

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION: CAV 0021 OF 2022

[Court of Appeal No: AAU0004/13]

[Lautoka High Court. HAC 21/2013]

BETWEEN : **MOHAMMED ZAHID KHAN**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Justice William Calanchini, Judge of the Supreme Court
The Hon. Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Mr R. Kumar for the Respondent

Date of Hearing: 5 April, 2024

Date of Judgment: 25 April, 2024

JUDGMENT

Temo, J

1. I have read Her Ladyship Hon Justice Lowell Goddard's draft judgment and I agree entirely with the same.

Calanchini, J

2. I have had the advantage of reading the draft judgment of Goddard J and agree with her reasoning and her conclusion.

Goddard, J

Introduction

3. The petitioner was charged in the High Court at Lautoka with one count of rape pursuant to section 207 (1) (2) of the Crimes Act 2009. The offence was committed in 2013 and the victim was his stepdaughter.
4. At the conclusion of the trial the assessors returned a unanimous opinion of guilty and this was confirmed by the learned trial judge. The petitioner was duly convicted and sentenced to a term of imprisonment of 10 years with a non-parole period of seven years. That was on 25 November 2016.
5. The appellant filed an appeal against his conviction and sentence but ultimately proceeded only with the appeal against conviction.
6. He advanced five grounds of appeal before the Court of Appeal and these were definitively dealt with by their Lordships in a reasoned judgment delivered on 3 March 2022.

The grounds of appeal:

7. The first two grounds concerned the taking of the complainant's evidence by Skype. The petitioner contended that this was permitted by the trial judge without a proper hearing to establish whether she was a vulnerable witness. He argued that, as an adult, the complainant did not require such an exemption and the mode by which her evidence was taken had resulted in a miscarriage of justice.

8. Under the third ground, the petitioner contended that the trial judge had erred in law and in fact by failing to direct himself or the assessors on certain facts which would have pointed to his credibility. This ground essentially concerned the medical evidence given by the doctor who examined the complainant and an alleged inconsistency between the complainant's sexual history and the doctor's medical findings on examining her following her complaint of rape. This ground of appeal also alleged a history of animosity between the complainant and the petitioner.
9. Ground four was a related ground, whereby the petitioner contended that in directing the assessors and himself, the trial judge had erred by stating that the medical report contained no significant findings. The petitioner says this was an error, as the doctor was the first independent person with whom the complainant had contact after the alleged event and there was inconsistency in the history she gave and in the findings of the medical practitioner.
10. Ground five alleged a failure by the prosecution to call the complainant's uncle and her mother, both of whom had arrived home shortly after the rape incident. The petitioner contended that these persons should have been called to attest to the demeanour of the victim immediately after the incident, as they were the first persons to see her.
11. Each of these grounds of appeal was definitively dealt with by the full Court of Appeal and the appeal was dismissed.

New grounds of appeal.

12. On 22 March 2022, the petitioner filed an application for special leave to appeal to this Court from the decision of the Court of Appeal, reiterating the same five grounds of appeal already determined by the Court of Appeal and putting forward four new grounds of appeal that had not been argued before the Court of Appeal. The purported new grounds of appeal are as follows:

1. “The learned trial judge had erred by not calling the doctor when the defence asked the court to call the doctor who carried the medical examination to the complainant, who the prosecution decided not to call on the day of the trial, who was already summoned as a witness, not being present prejudiced the appellant in that he could not cross examine the doctor on what the absence of bruises or any sort of injuries meant.
2. The court of appeal had erred by stating in the judgment that the defence counsel did not object during the trial evincing the court that the defence counsel failed to carry out his duties diligently as an effective counsel for the interest of his client, which caused miscarriage of justice by his ineffective advocacy.
3. The complainant was adduced to give evidence under duress that is she gave evidence under threat by the court to be sent to remand if she do not give her evidence and her evidence created doubt as she gave an involuntary evidence in court.
4. The learned trial judge erred by denying the application by the state that the complainant to be treated as hostile witness, which caused miscarriage of justice, as her evidence created doubt and incredible.”

