

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

CRIMINAL APPEAL NO. AAU 0002 OF 2024
[Suva High Court: HAC 199 of 2022]

BETWEEN : **THE STATE**

Appellant

AND : **ARE BAU**

Respondent

Coram : Mataitoga, P

Counsel : Vosawale M for the Appellant [ODPP]
Daunivesi S for the Respondent [LAC]

Date of Hearing : 13 December, 2024

Date of Ruling : 3 February, 2025

RULING

1. The respondent [Are Bau] was charged with 2 counts of Rape by the DPP. The information states:

Count 1

Statement of Offence

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

Particulars of Offense

ARE BAU on the 6th day of June 2022, at Navua in the Central Division, penetrated the vulva of **MARIA EMI DAUNIVALU** with his tongue, without her consent

Count 2

Statement of Offence

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

Particulars of Offence

ARE BAU on the 6th day of June 2022, at Navua in the Central Division, penetrated the vagina of **MARIA EMI DAUNIVALU** with his finger without her consent

2. The appellant pleaded not guilty to the above charges and the matter proceeded to trial at the High Court in Suva. The trial started on 26 September 2023 and lasted a day.
3. The Prosecution called evidence from 4 witnesses, including the complainant. The appellant gave evidence. Apart from closing submissions from both parties; comprehensive written submissions were also provided by the parties.
4. The appellant tendered a statement of admitted facts under section 135 of the Criminal Procedure Act 2009.
5. The appellant was found not guilty of both counts charged against him by the DPP. He was acquitted of the charges.

The Appeal

6. The appellant [State] being aggrieved of the outcome of the High Court trial filed a timely appeal on 5 January 2024.
7. The appellant submitted 1 ground of appeal against the acquittal of the charges against the respondent in the High Court.

Applicable Law

8. The ground of appeal submitted by the appellant involves questions of law and fact. Section 21 (1)(b) of the Court of Appeal Act 2009 requires leave of the court to be granted before appeal may proceed further.
9. For a timely appeal, the test for leave to appeal against conviction is ‘reasonable prospect of success’ see: Caucu 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 Ground of Appeal

10. At the outset I observe that the issue of law raised by this appeal raises an important issue of public importance, in defining what is “..the necessary mental capacity to give consent” as referenced in section 206(1) of the Crimes Act 2009 in the factual circumstances of this case.
11. The ground of appeal by the appellant states:

“the trial judge erred in law and in fact in acquitting the Respondent [Are Bau] on both counts of rape when he failed to take into consideration relevant pieces of evidence that would have led him to believe that the complainant was a credible and truthful witness.”
12. In support of this ground of appeal, the appellant submits that the complainant did not have the “capacity” to consent to acts performed by the respondent. The appellant refers to paragraph 15 of the judgement where the trial judge discussed consent.
13. In it necessary to provide the wider context of paragraph 15, by including paragraphs 13 to 17 of the judgement, which states:

“13. Section 206 (1) of the Crimes Act defines the consent as:

"The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent."

14. *Accordingly, consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent. Accordingly, the "capacity" is essential in making free and voluntary choice about whether to consent.*

15. *In this case, the Complainant said that she became unconscious when the Accused pulled her legs from her bed to the living room; hence, she could not recall anything that happened on that night, suggesting that she had no capacity to make a choice whether to consent to the Accused to penetrate her vagina with his tongue and fingers. As stated above, the Accused claims that she was conscious and could give her consent to the Accused to penetrate her vagina with his tongue and fingers, though she was drunk.*

16. *In R v Bree [2007] EWCA Crim. 804, England and Wales Court of Appeal (Criminal Division) outlined the scope of the drunken consent, where the Court held that:*
 - “26. *In cases which are said to arise after voluntary consumption of alcohol the question is not whether the alcohol made either or both less inhibited than they would have been if sober, nor whether either or both might afterwards have regretted what had happened, and indeed wished that it had not. If the complainant consents, her consent cannot be revoked. Moreover it is not a question whether either or both may have had very poor recollection of precisely what had happened. That may be relevant the reliability of their evidence. Finally, and certainly, it is not a question whether either or both was behaving irresponsibly. As they were both autonomous adults, the essential question for decision is, as it always is, whether*

the evidence proved that the appellant had sexual intercourse with the complainant without her consent.”

17. *The definition of consent stipulated under Section 75 of the Sexual Offence Act of the UK is fundamentally similar to the definition of consent under Section 206 of the Crimes Act of Fiji. Hence, the above view expressed in **R v Bree (supra)** could be a persuasive guideline in approaching drunken consent in Fiji.”*
14. The trial judge having set out the applicable law then proceeded to evaluate the evidence of the complainant. At paragraphs 25 to 31 of the judgement, the trial judge reviewed evidence of the complainant which he concluded were contradictory, lacks credibility and was untruthful. He compared this with the respondent’s evidence which he found consistent in his defence.
15. In addition, the trial judge found that the prosecution did not provide any explanation to explain the contradiction in the complainant’s evidence, which adversely affected the credibility and reliability of her evidence.
16. At paragraphs 35 to 37 of the judgement, the trial judge stated:
- “35. The Aunt of the Complainant gave evidence. Her evidence is considered evidence of a recent complaint. The evidence of the recent complaint is not evidence of the fact that could corroborate the Complainant's evidence, but they are relevant to the issue of consistencies in the conduct of the Complainant; hence, they link to the issues of credibility and reliability of the Complainant's evidence. (vide **Gates CJ in Raj v State [2014] FJSC 12; CAV0003.2014 (the 20th of August 2014)**).*
36. *During the evidence-in-chief, the Complainant said that she told the Aunty what had happened. The learned Counsel then asked the Complainant whether she could recall what exactly she told her Aunty, to which she replied, saying that she could not recall. The Complainant then testified that she told Aunty that the Accused might have done something.*

37. Accordingly, the Complainant had told Aunty that the Accused might have done something. However, the Aunty said that the Complainant told her that she was raped. I reproduced the question and the answer of the Aunty below:

Mr Samisoni: What else did she say to you?

Sereima: I really can't recall everything in detail but those were the few things I remember. I asked her questions and she just kept her nodding. And then I said "Why are you smelling of alcohol? "Did you drink with him? She just said yes. Okay, I didn't want to ask her too much and I said okay "Did he sexually abuse you? Because I could see the marks and the bites. "Did you allow him to? Of course any child in that;

Mr Samisoni: What did she say when you said "Did you allow him to?"

Sereima: "He raped me"

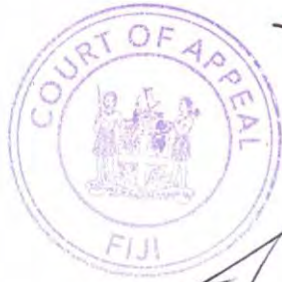
17. As was stated by the Supreme Court in **Rokete v State [2022] FJSC 11**; per Keith J at paragraph 109:

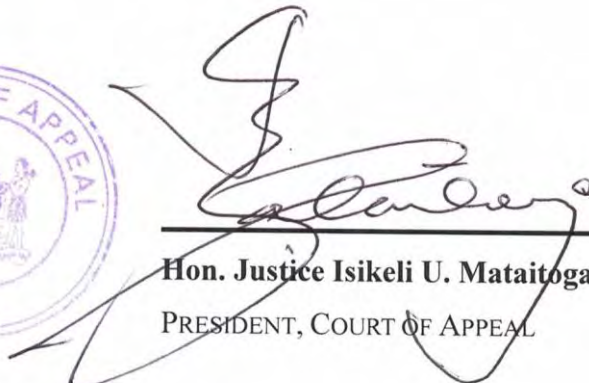
"109. Marsoof J's observation about the appellate court having to evaluate the evidence and independently assess it has to be seen in its context. He was explaining what the appellate court has to do in its "supervisory" role. When the appellate court is independently assessing the evidence, it is doing 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."

18. In light of the governing principle of law, as regards the approach of the court of appeal, stated by the Supreme Court and the clear finding made by the trial judge, I find that the appellant's submission has no merit.

ORDER :

Appellant Leave Application is refused.





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