

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

CRIMINAL APPEAL NO.AAU 0039 of 2019
[In the High Court at Suva Case No. HAC 17 of 2017]

BETWEEN : **SALAUCA VOLAUKILODONI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. I. Ramanu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **23 August 2021**

Date of Ruling : **27 August 2021**

RULING

[1] The appellant had been indicted (with another – 01st accused and appellant in AAU 0065 of 2019) in the High Court at Suva on one count of rape contrary to section 207(1) and (2) of the Crimes Act, 2009 committed at Lau in the Southern Division.

[2] The information read as follows:

COUNT 2

Statement of Offence

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

Particulars of Offence

SALAUCA VOLAUKILODONI between the 1st day of July, 2016 to the 31st of July, 2016 at Lau, in the Southern Division, inserted his penis into the vagina of LL without her consent.

- [3] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted the appellant of rape. The trial judge had sentenced the appellant on 12 April 2019 to 14 years of imprisonment with a non-parole period of 12 years (the effective serving period being 13 years, 08 months and 18 days with a non-parole period of 11 years, 08 months and 18 days after the period of remand was deducted).
- [4] The appellant's timely notice of appeal (06 May 2019) had been against conviction and sentence and his amended grounds of appeal (only against conviction) had been tendered on 14 September 2020 and written submissions on 29 December 2020. The state had filed its written submissions on 26 January 2021. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.
- [5] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is 'reasonable prospect of success' [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The appellant's grounds of appeal against conviction are as follows:

Conviction

Ground 1

THAT His Lordship erred in law and in fact in that His Lordship misdirected the Assessors at paragraph 49 of the summing up in that the 1st Accused's evidence is relevant against the 2nd Accused.

Ground 2

THAT His Lordship erred in law and in fact in that His Lordship misdirected the Assessors in accordance with the Turnbull legal principle of fleeting glance in that the complainant evidence states that the solar light was not bright.

Ground 3

THAT His Lordship erred in law and in fact in that His Lordship misdirected the Assessors in allowing the 2 reasoning above, therefore, disregarding the alibi of the 2nd accused (Appellant).

[7] For the purpose of sentencing the trial judge had summarised the factual scenario of the case as follows:

2. *The victim in this case was 13 years old at the time the two of you sexually exploited her.*
3. *Petero Mawi , one night in the month of July 2016 around 8.00pm, you approached the victim and asked her whether you can have sexual intercourse with her. Even though she refused initially, later on she agreed. Then you and the victim had sexual intercourse and the victim in her evidence said that it was consensual. This took place outside her house. The evidence revealed that Salauca Volaukilodoni was also around when you had sexual intercourse with the victim and he approached you after you had finished having sexual intercourse with the victim. Having spoken to Salauca Volaukilodoni you then told the victim that Salauca Volaukilodoni wants to speak to her. The evidence suggests that you wanted the victim to have sexual intercourse with Salauca Volaukilodoni. The victim is related to your wife.'*
4. ***Salauca Volaukilodoni**, you then told the victim that you want to do the same thing Petero Mawi did with her. She refused. But then you threatened the victim that you will inform her grandfather about her having sexual intercourse with Petero Mawi . It is pertinent to note at*

this point that the victim's parents had passed away when she was around 5 years old and she was living with her grandparents when this incident took place. Due to your threat, the victim agreed and had sexual intercourse with you. The victim and you are cousins.'

01st ground of appeal

- [8] The appellant's counsel's argument is based on paragraph 49 of the summing-up and he submits that the admissions relating to the appellant made by his co-accused at the trial is not admissible against the appellant. Paragraph 49 is as follows:

49. *You should remember few things when you consider this evidence of the first accused against the second accused. The evidence of an accused is admissible as evidence in a case. A while ago, I have explained that you should examine the case of each accused separately and in turn. When you are considering the case of the second accused, the evidence of the first accused will be relevant. When you are considering the case of the first accused, the evidence of the second accused will be relevant. But, in this case the second accused has not given any evidence that implicates the first accused, because as I already said, the second accused's version is that he was never there. So, you must assess the truth of the first accused's evidence as you would, the evidence of any other witness but, when you do that, bear in mind that the first accused has his own interest to consider when giving evidence in his own defence.*

- [9] Paragraph 49 has to be read with paragraph 48 of the summing-up:

48. *You heard the evidence of the first accused who said that he saw one Saluaca having sexual intercourse with the complainant. His defence was that the allegation against him was fabricated by the complainant because he saw the complainant having sexual intercourse with Saluaca. As I have pointed out the defence of the second accused is that he was never there where the offence was committed at the time the offence was committed. Therefore, if you believe the above evidence of the first accused and also if you find that the person the first accused referred to as Saluaca is the second accused, that would place the second accused in the scene of crime.*

- [10] The counsel has referred to **Blackstones Criminal Practice F.17.33. at page 1979** headed "**Confession Implicating Co-Accused**".

