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.

[35] In my view, in both situations, a judgment of a trial judge cannot not 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.

[36] This stance is consistent with the position of the trial judge at a trial with assessors in Fiji i.e. 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).'

- [16] In his judgment the trial judge had discharged his role as described in paragraph [33] in Eroni Cevamaca v State (supra). Therefore, I do not think that the appellant's criticism of the trial judge is justified. This ground of appeal has no reasonable prospect of success.

02nd ground of appeal

- [17] The appellant argues that the trial judge had not given reasons for rejecting the defence of *alibi*. The appellant seems to have misunderstood the judge's role and task when he agrees with the assessors. The assessors had obviously rejected the defence of *alibi* and

they were expected to give no reasons. The trial judge had agreed with the verdicts of the assessors except on the last count.

- [18] In addition to pointing out the evidence of all defence witnesses whose collective effort was to show that the appellant was elsewhere when the crimes were committed, the judge had specifically directed the assessors on the *alibi* defence taken up by the appellant in the summing-up.

102. *May I now direct you on the defence of alibi. Defence of alibi means, the accused takes up the position that he was not at the crime scene but elsewhere at the time the crime was committed. His position is that he could not have committed the offences he is charged with because he was not at the place where the offences were committed at the material time. Though the accused had put forward this defence of alibi, please remember that there is no burden for the accused to prove that he was elsewhere during the time the offences were alleged to have been committed. The prosecution should still prove that it was the accused that committed each offence and that therefore the alibi is not true.*

103. *If you think that the version of the accused that the accused was not at the place the offences took place at the time the offences are alleged to have been committed is true or it may be true, then you must find the accused not guilty.*

104. *However, you should also bear in mind that you should not assume that the accused is guilty of the offences merely because you decide not to accept his version. You should remember that sometimes an accused may invent an alibi just because it is easier to do so rather than telling the truth. Main question remains the same. That is, are you sure that it was the accused who committed each offence.*

105. *You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case beyond reasonable doubt.*

106. *I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.*

107. *Generally, an accused would give an innocent explanation and one of the three situations given below would then arise pertaining to each offence;*

(i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.

(ii) *Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.*

(iii) *The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.*

- [19] The trial judge's directions on the defence of *alibi* are in compliance with what had been set down in **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) where the Court of Appeal said of the required direction in cases where there is a defense of *alibi* in the following words by reiterating **Mateni v State** [2020] FJCA 5; AAU061.2014 (27 February 2020).

'[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (R v Anderson [1991] Crim. LR 361, CA; R v Baillie [1995] 2 Cr App R 31; R v Lesley [1996] 1 Cr App R 39;'

- [20] In fact the trial judge had also directed assessors as to what they should do if they neither believed nor disbelieved the appellant's *alibi* (the intermediate position) as highlighted in **Raisele v State** [2020] FJCA 49; AAU088.2018 (1 May 2020) and **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020).

- [21] Therefore, there is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

- [22] The appellant joins issue with the trial judge's statement in the judgment that the inconsistencies in the complainant's evidence are insignificant.

'[7] I find that the inconsistencies in the complainant's evidence highlighted by the defence are insignificant. Main inconsistency highlighted by the defence, that is, the fact that the sequence of events the complainant mentioned in court is different from what is recorded in her statement to the police, does not make the complainant an unreliable witness.'

- [23] The judge had addressed the assessors on the inconsistencies as follows.

92. *Defence says that there were inconsistencies in the evidence given by the complainant and therefore her evidence is unreliable. The main inconsistency pointed out by the defence was that the sequence of events the complainant alluded to during her evidence in court is different from the sequence given in her statement to the police.*

93. *This is how you should deal with inconsistencies when you evaluate the evidence of a particular witness. First you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistency is material and relevant or insignificant and irrelevant. If you find an inconsistency to be material and relevant, then you must consider whether there is any explanation for that inconsistency. If there is no such explanation or if you are not satisfied with the explanation, again you have two options. You may either conclude that that particular witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.*

94. *On the other hand, if you consider the inconsistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witness as a reliable witness notwithstanding the inconsistency.*

95. *You have to bear in mind that previous statements made out of court are not evidence except for those parts that are put to a witness as inconsistent versions. As I have already told you, evidence is only what came out from the witness box. When a counsel attempts to highlight an inconsistency, only the alleged inconsistent part is put to the witness and that part is all you need to consider when it comes to a previous statement made out of court.'*

[24] Therefore, I cannot see anything materially wrong with the trial judge's directions on the alleged inconsistencies. The applicable test in assessing the contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows.

*'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. 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).'*

[25] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal stated:

‘[35]Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;’

[26] Therefore, this ground of appeal has reasonable prospect of success.

04th ground of appeal.

[27] The appellant complains of what the trial judge had stated in paragraph 10 of the summing-up which is as follows.

‘Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.’

