

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

CRIMINAL APPEAL NO.AAU 65 of 2020
[In the High Court at Lautoka Case No. HAC 166 of 2017]

BETWEEN : **KAMAL KAPOOR** *Appellant*
AND : **STATE** *Respondent*

Coram : Prematilaka, RJA

Counsel : Mr. Iqbal Khan for the Appellant
: Mr. L. J. Burney for the Respondent

Date of Hearing : 23 January 2023

Date of Ruling : 25 January 2023

RULING

- [1] The appellant had been indicted in the High Court at Lautoka on a single count of rape contrary to section 207 (1) and 207 (2) (c) of the Crimes Act, 2009 committed on the 13 July 2017 at Yalalevu, Ba in the Western Division.
- [2] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty of rape. The learned trial judge had agreed with the assessors' opinion, convicted the appellant for rape and sentenced him on 08 July 2020 to 10 years 11 months and 15 days imprisonment with a non-parole period of 09 years.
- [3] The appellants' appeals against conviction and sentence is timely. 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. For a timely appeal, the test for leave to appeal against conviction and sentence 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)].

- [4] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **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)].

- [5] According to the judgment, the brief facts are as follows:

5. *On 13th July, 2017 the complainant was working as a Cleaner at the construction site of the new hospital near Clopcott Street in Ba.*
6. *During lunch time the complainant was in her room alone resting when the accused called on her mobile phone asking her to come and clean his office. The accused was a Foreman at her workplace, when the complainant was in the office of the accused she was told to clean the tables, as she turned around the accused locked the room door.*
7. *At this time the accused asked the complainant to have sex with him when she refused he then told the complainant to suck his penis, at this time he pushed his pants down and told her to suck his penis when the complainant refused he forcefully pushed her down from her head and then forcefully pushed his penis inside her mouth.*
8. *When the accused forcefully pushed her down she did not do anything he made her sit on her knees and then he forced her to suck his penis she refused to do so the accused told her if she did not suck his penis he will*

terminate her from her employment. The accused was forceful in what he was doing the complainant tried to struggle with him but she couldn't. The accused also ejaculated inside her mouth he made her suck his penis for at least two minutes she tried to close her mouth but couldn't do it since the accused was forcefully penetrating her mouth.

9. *After ejaculating inside her mouth, the accused pulled out his penis and then wiped it with a tissue. The complainant also pulled out a tissue to clean her mouth, she was vomiting and she did not like what had happened to her. The accused pulled up his pants and opened the door after covering her mouth with a tissue the complainant left the office and went to her room.*

[6] The grounds of appeal of the appellant are as follows:

Ground 1

THAT the Learned Trial Judge erred in law and in fact in not recusing himself when he was well aware that his wife was related to the appellant (the trial judge's wife and the appellant's paternal aunt being cousins) and as such the appellant did not get a fair trial and as such there was a substantial miscarriage of justice.

Ground 2

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors to disregard the opening and closing address by the State, who used unnecessarily emotive language which could have only excited sympathy for the victim or prejudiced against the appellant in the minds of the assessors.

Ground 3

THAT the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting himself and the assessors, the previous inconsistent statements/evidence made by the complainant and as such there has been a substantial miscarriage of justice.

Ground 4

THAT the Learned Trial Judge erred in law and in fact in not directing himself and or the assessors to refer to any Summing Up the possible Defence on evidence and as such by his failure there was a substantial miscarriage of justice.

Ground 5

THAT the Learned Trial Judge erred in law and in fact in directing himself to assess evidence of the complainant on the basis of her demeanor in his judgment

when he stated, “her demeanor was consistent with her honesty” without failing to direct himself that the demeanor of the complainant should have been taken into consideration with all the evidences and as such there was a substantial miscarriage of justice.

Ground 6

THAT the Learned Trial Judge erred in law and in fact in misdirecting himself and the assessors, in paragraph 88 of the Summing Up, that, “indeed you do not have to accept the unchallenged evidence of the doctor”, whereas such evidence was favourable to the Defence and as such ought to have directed himself and the assessors that serious doubts could be created.

Ground 7

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors that the Prosecution witnesses, Lavenia Aditukana and Miriama Likutabua, had not told the truth during the trial, and as such their evidences ought to be either rejected and/or doubtful because it has raised serious doubts in favour of the appellant and as such a failure caused a substantial miscarriage of justice.

