

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0031.2016
(On Appeal from Court of Appeal No: AAU 0074.2012)

BETWEEN : **EDWARD SHARMA**

Petitioner

AND : **THE STATE**

Respondent

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

Counsel : Mr. S. Waqainabete for the Petitioner
Mr. M. D. Korovou for the Respondent

Date of Hearing: 7 April 2017

Date of Judgment: 20 April 2017

JUDGMENT

Marsoof, J

1. I have read in draft the Judgment of Aluwihare, J and I agree with his reasons and conclusions.

Suresh Chandra, J

2. I agree with the reasons and conclusions of Aluwihare J.

Aluwihare, J

3. Following the trial before the High Court of Lautoka, the petitioner was convicted on one count of rape contrary to section 207 (2) (b) of the Crimes Decree number 44 of 2009.
4. At the conclusion of the trial, the three assessors returned a unanimous opinion that the petitioner was not guilty. The learned trial judge, however, by his judgement dated 31 July 2000 found the petitioner guilty of the charge of rape and proceeded to convict him.
5. The learned trial judge, on the 7 August 2012, sentenced the petitioner to a term of 12 years imprisonment with a non-parole period of 10 years.
6. Aggrieved by the conviction and the sentence imposed on him, the petitioner sought leave to appeal on several grounds from the Court of Appeal, and by its ruling dated 2nd June 2014 a single judge granted leave to appeal on all grounds averred by the petitioner before the Court of Appeal, save for one.
7. The Court of Appeal having heard the matter, their Lordships by their judgement dated 30th September 2016, dismissed the petitioner's appeal, both against the conviction and the sentence.
8. The petitioner being aggrieved by the said judgement of the Court of Appeal sought special leave to appeal from this Court by the present petition filed, in terms of Section 7 (2) of the Supreme Court Act.
9. The petitioner filed the appeal on 21 October 2016, which is timely, pursuant to Rule 6 of the Supreme Court Rules, raising four grounds of appeal against the conviction and two further grounds of appeal challenging the sentence on the basis that in the circumstances of the case, the sentence imposed is too harsh.

10. The petitioner, however, filed an amended petition of appeal dated 8th March 2017 confining himself to 2 grounds of appeal, one in respect of the conviction and the other in respect of the sentence. At the hearing of this petition, the learned counsel for the petitioner submitted to the court that the petitioner wishes to pursue only the grounds of appeal raised in the amended petition and the petitioner had abandoned the grounds of appeal raised in the initial petition filed. Thus, I do not wish to refer to them in this judgement.

11. Amended grounds of appeal are as follows:-

Ground 1; that the honourable judges of the Court of Appeal erred when they stated in the judgement “the mother of the appellant cannot see without her glasses and that she was not wearing glasses at the time” when there was no evidence produced at the trial to support of the same.

Ground 2; The Court of Appeal erred by failing to take into consideration that the petitioner was not given a chance to challenge the Victim Impact Report.

12. **Jurisdiction of the Supreme Court**

Section 98 (3) (b) of the Constitution of the Republic of Fiji lays down that:

“The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by a written law, to hear and determine appeals from all final judgements of the Court of Appeal”.

Further, section 98 (4) of the Constitution stipulates that:

“an appeal may not be brought before the Supreme Court from a final judgement of the Court of Appeal unless the Supreme Court grants leave to appeal”.

13. Section 7 (2) of the Supreme Court Act (chapter 13) sets down the threshold, a party seeking special leave in a criminal matter. Section 7 (2) of the Supreme Court Act reads thus;

“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.
- (c) Substantial and grave injustice may otherwise occur”

14. In the case of **Livia Lila Matalulu and Anor v The Director of Public Prosecutions**, [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003), their Lordships expressed the role of the Supreme Court of Fiji in special leave to appeal matters in the following words;

“The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice”

15. Thus, it is clear that the Supreme Court, in exercising its powers vested under section 7 (2) of the Supreme Court Act, is not required to act as a second court of criminal appeal, but will only consider as to whether the question of law raised is one of general legal importance or a substantial question of principle affecting the administration of criminal justice is involved or whether substantial and grave injustice may occur in the event leave is not granted.

16. In the case before us, what was argued before the court on behalf of the petitioner was that substantial and grave injustice had occurred due to the erroneous evaluation of the testimony of the witnesses and the imposition of a sentence that is harsher than the circumstances of the case demanded.
17. I am of the view that the primary role of the Supreme Court in the exercise of the powers vested in it under section 7 (2) of the Supreme Court Act is to resolve the points of law which are of “general legal importance” and “substantial questions of principle affecting the administration of criminal justice”. The section, however, caters also as a residual safeguard in exceptional cases where a grave and substantial injustice had been caused to a party. Thus, even in the absence of a question which is of general legal importance or a substantial question of principle affecting the administration of criminal justice, this court is vested with the power to grant relief, if it can be established that the lower court erred in arriving at its decision and that had resulted in substantial and grave injustice to the party seeking redress.
18. It is to be observed that the injustice that is said to have occurred must not only be one that is substantial but also one that is grave. As such, even if the party succeeds in establishing that some injustice had been caused, that by itself may not be sufficient to obtain relief unless the party is capable of establishing that the injustice referred to is one that meets the threshold laid down in section 7 (2) paragraph (c) of the Supreme Court Act.
19. In the case of **So Yiu Fung v Hong Kong Special Administrative Region [1999] 2HKCFAR 539; [2000] 1 HKLRD 179** the Court of Final Appeal of the Hong Kong Special Administrative Region considered the residual safeguard provided under the limb, “substantial and grave injustice” and held as follows;

“This court's primary role in the administration of criminal justice is to resolve real controversy on points of law of great and general importance. For this Court does not function as a court of criminal appeal in the ordinary way. However, the ‘substantial and grave injustice’ limb of S.32 (2) exists as a residual safeguard cater for those rare and exceptional cases in which there is a

real danger or something so seriously wrong that justice demands an enquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of great and general importance.

...Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court. If the matter proceeds further to this Court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought on the 'substantial and grave injustice' limb of S.32 (2) of the Hong Kong Court of Final Appeal Ordinance to succeed, it must be shown that there has been to the appellant's disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice."

Factual Background

20. The petitioner was charged and convicted for rape, for penetrating the victim in this case Collin Karina Kumar (hereinafter referred to as CKK) on the 28 August 2011 at Navatu, Ba.
21. CKK was a girl of 10 years at the time the incident took place testified to the effect that on the day in question around 7:30 PM she along with her parents and younger brother visited the petitioner whose wife happened to be a cousin of the mother. They were to have dinner at the petitioner's house. CKK had been watching a cartoon program on the television, seated on a mattress in the living room of the house. The evidence was that she was seated along with the daughter of the petitioner who had been 4 ½ years of age at the time. While they were watching the television program, the petitioner had come and had sat beside them. The petitioner then had unzipped the "three quarter pants" the victim was wearing and having inserted his hand into the pants had fondled her vagina with his fingers. CKK testifying had said that she tried to pull out the hand of the petitioner but without success.
22. The evidence was that the mother of CKK and the wife of the petitioner had been in the kitchen at the time, engaged in the preparation of dinner. At one point the mother of CKK had called her out of the living room and had questioned her as to what the

petitioner was doing and the victim had related to her mother as to what the petitioner was doing.

23. Under cross examination CKK had been suggested that both the petitioner's mother and her brother were seated on a sofa in the living room and would have seen this incident.
24. CKK's response had been an emphatic "no" and the witness had added, when she was further probed as to how the petitioner's mother and her brother did not see the incident, that her brother had fallen asleep and the petitioner's mother was deeply engrossed in the cartoon program that they were watching. It was suggested to CKK, under cross examination, that the petitioner denied the allegation when confronted by her mother, CKK's response in fact was that the petitioner denied the allegation. The questioning of the witness by the learned counsel for the petitioner, affirmed the fact that the petitioner had been confronted promptly by the mother of the victim, which was the natural course of conduct that can be attributed to any mother, when a daughter is subjected to sexual assault.
25. Although this court did not have the benefit of observing the demeanour and the deportment of CKK as a witness, when one considers the answers given by the victim, her evidence remain unassailed and is bereft of any contradictions.
26. The mother of the victim Reshana Sanjani had testified to the effect that she was cooking dinner with the petitioner's wife and the children were running around the house. When she did not notice them for some time, she went to check on them. When she had walked up to the door of the passage, she says she saw her daughter CKK, the petitioner and the petitioner's daughter seated on the mattress. She had said that she noticed her daughter "struggling" and from her facial expressions, the witness had felt that something was wrong. The witness had then noticed the petitioner retracting his hand from the pants of her daughter.

27. This witness had promptly called her daughter to come out of the living room and when questioned, CKK had started crying and had said, that the petitioner was poking her private parts with his fingers. This witness had then wanted her daughter to tell the wife of the petitioner as to what the petitioner had done.
28. The wife of the petitioner according to the evidence, had confronted the petitioner with the incident related by CKK and the petitioner had denied the allegation.
29. The matter had been reported to the police and CKK had been subjected to a medical examination. Dr Baleinamau, whose testimony was supplemented by his report marked and produced as P1, had testified to the effect that the hymen of CKK was not intact and that he observed a ruptured hymen which was consistent with the history of “penetrative sexual assault”.
30. The petitioner had given evidence at the trial under oath and had said that the allegation made against him by CKK was false. The petitioner, however, had admitted that his wife confronted him with the allegation and had also admitted that the mother of CKK told him that she saw the petitioner’s hand inside the pants worn by the victim at the time. The petitioner testifying further, had said that the parents of the victim were his tenants and over some incident he had to request them to leave the house and as a result, their relationship became somewhat strained. The petitioner, however, had admitted that the victim's family was on visiting terms even after the alleged dispute.
31. Inda Devi, mother of the petitioner also had testified on behalf of the defence. She had been an inmate of the household of the petitioner. This witness did admit that she was watching television seated on a settee with the children. Her version is, as to who was seated on the mattress, was different to that of the prosecution witnesses and the petitioner. Her testimony was to the effect that only the victim CKK was on the mattress. In her own words “Colin was on the mattress. No one on the mattress”. I presume what she had meant by the statement was that the victim CKK was the only one who was seated on the mattress, as opposed to the petitioner who said “at the time Collin was lying on the mattress, I took my daughter, put beside her and I also lay beside my daughter.”

