

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

CRIMINAL APPEAL NO. AAU 057 of 2022

BETWEEN : **SEMESA NAULAGO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in Person**

: **Lati, L for the Respondent**

Date of Hearing : **23 September 2024**

Date of Ruling : **15 October 2024**

RULING

1. The appellant was charged with two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, and one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act.
2. The particulars of the offences are that:

COUNT 1

(Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO between the 1st day of January 2016 and the 12th day of February 2022 at Koroibici Settlement, in Nausori, in the Eastern Division, unlawfully and indecently assaulted **ROSEMARY NORA ATIRA**, by touching her breasts.

COUNT 2

(Representative Count)- Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO between the 1st of January 2016 and the 12th of February 2022, at Koroibici Settlement, in Nausori, in the Eastern Division, unlawfully and indecently assaulted **ROSEMARY NORA ATIRA**, by rubbing his penis between her thighs.

COUNT 3 - (Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO between the 1st day of January 2016 and the 12th day of February 2022 at Koroibici Settlement, in Nausori, in the Eastern Division,

*penetrated the vagina of **ROSEMARY NORA ATIRA**, a child under the age of 13 years, with his tongue.*

COUNT 4 - (Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO *between the 1st day of January 2016 and the 12th day of February 2022 at Koroibici Settlement, in Nausori, in the Eastern Division, penetrated the vulva or vagina of **ROSEMARY NORA ATIRA**, with his penis, a child under the age of 13 years.*

3. The appellant pleaded not guilty to the four offences and the matter proceeded to the hearing. At the conclusion of the Prosecution's case, the Court found there was no evidence to establish two counts of Sexual Assault; hence, the Accused was acquitted of the same pursuant to Section 231 (1) of the Criminal Procedure Act. The hearing proceeded in respect of counts three and four. The appellant exercised his rights to remain silent, offering no evidence in his Defence.
4. The appellant was found guilty for the 2 counts of Rape he was tried with. He was found guilty and convicted in a judgement dated 21 June 2022, with 30 days to appeal. He was sentenced on 22 June 2022 to 15 Years and 8 months imprisonment, with a non-parole period of 13 years and 8 months.

Notice of Appeal & Grounds

5. On 21 July 2022 the appellant submitted a letter Notifying his intention to appeal and this was received in the Court Registry on 22 July 2022. **This Notice to Appeal against Conviction was timely.** On 4 March 2024, the appellant submitted additional grounds for his appeal against conviction. More grounds of appeal were received from the appellant dated 6 June 2024.

The Law & Legal Principle

6. Under section 21 (1) (a) of the Court of Appeal to appeal is not required where grounds of appeal are limited to question of law only. However, for an appeal alleging errors of law and fact, the relevant law is section 21 (1)(b) of the Court of Appeal Act and under that provision leave of the court is required.
7. For leave to be granted, the grounds of appeal relied upon by the appellant must have a reasonable prospect of success: Caucu v State [2018] FJCA 171; Sadrugu v State [2019] FJCA 87.

Grounds of Appeal

8. The appellants submit 6 grounds of appeal and they are:
 - i) Trial judge erred in principle and law when he considered the evidence of the complainant whilst at the same time saying at paragraph 8 of the judgement, hence the law recognizes that she was not at an age where she could consent to any sexual activities;
 - ii) Trial judge erred in principle and in law and in fact when he made a finding that since the accused and the complainant had an age gap of 28 years and that the accuse was complainant's uncle (relationship through village ties) the accused had an authority over the complainant;
 - iii) The trial judge erred in law and fact not to direct the police to get a footage of the CCTV of the allege crime scene (shop) to justify the truth about this case;
 - iv) That the conviction was unsafe and unsatisfactory having regard to the totality of the evidence, in particular the complainant's evidence which created a doubt with respect to the alleged offence during the defence cross-examination;

- v) The trial judge erred in law and fact when he failed to reduce the charge of Rape to Defilement, contrary to section 215(1) Crimes Act 2009 after considering the evidence in totality.
- vi) Trial judge was biased and unfair in conducting the trial.

Assessment of the Grounds

9. The grounds of appeal set out in paragraph 8 above will now be considered individually to determine its prospect of success on appeal:

Ground i) This ground is frivolous based on an incorrect understanding of the legal position as regards consent for underage sexual offence victims. Paragraph 8 of the Judgement simply states that a person under the age of 13 cannot in law consent to sexual activities of any kind. This ground is misconceived.

Ground ii) This ground is misconceived because the trial judge did not make a finding about age disparity between appellant and the complainant. That was part of agreed facts that the appellant had accepted: see Paragraph 10 under the sub-title Admitted Facts, there is reference to background facts which refers to the appellant's age and place of residence and that of the complainant.

Ground iii) This ground of appeal is as confusing as it is frivolous. A trial judge may not direct the police to undertake further investigation without any basis arising from the evidence in a trial before him. In this case, the appellant did not raise the issue of CCTV at all during his trial and he now suggest that the trial judge should have done. This ground has no prospect of success on appeal.

Ground iv) For this ground I agree with the Respondent's submission, that the trial judge had carried proper analysis of the complainant's evidence at paragraphs 11 to 22 of the judgement and concluded that evidence is credible and reliable and contributed to the prosecution successfully proving that the appellant penetrated the complainant's vagina with his tongue and then his penis. The evidence which the trial judge had analysed remove any doubt from the prosecution case against the appellant.

This ground has no reasonable prospect of success on appeal.

Ground v) This ground of appeal have not been supported with specific and clear basis that explains why in law the judge should have reduced the charge to Defilement from Rape. The preference for the charges faced by the appellant is the prerogative of DPP not the trial judge. The Rape charge in this case was properly brought.

This ground of appeal is frivolous.

Ground vi) – This ground is ground has no merit and is frivolous. It is dismissed under section 35 (2) of the Court of Appeal Act.

Additional Grounds

10. The appellants submitted 4 additional grounds of appeal on 29 April 2024. In reviewing these the first 2 grounds were for appeal against sentence. This Leave to Appeal is for conviction only; these 2 grounds are not relevant in this hearing.

Additional ground 3 states: trial judge erred in law and fact in considering the complainant's evidence as credible when it took her 6 years to relate what was done to her.

11. The counsel for the appellant raised this issue at the trial and the trial judge considered it. At paragraphs 19 and 21 he stated the basis of his finding thus:

19. "The learned Counsel for the Defence contended that the delay in reporting the matter might affect the credibility of the evidence given by the Complainant. Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018) 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 case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.

20. The Complainant was an eleven-year-old minor, and the Accused was her father's cousin's brother. He had told her not to tell anyone about this matter, which was why she had not informed anyone about this matter. Considering her tender

age and her relationship with the Accused, I accept the explanation given by the Complainant for not reporting this incident to anyone immediately.

21. The Complainant maintained her consistency about this allegation during the cross-examination. The Court observed her demeanour and deportment during the cross-examination, where she happily and promptly answered the general questions posed by the learned Counsel for the Defence. However, her facial expressions changed, and she looked scared and frustrated when asked about this incident, though she still managed to answer promptly and coherently.

12. On the basis of the trial Judges finding and reliance on the relevant law, this ground of appeal has no reasonable prospect of success on appeal.
13. Additional ground 4 claims that if there was no evidence in the 2 counts of sexual assault charges that were, the same should apply to the 2 counts of Rape the appellant was tried and convicted with.
14. The short answer is that this ground is misconceived in that the factual basis on which the 2 counts of sexual assault charges were withdrawn is not the same as the those relied on by the prosecution to prove the charges against the appellant on the 2 Rape charges. The sexual assault charges were withdrawn at the ‘No Case to Answer’ stage of the proceedings not at the end of the trial.
15. The judgement at paragraph 18 states:

18. The Complainant expressly stated that the Accused put his tongue inside her female private part. She then explained that the Accused put his male private part inside her female private part. The Complainant is an eleven-year-old minor. It is unreasonable to expect an eleven-year-old child to explain sexual conduct using all these technical and scientific terms. The Complainant precisely said that both the male private part and female private part are used to urinate, thus establishing that she was referring to the vaginal area of her body and the penis of the accused. Accordingly, I am satisfied that the Complainant had explained in her evidence that the Accused had penetrated her vagina, if not vulva, with his tongue and then with his penis.

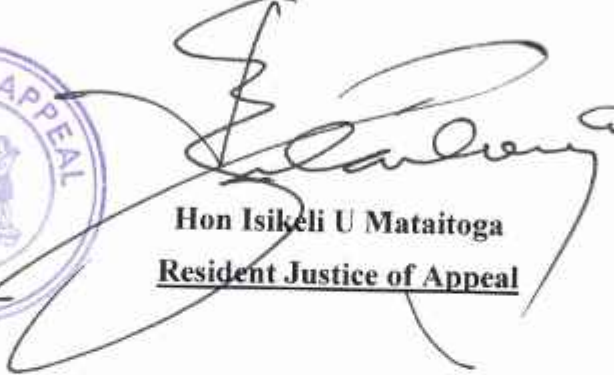
16. This passage clearly establishes the evidence in support of the Rape charges, and there is no basis in the claim by the appellant implicit in this appeal ground. This ground has no merit.

17. The 6 grounds of appeal and the 2 additional grounds submitted by the appellant to support his application for Leave to Appeal against conviction, would have no prospect of success. Leave to appeal is refused.

ORDERS:

1. Application for Leave to Appeal against conviction is refused.




Hon Isikeli U Maitaitoga
Resident Justice of Appeal