"A confession made by an accused person which is admitted in evidence is evidence against him. (Police & Criminal Evidence Act 1984; s.76(ii). It is not, however evidence against any other person implicated in it (Rhodes (1959) 44 Cr. Appl. R. 23), unless it is made in the presence of that person and he acknowledges the incriminating parts so as to make them, in effect, his own.-----"

[11] The above paragraph sets out the legal position relating to an accused's confession implicating another accused made to the police and not in the course of a trial before court. It is trite law that if an accused goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-accused (see **R. v. Rudd** (1948) 32 Cr. App. R 138 and **Archbold Criminal Pleading Evidence & Practice** 1992 Volume 1 (15-315) at page 1838).

[12] Therefore, this ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[13] The counsel for the appellant under this ground of appeal challenges the identification of the appellant.

[14] The relevant paragraphs in the summing-up are as follows:

52. *With regard to the second count which is against the second accused, the complainant says that the second accused had sexual intercourse with her where the second accused inserted his penis inside her vagina. She says that she agreed to have sexual intercourse with the second accused after he threatened her that he will inform her grandfather about her having sexual intercourse with the first accused. The second accused says that the complainant has mistaken him for someone else and that he was elsewhere at the time of offence. The second accused also said in his evidence that the complainant had made this allegation against him due to a family dispute.*

53. *With regard to the issue of identity, I have already pointed out to you that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends.*

54. *The complainant said that she recognized the second accused who is her cousin with the light emanating from the solar light next to her main door when the second accused was walking towards the first accused. She observed the second accused for few seconds while he was so walking. She said thereafter the second accused spoke to her where he said that he wants to do the same thing the first accused did with her and then threatened her when she refused. Then he told her to lie-down and he was putting his penis inside her vagina for 3 to 4 minutes. She says she clearly identified the second accused and nothing was obstructing her view of the second accused when she recognized him. She agreed during cross-examination that the solar light was not bright as a normal light powered by electricity.*
55. *You have to consider all the evidence relevant to the identification of the second accused and decide whether you are sure that it was the second accused who committed the offence he is charged with.*

[15] The complainant had recognized the appellant with the light emanating from the solar light next to her main door. It is clear that the appellant being her cousin was well known to the complainant and he had threatened her by words prior to raping her. According to the appellant's evidence she had falsely implicated him due to a family dispute which is an acknowledgment of their family relationship. The co-accused had seen the appellant having sexual intercourse with the complainant.

[16] Thus, it was not a case of a fleeting glance or doubtful identification. It was a plain and simple recognition by the complainant of one of her cousins *via* multiple mediums. Nevertheless, the trial judge had administered Turnbull guidelines at paragraphs 28 of the summing-up:

28. *The first element is concerned with the identity of the accused. The second accused claims that this is a case of mistaken identity in relation to the second count. When you consider the evidence on the identification of the second accused, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the complainant on identification of the second accused in relation to the second count;*
- a. Duration of observation;*
 - b. The distance within which the observation was made;*
 - c. The lighting condition at the time the observation was made;*

- d. Whether there were any impediments to the observation or was something obstructing the view; and*
- e. Whether the complainant knew the accused and for how long.*

[17] The trial judge had considered the issue of identity in the judgment as well:

- 9. *Given that the complainant and the second accused are cousins; that the complainant and the second accused are known to each other; the fact that the complainant saw the second accused when he was walking to the first accused; the fact that there was a conversation with the complainant and the second accused before the incident, I am satisfied beyond reasonable doubt that the complainant had clearly identified the second accused and that this is not a case of mistaken identity.*

[18] Therefore, there is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[19] The counsel for the appellant contends that the appellant's defence of *alibi* had not been properly put to the assessors.

[20] On a perusal of the summing-up, I find that the trial judge had addressed the assessors very compressively on *alibi* at paragraphs 40, 41, 45, 46, 47, 52 and finally at 58 as follows:

- 58. *Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each accused in relation to their respective charge;*

- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.*

- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.*

- (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witness, that itself does not make him guilty. The situation would then be the same as if he had not given any*

evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

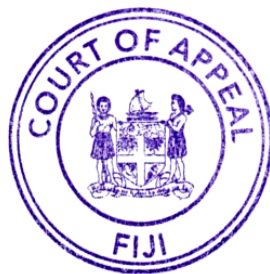
[21] The trial judge had given his mind to his defence in the judgment as follows:

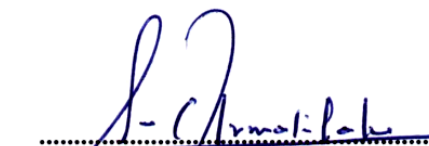
8. *With regard to the second accused, in his evidence, I noted that he tried to over emphasize about the month of July 2016. He said he started diving from July 2016, but his witness said that he was diving from January 2016. All in all, I found the evidence of the second accused and his witness with regard to the second accused's alibi to be unreliable.*

[22] Therefore, there is no reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is refused.




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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL