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

CRIMINAL APPEAL NO. AAU 0003 of 2024
[Lautoka High Court Case No. HAC 159 of 2019]

BETWEEN : **ISAAC LAL**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Appellant in Person**
: **Nasa J for the Respondent [ODPP]**

Date of Hearing : **22 January, 2025**

Date of Ruling : **4 March, 2025**

RULING

[1] The appellant [Isaac Lal] was charged and tried with one count of Rape, at the High Court in Lautoka. The Information filed by the DPP read as follows:

Statement of Offence

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

Particulars of Offence

ISAAC LAL on 2 September 2019 at Nadi in the Western Division, penetrated the vagina of SHIVASHNA PRASAD with his penis, without her consent.

[2] The appellant pleaded guilty to the charge and the matter proceeded to trial. Following the trial, the appellant was found guilty and was convicted as charged on 29 November 2023.

[3] The appellant was sentenced on 8 **December 2023**, to 9 years imprisonment with a non-parole period of 7 years. He was advised that he had 30 days to appeal to the Court of Appeal.

The Appeal

[4] The appellant through his counsel [MIQ Lawyers] filed a Notice of Appeal against Conviction that was filed in the Court Registry on 8 January 2024. This appeal is timely.

[5] The Notice of Appeal set out 2 grounds of appeal and 1 ground against sentence.

[6] On 12 July 2024, the appellant submitted additional 8 grounds of appeal against conviction. At the hearing it was confirmed by the appellant that these are grounds of appeal that he was relying on for this application for leave to appeal. The grounds of appeal will be set out later in this ruling.

Applicable law

[7] Pursuant to section 21 (1)(a) and (b) of the Court of Appeal 2009, the right to appeal in criminal cases are as follows:

> *"1 (1) A person convicted on a trial held before the High Court, may appeal under this part to the Court of Appeal –*
>
> *(a) Against his conviction on any ground of appeal which involves a question of law alone;*

> (b) *With leave of the Court of Appeal or upon the Certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves question of law and fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal;"*

[8] From the above reference on the right of appeal, grounds of appeal involving questions of law only, do not require leave of the court; whereas grounds of appeal involving both question of law and fact require leave of the court.

[9] For a timely appeal like this one, 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.

[10] The appellant through counsel have submitted the following grounds of appeal:

1. *The Trial Judge erred in law and in fact when he failed to take into account the fact that the complainant had noted in her evidence that a Fijian man was sitting on a chair in the staff area immediately outside the Accused's office and would have been drawn to the attention in the Accused's office had there been a forceful sexual intercourse as alleged by the complainant which was confirmed by the Accused in his evidence.*

2. *The Trial Judge erred in law and in fact when he failed to scrutinize in detail the medical finding in particular the following evidence:*

   - *There was no cuts to the vagina of the complainant;*
   - *There was no active bleeding to the vagina of the complainant;*
   - *There was no laceration to the vagina of the complainant;*
   - *The vaginal canal was noted to be red and De Pene confirmed in cross examination that it can result from consensual sex.*

3. *The Trial Judge erred in law and fact when he admitted the medical report (unchallenged) prepared by Dr Pene, which was inadmissible as it was "hearsay".*

4. *The Trial Judge erred in law and fact when he rushed the trial to only a day, an unfair and unsafe practice which impugned the Appellant's right to a fair trial.*

5. *The Trial Judge erred in law when he abdicated his function to the expert witness.*

6. *That the Trial Judge erred in law and fact when he did not scrutinize the evidence in totality and not gave the proper weight to the evidence when he directed or misdirected himself on the evidence pertaining to the commission of offence yet gave weight to factors that were irrelevant amounting to grave miscarriage of justice.*

7. *The Trial Judge erred in law and fact when he shifted the burden or onus of proof to the defense from the prosecution. Resulting in an erroneous miscarriage of justice.*

8. *That the defense counsel did not prepare well to test to various inconsistencies in the prosecution case as a result of the lack of preparation and thus caused the Appellant great prejudice resulting in an erroneous miscarriage of justice.*

Assessment of Grounds of Appeal

[11] **Ground 1**: *The Trial Judge erred in law and in fact when he failed to take into account the fact that the complainant had noted in her evidence that a Fijian man was sitting on a chair in the staff area immediately outside the Accused's office and would have been drawn to the attention in the Accused's office had there been a forceful sexual intercourse as alleged by the complainant which was confirmed by the Accused in his evidence.*

[12] Paragraph 42 of the judgement is relevant in evaluating this ground of appeal. It states:

> "*The sexual intercourse had taken place at the office of the accused at around 2.30 p.m. The complainant admitted that she did not shout or raise alarm. It was suggested that she did not raise alarm because the sexual intercourse was consented. There is no dispute that, at the time of the alleged offence, only the accused and the complainant were present in the office. The complainant had known the accused for many years and was shocked at what was happening. The accused was holding her hands tightly so that she couldn't move. Being faced with such an unexpected situation, and due to the shock and the fear, it is possible for her to behave in the manner she had behaved. She had not seen anyone else in his office before the incident. She saw an iTaukei man only when she left out. Therefore, it was also possible for her to think that shouting would not help her. It is also possible for her to think of the negative consequences of shouting. There is no stereotype that a victim of rape should behave in a certain manner. I find that the conduct of the complainant is not inconsistent with that of a rape victim.*"

[13] The appellant is his submission is claiming that if the sexual intercourse with the complainant was rough and that the complainant was moaning and making other related noises during sex, it would have been heard by Rupeni Waqavono whose evidence is discussed by the judge at paragraphs 57 to 59.

[14] It is not clear what error of law and fact was caused by the trial judge, in rejecting the explanations of the appellant. He provided reasons for his decision in believing the evidence of the complainant. This was open for the trial judge to decide based on his assessment of the evidence and credibility of the witnesses. This ground has no merit.

[15] **Grounds 2 and 3** raise an important issue of law, namely, the use of the medical report prepared by a doctor that was exhibited as evidence at the trial. The doctor that prepared the medical report was not called at the trial to explain its contents, instead prosecution called another medical doctor to explain the report he did not prepare. This issue involved a question of law only, namely, the use of documentary hearsay evidence. This was the case in which the direct evidence to act of sexual intercourse which constituted the rape charge was based on the evidence of the complainant only. The appellant on the other hand provided evidence that the sexual intercourse did take place but with consent of the complainant. In that context the circumstantial evidence called by the prosecution in support of the charge against the appellant, assume important significance. The issue of who produced the medial report into the trial as evidence, when the maker was not available, is unclear and should have been made clear.

[16] An example is the use of and procedure followed by the prosecution to introduce the medical report is important. It raises two specific issues of law: the circumstances in which documentary hearsay evidence was adduced in evidence and the second is the fairness of the procedure followed by the prosecution before and during trial in ensuring that in selecting the final list witnesses it will call at the trial, that section 14(2)(d)(e)(k) and (3) of the Constitution 2013 was fully observed.

[17] The Supreme Court in **Suresh Chandra v State [2015] FJSC 32** (CAV 021 of 2015), a post-mortem report prepared by Dr Gounder, a pathologist relating to the likely cause of death was not called at the trial, instead another Dr Gupta called to testify using the Post-Mortem report:

> *"[5] It is noteworthy that in the post-mortem report tendered in evidence by Dr. Gupta marked Exhibit P.4, the cause of death of Farzana Begum is stated to be "asphyxia due to or as a consequence of strangulation". The said report was issued by Dr. Goundar, who performed the autopsy, but who for some inexplicable reason did not testify at the trial. In the said report, Dr. Goundar did not express any opinion as to whether the strangulation was the result of suicide or homicide, nor did his report advert to any particulars of morbid or other significant conditions contributing to her death. The absence of any photograph showing the deceased neck, and Dr. Gupta's admission that in cases of hanging, constricting force on ligature will depend on the weight of the deceased, add to the inconclusive nature of the post-mortem report and the testimony of Dr. Gupta who was called as an expert to speak on the report.*
>
> *[6] The term "strangulation" as used in the post-mortem report is itself neutral as to its cause, and has been defined in the Webster's Ninth New Collegiate Dictionary as "the state of being strangled or strangulated; especially: excessive or pathological constriction or compression of a bodily tube that interrupts its ability to act as a passage." In its ordinary meaning, the word is used to refer to both homicidal and suicidal strangulation.*
>
> *[7] Even if the post-mortem report is taken to be evidence of homicide as did the trial judge and the Court of Appeal, <u>I share with Keith J the concern that the contents of the post-mortem report marked Exhibit P.4 might be inadmissible hearsay,</u> since Dr. Goundar, who performed the autopsy and issued the report was not called to give evidence in the case."*

[18] In this case the examining Doctor was Doctor Pene but for the trial, **<u>he was not available in Viti Levu</u>**, so Dr Shanil Sen was called to tender the medical report and explain what its content meant at the trial was not the maker of the statements in the report.

