IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0006 of 2021
Criminal Appeal No. AAU 0034 of 2013

BETWEEN : **DEWAN CHAND**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel : **Ms. Y. Kumar for the Petitioner**

Dr. A. Jack for the Respondent

Date of Hearing : **03 August 2023**
Date of Judgment : **30 August 2023**

JUDGMENT

Temo, AP

[1] I had read His Lordship Mr. Justice Isikeli Mataitoga's draft judgment. I agree entirely with His Lordship's views, reasons, conclusions and proposed orders.

Arnold, J

[2] I agree with His Lordship Mr Justice Mataitoga's judgment.

Mataitoga, J

[3] The Petitioner [Dewan Chand] was charged in the Magistrate Court at Labasa on 2 August 2012, with one count of Indecent Assault contrary to section 154(1) of the Penal Code Cap 17 and 3 counts of defilement contrary to section 155(1) of the Penal Code Cap 17.

[4] He was convicted of two counts [counts 1 and 4] count 1 on Indecent Assault contrary to section 154(1) of the Penal Code Cap 17 and count 4 of defilement of a girl under the age of 13 years contrary to section 155(1) of the Penal Code Cap 17. He was sentenced to 4 years imprisonment each for count 1 and 4 to be served concurrently, with a non-parole period of 3 years 6 months. He was acquitted of counts 2 [counts 2 and 3] both counts alleging Defilement of a Girl below the age of 13, contrary to section 155(1) of the Penal Code Cap 17.

Background Facts

[5] The victim MDT was 11 years old at the time of the incident and was a class 6 student. Both the Appellant and his wife were teachers attached to the same school the victim attended. The incident of indecent assault pertaining to count 1, in the Information occurred in December 2007. The incidents pertaining to counts 2 to 4 in the Information occurred between November 2008 and May 2009, at the victim's home in Tabucola, Labasa.

[6] Towards the end of the school term in 2007 the appellant called the victim in to another teacher's class room, and made indecent comments to her, saying her breasts were like mangoes and that he wanted to taste them.

[7] During the December school holidays in 2008, the Appellant went to the victim's home when the parents were away, and fondled her breasts, kissed her and touched her vagina. Subsequent to this incident, the Appellant visited the victim at her home from time to time, when her parents were away, and had sex with her on numerous occasions. These incidents of sexual abuse proceeded uninterrupted until May 2009, when the Appellant's wife having come to know of the incidents, questioned the victim at school. When questioned, the victim made a full disclosure of the incidents to the wife of the Appellant, which resulted in the head teacher intervening and reporting the matter to the police.

Before the High Court and the consequence

[8] Being aggrieved by his conviction in the Magistrate's Court the petitioner filed an appeal before the High Court at Labasa on 12 September 2012. This Notice to appeal against his conviction in the Magistrates Court was filed by Mr. A Kholi on 24 October 2012. The Petitioner by his new counsel filed a Notice of Motion indicating that on 29 November 2012, he intended to apply to the court for an order admitting fresh evidence in the case. This motion to apply for an Order to adduce new evidence was filed by Mr. Nepote Vere. When the matter was called on 29 November 2012, for the hearing of the Notice of Motion to adduce new evidence, Mr. Kholi now appeared for the petitioner, but his submission on that day, did not make any reference at all desire to call new evidence. It was omitted.

[9] The High Court using its appellate powers initiated the proceedings to hear the Appeal against the order of conviction of the Magistrate. On the 22nd of February 2013, Justice Goundar delivered the judgment of the High Court dismissing the appeal of the petitioner. In his judgement Justice Goundar did not discuss the Notice of Motion and supporting affidavit requesting additional evidence. It is this failure to address the Notice of Motion for additional evidence, that moved the Hon. Justice Calanchini

[sitting as Judge Alone] to find that the appeal ground raising this issue, raises an issue of law only and granted leave for the matter to be heard by the full Court of Appeal.

Before the Court of Appeal against the order of the High Court

[10] On the 12th April 2013, the petitioner filed a Notice of Appeal in the Court of Appeal against the High Court's order of dismissal of his appeal, advancing the following 3 grounds of appeal.

(i) *"That the learned trial Judge erred in law in failing to comply with the legal principles of recent complaint and as a result admitted hearsay evidence.*

(ii) *That the learned Judge erred in law in concurring with the Magistrate's Court decision in apply the legal principles of assessing credibility in sexual offence cases.*

(iii) *That the learned Judge erred in law in upholding a conviction that was unsafe in law therefore there is a substantial miscarriage of justice."*

[11] Section 22(1) of the Court of Appeal Act, reads as, *"Any party to an appeal from a Magistrate's Court to the [High Court] may appeal, under this Part, against the decision of the [High Court] in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only ..."*

[12] On the 4th December 2014, the above application for leave to appeal was dismissed by a single Judge of the Court of Appeal ruling that, "The grounds of appeal raised by the petitioner have no merit and do not raise any questions of law and therefore do not satisfy the requirements of section 22(1) of the Court of Appeal Act (Cap 12)."

[13] Consequent to the refusal of the leave to appeal application made on the 4th December 2013, an amended notice of appeal was filed by the petitioner on the 25th October 2019, citing 8 grounds of appeal, stated to be "errors of law only." On the 27th November 2019 single judge of Appeal, Hon Justice Calanchini granted leave to proceed only in respect of ground of appeal number 8, on the basis it raised an error of law only. The said ground of appeal reads as:

"The Learned Appellate Judge erred in law when he failed to deal with the motion dated 23rd day of October 2012 and filed in the High Court at Labasa on the 24th October 2012 seeking to introduce new evidence with supporting affidavit of Madvan, sworn and dated the 23rd day of October 2012, seeking to introduce new evidence, thus rendering it as an unequivocal error in law."

Full Court

[14] The petitioner submits the following grounds of appeal in seeking special leave to appeal the decision of the Court of Appeal.

> *"(i) That the appellate court did not properly consider and/or evaluate the effects of the High Court Judge's failure to take notice of an application seeking to introduce new evidence.*
>
> *(ii) That the appellate court did not properly consider and/or evaluate the effects of the trial judges error or failure in disregarding the Notice of Motion to introduce Fresh Evidence and in turn stating that the appellant had not intended to make further application to move the maters on the date specific in the motion or thereafter, when in fact the High Court had ignored that application and proceeded straight to hear the appeal proper without realizing the fact that the appellant was a serving prisoner at that time and had limited resources to contact his lawyers in respect of the application*
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> *(iii) That the appellate court did not properly consider and or evaluate that the High Court Appellate Judge, error or failure in disregarding the Notice of Motion to introduce Fresh Evidence that the said Notice of Motion filed remains pending to this day and has not been abandoned."*

[15] In terms of the above grounds of appeal, on which leave to proceed was granted, the grievance of the appellant is that the High Court Judge erred in law when he did not deal with the notice of motion filed in the High Court to introduce new evidence.

[16] The full court acknowledged that under section 257(1) of the Criminal Procedure Act 2009 provides a discretionary jurisdiction to the High Court to take new evidence were, it necessary. It is clear from the judgement of the Court of Appeal that primary cause in the failure to address the Notice of Motion to adduce new evidence in the High Court was due to the omissions on the part of the petitioner, to prosecute the

Notice of Motion as required, when the case was called on 29 November 2012. He is now trying to apportion blame to the Courts and not address his own failure to pursue the full and final determination of the Motion filed on his behalf in the High Court.

[17] To provide a background to claim by the petitioner, the Court of Appeal Judgement sets out its consideration of the grounds of appeal urged by the petitioner as follows:

> *"[14] In terms of the above ground of appeal, on which leave to proceed was granted, the grievance of the defence is that the learned High Court Judge (sitting as an Appellate Judge) erred in law when he did not deal with the notice of motion filed to introduce new evidence, an application which the appellant claims, properly filed and served. In fact the said motion forms the subject matter of the ground of appeal impugned before this full Court of Appeal.*
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> ... ...
>
> *[16] However in the instant case the bona fides of using the impugned notice of motion and its purpose, to form a ground of appeal, should be viewed in the light of the following questions:*
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> *(i) After filing the impugned notice of motion dated the 24th October 2012 before the High Court, did the appellant in fact intend to make any application in furtherance of moving the Court on the matters mentioned therein?: or;*
>
> *(ii) After filing the said motion did the appellant intend to abandon moving the Court on the matter any further by explicit acts of omission?*
>
> *(iii) Does the appellant now attempt to use an explicitly abandoned course of action as a deliberate tactic of finding a ground of appeal?*
>
> *[17] In the course of the appeal hearing before this full court, the counsel for the appellant drew our attention to the contents of the Notice of Motion dated 24th October 2012, and the two supporting documents attached to the same, namely an affidavit of a person by the name of Madvan and a statutory declaration of the victim. I do not intend to deal with the merit of the contents of the said two supporting documents herein, since they had not been proven.*
>
> *[18] On the 24th October 2012, whilst the appeal was pending before the High Court, the impugned Notice of Motion was filed by the Appellant, indicating therein that it would be moved on the 29th November 2012, for the counsel for the Appellant to be heard of an application on behalf of the Appellant for the following order.*
> *1. That an order is granted to the Appellant to introduce new evidence in his appeal. However, when the case was mentioned on*

the 29th November 2012 before the High Court, no such application whatsoever had been made as reflected in the court proceedings.

[19] The minutes of the Court proceeding on 29th November 2012 is available at Page 117 of the appeal brief before us. Counsel Mr A Kohli had represented the accused on that day and no mention had been made by him in respect of the impugned motion or made any application in furtherance of any matter set out therein. Moreover on that day the Court had directed the defence to 'file written submission on the 31st of December wherein no mention had been made of the notice of motion in question.

[20] This act of omission on the part of the defence indicates explicitly that it did not intend to support the impugned notice of the motion in court."

[18] The petitioner's submission to this court does not provide any explanation to address the determination of the Court of Appeal set out above in paragraph 17. Furthermore, the full court state as follows:

"[23] The written submissions that Mr Kohli had referred to in the court proceedings dated 10 January 2013 appeal at page 102 of the appeal brief before this full court. The written submissions had been filed on the 3 December 2012, more than two months after the notice of motion in question had been filed. The said written submissions runs into 10 pages and the learned High Court Judge in his judgement had adequately dealt with each ground of appeal mentioned therein.

[24] On the written submissions file on the 31 December 2012, we do not find any reference made to the impugned notice of motion filed or any matters mention therein. Moreover", the learned High Court Judge's comprehensive judgement does not make any reference to the impugned notice of motion, giving rise to the reasonable assumption that the oral submissions of the defence too may not have referred to the same."

In the Supreme Court

Statutory Regime for Special Leave to Appeal

[19] Section 98(3)(b) of the Constitution of the Republic of Fiji sets out the jurisdiction of this Court and provides:

"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."

[20] 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."*

[21] To engage this Courts appellate jurisdiction as contemplated in section 98(5), one must first be granted special leave. This Court is directed to have regard to the criteria set out in section 7(2) of the Supreme Court Act 2016 which provides:

> *"In relation to a criminal matter, the Supreme Court* ***must not grant leave to appeal unless***
>
> a. *a question of general legal importance,*
> b. *a substantial question affecting the administration of criminal justice,*
> c. *a substantial and grave injustice may otherwise occur"*

[22] The above are the threshold criteria which MUST be satisfied by the petitioner before leave may be granted. Section 7(2) requires that one or more of the criteria set out therein is made out before special leave is granted. The special leave applications act as a filtering mechanism to ensure that the Supreme Court expends its limited judicial resources determining only the most significant legal questions. The threshold for special leave in section 7(2) of the Supreme Court Act is extremely stringent: **Dip Chand v State** [2012] FJSC 6; (CAV 0014/2010).

[23] The Supreme Court in **Aminiasi Katonivualiku v State** [2003] FJSC 17; (CAV 001/1999) at page 3 state:

> *"It is plain from this provision that the Supreme Court is not a court of criminal appeal or general review nor is there an appeal to the court as a matter of right and, whilst we accept that in an application for special leave some elaboration on grounds of appeal maybe entertained, the Court is necessarily confined with the legal parameters set out above.."*

[24] I have set out below some broad guidelines setting the requirements of Section 7 (2) of the Supreme Court Act and what the court would be expecting for special leave application to address in their submissions.

Section 7(2) (a)

[25] Section 7(2)(a) of the Supreme Court Act 2016 is directed to the court's law-making function. The grant of special leave in relation to such questions of law enables the court to clarify the law by formulating the correct legal principle. The formulation of the correct principle to clarify the law is the decisive consideration in the grant of special leave. In this way, a question of general legal importance requires this Court to be satisfied that there is a gap in its jurisprudence that requires filling. It is not sufficient that mere error be demonstrated or that a contestable point is raised. It must be established that if the error is left to stand, a state of unsatisfactory incoherence in law will exist.

Section 7 (2) (b)

[26] Section 7(2)(b) of the Supreme Court Act 2016 permits special leave to be granted if the issue raised in the appeal grounds is "a substantial question affecting the administration of criminal justice." The High Court of Australia in **Liberato v R** [1985] HCA 66; (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792 (HCA), stated the Court will not grant special leave to appeal in criminal cases unless some point of general importance is involved which, if wrongly decided, might seriously interfere with the administration of criminal justice. It would not accord with that practice to grant special leave to appeal in a case where no question of law is involved and the court is merely asked to substitute for the view taken by an appellate court below a different view of the evidence and the summing up.

Section 7 (2) (c)

[27] Section 7(2)(c) of the Supreme Court Act 2016 covers the situation where "substantial and grave injustice may occur if grant of special leave may otherwise be denied." In dealing with applications for special leave to appeal in criminal cases, the Privy Council in **Re Dillet** (1887) 12 App Case 459 at 467, held that special leave to appeal will not be granted unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done.

Assessment of Petitioner's Submission in the Supreme Court

[28] The petitioner's application for special leave to appeal the decision of the Court of Appeal to this court, is based on section 7(2)(c) of the Supreme Court Act 2016. In the light of the requirements articulated above, it will be evident from the grounds of appeal urged by the petitioner in this court, that none of the grounds of appeal satisfy any of the threshold set out in Section 7(2) of the Supreme Court Act 2016. The grounds and submissions made in support of it, is simply asking this court to undertake a review of the determination of the issues in the Court of Appeal; treating this court as another criminal appeal review court. As stated in **Aminiasi Katonivualiku** (supra) the Supreme Court will not routinely review decision of the Court of Appeal.

[29] The petitioner's submissions in support of its grounds of appeal to this court, does not address the clear determination of the Court of Appeal referred to above from paragraphs 16,17 and 18. During the hearing of this Special Leave application, the court raise this issue directly with counsel and requested an explanation. There was none provided. It was also pointed out that before the petitioner can address the grounds it had submitted and filed in the court registry on 28 July 2023, the threshold requirement of section 7(2) of the Supreme Court Act must be satisfied. The court observed to counsel for the petitioner that none of the submission [both written and oral] filed in court so far, addresses the threshold requirements, therefore the grounds of appeal submitted is untenable until such requirements is met.

[30] It was at this point of the hearing, that the counsel for the petitioner conceded that he had not addressed arguments in Court to meet the requirements of Section 7 (2) of the Supreme Court Act for the granting of Special Leave

[31] In light of the above, this Special Leave application have not satisfied the requirement of section 7{2) of the Supreme Court Act, therefore the court will decline special leave application.

ORDERS

(1) Special Leave application is refused and is dismissed;

(2) All other Orders of the Court of Appeal and High Court are affirmed.

The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

SOLICITORS:
Jiten Reddy Lawyers, Suva for the Petitioner
Office of the Director of Public Prosecutions, Suva for the Respondent