IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 103 OF 2022

BETWEEN: **JAMES ANTHONY NAIDU**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, RJA**

Counsel: **Chand A for Appellant**
Swastika S for Respondent

Date of Hearing: **29 October 2024**

Date of Ruling: **2 December 2024**

RULING

1. The appellant was charged with 1 count of Rape, contrary to section 207(1) and (2) [c] the Crimes Act 2009 and 1 count of Indecent Assault, contrary to section 212 (1) of the Crimes Act 2009 at the High Court in Lautoka. He pleaded not guilty and following a trial, the appellant was found guilty and convicted on 3 August 2022.

2. The appellant was sentenced on 6 September 2022 to a term of 12 years imprisonment with a non-parole period of 10 years imprisonment.

3. The appellant was dissatisfied with his conviction and sentence in the High Court. On 5 October 2022, he appealed against both conviction and sentence through his solicitors. In his Notice of Appeal and Application for Leave to Appeal he submitted 13 grounds of appeal against conviction and 2 grounds against sentence. The appeal against conviction is 5 weeks out of time. It is not substantial. The appeal against sentence was timely.

4. In another filing dated 23 October 2023, the appellant submitted a further 7 grounds against conviction. In total 20 grounds against conviction – all involves issues of law and facts, even though 4 grounds were submitted as involving questions of law. Section 21(1)(b) of the Court of Appeal Act is relevant provision to review this leave application.

5. In terms of section 21(1) (a) and (b) 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 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.

6. When a sentence is challenged on appeal, the guidelines 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** [1999] FJCA 21.

At the Hearing of Leave Application

7. I commend the detail and useful submissions made by Anishini Chand Lawyers on behalf of the appellants.

8. I have reviewed all the grounds of appeal and the submissions made on behalf of the appellant. For the purpose of the leave hearing there are only two sets of grounds of appeal against conviction that I will discuss briefly. Before I do that, I will review the claim in the appellant's submission that grounds 4, 6, 12 and 13 involves question of law only therefore leave of the court is not required under section 21 (1)(a) of the Court of Appeal Act 2009.

Appeal Grounds involving Question of law Only

9. It is trite, that a mere claim by the appellant that the grounds of appeal he submits, involves a question of law only, that the court will not review them to find if that claim is true. In **Jason Zhong v State [2014] FJCA 108 (AAU 044 of 2013)** – Calanchini P at paragraph 13 stated;

> *"[13] At the outset it needs to be clearly stated that the mere fact that the ground of appeal is stated in the notice to raise an error of law does not necessarily mean that the ground involves a question of law alone. In* ***Hinds -v- R*** *(1962) 46 Cr. App. R 327 Winn J at page 331 when commenting on section 3(a) of Criminal Appeal Act 1907 (the terms of which are similar to section 21 (1) (a) of the Court of Appeal Act) noted:*
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> *"The court is very clearly of the opinion that the proper construction of those words (against conviction "on any ground of appeal which involves a question of law alone") is that there must be, in order that the right given by that subsection can be claimed, a ground of appeal raised which is a question of law, and that the section cannot be effectively invoked merely by raising a ground which the grounds of appeal or the submissions of counsel at any later stage describe as a ground of law."*
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> *[14] That each ground of appeal against conviction is described as an error in law does not in any way assist this Court to determine whether any ground against conviction involves a question of law alone. As the Court of Criminal Appeal noted in the* ***Hinds*** *decision (supra) at page 333:*

"Whether or not such a ground so stated is to be regarded as a question of law alone or whether it is a ground of law mixed with fact or of mixed law and fact may, in any particular case, not be an easy question to determine."

[15] The Court of Criminal Appeal in ***Hinds*** *(supra) relying on the ground of appeal under discussion in that case provided a most useful example of the difference between a ground of appeal involving a question of law alone and a ground of appeal involving a question of law mixed with fact or a ground of mixed law and fact at page 333:*

"If the question were: Is hearsay evidence admissible on a criminal trial in England? that would plainly be a pure question of law or a question of law alone. If the question were: Was hearsay evidence admitted at this trial, or did the answers given by a witness on page so-and-so and so-and-so of the transcript constitute hearsay? then it might be that the natural approach would be to suppose that there were questions of fact to be determined, and after the determination of those facts the law of hearsay evidence, including the proper definition of hearsay, would have to be applied to those facts."