[28] I do not think that there are any merits in this complaint. Judges are free to express their views of human behaviour acquired through years of judicial experience. There are enough examples of such observations made by judges even in other jurisdictions. For example in **Bharwada Bhoginbhai Hirjibhai** (supra) the Supreme Court of India remarked as follows and they are relevant to this case as well.

‘(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the ‘time sense’ of individuals which varies from person to person.’

[29] Therefore, there is no reasonable prospect of success in this ground of appeal.

05th ground of appeal

[30] The appellant complains that the trial judge had failed to direct the assessors to consider the complainant's evidence that the appellant had a tattoo of rose on his leg but in reality there was no rose tattooed on either legs of the appellant.

[31] In the first place the counsel for the appellant should have sought a redirection on this matter at the end of the summing-up if he thought it to be so important. Therefore, the appellant is not entitled to raise it as an appeal point at this stage (vide **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)).

[32] In any event, this is how the trial judge had placed it before the assessors.

'24. During cross-examination..... She admitted that she told the police that the accused had a tattoo of a rose in his leg.' (Complainant's evidence)

'41. He said on his right leg, there is a tattoo of an angel with his name and on the left leg, there is a tattoo of an arrow and the met sign. He said there is no other tattoo on his legs.' (Appellant's evidence)

'99. Defense points out that though the complainant said that there was a tattoo of a rose on the offender's leg, the accused does not have a tattoo of a rose on either of his legs. During his evidence the accused showed both legs below the ankle to the court.'

[33] Thus, it does not appear that the complainant had given this evidence at the trial though she had said so in her police statement. Even to the police, the complainant had not said which leg or which part of the leg of the appellant she had seen the tattoo. The appellant had only shown his legs below the ankle to court. In fact there had been tattoos on his both legs though the tattooed pictures were different. The complainant, a 14 year old girl, would never have spoken to a tattoo on the appellant's leg unless she had seen at least one. The appellant admittedly had two. Only the description of the tattoo she had seen was different. The observations in **Turogo v State** (supra) is quite relevant here and the complainant may well have mistaken as to the tattooed picture.

[34] There is no reasonable prospect of success in this ground of appeal.

06th and 07th grounds of appeal

[35] The appellant submits that the trial judge had erred in accepting the evidence of the third prosecution witness ASP Sunil Dutt and fourth prosecution witness, one of appellant's childhood friends Kaliova Nadumu.

[36] The relevant paragraph in the judgment is as follows.

'6. I accept the evidence of the third prosecution witness that on 22/01/16 he left the police store close to 5.00pm and the accused was still in the office when he left. I accept the evidence of the fourth prosecution witness who is a friend of the accused since childhood that the accused called him around 5.56pm on 22/01/16 and told him that the accused is still in office. Considering all the evidence led in this case, I do not find that the alibi evidence presented by the defence is reliable.'

[37] Despite the criticisms of the appellant about these two witnesses it is clear that their evidence was only circumstantial which would help negate the appellant's position that he was not at the crime scene at the time the complainant had said it was committed. The matters raised by the appellant under cross-examination against accepting their evidence and what they had stated under re-examination had been placed by the trial judge before the assessors in paragraph 31 to 35. Thus, when the trial judge had directed himself according to the summing-up he had reminded himself of the same in the judgment as well.

[38] Once again the legal position set out above under the first ground of appeal as to the obligation on the part of the trial judge when agreeing with the assessors is equally applicable here. The appellant had not suggested any sinister motive on the part of both of them to give false evidence against him.

[39] There is no reasonable prospect of success in this ground of appeal

08th ground of appeal

- [40] The appellant also argues that the trial judge erred in accepting the evidence of the fourth prosecution witness in the light of the fourth defence witness who was said to be the appellant's neighbour.
- [41] Paragraphs 50-52 of the summing-up deal with the evidence of Vijay Lal who had spoken to having seen the appellant and his wife coming home at about 5.30 p.m. The appellant's argument is that if not for the evidence of the fourth prosecution witness who had said that the appellant had called him at 5.56 p.m. and told him that he was still at his office, the case against him could not be said to have been established.
- [42] It is true that though the evidence of the third and fourth witnesses for the prosecution had helped negate the appellant's *alibi*, even if those two witnesses had not been available but the assessors and the trial judge had believed the complainant fully the case against the appellant could have been proved beyond reasonable doubt. The complainant's evidence alone, when believed, could disprove the appellant's *alibi* defence as the time period in issue at the most is about an hour (*i.e.* 5.00 p.m. to 6.00 p.m.) and the crime scene and the appellant's house was not so far away from each other that it was physically impossible for the appellant to commit the crime and come home during the period in contention.
- [43] In any event these are matters that had been placed fairly and squarely before the assessors by the trial judge. The legal position set out above under the first ground of appeal as to the obligation on the part of the trial judge when agreeing with the assessors is equally applicable here as well.
- [44] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it is complained that the verdict is unreasonable or cannot be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

'.....Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.'

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

The appeal is dismissed.'