Ground 8

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors that the Prosecution witnesses, namely, Miriama Likutabua in examination-in-chief stated that “she saw the complainant crying outside where they usually have lunch” and whereas Lavenia Aditukana, when asked in cross-examination “whether she saw the complainant crying inside the room, in which she stated “Yes Sir” and as such there were serious doubts supporting the complainant and as such there has been a miscarriage of justice.

Ground 9

THAT the Learned Trial Judge erred in law and in fact in not adequately directing himself and the assessors as to the medical report of the complainant and the evidence of the Doctor which were favourable to the Defence and as such there has been a miscarriage of justice.

Ground 10

THAT the Learned Trial Judge erred in law and in fact in not adequately directing the assessors and himself the significance of Prosecution/Defence witnesses, Doctor Shahid and WPC Shiwani’s conflicting evidence during the trial and only accepting WPC Shiwani’s evidence and rejecting Dr. Shahid’s evidence without giving reasons for such rejection.

Ground 11

THAT the Learned Trial Judge erred in law and in fact in not properly sufficiently directing himself and the assessors on the standard and burden of proof when the evidence is given by the appellant and his witness and such failure caused a substantial miscarriage of justice.

Ground 12

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors in paragraph 64 – what was the “relevant information” relayed to Miriama and Lavenia about what the appellant has done and further on the basis of what was relayed to Miriama and Lavenia the complainant was more likely to be truthful and as such there has been a substantial miscarriage of justice.

Ground 13

THAT the Learned Trial Judge erred in law and in fact in not properly directing himself and the assessors what the complainant had demonstrated in Court was not possible in view of the evidence given by the Doctor concerning the issue of consent.

Ground 14

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors that based on the evidence of the appellant his witness and the Doctor’s evidence and the medical report strong inference ought to have been drawn that the allegations against the appellant could be pointing towards a consensual act by the complainant and as such a reasonable doubt was created.

Ground 15 (sentence)

- (a) *THAT the appellant relies on Grounds 1 to 14 stated hereinabove.*
- (b) *THAT the Learned Trial Judge erred in law and in fact in misdirecting himself in finding that a trust relationship existed between the complainant and appellant and as such there has been a substantial miscarriage of justice.*

01st ground of appeal

- [7] The appellant complains of lack of a fair trial and miscarriage of justice as the trial judge had not recused himself when he was well aware that his wife was related to the appellant (the trial judge’s wife and the appellant’s paternal aunt being cousins).

[8] The appellants' counsel admits that currently there is absolutely no material whatsoever to substantiate this allegation. As to why it was raised as a ground of appeal without any material before this court is puzzling. Nor had the appellant's trial counsel made any recusal application during the trial. Had the appellant instructed his counsel to do so he in all probability would have obliged.

02nd ground of appeal

[9] The trial judge had at paragraph 05 and 10 directed as follows:

- 5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.*
- 9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.*
- 10. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.*
- 11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.*

[10] I see no merits in this complaint that the judge should have asked the assessors to disregard the opening and closing address by the State.

03rd ground of appeal

[11] The trial judge had addressed the assessors on alleged inconsistencies at paragraphs 41-45 and at paragraphs of the judgment on the sale issue as follows:

24. *Taking into consideration the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. I have no doubt in my mind that the complainant told the truth in court. She gave a clear and coherent account of what the accused had done to her. Her demeanour was consistent with her honesty. The complainant was able to withstand vigorous cross examination and was not discredited. The defence did not suggest any motivation on the part of the complainant to implicate the accused.*
25. *The only issue before the court was whether the complainant had consented or not. The assertion by the defence that the complainant did not resist or shout or allowed the accused to penetrate his penis into her mouth is misconceived. On the evidence before the court the complainant was faced with an unexpected encounter by the accused she tried to push the accused but was not successful the accused had exerted force which rendered her resistance futile. The complainant was also prompt in telling her friends about what the accused had done to her and thereafter to the police.*
26. *The evidence before the court leads me to the inescapable conclusion that the complainant had not consented to what the accused had done to her.*
27. *There were some inconsistencies between the police statement of the complainant and her evidence in court. The inconsistencies were not significant but a natural occurrence due to passage of time which did not adversely affect the reliability of the complainant's evidence.*

[12] The Court of Appeal remarked in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) on inconsistencies, contradictions and omissions 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)'*

- [13] I do not think that the inconsistencies highlighted by the appellant go to the very root and shake the basic version of the complainant. It is more so, when the all-important "probabilities- factor" echoes in favour of the version narrated by the witnesses. 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 [vide **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280].