10. In my judgment upon a careful reading of each of the four grounds referred to above, of appeal against conviction there is in each case a question of law mixed with a considerable amount of fact. In my judgment none of the four grounds involves a question of pure law or a question of law alone. Therefore, all the ground of appeal submitted by the appellant, will be treated as involving both questions of law and fact.

Assessment of Grounds of Appeal

11. For the purpose of this Application for Leave to Appeal hearing, I will group the grounds of appeal under three headings, namely, i) Inconsistent Statements; ii) Delayed Complaint and iii) Unreasonable Verdict. Most of issues raised as grounds of appeal are covered by these three broad areas of law and facts for consideration.

i) Inconsistencies in Prosecutions evidence and failure of trial judge to adequately analyze evidence

12. As per written submission date 4 June 2024, counsel for the appellant submits grounds 1, 2 and 5 covers inconsistencies in the prosecution case, which were overlooked or not adequately analyzed by the trial judge. It is important to keep in mind that this was a case of "word for word" i.e. the prosecution called only one witness and for the defence there was only 1 witness. It is imperative that the trial judge is very clear and fair in assessing the evidence at the trial where the prosecution has called only 1 witness as in the case and she is also the complainant.

13. The appellant made extensive submissions to support this ground. These are set out in full in his written submission filed in Court on 4 June 2024 at paragraphs 6.1 to 6.25. The appellant referred to the fact that the prosecution rested its case on the evidence of the complainant only. The appellant submitted that the trial judge relied exclusively on the complainant's (DD) evidence to convict him, which he concedes is permissible in law, but he submits that on the evidence in this case, he did so by overlooking glaring inconsistencies and shortcomings in DD's evidence, resulting in a miscarriage of justice.

14. Some of issues submitted by the appellant, not all, to support these grounds of his appeal against sentence are:

- Under cross-examination DD was evasive, and at time argumentative
- She responded to a majority of question put to him with "I don't recall" – she could even recall the group of friends she was with immediately before and after the Rape
- At the trial DD stated that the appellant penetrated her mouth with his penis until he ejaculated. This was not mentioned in her Police statement - suggesting
- During DD's examination in chief, she explained the alleged rape as follows: "One hand was on my breast, then he pushed his penis inside my mouth." Q; How long did he do that? A; 3 minutes, close to 3 minutes, I can't recall."
- In DD's police statement she said: "...James got hold of my head and pushed it towards his private part and forced to suck his penis. He forced me to suck his penis and the same time fondled my breast. I only suck her penis once and started crying but he kept fondling my breast with my breast it was paining..."

There were several other examples of alleged inconsistencies submitted and clearly set out in the appellant's written submission; see paragraph 63 to 73 Appellant submission filed on 23 October 2023. In all of the above the appellant submits the complainant evidence is unreliable and cannot be relied on by the trial judge.

15. In **Nadim v State [2012] FJCA 130;(AAU 080 of 2011),** the Court of Appeal stated:

> *"15. The following passage from* ***Praveen Ram's*** *case has been cited in support of the above argument:*
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> *16. "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*
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> *17 . 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."*

16. I am satisfied that on the basis of the submission made by the appellant and the specific references to instances of inconsistencies in the evidence of the complainant, leave should be granted to allow review by the full court, with the advantage of the court record of the trial.

Delayed Complaint

17. On the facts of this case, there was a 10 months delay in making a complaint. It was not a recent complaint. The complainant by her own evidence stated that she only complained to protect her younger sister from being preyed upon by the appellant. It was not because she was raped by the appellant. The reasons provided by the complainant to explain the delay must be carefully considered by the trial judge, given the fact that this case was prosecute on the evidence of the complainant only.

18. As was stated in **State v Serulevu [2018] FJCA 163 (AAU 141 of 2014)** the court of appeal stated:

> *"[26] ..if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of* ***Thulia Kali v State of Tamil Naidu****; 1973 AIR.501; 1972 SCR (3) 622:*
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> *"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."* (see: 1973 AIR 501; [1972] INSC 64; 1972 (3) SCR 622; 1972(3) (SCC) 393).
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> [27] In the case of **State of Andhra Pradesh v M. Madhusudhan Rao** (2008) 15 SCC 582;
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> > *"The delay in lodging a complaint more often than not results in embellishment and exaggeration which is a creature of an afterthought. That a delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story. As a result of deliberations and consultations, also creeps in issues casting a serious doubt in the veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained. Resultantly when the substratum of the evidence given by the complainant is found to be unreliable, the prosecution's case has to be rejected in its entirety".* (See: Sahib Singh v State of Haryana, AIR 1977 SC 3247; Shiv Rama v State of U.P AIR 1998 SC 49; Munshi Prasad & Ors v State of Bihar, AIR 2001 SC 3031). [Emphasis mine]