[45] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[46] In my view, it was open to the assessors to bring the verdict they brought against the appellant and for the trial judge to agree with them. Having considered the evidence against the appellant as a whole, one cannot say that the verdict was unreasonable. There was evidence, when believed, on which the verdict could be based. In the circumstances, I do not see any basis for this court to interfere with the verdict of the assessors and the trial judge.

[47] Thus, there is no reasonable prospect of success of the appeal as far as this ground of appeal is concerned.

09th ground of appeal

[48] The appellant argues that the trial judge's interpretation of section 18(2) of the Sentencing and Penalties Act is erroneous. The judge had said in paragraph 22 of the sentencing order as follows.

'My reading of the above section is that the said section is to be applied if a sentencing court considers that an offender should not be released on parole and should serve the full sentence, given the nature of the offence or the past history of the offender. I am not convinced that the provisions of the said section can be used to grant an offender the benefit of an early release.'

[49] In **Rarasea v State** [2018] FJCA 156; AAU0118.2014 (4 October 2018), I expressed my views on section 18(1) and 18(2) as they stood then as follows.

[50] In my view any sentence ranging from 02 years to life imprisonment must necessarily attract a non-parole period by operation of section 18(1) of the Sentencing and Penalties Act unless the nature of the offence and the past

history of the offender make fixing of the non-parole period inappropriate and the court declines to fix a non-parole period as permitted by **section 18(2)**. In other words, if the sentence is between 02 years and life imprisonment a non-parole period has to be mandatorily fixed and such a sentence would automatically attract a period during which the offender is not eligible to be released on parole. There is no discretion vested in court in that respect. The use of the word 'must' in section 18(1) expresses that legislative intention in stronger terms than even the word 'shall'.

[51] The Supreme Court in *Tora v State* CAV11 of 2015: 22 October 2015[2015] FJSC 23 had quoted from *Raogo v The State* CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period which in my view supports the above interpretation placed on section 18(1).

"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."

[52] Therefore, in my view the phrase 'Subject to sub-section (2)' in section 18(1) should only be taken to mean that **section 18(2)** creates an exception to section 18(1). Thus, the rule or the norm is to fix a non-parole period in all sentences from 02 years to life imprisonment and the exception is to decline to do so if the nature of the offence and the past history of the offender make fixing of the non-parole period inappropriate. In other words **section 18(2)** in effect operates as a proviso to section 18(1). Therefore, **section 18(2)** comes into play only after the main provision i.e. Section 18(1) takes effect but when the former is invoked the latter is overridden or subdued enabling the sentencing judge to avoid imposing a non-parole period.

[53] I would think that the legislature could have added the words 'However' or 'Provided' at the beginning of **section 18(2)** to achieve the same result instead of 'Subject to sub-section (2)' in section 18(1). It appears to have been the choice of the draftsman.

[54] In contrast, the legislature has made its intention clear by vesting a discretionary power in the court in terms of section 18(3) of the Sentencing and Penalties Act to fix or not to fix a non-parole period if the sentence is less than 02 years and more than 01 year. The intention is expressed by the use of the word 'may'.

[55] To interpret section 18 (1) and (2) in any other way, in my view would also negate the intention of the legislature in the matter of the requirement of imposing non-parole periods as expressed in **Tora** and **Raogo**.

[50] The written submissions of the appellant had not elaborated on this ground of appeal. Section 18(4) of the Sentencing and Penalties Act states that any non-parole period fixed must be at least 06 months less than the term of the sentence. If the appellant's argument is that the trial judge should not have fixed a non-parole period he is wrong.

[51] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

*“While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that **the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.**”*

‘... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission’.

[52] Thus, there is no reasonable prospect of success of the appeal as far as this ground of appeal is concerned.

[53] The current legal position is reflected in Corrections Service (Amendment) Act 2019 which states:

‘2. Section 27 of the Corrections Service Act 2006 is amended after subsection (2) by inserting the following new subsections—

“(3) Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period.

(4) For the avoidance of doubt, where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve the full term of the non-parole period.

(5) Subsections (3) and (4) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019.”.

Consequential amendment

3. The Sentencing and Penalties Act 2009 is amended by—

(a) in section 18—

(i) in subsection (1), deleting “Subject to subsection (2), when” and substituting “When”; and

(ii) deleting subsection (2); and

(b) deleting section 20(3).

[54] In terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

10th ground of appeal

[55] The appellant submits that the sentence is harsh and excessive. He has however not substantiated his argument in the written submissions.

[56] In any event, the ultimate sentence of 12 years and 11 months of imprisonment is well within the tariff applicable to juvenile rape of 10-16 years of imprisonment [vide **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)]. Now it is 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). As said in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) quantum can rarely be a ground for the intervention by an appellate court.

[57] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate

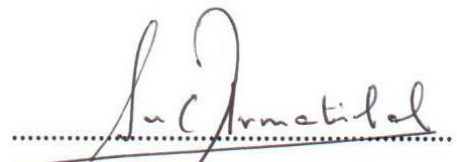
sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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).

[58] Thus, there is no reasonable prospect of success of this ground of appeal.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused




Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL