

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**

**CRIMINAL PETITION NO: CAV 0030 of 2016**  
**[Court of Appeal No: AAU 0035 of 2013]**

**BETWEEN** : **APOROSA TUICOLO**  
*Petitioner*

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

**Coram** : **The Hon. Mr. Justice Saleem Marsoof,**  
**Justice of the Supreme Court**  
**The Hon. Mr. Justice Suresh Chandra,**  
**Justice of the Supreme Court**  
**The Hon. Mr. Justice Buwaneka Aluwihare,**  
**Justice of the Supreme Court**

**Counsel** : **Petitioner in person**  
**Mr. L. J. Burney for the Respondent**

**Date of Hearing** : **7 April 2017**

**Date of Judgment** : **20 April 2017**

**J U D G M E N T**

**Marsoof J**

[1] I have read in draft the judgment of Chandra J, and I am in agreement with his reasoning and conclusions. I also agree with the orders proposed by him.

**Chandra J**

[2] The Petitioner seeks special leave to appeal against the judgment of the Court of Appeal dated 30 September 2016 affirming the conviction and sentence of the Petitioner.

- [3] The Petitioner was convicted on one count of rape contrary to section 207(1) and (2)(a) of the Crimes Decree 2009 following a trial in the High court at Suva and was sentenced to 10 years imprisonment with a non-parole term of 8 years.
- [4] The Petitioner filed a notice of appeal against his conviction and sentence and leave to appeal was refused by a single Judge of the Court of Appeal.
- [5] The Petitioner thereafter filed an application for leave to appeal to the full court of the Court of Appeal. The Court of Appeal by judgment dated 30 September 2016 refused leave to appeal and dismissed the appeal.
- [6] The Petitioner by letter dated 7 October 2016 has appealed against the judgment of the Court of Appeal and had himself filed written submissions dated 9 March 2017 in support of his application.
- [7] The Petitioner in layman's language had filed his written submissions from which the following issues could be discerned:
- (i) identity of the Petitioner by the victim;
  - (ii) defence of alibi;
  - (iii) absence of corroboration via medical evidence.
- [8] It is to be observed that none of these grounds were canvassed before the Court of Appeal when the appeal had been taken up for argument. The position regarding the identification related to the complainant as the Prosecution had moved to amend the surname of the complainant when she was giving evidence at the trial, which application had been allowed. The Court of Appeal had dealt with that matter adequately.

[9] It has been a practice not to entertain new grounds of appeal when considering an application for special leave to this Court unless there has been a grave miscarriage of justice as the threshold of granting leave by this Court is very high.

[10] Section 7(2) of the Supreme Court Act 1998 provides:

“In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

- (a) A question of general legal importance is involved;
- (b) A substantial question of principle affecting the administration of criminal justice is involved; or
- (c) Substantial and grave injustice could otherwise occur.”

[11] This provision has been considered in several decisions of the Supreme Court and it is well settled that the threshold is very high when considering applications for special leave to appeal to the Supreme Court and that such leave is not granted as a matter of course. **Bulu v Housing Authority** (2005) FJSC 1 CBV 0011.2004S 8 April 2005.

### ***Factual Matrix***

[12] The complainant resided at Nataveya Village in the province of Naitasiri with her grandmother. She had never attended school and was unable to read or write. On the day of the incident, 26 July 2011, before lunch, while the complainant was cooking dalo with a relative in the kitchen of her home, the Petitioner who was her neighbor, had called her from his sister’s house. He had asked the complainant to bring his bed sheet which was on the clothesline to the house. The Complainant did as she was requested and took the sheet to the same house. As she entered the house, the Petitioner had closed the door behind her and dragged her inside. The Petitioner had then forcibly removed her sulu and underwear and closed her mouth. When she was lying on her stomach the Petitioner had inserted his penis into her anus. Her complaint had been recorded by the Police on 22 August 2011 when she was taken to the Police Station by her grandmother. She had been

medically examined on 23 August 2011. The petitioner chose to remain silent and did not call any witnesses.

### *The Present Application*

[13] At the hearing the Petitioner chose to rely on the written submissions filed by him.

[14] As stated above the Petitioner had in his layman's language set out repetitively the basic issues on which he was challenging the judgment of the Court of Appeal.

[15] The appeal that was argued on his behalf before the Court of Appeal was on the basis of the identification of the victim, as there had been an application to amend the surname of the complainant which had been allowed by the trial Judge. The Court of Appeal dealt with that position adequately and concluded thus:

“[14] It is clear that the identity of the complainant was not raised as an issue at the trial. Counsel for the Appellant sought to challenge the testimony of the complainant by cross-examining her on inconsistencies between her evidence in court and her previous out of court statement to the police. It was also suggested to her that she had invented or made-up the complaint. The actual name of the complainant was of no consequence in the context of the trial since the defence was based on a denial and an alibi. For all the above reasons I would refuse leave to appeal and order that the appeal be dismissed.”

[16] In his submissions before this Court, the Petitioner has urged that the prosecution had failed to prove that it was the same person who dragged the victim to his house who had raped her. He also has stated that the victim could not have identified him as the perpetrator, as she was lying on her stomach when she was being raped from behind, as she would not have been able to see the perpetrator. This position taken up by the Petitioner is in the background of the fact that at the trial he took up the defence of alibi.

- [17] The Petitioner has also urged that the prosecution failed to disprove his defence of alibi as he had taken up the position at the trial that he had lunch with another person in a different house. The prosecution had led the evidence of Talica Bativesi who had stated that the Petitioner had come to his house and had lunch with him and had stayed with him for about one hour. The evidence of the complainant was that the incident had occurred before lunch time.
- [18] The Petitioner was described by the complainant as her uncle and therefore it is clear that they knew each other. Further, there was evidence at the trial to the effect that the Petitioner was in his house when the complainant stated that she was raped, as another prosecution witness, Loraini Vulagiruva, had called out to him while the complainant was in the petitioner's house, about his T-shirt and he had responded asking her to hang the T-shirt in the verandah. Therefore, the identification of the Petitioner by the complainant and his presence in his house at the time of the alleged offence was well established.
- [19] The Petitioner also urged in his written submissions that there was no corroboration as it was only the complainant's version that was available as evidence regarding the commission of rape. He also urged that there was no medical evidence to corroborate the commission of rape and he cited the decision in **Khaiyum v. State** [2013] FJCA 146; AAU71.2012 (14 March 2013) stating that the appeal of the accused in **Khaiyum's** case was allowed as the oral evidence was not accompanied by a medical report.
- [20] The Petitioner is misconceived as to the decision in **Khaiyum's** case where the appeal was allowed in the case of a rape of a man as the evidence was not satisfactory and not on the basis of there being no medical report. In the present case, the Petitioner has also stated that the medical report had been obtained one year after the incident which is not correct as the complainant had been subject to a medical examination on 23 August 2011 which was about one month after the commission of the rape. However, the prosecution was not relying on a medical report to prove its case and it is trite law that in cases of rape that there is no requirement of corroboration.

[21] The issues raised by the Petitioner in his written submissions have no merit and there has been no miscarriage of justice. The application of the Petitioner does not meet the threshold required for special leave to appeal to the Supreme Court.

[22] In the above circumstances, the application of the Petitioner seeking special leave to appeal is refused and the appeal is dismissed. The conviction and sentence imposed on the Petitioner by the High Court are affirmed.

**Aluwihare J**

[23] I have read in draft the judgment of Chandra J and I agree with his reasoning and conclusions.

***Orders of Court:***

- (a) Application for special leave is refused.
- (b) Appeal of the Petitioner is dismissed.



**Hon. Mr. Justice S. Marsoof**  
**JUDGE OF THE SUPREME COURT**



**Hon. Mr. Justice S. Chandra**  
**JUDGE OF THE SUPREME COURT**



**Hon. Mr. Justice B. Aluwihare**  
**JUDGE OF THE SUPREME COURT**

**Solicitors:**

Petitioner in person

Office of the Director of Public Prosecutions, Suva for the Respondent