

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 082 OF 2023

BETWEEN: **MOHAMMED IFTIKHAR ALI**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, RJA**

Counsel: **Yunus.M for the Appellant**
Shameem .S for the Respondent

Date of Hearing: **16 July 2024**

Date of Ruling: **19 August 2024**

RULING

1. The appellant was tried of the following offences in the High Court at Suva:

COUNT 1

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

MOHAMMED IFTIKHAR ALI on an unknown date between the 1st of August 2020 and the 31st of August 2020, at Lulu Place in Davuilevu, in the Eastern Division, unlawfully and indecently assaulted **AB** by touching her breasts.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

MOHAMMED IFTIKHAR ALI on the same occasion as in Count 1, penetrated the vagina of **AB** with his finger without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

MOHAMMED IFTIKHAR ALI on the same occasion as in Count 1 and 2, had unlawful carnal knowledge of **AB** by inserting his penis into her vagina without her consent.

2. The appellant pleaded not guilty to the charges against him and the matter proceeded to hearing. The appellant was represented by counsel at the trial. The trial started on 24 July and concluded on 16 July 2023.
3. The prosecution called 8 witnesses, including the complainant's evidence, and tendered exhibits to support their case. The appellant gave evidence and called three other witnesses.
4. The Court heard the closing submissions from both counsels and the parties also gave oral and written submissions. At the conclusion of the trial, the judge found the appellant guilty and convicted him on 15 August 2023, of two counts of Sexual Assault, contrary

to section 210(1)(a) of the Crimes Act 2009 and one count of Rape, contrary to section 207(1)(2)(a) of the Crimes 2009.

5. On 5 September 2023, the appellant was sentenced to 16 years and 10 months imprisonment with a non-parole period of 14 years and 10 months.

The Appeal

6. On 4 October 2023 the appellant through his Counsel filed a Notice of Application to Seek Leave to Appeal Against Conviction and Sentence. There were four grounds of appeal submitted against conviction and one ground against sentence.
7. On 15 March 2024 an Amended Notice of Appeal was lodged by Counsel for the appellant with 4 grounds of appeal against conviction and 1 ground against sentence. Counsel for the appellant confirms at the hearing that it is the grounds in the amended Notice of Appeal that is to be assessed for the leave to appeal application.

Grounds of Appeal against Conviction

8. The following grounds of appeal against conviction are as follows:
 - (i) The trial judge erred in law and facts to rely on the DNA Analyst Report when it did not conclusively expound that the appellant was the father of the complainant's child;
 - (ii) The trial judge erred in law and in fact when he failed to clarify from the complainant her last day of menstruation and the period of between alleged sexual intercourse from the last day menstruation, to establish whether the complainant could have conceived or not. Without this evidence, the court formed an indisputable and undeniable inference that the appellant has sexual intercourse with the complainant on an unknown date in August 2020;
 - (iii) The trial judge erred in law and fact to convict the appellant of a lesser offence of sexual assault instead of Rape pursuant to section 162(1)(f) of the Criminal Procedure Act 2009, which contravened the appellant's right to be informed of

the nature and reasons for the charge and to be given adequate time and facilities to prepare his defense under section 14(2)(b) and (c) of the Constitution and the appellant's right to fair trial under section 15 (1) of the Constitution;

- (iv) The judge erred in law and fact to convict the appellant on the evidence of the complainant despite the complainant suppressing the alleged incident until she was found six months pregnant by the mother and the doctor.

Relevant Law

9. Under section 21(1)(b) of the Court of Appeal Act any person convicted on a trial before the High Court may appeal with leave of the Court of Appeal against his conviction and sentence on any mixed question of law and fact on any grounds to the Court of Appeal.
10. For a timely appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success': Caucau v State¹, Navuki v State² and Sadrugu v The State³.

Assessment of Grounds of Appeal against conviction

11. Ground 1 allege error of law and fact by the trial judge in relying of the DNA Report when it did not conclusively expound that the appellant was the father of the child in question. This is a deliberate misinterpretation of the clear evidence accepted by the trial judge with regard to the DNA Report and the chain of evidence to protect its integrity from when the sample was taken to when it was handed to Mr. Gusu for analysis.
12. In paragraphs 36 to 38, the trial judge stated as follows:

36. Accordingly, Mr. Gusu's finding of the paternity of the Child is founded on a scientific analytical comparison of the DNA profiles obtained from the Accused, the Complainant and the Child. Hence, he concluded that the Accused cannot be excluded as the biological father of the Complainant's child. As expounded in Dawson (supra), the Court is not obliged to conclude that the Accused is the Child's father based on the opinion of "cannot be excluded" given by Mr. Gusu. If then, there is no purpose

¹ [2018] FJCA 171 (AAU 029 of 2016)

² [2018] FJCA 172 (AAU

³ [2019] FJCA 87 (AAU 057 of 2015)

in giving this Court the jurisdiction to adjudicate the facts of the dispute. Indeed, the scientific opinion of Mr. Gusu has the most significant importance. However, the Court needs to make its judgment on the whole of the evidence presented during the hearing, including Mr. Gusu's evidence and the result of the DNA Analysis Test.

37. The Defence cross-examined IP Liga, Cpl Jiko and Mr. Gusu, asking questions regarding collecting, submitting and testing DNA samples. However, the Defence failed to adduce or point out any evidence to create any doubt about the integrity of the chain of custody and/or the testing procedure of this DNA Analysis Test.

38. Considering the reasons discussed above, I find the Prosecution has successfully established the integrity of the collection process of the Accused's buccal swab sample and then the chain of custody of the same from the point of collection to the testing beyond a reasonable doubt. Thus, I accept the DNA Analysis Report as true, credible, and reliable evidence.

13. In light of the finding and conclusion of the trial judge above, the appellant has not provided any basis for challenging the correctness of the finding and conclusion, except to say that there is no evidence of ejaculation and the dates of menses.
14. The explanation provide in the quoted passages above is sufficient to show that this ground of appeal has no reasonable prospect of success.
15. Ground 2 of the appeal against conviction is frivolous and misconceived because in the context of the undisputed evidence in this case, the undeniable inference that the appellant had sexual intercourse with the complainant is derive from nothing else but the DNA Report that established that the father of the child is the appellant.
16. The lack of proof of ejaculation and period of menses of the complainant is really irrelevant on the facts of this case. This ground has no prospect of success on appeal.
17. Ground 3 is another confused ground by the appellant, whose submission misunderstands that the court has the power not find the appellant guilty of the charged offence of Rape in this case and to find him guilty of a lesser offence of Sexual Assault. This power is given to the court by section 162(f) of the Criminal Procedure Act.
18. In paragraph 57 of the Judgement, the trial judge explained it thus:

"57. The Complainant only stated that the Accused touched her vagina with his finger. Hence, no specific evidence exists to establish whether he penetrated her vagina with his fingers. Accordingly, the Prosecution failed to establish the second count of Rape,

that the Accused penetrated the vagina of the Complainant with his fingers without her consent. However, the Prosecution established beyond reasonable doubt that the Accused had sexually assaulted the Complainant by touching her vagina with his fingers. Accordingly, the Prosecution has proved that the Accused committed a lesser offence of Sexual Assault by indecently and unlawfully touching her vagina with his fingers."

19. Woven into the appellant submission as part of ground 3 is the claim that his right as an accused person under section 14 (2)(b)(c)(e) of the Constitution. These rights are pretrial rights of an accused person to ensure that he is not unfairly prejudiced in his preparation of his defense for the charges he will face at his trial. That is not the situation here in question.
20. This ground has no reasonable prospect of success.
21. Ground 4 - This ground of appeal is about delayed reporting of the incident which transpired in August 2020, when the complainant realized that she was pregnant in February 2021 only then did she informed her mother about how she was impregnated.
22. In dealing with this ground, the court correctly referred to the approach adopted by the Court of Appeal in **State v Serelevu**⁴ wherein the "totality of circumstances test" was applied in evaluating the complainant's evidence.
23. In this case the trial judge turned his mind to the relevant circumstances thus:

48. I shall now proceed to determine the credibility and reliability of the Complainant's evidence. In doing that, I first draw my attention to determining whether the delay in reporting this matter affected the credibility and reliability of the Complainant's evidence.

*49. Gamlath JA in **State v Serelevu (supra)** has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution's case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.*

*50. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay: **Masei v State**⁵*

⁴ [2018] FJCA 163 (AAU 141 of 2014)

⁵ [2022] FJCA 10 (AAU 131 of 2017)

51. *The Complainant was 14 years old in 2020, and the Accused is an elderly neighbour who resides very close to her house. She explained the reason for not telling of this incident to anyone. The Complainant was scared of the Accused and his threat. It was her pregnancy that forced her to reveal about this incident. Considering her young age and the proximity of the Accused in her neighbourhood, the explanation given by the Complainant is acceptable; hence, the delay in reporting has not affected the credibility and reliability of her evidence.*

24. The delayed reporting of the appellant's Rape and Sexual Assault of the complainant until she was faced with her pregnancy does not affect her credibility as a witness. The trial judge did not err in reaching that conclusion.
25. This ground as no reasonable prospect of success.

Appeal against Sentence

26. The one ground of appeal against sentence was that the trial judge erred in principle when he considered the unchallenged Victim Impact Report of the complainant in selecting the starting point of sentence at the higher end of the tariff.
27. The Court of Appeal in **Kim Nam Bae v State**⁶ stated the principle to be applied where a sentence is challenged on appeal thus:

"It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499)."

28. In light of the principle enunciated in **Kim Nam Bae** (supra) the trial judge followed the correct principle in adopting the sentence tariff for Rape of a child set out by the Supreme Court in **Aitcheson v State**⁷ held that the tariff for rape of a child is 11 to 20 years imprisonment.

⁶ [1999] FJCA 21 (AAU 015 of (1998)


⁷ [2018] FJSC 29 (CAV 0012 of 2018)

29. There is some unfairness in the trial judge using the Victim Impact Report in his assessment of the aggravating factors to consider in computing the sentence, without the appellant having an opportunity to challenge aspects of it. The appellant should have been given the opportunity to challenge the Victim Impact Report, if he want to. This should have been considered and is relevant factor that was left out. The respondent concedes this aspect of the sentence and agrees that leave may be given
30. In light of the above, there is real prospect that the sentence in this case may be varied as a result of the need for Victim Impact Report to be tested by the Appellant. I conclude that leave to appeal against sentence be allowed.

ORDERS:

1. Leave to Appeal Against Conviction is refused.
2. Leave to appeal against sentence on the grounds submitted to this court is allowed.




Isikeli U Maitaitoga
RESIDENT JUSTICE OF APPEAL