04th ground of appeal

- [14] The one and only defense taken up by the appellant was 'consent' which had been put to the assessors at paragraphs 90-97. The judge had also examined the appellant's position in the judgment as follows:

32. *On the other hand, the accused did not tell the truth in court and the narration by the accused of what had happened in his office is unbelievable and untenable on the totality of the evidence.*
33. *The accused took advantage of his position due to the fact that he knew the complainant's employer as a Ministry of Health representative based at the construction site and the fact that it was through him the complainant had obtained employment at the construction site. Although the accused was not in a position to sack the complainant I accept that he had threatened the complainant with termination when she was refusing his advances.*
34. *I do not accept that the accused had told a white lie to the police when he denied the allegation during his caution interview on the basis that he wanted to save his family.*
35. *I also do not accept the accused did not tell the police the complainant had consented because he wanted to save his family and the complainant's reputation is untruthful and misleading. It was obvious that the accused had carefully thought out these answers not to save anyone but himself. The accused struck me as a person who had carefully crafted the above response during cross examination to divert attention away from himself*

towards his family and the complainant. I reject the assertion by the accused that his lie was a white lie as not worthy of belief.

- [15] There was no other possible defense for the judge to have directed the assessors or himself.

05th ground of appeal

- [16] The directions of the trial judge on demeanor is at paragraphs 118-121 of the summing-up. The judge again considered it among other things in the judgment as well.

24. Taking into consideration the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. I have no doubt in my mind that the complainant told the truth in court. She gave a clear and coherent account of what the accused had done to her. Her demeanour was consistent with her honesty. The complainant was able to withstand vigorous cross examination and was not discredited. The defence did not suggest any motivation on the part of the complainant to implicate the accused.

- [17] I do not see any merits on the complaint about the judge's observations of the complainant's deportment.

06th, 09th, 13th and 14th grounds of appeal

- [18] The appellant complains about the trial judge's direction at paragraph 88 of the summing up, that, "*indeed you do not have to accept the unchallenged evidence of the doctor*" when the medical evidence was favourable to the defense.

- [19] An expert's opinion is admissible to furnish the court with scientific information or criteria which are likely to be outside the experience and knowledge of a judge or assessors so as to enable the judge or assessors to form their own independent judgment by the application of these information or criteria to the facts proved in evidence. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. In other words where the

question is one which falls within the knowledge and experience of the triers of fact, there is no need for expert evidence and an opinion will not be received [see **Goundar v State** [2021] FJCA 117; AAU0042.2018 (6 August 2021)].

[20] The trial judge had stated in the summing-up that:

87. *You have heard the evidence of Dr. Shahid who was called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in his evidence as a whole is to assist you.*
88. *An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.*
89. *You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.*

[21] The judge also alluded to medical evidence in the judgment as follows:

19. *Dr. Shahid was not able to make a finding whether or not the complainant had been sexually assaulted since he did not see any injuries on the complainant. The history related by the patient and the doctor's medical finding did not match.*
20. *The general impression of the doctor was that it was quite strange for a victim of sexual assault to be laughing in front of him. The doctor did not have any discussions with WDC Shiwani before or after the medical examination of the complainant or in the presence of the complainant. WDC Shiwani and a staff nurse were present during the medical examination.*
21. *According to the doctor based on the history given he could not rule out sexual assault but upon his professional opinion and clinical examination*

he could not find any evidence of whether the sexual assault had taken place or not.

[22] There cannot be in my view any reasonable criticism of these directions. Considering the fact that that this was an allegation of oral sex and the complainant not having complained of any injuries caused the medical evidence had become inconclusive.

[23] I also do not see any merits in the submission that what the complainant had demonstrated in Court was not possible in view of the evidence given by the doctor concerning the issue of consent. Nor do I see any improbability between the oral penetration alleged by the complainant and the medical evidence which had not and could not have ruled out such an act.

07th and 08th grounds of appeal

[24] The appellant complains that the learned trial judge erred in law and in fact in not directing himself and the assessors that the prosecution witnesses, Lavenia Aditukana and Miriama Likutabua, had not told the truth during the trial.

[25] The trial judge had addressed the assessors on the evidence of Miriama Likutabua and Lavenia Adi Tukana at paragraphs 46-56 & 61-67. The trial judge had given his mind to their evidence again at paragraphs 22-29 of the judgment and concluded that:

28. I also accept the evidence of Miriama and Lavenia these two witnesses were also believable. I have no doubt that these two witnesses told the truth that they understood Hindi language and were able to narrate what the complainant had told them. Although Lavenia said she did not understand Hindi well she was able to say the Hindi words clearly and translate the same into English. This shows this witness understood and spoke Hindi and was able to translate as well.

29. Both these witnesses were forthright and believable even though Lavenia was referred to some inconsistencies between her police statement and her evidence they were minor contradictions which did not adversely affect her credibility. I also accept the observation of these witnesses that the complainant was crying when they saw her in the room.

[26] The appellant's complaint has no merits at all.

10th ground of appeal

[27] The evidence of WDC Shiwani, according to the summing-up is as follows:

68. *The final witness WDC Shiwani told the court that she was the investigating officer in this case. As part of her duties the witness had recorded the complainant's and other witnesses police statement.*

69. *When the witness met the complainant in the charge room she saw the complainant was crying so she took the complainant into another room and calmed her down.*

70. *When the complainant was on her way to the hospital she was quiet and at the hospital the witness told the complainant that even though a male doctor would be examining her she should tell him everything she had told her. According to the witness the complainant was shy.*

[28] However, according to the judgment she had not been present when the doctor was examining the complainant.

36. *The doctor's observations that the complainant was laughing at the time of her medical examination is also not plausible on the totality of the evidence. It was obvious that the doctor had misinterpreted the impression he got from the complainant during her medical examination. Furthermore, I do not accept the evidence of the doctor that WDC Shiwani and a staff nurse were present at the time of the medical examination.*

37. *The Fiji Police Medical Examination Form of the complainant (defence exhibit no. 1) which was completed by the doctor does not mention that anybody was present other than the complainant and the doctor. This in my view creates a doubt on the observations made by the doctor.*

[29] Thus, the trial judge had preferred WDC Shiwani's version of the complainant crying prior to being taken for the examination as opposed to the doctor's evidence that she came smiling. Both witnesses may be speaking to two different scenarios. On the other hand, they are not necessarily mutually exclusive. The complainant may well have greeted the doctor with a smile hiding her tears.

11th ground of appeal

[30] The appellant complains of directions on standard and burden of proof. The trial judge had directed that:

7. *As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.*
8. *The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.*

[31] The trial judge had addressed the assessors on the credibility rather than standard and burden of proof in the following paragraphs which appear to be of concern to the appellant.

'119. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.'

[32] However, the trial judge had also added that:

122. *It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
123. *If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
124. *The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*

- [33] Thus, I do not think any miscarriage of justice had occurred by what the trial judge had stated at paragraph 119.

12th ground of appeal

- [34] According to the complainant, she told Lavenia, Milinia and Miriama about what the appellant had done to her. As per Lavenia, Milinia and Miriama, the complainant told them that the appellant had said in Hindi “*hamar lund khao*” meaning “*you eat my penis*”. Furthermore, the complainant had also said that she did not have her lunch because the appellant had ejaculated inside her mouth. Further they had said that the appellant had told the complainant to suck his penis and he then forcefully pulled her hair and then penetrated her mouth with his penis when he was finished he wiped his penis with a tissue. He had forcefully put his penis through her mouth.

- [35] Thus, when the trial judge had said at paragraph 64 of the summing-up that ‘*the prosecution also says that the complainant had relayed relevant information to Miriama and Lavenia about what the accused had done to her*’, there was no difficulty for the assessors to understand what the *relevant information* was.

15th ground of appeal (sentence)


- [36] Indeed the evidence has revealed that a trust relationship existed between the complainant and appellant and the trial judge did not err in referring to that in the sentencing order.
- [37] The sentence of 10 years, 11 months and 15 days imprisonment for the count of rape is within tariff of 07 to 15 years for adult rape [see **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018)] and not harsh or excessive. I see no sentencing error.
- [38] 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)).

Orders of the Court:

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




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