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

CRIMINAL APPEAL NO. AAU 0042 OF 2021
[Suva High Court: HAC 334 of 2020]

BETWEEN : **TEVITA BOSE**

Appellant

AND : **THE STATE**

Respondent

Coram : Mataitoga, P

Counsel : Ratidara L. for the Appellant
Semisi K. for the Respondent [ODPP]

Date of Hearing : 3 December, 2024

Date of Ruling : 3 February, 2025

RULING

1. The appellant was charged by the DPP and tried in the High Court at Suva. The Information by the DPP set out the charges as follows:

Count 1

Statement of Offence

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

Particulars of Offence

TEVITA BOSE on the 31st day of October, 2020 at Kadavu in the Eastern Division, penetrated the mouth of A.B with his penis, without the consent of the said A.B.

Count 2

Statement of Offence

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

Particulars of Offence

TEVITA BOSE on the 31st day of October, 2020 at Kadavu in the Eastern Division, had carnal knowledge of A.B, without the consent of the said A.B.

2. The appellant was explained the charges by the trial judge. He understood the two counts in the information and he pleaded not guilty to the same.

3. The prosecution called the complainant and 3 other witnesses to prove its case. The appellant gave sworn evidence for his case.

4. Agreed Facts were admitted and they are part of the evidence before the Court.

5. At the end of the trial, the appellant was found guilty and convicted as charged on 13 May 2022. He was sentenced on 16 May 2022, to 13 years imprisonment with a non-parole period of 11 years imprisonment.

The Appeal

6. The appellant being dissatisfied with the judge of the trial court, by letter dated 1 June 2022 submitted a Notice of Appeal against conviction, which was received in the Court Registry on 2 June 2022. This was a timely appeal.

7. The grounds of appeal submitted are:

   i) The conviction is unreasonable because it was not reasonably open on the totality of the evidence for the trial judge to convict the appellant;

   ii) The trial had not fairly and objectively assessed the defence case.

8. The Legal Aid Commission counsel [Ms Ratidara] assisted the appellant in his submission at the hearing. It was confirmed that the appeal is against **conviction only**. The two grounds of appeal remain the same but it was elaborated during the hearing, with written and oral submissions.

Relevant Law

9. 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.

10. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'**: **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.

Grounds of Appeal

11. Before I assess the two grounds of appeal submitted on behalf of the appellant. I observe that at the Leave State application it was evident that some of preliminary assessment of the evidence for the defence which was led at the trial was not possible, because the judgement was brief and its covers mostly the prosecution evidence. Apart from the "agreed facts" there was hardly any discussion of the appellant's evidence in the judgement. It may have been covered in the record of the hearing.

12. Ground 1 of the appellant's appeal claims that on the totality of evidence at the trial it was unreasonable to find the appellant guilty as charged. In assessing this submission, it is noted that the only issue before the court during the trial was whether there was consent by the complainant for the Rape.

13. The trial judge set out the ingredients of the offence to be proven beyond reasonable doubt by the prosecution as follows in the judgement: **State v Bose [2022] FJHC 230; para 3-5**

"3. For the accused to be found guilty of rape, the prosecution must prove beyond reasonable doubt, the following elements:

(i) the accused
(ii) penetrated the complainant's mouth with his penis (count ; or
(iii) penetrated the complainant's anus with his penis (count no. 2);
(iv) without the complainant's consent; and
(v) he knew, that the complainant was not consenting to 3 (ii) or 3 (iii), at the time.

4. The slightest penetration of the complainant's mouth (count no. 1) or anus (count no. 2), by the accused's penis, is sufficient to satisfy elements 3 (ii) or 3 (iii) above.

"5. Consent" is to agree freely and voluntarily and out of his own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to himself or by exercise of authority over him, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant.

14. Further at paragraphs 11 and 12, the trial judge stated:

"11. A prima facie case was found against the accused on both counts. He chose to give sworn evidence in his defence, and called no witness. He did not deny inserting his penis into the complainant's mouth, at the material time. He also did not deny inserting his penis into the complainant's anus, at the material time. In fact, in paragraphs 9 and 10 of the parties' "Agreed Facts", dated 8.4.2022, the accused admitted the above. His defence was that the complainant consented to him inserting his penis into his mouth and anus, at the material time.

12. The court had carefully listened to the complainant's evidence, and had also carefully listened to the accused's evidence. The court had also carefully examined and considered their demeanour, while they were giving evidence in court. The age difference between the two was 23 years. The accused was 37 years old at the time, while the complainant was 14 years old. The complainant was young enough to be his son. When cross examined by the prosecution, the accused admitted it was wrong for him to have sex with the complainant. He said, the complainant was much younger than him, and he admitted what he did to the complainant was not right. After carefully comparing the complainant and the accused's evidence, I find the complainant to be a credible witness, and I accept his evidence and version of events. I find the accused not to be a credible witness, and I reject his version that the complainant consented to the sexual acts in count no. 1 and 2."

15. It is difficult to disagree with the trial judge that on the evidence he heard at the trial that it was the conviction of the appellant of the Rape charges brought against were unreasonable.

16. 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."*

17. I therefore find that ground 1 of the appeal has no merit.

18. The insufficiency of the record available to the appellant, at this stage of the criminal appeal process to make a full submission may be rectified if he renews his appeal to the full court under section 35(3) of the Court of Appeal Act 2009.

19. Ground 2 submitted by the appellant claims that the conviction is unreasonable in that the trial judge had not fairly and objectively assess issues elicited during the lengthy cross examination of the complainant. This court is also unable to make an assessment of the appeal ground, because the full record of the trial proper is not available and would only be available if the case progress to the full court hearing.

20. In the interest of justice and fairness, I allow this second ground to go forward to the full court and grant leave. In doing so, I noted that the appellant was unrepresented at the start of this appeal and the LAC counsel became involved only after the Court requested LAC assistance. For the latter the court is grateful indeed.

ORDERS:

1. Application for leave to appeal on ground 1 is declined.

2. Leave is granted for ground 2 in the absence of the full record, to allow the appellant to articulate the basis of his claim against his conviction.