32. I also wish to refer to an answer given by witness Inda Devi (mother of the petitioner) which is the contentious issue in these proceedings before this court. This witness under cross examination was shown the document marked and produced as X1, a sketch of the scene of the incident. When the witness was asked to point out where she was seated, her answer was “I can’t see them without my glasses. I did not bring my glasses”.
33. At the hearing of this petition, the learned Counsel for the petitioner drew the attention of this court to the paragraph 10 of the judgement the Court of Appeal and contended that their Lordships were in error when their Lordships of the Court of Appeal held that witness Inda Devi, mother of the petitioner had not seen the incident as “she cannot see without her glasses and that she was not wearing her glasses at that time.”
34. It was further contended on behalf of the petitioner that the witness Inda Devi had not testified to the effect that “she cannot see without glasses and that she was not wearing glasses at the time”. It was further argued on behalf of the petitioner that had their Lordships correctly analysed the evidence of Inda Devi, their Lordships in all probability would have arrived at a decision favourable to the petitioner and the petitioner was greatly prejudiced by this misdirection referred to. (1st ground of appeal)
35. It must be noted that the petitioner had not complained of any misdirection or a non-direction on the part of the trial judge in the present application. It is a well settled principle that an appellate court should not disturb the findings of fact by a trial judge unless it can be shown that the misdirection or the non-direction relied upon had caused grave prejudice to the accused and in turn resulted in a serious miscarriage of justice.
36. Unless a party satisfies the court, of the threshold referred to, an appellate court would be reluctant to disturb the findings of fact, even in cases where the trial judge had misdirected himself on certain aspects of the evidence.

37. The trial judge had, in the instant case, relied on the testimonial trustworthiness of the victim CKK and other witnesses who had given evidence on behalf of the prosecution and had based his findings on the evidence so led, which the trial judge was entitled to do.
38. When one considers the evidence placed before the court by the prosecution, the evidence to my mind remains unassailed and bereft of any infirmities. In addition the trial judge would have had the benefit of observing the demeanour and the deportment of the witnesses before deciding to act on the evidence. As such I am of the view this court ought not to disturb such findings unless the petitioner is capable of establishing a grave miscarriage of justice had occurred.
39. In the circumstances aforesaid, I am of the view that it cannot be said, the misdirection on the part of the Court of Appeal is so serious as to constitute a substantial and grave injustice to the petitioner satisfying the threshold the petitioner is required to meet under Section 7 (2) (b) of the Supreme Court Act. As such, special leave to appeal on the first ground of appeal is refused.
40. It was also argued on behalf of the petitioner that the learned High Court judge took into consideration the Victim Impact Report in determining the term of imprisonment that was to be imposed on the petitioner. The learned counsel pointed out that the Victim Impact Report was not one prepared by an expert, but one compiled simply on the material provided by the mother of the victim. It was also contended that, adequate notice of the said report was not given to the petitioner and thereby deprived the petitioner of effectively challenging the Victim Impact Report. The learned counsel strenuously argued that in a situation where the prosecution invites the court to consider the Victim Impact Report in determining the punishment, advance notice of the Victim Impact Report should be given to the accused so that the same could be challenged by the accused if he wishes to do so.

41. In the case before us, the judgement of the High Court was pronounced on the 31 July 2012 and the sentencing hearing had been fixed for the 3rd August 2012, on which date the submissions on behalf of the prosecution as well as the defence were entertained by the learned trial judge in order to determine a sentence commensurate with the offence committed. The VictimImpact Report is dated 2 August 2012 and filed in court on the same date, i.e. 2nd August 2012.
42. Thus, it appears that the petitioner's Counsel may not have had sufficient time to make a detailed study of the report when the sentencing hearing was taken up on the following day, i.e. on 3rd August 2012.
43. In fairness to the learned trial judge, he had posed a question to the petitioner as to whether he wishes to file "evidence in mitigation" to which the petitioner had responded by stating that "my Counsel says everything is written in the mitigation. I am not giving evidence" and added further that he would not be calling witnesses.
44. Thus, it appears that the petitioner was afforded an opportunity to challenge the Victim Impact Report and could have done so, if he had so wished. Having not availed of the opportunity afforded, to complain before this court that sufficient time was not available to challenge the Victim Impact Report is not acceptable.
45. Considering the above, I am of the view that the petitioner had failed to meet the threshold for the grant of special leave and as such I see no basis to grant special leave on the 2nd ground urged by the petitioner.
46. In all the circumstances, the application for special leave is refused.

Orders of the Court are:

1. *Application for special leave to appeal is refused.*
2. *Judgment of the Court of Appeal affirmed.*
3. *The conviction and the sentence imposed by the High Court will stand.*



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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court

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Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner
Office of the Director of Public Prosecutions for the Respondent.