The petitioner has already completed his sentence

13. On 7 February 2024 the petitioner’s case was called before the Hon. Acting Chief Justice for mention. At the hearing, it transpired that his sentence had already been completed (on 24 November 2023) and he was accordingly released on bail pending the hearing of this petition set down for 5 April 2024¹. The Hon Acting Chief Justice made the following ancillary orders:

“[4] Petitioner to file and serve Submissions by 28th February 2024.
[5] Respondent to file and serve Submissions by 20th March 2024.”

14. On 21 March 2024 the Supreme Court Registry received a written notice from the petitioner seeking to withdraw his application for special leave to appeal to this Court against his conviction.

¹ Kreimanis v State [2023] FJSC 19; CAV13.2020 (29 June 2023).

15. Although the petitioner now seeks to withdraw his application for special leave to appeal, his appeal has not been rendered nugatory simply by the completion of his sentence. In the interests of justice it is important for his victim that the matters he has raised are not left unresolved, particularly when the grounds he has put forward fall far short of the stringent threshold for a successful grant of special leave by this Court.

Jurisdiction for granting special leave to appeal

16. Under section 98(4) of the Constitution of Fiji, an appeal from a final judgment of the Court of Appeal can only be brought by the leave of this Court. The granting of leave is a discretionary matter.
17. Under section 7(2) of the Supreme Court Act, leave must not be granted in a criminal matter 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 may otherwise occur.
18. Section 7(2)(c) is the only provision of possible relevance to appeal grounds one to five, already definitively determined by the Court of Appeal and to the four new grounds of appeal the petitioner now seeks to advance.
19. What might constitute a substantial and grave injustice was considered by the Judicial Committee of the Privy Council in **Re Dillet** (1887) 12 App Cases 459 at 467, an appeal from the Supreme Court of British Honduras. In **Re Dillet**, their Lordships held that, in considering a grant of special leave to appeal, criminal proceedings would not be reviewed or interfered with "...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."
20. The stringent nature of the threshold was confirmed by this Court in **Dip Chand v State** [2012] FJSC 6; CAV0014.2010 (9 May 2012);

“... the threshold set in s.7 of the Supreme Court Act 1998 is “extremely stringent” and “...special leave to appeal is not granted as a matter of course ...”

21. In **Matalulu v Director of Public Prosecutions** [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003), this Court similarly found that a risk of substantial grave injustice must be present:

“..... the Supreme Court, as the final appellate body, will not lightly grant a petition for special leave unless there is the risk of “substantial grave injustice.”

Conclusion:

22. Grounds one to five as set out in the petition have already been the subject of a final determination by the Court of Appeal and none of them meets the high threshold required by the statutory criteria in section 7(2) of the Supreme Court Act,
23. Thus there is no risk of a substantial and grave injustice having occurred in respect of grounds 1 to 5 of the petition. The judgment of the Court of Appeal is thorough, soundly reasoned and based on careful factual analysis. The petition falls far short of meeting the stringent statutory test requiring the risk of a substantial and grave injustice.
24. In respect of the purported new grounds of appeal, there is a certain duplication of issues in the first, third and fourth grounds with those which have already been determined by the Court of Appeal. The second ground concerns trial tactics which are a matter for the judgement of trial counsel in the context of the trial as it is unfolding at the time.
25. None of these ‘new’ grounds carry the slightest risk of a “*substantial and grave injustice*” having occurred at the trial. On that basis they do not meet the test in section 7(2)(c) of the Supreme Court Act and there is no merit in them.
26. The petition is dismissed on all grounds.

Submissions on behalf of the State

27. The Court notes the learned and thoughtful submissions advanced by Mr Kumar on behalf of the State, concerning the futility and wastefulness of the Supreme Court’s resources in considering an increasing number of meritless petitions for special leave to appeal in the criminal justice jurisdiction - petitions that fall far short of the stringent statutory criteria in section 7(2) of the Supreme Court Act. Mr Kumar referred to the preliminary screening approach of the Hong Kong Court of Final Appeal in determining whether a threshold test has been met that requires a full hearing before the Court. Whilst a strict comparison cannot properly be drawn it may be that, in future, petitions for special leave to this Court which fail to disclose grounds that identify a prima facie risk of a substantial and grave injustice but merely seek to relitigate issues already determined, or to proffer new grounds, may be summarily disposed of on the papers.



The Hon Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT



The Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT



Hon Justice Lowell Goddard
JUDGE OF THE SUPREME COURT