

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 077 OF 2023

BETWEEN: **BRIAN RAVATUDEI**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, AP**

Counsel: **Baleilevuka U & Degei M for the Appellant**
Semisi K for the Respondent

Date of Hearing: **23 September 2024**

Date of Ruling: **2 December 2024**

RULING

1. The appellant was tried in the High Court at Lautoka, after he was charged with 1 count of Rape, contrary to section 207(1) and (2)(a) of the Crimes Act 2009. After the trial he was found guilty as charged and was convicted in a judgment dated 31 July 2023.
2. On 22 August 2023 the appellant was sentenced to 7 years 10 months and 20 days imprisonment with a non-parole period of 7 years and 2 months.

3. The appellant being dissatisfied with outcome of the trial filed, through his counsel, a Notice to Appeal Out of Time and an affidavit sworn by the appellant on 20 September 2023. His appeal is against conviction only.
4. The Notice of Appeal was out of time by only 1 month and because it is not a substantial delay and the explanation provided for the delay is not unreasonable, I will treat this application for leave as timely.

Grounds of Appeal

5. There 4 grounds of appeal submitted on behalf of the appellant by his counsel are:
 - (i) *That the trial judge erred in law and fact when convicting the appellant by relying on inconsistent, unreliable and untruthful statement of the complainant which created a reasonable doubt to the prosecution case;*
 - (ii) *That the trial judge erred in law and fact when convicting the appellant based on inconsistencies of the prosecution case;*
 - (iii) *That the trial judge erred in law and in fact when convicting the appellant based on hearsay and non-admissible evidence of Penina the Prosecution second witness;*
 - (iv) *That the trial judge erred in law and fact when convicting the appellant without an existence of any evidence by the prosecution that the appellant is the accused having being charged for the allegation.*
 - (v) *That the delay was reasonable due to the fact that I had difficulty finding a new solicitor to represent my appeal since I am in prison and my girlfriend resided in New Zealand.*

Relevant Law

6. Based on the grounds of appeal outlined above, the questions raised therein involves questions of law and fact, so under section 21(1)(b) Court of Appeal act, leave to appeal is required. For a timely appeal, the test for leave to appeal against conviction is ‘reasonable prospect of success’ see: Caucau v State [2018] FJCA 171; Navuki v State [2018] FJCA 172 and State v Vakarau [2018] FJCA 173; and Sadrugu v The State [2019] FJCA 87.

Assessment of the grounds

Inconsistent Statements

7. For grounds i) and ii), both claim is that the trial judge relied on inconsistent, unreliable and untruthful statement of the complainant, creating reasonable doubt in the prosecution case. In reviewing the judgement, the following is referred to:
- i) Inconsistent statements of the complainant are covered at paragraph 26 to 38 of the judgement. These paragraphs are the complainant’s evidence, as summarized by the trial judge. When cross-examined on critical statements she made in her police statement when compared to the evidence she made in court during the trial. The trial judge agreed that there were inconsistencies, at paragraph 102 of the judgment, but he accepted it on the basis that the police statement was made 2 years before the trial and the fact that a person is not expected to give a carbon copy versions of previous statements to the police, at the trial. In a case where the prosecution evidence is based only on the complainant’s evidence, it is risky to not explain in detail how the inconsistencies identified by the trial judge in his judgment does not negatively impact the credibility of the complainant. To simply declare that the discrepancies and omissions were based on human memory recollection and it does not adversely affect the credibility or the thrust of the complainant’s evidence is inadequate in my view.

Fairness to the appellant dictates that ALL the evidence must be considered before determination is made by the trial judge on which version to accept and which to reject. This is not apparent on the limited nature of evidence that is before this hearing. From the judgment it appears that the trial judge only believes what the prosecution said, despite identifying several inconsistencies in the statements made by the applicant in her police statement compared to the evidence she gave in court.