19. In **Raj v State [2014} FJSC 12; CAV 003 of 2014),** the Supreme Court stated:

> *"[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1998] UKPC 38; [1999] 1 AC 210 at p215H. This was done here.*
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> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
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> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.*

20. With regard to the delay in making the complaint the appellant submits as follows:

- She was scared of the society and how they will describe what happened to her;
- She finally decided to report the matter only when she found out for her younger sister that the appellant had apparently abused her as well;
- She reported it because if the appellant did it to her sister. And her, he could do it to anyone
- The complainant did not inform the court of any threat from the appellant not to tell anyone. She was free and under no threat from anyone

21. The appellant submits that from the above, that the complaint was an afterthought and a fabrication.

22. I noted that the explanation did not *"disclose material relevant to unlawful sexual conduct of the appellant"* highlighted in **Raj v State** [supra). I accept the appellant's submission in the circumstance of this case, 10 months delay is long and there has been no reasonable and plausible explanation provided by the complainant evident on the material presently before me.

23. I grant leave to appeal on this ground, to give both parties renewed opportunities to argue this issue with the benefit of the court record of the trial, not available to me at this stage, before the full court.

Unreasonable Verdict

24. In ground 7 of the appellant's ground of appeal and submissions in support thereof, beginning at paragraphs 97 to 120 of the written submission filed on 23 October 2023, he argues that on the basis of the many inconsistencies/omissions in the evidence of the complainant, the unreasonable delay in reporting the alleged rape to someone and the lack of the trial judge's clear assessment of the basis of his finding that the a complainant was credible and truthful witness, the verdict was unsatisfactory/unreasonable and unfair.

25. In **Kaiyum v State** [2014] FJCA 35 (AAU 0071 of 2012) – the Court of Appeal stated the test is whether the trial judge could have reasonably convicted on the evidence before him.

> "11] The appellant's second complaint relates to reasonableness of the guilty verdicts on the evidence led at the trial. It is the appellant's contention that if the learned trial judge had carried out an independent analysis of the evidence after the assessors' expressed opinions that the appellant was guilty of the charges, he would have disagreed with those opinions and would have found the appellant not guilty. Counsel for the appellant cites the Supreme Court judgment of **Ram v State [2012] FJSC 12 (CAV 01 of 2011; 9 May 2012)** to support his contention that the trial judge is required by law to carry out an independent analysis of evidence before pronouncing judgment even in cases where the judge affirms the opinions of the assessors.
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> [12] In **Ram** (supra), the Supreme Court said at paragraph [80]:
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> *"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."

26. The supreme Court in **Rokete v State [2022] FJSC 11;** per Keith J at paragraph 109:

> "109. Marsoof J's observation about the appellate court having to evaluate the evidence and independently assess it has to be seen in its context. He was explaining what the appellate court has to do in its "supervisory" role. When the appellate court is independently assessing the evidence, it is doing so to satisfy itself, to use Marsoof J's own words, "that the ultimate verdict is supported by the evidence and is not perverse". *In other words, the function of the Court of Appeal is to look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the accused was guilty of the charge he faced*. It is not part of the Court of Appeal's function to consider for itself whether on the totality of the evidence the accused is guilty. That would be to usurp the function of the trial judge who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused."

27. In a criminal trial, the standard of proof and the burden of proving the case against the person charged, must be beyond reasonable doubt. In this case the lack of clear reasons in the judgement, for the judge to support the credibility evidence of the complainant in the face on many inconsistencies in her evidence and with the lack clear cogent reason by the complainant to explain the delay in reporting the Rape within a reasonable time, all adds up to the possibility that on the totality of all the admissible in this case, it may not be open to that trial to have found the appellant guilty as charged. Again, this is best reviewed by the full court with all the court record of the trial in the High Court, which I do not have at this stage.

28. I grant leave allow the appellant to argue this ground before the full court.

ORDERS

1. The appellant is granted leave to appeal against conviction on the grounds discussed in this ruling.

Hon Isikeli U Mataitoga
Acting President

COURT OF APPEAL FIJI