

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

CRIMINAL APPEAL NO. AAU 0016 of 2024
[Suva High Court Case No: HAC 258 of 2020]

BETWEEN : **ATIK ASHAD ALI** ***Appellant***

AND : **THE STATE** ***Respondent***

Coram : **Mataitoga, P**

Counsel : **Kumar N, for the Appellant**
: **Kumar R, for the Respondent**

Date of Hearing : **11 March, 2025**

Date of Ruling : **10 April, 2025**

RULING

[1] The appellant [Atik Ashad Ali] was charged on the following Information at the High Court in Labasa: -

COUNT ONE

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

ATIK ASHAD ALI on the 6th of August 2022 at Labasa Town in the Northern Division, assaulted **AH** by punching the said **AH** causing actual bodily harm

COUNT TWO

Statement of Offence

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

Particulars of Offence

ATIK ASHAD ALI on the 6th of August 2022 at Labasa Town in the Northern Division, had unlawful carnal knowledge of **AH**, without her consent.

- [2] After a full trial, the Accused was convicted of both counts on the 30th of November 2023. On 16 January 2024 the appellant was sentenced to a total sentence of 11 years 11 months and 23 days imprisonment with a non-parole period of 8 years. A DVRO and Non- Molestation Order was issued to protect the victim. The appellant had 30 days to appeal.

The Appeal

- [3] The appellant through counsel filed a Notice and Grounds of Appeal on 15 February 2024. The appeal was against both conviction and sentence and there were 8 grounds of appeal against conviction and 3 grounds of appeal against sentence submitted with the Notice of Appeal.
- [4] The appeal is timely.

The Law

- [5] All grounds of appeal filed by the appellant, allege errors of law and facts by the trial judge. Section 21(1)(b) of the Court of Appeal Act requires leave of the court for grounds of appeal, involving questions of law and facts. Where the appeal is timely, as in this case, the test for leave to be granted is “reasonable prospect of success’ of the grounds of appeal submitted: see **Caucou v State** [2018] FJCA 171; AAU0029 of

2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Wagasaqa v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019).

[6] The test for an appeal against sentence was set out in **Kim Nam Bae v State** [1999] FJCA 21, which was endorsed by the Supreme Court in **Naisua v State** [2013] FJSC 14 (CAV 010 of 2013) in these terms:

“[19] *It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499 and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

[20] *When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in **Chirk King Yam v The State** Criminal Appeal No. AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of **Kim Nam Bae's** case.”*

Assessment of Grounds of Appeal

Against Conviction

[7] At the appeal hearing, *ground 2 was abandoned*. The remaining 7 grounds was argued under 2 consolidated heading. The first covers *grounds 3 to 6* and here the appellants are claiming that the trial judge did not consider defence evidence and only considered the prosecution evidence.

- [8] In reviewing the judgement in **Atik Ashad Ali v State [2023] FJHC; (HAC 096 of 2022)** the trial judge was clear in setting out the charges that the appellant face and the elements of the two charges which the prosecution must prove beyond reasonable doubt. From paragraphs 7 to 33 of the judgement, the evidence of the state was outline and then from paragraphs 35 to 44 the evidence of the appellant was set out. This was followed by the trial judge's analysis of the evidence and determination from paragraphs 49 to 63.
- [9] Against the trial judge's assessment of the evidence the appellant is submitting that he did not consider the evidence that were adduced in his defence. The trial judge did set out the evidence submitted by the defence and considered it. He did not believe what was submitted in evidence by the appellant at the trial and he also did not believe the evidence of the appellants brother DW2 who gave evidence of alibi. It important that even before the defence evidence was called for, the trial judge had already found a case to answer.
- [10] The evidence discussed by the trial judge at paragraphs 44 and 45 of the judgement which is the basis of the claim by the appellant that the trial judge was one-sided in his assessment of the evidence leading to his conviction. It is clear that the trial judge was faced with questions of credibility regarding the evidence adduced by the appellant and his brother. The trial judge was not in error of law and fact when he rejected the defence evidence in this case, in the face of the evidence adduced by the prosecution.
- [11] These grounds of appeal have no prospect of success.
- [12] *Ground 7* submits that the trial judges gave insufficient consideration to the special boyfriend/girlfriend relationship that exists between the appellant and complainant. This ground is misconceived. The trial judge is only required in law to consider relevant and admissible evidence to prove the case. The relevant evidence must be introduced by the prosecution or the appellant; the judge cannot go out on his own frolic to consider issues that the prosecution had not called in evidence to prove the charges it has brought against the appellant. This ground has no merit.

[13] *Ground 8* is also misconceived. On the facts in this case, the issue of delayed complainant is not relevant. No merit to this ground.

[14] *Ground 1* – This ground has been exaggerated to suggest that the complainant was force by circumstances to make a complaint and try to also impose the suggestion of delayed complaint because the victim had opportunity to report the assault and rape at the Market Place Police Post. The facts of the case is the report of the rape and sexual assault was reported same day of the commission of the offence and medical examination was made the next day.

[15] The grounds of appeal against conviction submitted by the appellant have no prospect of success if leave of appeal is granted.

Against Sentence

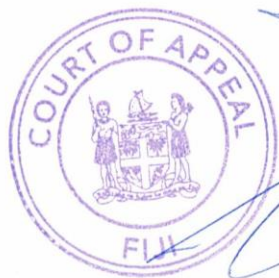
[16] The appeal against sentence was abandoned by the appellant after the initial Notice and Grounds of Appeal were filed in the Court. The earlier grounds submitted have therefore not been considered. The appellant must follow appropriate procedure set out in Rule 39 of the Court of Appeal Rules by filing Form 3 of Schedule 2 and submitting it to Court Registry. It is not enough to simply inform the court from the bar table that an appeal is abandoned.

[17] Given the nature of the grounds of appeal against sentence, there is lack of understanding of the role of the appellate court has when a sentence is being challenged. In paragraph 6 above, the 4 factors outlined in **Kim Nam Bae** (supra), the grounds of appeal against sentence must show with reference to judgment, where the trial judge have erred in passing sentence because he applied the wrong principle of law or he disregarded relevant factors or did not take on board some relevant consideration.

[18] Broad generic type grounds of appeal will not meet the required threshold.

ORDERS:

1. *Appellants application for leave to appeal against conviction is refused.*
2. *Application for Leave to appeal against sentence was abandoned must follow procedure in Rulle 39 Court of Appeal Rules.*



[Handwritten signature]

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