In **Nadim v State [2015] FJCA 130 (AAU 080 of 2011)**, the Court of Appeal also stated the following:

*[10] The complaint of the Appellants is that the High Court Judge has failed to direct the assessors on the alleged inconsistencies in accordance with the guidelines stated by the Supreme Court in **Swadesh Kumar Singh v The State** [2006] FJSC15 which had been confirmed by the Supreme Court in **Praveen Ram v. The State** Petition No. CAV0001 of 2011: 09 May 2012. The following passage from **Praveen Ram's** case has been cited in support of the above argument.*

*“It is pertinent to note in this connection that in **Swadesh Kumar Singh v The State** [2006] FJSC 15 at paragraph 51, this Court emphasised that "where a witness has made a statement on oath directly inconsistent with evidence he or she gives in court and particularly when that evidence implicates the accused person, the assessors should be informed of the importance of statements made on oath. They should also be told that they should be cautious before they accept a witness's sworn evidence that conflicts with a sworn statement the witness previously made. Having said that, this Court also went on to lay down following guidelines for trial judges*

*“The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that **the evidence in court should be regarded as unreliable unless the assessors are satisfied in two particular respects. Firstly, the explanations are genuine. Secondly, that, despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth.**” [Emphasis Added]*

In light of the above and a fuller consideration of these grounds of appeal is best achieved with the benefit of the full trial record, I would grant leave for ground i) and ii).

Hearsay Evidence of PW2 – Penina Manumnaunivalu

8. Ground iii) alleges that the trial judge relied on hearsay evidence given by PW2 Penina Manumanunivalu in convicting the appellant. At paragraphs 109 to 112 of the judgement, the trial judge stated the following:

“109. I also accept the evidence of Penina Manumanunivalu as reliable and credible; she was able to relay what the complainant had told her. The defence had taken issue in respect of the date and day of the alleged incident mentioned in the police statement of Penina. However, defence exhibit 1 in the form of the Viber messages clearly indicates that something between the complainant and the accused had happened on 19th September hence the reaction by the complainant via Viber messages from early morning of the 20th (the following day).

110. I accept the evidence of Penina that the day and date of 18th September mentioned in her police statement was a mistake. The date and day of the allegation has been confirmed by the complainant. The complainant denied telling Penina that the incident had happened on Saturday 18th September. In any event the above day and date of the incident does not have any bearing on the substantive allegation.

111. There was an inconsistency of evidence between the complainant and Penina about the threat made by the accused to the complainant. The complainant told the court that she did not tell Penina about the accused threatening her but Penina said the complainant had told her the accused had threatened the complainant. This is an obvious inconsistency between the two versions; however, this inconsistency is not a major inconsistency which does not affect the evidence of both the prosecution witnesses.

112. The decisive aspect of recent complaint evidence is to show consistency of the complainant’s conduct with her evidence given at trial. In this case the complainant had relayed crucial information to Penina about what the accused had done to her in her room which was consistent with the evidence of the complainant. I also accept the observations of Penina that the complainant looked sad and was crying when she was narrating to Penina about what the accused had done to her”

9. It is evident from the above that trial judge has made it clear that she accepts the evidence of Penina, he summarized these at paragraphs 47 and 48 of the judgment. On the face of it, some of the statements made by this witness is hearsay. To be absolutely sure the full record of the trial would assist in making the final determination.
10. This ground of appeal has merit and leave is granted.
11. Grounds iv) and v) are simply confusing. No substantive grounds of appeal are made out with clarity. Leave is refused for both.

ORDERS:

1. The appellant is granted leave to appeal grounds set out in paragraphs 5(i), (ii) and (iii) above.
2. Leave is refused to appeal on grounds in paragraph 5 (iv) and (v)



The Hon Isikeli U Maitoga
Acting President



The seal of the Court of Appeal, Fiji, is circular with the text "COURT OF APPEAL" at the top and "FIJI" at the bottom. In the center is a coat of arms featuring a crown, two figures holding a shield, and a banner.