[19] This issue should be considered by the full court and requires no leave because it is a question of law.

[20] **Grounds 4, 5, 6 and 7**

> *"4. The Trial Judge erred in law and fact when he rushed the trial to only a day, an unfair and unsafe practice which impugned the Appellant's right to a fair trial.*
>
> *5. The Trial Judge erred in law when he abdicated his function to the expert witness.*
>
> *6. That the Trial Judge erred in law and fact when he did not scrutinize the evidence in totality and not gave the proper weight to the evidence when he directed or misdirected himself on the evidence pertaining to the commission of offence yet gave weight to factors that were irrelevant amounting to grave miscarriage of justice.*
>
> *7. The Trial Judge erred in law and fact when he shifted the burden or onus of proof to the defense from the prosecution. Resulting in an erroneous miscarriage of justice."*

[21] The appellant in his submission at the hearing claim the following:

Ground 4: relates to the trial judge's rejection of Rupeni Waqavono's evidence. The claim of unsafe practice which gave rise to unfair trial was based on the trial judge's acceptance of evidence of witnesses called by the prosecution - WPC Naaz and PC Talemaitoga. The basis of the rejection of Rupeni Waqavono's evidence is stated by the trial judge at paragraphs 57 and 58 thus:

> *"57. The evidence of Rupeni Waqavono does not carry much weight for two reasons. First, his evidence was not tested in cross-examination and his absence in Court deprived me of the opportunity to observe his demeanour while giving evidence. Second, Rupeni had been a subordinate officer working under the accused. His ability to give independent evidence is highly doubted. Even if I accept that Rupeni told the truth, his evidence is not capable of supporting the defence version or creating any doubt in the Prosecution case.*
>
> *58. Even if I accept that Rupeni told the truth in his statement, his evidence is not capable of supporting the defence version or creating any doubt in the version of events of the Prosecution case. There is no dispute that a complainant came to the office of the accused twice that day and, on none of those occasions, no one except the accused had been present in the office. That should be the reason for the accused to feel free to have sex with a girl in his office. In these circumstances, it is unlikely that Rupeni was in a position to tell what had actually transpired between the complainant and the accused in the accused's office."*

There is no error of law and fact in the explanation provide above by the trial judge. This ground has no merit.

Grounds 5 & 6: relates to the appellant's claim that the trial judge should have scrutinized the medical report findings in more detail. The appellant's claim is that the report my support his claim of consensual sex. To support this the appellant refers to Rupeni Waqavono's evidence pertaining to the 30-40 minutes of silence and the fact that he was seated just outside the appellant's office he would have heard any contrary noise.

The evidence of Rupeni Waqavono and PC Talemaitoga also differ in important respects as regards timing the appellant came out of the office with the complainant as between 3.45 pm to 4.00pm. PC Talemaitoga's evidence that the complainant came to the police station around 2.30 pm [Refer to paragraphs 59, 61 and 62 of judgement] The trial judge did not believe the appellant's witness and he stated his reasons to support his conclusion.

The trial judge did not accept the evidence of Rupeni Waqavono and he gave his reasons for that decision. As regards, the medical report and its findings, these are best argued as part the submissions to support issue raised in grounds 2 and 3, for which leave is granted.

Ground 7: This claim about the judges summing up, is misconceived as this was a trial before a judge alone and there is no summing up given, like it would be the case, if was a trial with assessors. There is also an embedded claim that the trial judge may have reversed the onus of proof and this may be due to the wording of paragraphs 61 and 62, of the judgement. I accept that the wording of those paragraphs could have been better worded; but as it is there is no error of law or fact committed.

Ground 8: This claim is about the incompetence of appellant's counsel at the trial. The appellant did not follow the procedure set out by the Court of Appeal in **Nilesh Chand v State [2024] FJCA 49** in brining this complain. This matter may not be raised in this manner.

[22] After an assessment of the 8 grounds of appeal against conviction, the conclusion is grounds 1, 4, 5, 6, 7 and 8 have no merit. Ground 2 and 3 raises issues of law for consideration by the full court.

[23] In the documents submitted for this leave hearing there has been no submission addressing sentence. It was not expected given the fact that the Notice of Appeal that was filed initially on 17 January 2024 was for Appeal Against Conviction only.

ORDERS:

1. Application for leave to appeal against conviction for grounds, 1,4,5,6,7 and 8 is declined
2. Leave for ground 2 and 3 raises issue of law and may proceed to the full court.

COURT OF APPEAL FIJI

Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL