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

CRIMINAL APPEAL NO.AAU 185 of 2016
[In the High Court at Suva Case No. HAC 149 of 2013L]

BETWEEN	:	**VINEND KUMAR**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Ms. L. Latu for the Respondent**
Date of Hearing	:	**21 July 2020**
Date of Ruling	:	**22 July 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of attempted rape and one count of murder contrary to section 208 and 237 of the Crimes Decree, 2009 respectively at Malele, Tavua in the Western Division on 15 July 2013.

[2] The information consisted of the following counts.

COUNT 1

Statement of Offence

ATTEMPTED TO COMMIT RAPE: *Contrary to section 208 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

VINEND KUMAR *on the 15th day of July 2013 at Malele, Tavua in the Western Division, attempted to penetrate the vagina of* ***SITAMMA*** *with his penis, without the consent of the said* ***SITAMMA.***

COUNT 2

Statement of Offence

MURDER: *Contrary to section 237 of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

VINEND KUMAR *on 15th day of July 2013 at Malele, Tavua in the Western Division, murdered* ***SITAMMA.***

[3] After the conclusion of the full trial, on 29 November 2016 two assessors had expressed an opinion that the appellant was not guilty of both counts but guilty of manslaughter. The remaining assessor's opinion had been that the appellant was guilty of both counts. The learned High Court judge had agreed with the single assessor and disagreed with the majority of assessors in the judgment delivered on 29 November, 2016 and convicted the appellant on both counts as charged. He was sentenced on 30 November 2016 to mandatory life imprisonment with a minimum serving period of 17 years and 04 years of imprisonment on attempted rape; both to run concurrently.

[4] The appellant in person had filed a timely appeal on 22 December 2016 against conviction and sentence but raised no grounds on the sentence. Subsequently, he had filed a notice to abandon the sentence appeal on 26 April 2016 (year mentioned erroneously). Legal Aid Commission had tendered amended grounds of appeal against conviction along with written submissions on 31 December 2019. The state had tendered its written submissions on 29 June 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau 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 **Waqasaqa 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. This threshold is the same with timely leave to appeal applications against sentence as well.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

> *1. THAT the Learned Trial Judge erred in law and in fact when he opined that the fact that the Appellant did not complain when he appeared in court at the outset meant that he was treated well in custody, was not assaulted by police and consequently no complaints against the police.*
>
> *2. THAT the Learned Trial Judge erred in law and in fact when he failed to independently assess the totality of the admissions and also the totality of evidence as a whole.*

[7] The learned High Court judge had summarized the prosecution case in paragraph 13 and 14 of the 'Written Reasons for Judgment and Sentence' as follows.

> *13. ..... In July 2013, the accused held himself out as a person who could cure women's menstrual problems by praying for them and giving them herbal medicine. He was not a "pundit" or doctor by profession. As such, the deceased invited him to her home to pray for her and give her herbal medicine. The accused was 25 years old and a labourer by profession. He reached Form 7 level education. The deceased was a 53 year old housewife. As part of the prayer ceremony, the deceased gave him her gold jewellery.*
>
> *14. Unbeknown to the deceased, the accused took the gold and sold the same, and used the proceeds of sale for himself. The deceased was continually asking the accused to return her gold jewellery, but he was evading her. On 15 July 2013, the matter came out into the open. The accused admitted to the deceased that he had sold her gold jewellery. An argument erupted between the two. They struggled. The deceased fell on the floor. Her skirt came up and she was wearing no under garments. The accused got tempted and wanted to insert his penis into her vagina without her consent. He forcefully laid on top of her. He took his pants down to knee level. The deceased scratched his face with his fingernails. He stood up and hit the deceased with a small coffee table. He did so twice. Then he got a grog pounder (iron rod). He then hit her*

twice on the head. The deceased later died of her injuries. The accused fled the crime scene.

15. Furthermore, the state of the deceased's injuries as itemized in her post mortem report, and the cause of her death, spoke volumes about how she met her death. She was severely injured in the face and head. In his caution interview statements, the accused said he struck the deceased twice on the head with the grog pounder (iron rod), and also hit her twice on the face with a small coffee table. Both the grog pounder and the coffee table were produced as exhibits. I lifted both exhibits in court, and they were pretty heavy. The deceased suffered broken teeth and a broken jaw. Her head was severely injured. When putting the accused's admissions together with the contents of the deceased's post mortem report, the inescapable inferences was that the deceased met her death after been hit four times with the grog pounder and small coffee table. The accused showed no mercy to the 53 year old deceased when he assaulted her to death.'

[8] Therefore, the prosecution case mainly depended on the appellant's cautioned interview, charge statement and the medical evidence. The appellant had challenged his confessional statements at the *voir dire* inquiry and the trial proper.

01st ground of appeal

[9] The appellant's complaint on the first ground of appeal is based on paragraph 07 of the *voir dire* inquiry.

'..... Had he really been assaulted by police, he would have complained to the Magistrate Court or High Court, when he first appeared in those courts. He didn't. To me, that showed, he had no complaints against the police, and the consequential inference was that he was treated well in police custody. I accept the prosecution's version of events that he made his caution interview and charge statements voluntarily, and I ruled the same as admissible evidence.'

[10] Due to the non-availability of the complete appeal record at this stage, I cannot independently verify whether the appellant had in deed not complained to the Magistrate or the High Court judge at the first available opportunity of the frightening threats and serious assault on him allegedly carried out by the police, which he had described in evidence, forcing him to confess to the charges; if not, whether there had been an acceptable explanation for the failure. However, I would expect the appellant to have brought it to the Magistrate or the High Court judge so that he could have been subjected to a medical examination to see whether the appellant's complaint was

truthful. At the same time, I tend to believe that the learned High Court judge may not have said what he said in paragraph 7 had that not been in fact the case.

[11] Given the appellant's evidence on the threats of physical harm and the actual attack on him by the police officers as revealed in paragraph 6 of the *voir dire* ruling, it is unthinkable that any reasonable person placed in the appellant's position would have failed to make a complaint to a judicial officer at the first available opportunity.

[12] Obviously, all the assessors had acted upon appellant's confessional statements accepting its voluntariness (though coming to contrasting decisions), for otherwise they would not have been able to hold him responsible for the death of the deceased. The learned trial judge had addressed himself on this matter in paragraph 10 of his written reasons agreeing with the single assessor and disagreeing with the majority of them.

> *'..... When the accused first appeared in the Magistrate Court and later in the High Court, the accused never complained to the Magistrate or the Judge of any untoward police behaviour. This suggested to me that he had no complaints against the police, and the inferences therefrom was that the police treated him well when he was in their custody.'*

[13] In the circumstances, I do not find the first ground of appeal as having a reasonable prospect of success at this stage.

02nd ground of appeal

[14] The appellant argues that the learned trial judge had not independently assessed the totality of evidence concerning the charge of attempted rape.

[15] In **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held that

> *"...In Fiji, 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..."*

[16] **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] Keith, J reiterated:

"21...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".

[17] In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court again held on the role of assessors and the judge as follows.

'58. 'In Noa Maya v. The State [2015] FJSC 30*; CAV 009. 2015 (23 October 2015] his Lordship Sir Keith, J said at paragraph 21:*

"...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".

[18] However, when the trial judge disagrees with the majority opinion he is expected to provide cogent written reasons (see **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009). Reasons are to be found in the judgment which includes the summing-up as well.

[19] I made the following observations on section 237(3) and (5) of the Criminal Procedure Act, 2009 in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) where I had the occasion to deal with section 237 of the Criminal Procedure Act. I reiterated those sentiments in **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020) and **Lasarusa Tikoigiladi v State** AAU 138 of 2016 (23 June 2020).

'[9] A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing, 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).

[20] Examining the learned trial judge's reasons for disagreeing with the majority of assessors on both counts, I find that in paragraph 9 of the Reasons for the Judgment, the trial judge had referred to the appellant's cautioned interview and the charge statement and stated that the appellant had admitted both the attempted rape and murder on 15 July 2013. Thereafter, the trail judge had proceeded to state in

paragraph 10 why he had rejected the appellant's position that those statements were not voluntarily made.

[21] Having drawn the attention of the assessors to the appellant's version under oath in paragraphs 27 of the summing-up (again in paragraph 43 & 45), the trial judge had proceeded to ask the assessors to consider the appellant's allegation that he had not made the confessions voluntarily in paragraphs 28 and 36 and directed them to consider whether he had made them, they were true and voluntary in paragraph 37 and in paragraph 38 to find him not guilty if they did not accept those confessions. The learned trial judge had also pointed out in paragraph 32 that the prosecution case substantially depended on the confessional statements and their contents in paragraph 35.

[22] The learned trial judge had narrated the appellant's version as follows in paragraph 27 (and 43 which states that the appellant had denied attempting to rape) of the summing-up which according to paragraph 39 only slightly differs from his confessional statements.

> *'The defence's case was simple. On oath, he denied the allegations against him. He admitted, he was with the deceased at the crime scene, at the material time. He admitted that, he told the deceased at the crime scene that he had sold her gold jewellery. He admitted, a heated argument erupted between the two, as a result of the above. He said, the deceased slapped his face and grabbed his collar, and in the process broke his silver chain. He said, the deceased went outside the house and got an iron rod, usually used for pounding the grog. He said, while holding the grog pounder, she threatened to kill him. He said, she then hit him with the grog pounder. He said, the grog pounder hit his wrist, and he later grabbed the grog pounder from the deceased. He said, he later hit the deceased with the grog pounder on the back, either on the back of the head or shoulder. He said, he later fled the crime scene.*

[23] Considering the appellant's above position, the learned trial judge had directed the assessors to consider the lessor charge of manslaughter based on provocation and/or lack of intent to kill but to cause serious harm (see paragraphs 14, 15, 16, 44, 45 and 46 of the summing-up). The decision of the majority of assessors to find the appellant guilty of manslaughter therefore may have been due any of the above reasons based on the appellant's confessional statements and his evidence.

[24] However, I do not find that the trial judge had specifically stated the reasons why he had disagreed with the majority of assessors on the lesser charge of manslaughter. Was it because the appellant's defense of provocation did not satisfy the tests set down in **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) to succeed or whether the nature and number of injuries inflicted, the vital areas of the body the blows were aimed at and the weapons used by the appellant could leave no one with any doubt of his intention to kill the deceased? These issues could be examined only with the benefit of the complete appeal record, if the appeal is renewed before the full court.

[25] In ***Lautabui*** and the Court of Appeal said

> *'[34] In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence.*

[26] The decision in **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) would also be helpful in this regard [subject of course to section 23(1) of the Court of Appeal Act on the grounds on which a verdict could be set aside by the Court of Appeal] where the Supreme Court stated

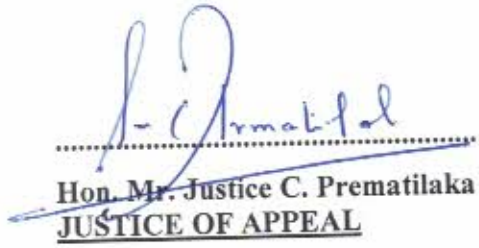
> *'[23] In the course of its judgment in Ram v The State this Court succinctly described the role of the trial judge as well as the supervisory function of the appellate court in the following words-*
>
> *"A trial judge's decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the*

ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case." (Emphasis added)

[27] However, as far as the present leave to appeal application is concerned the second ground of appeal has no reasonable prospect of success on the material available to me.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL