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

**CRIMINAL APPEAL NO. AAU 158 of 2020**
**[In the High Court at Labasa Case No. HAC 19 of 2019]**

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| **BETWEEN** | : | **MADIGIBULI BALEISUVA** | |
| | | | ***Appellant*** |
| **AND** | : | **THE STATE** | |
| | | | ***Respondent*** |
| **Coram** | : | **Prematilaka, RJA** | |
| **Counsel** | : | **Appellant in person** | |
| | : | **Ms. U. M. Tamanikaiyaroi for the Respondent** | |
| **Date of Hearing** | : | **16 June 2023** | |
| **Date of Ruling** | : | **19 June 2023** | |

# RULING

[1] The appellant had been charged and found guilty in the High Court at Labasa on one count of attempted rape and one count of rape of his 16 year old niece committed at Taveuni.

[2] 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 him and sentenced the appellant on 25 March 2020 to a period of 05 years' imprisonment for attempted rape and 14 years' imprisonment for rape ( both sentences to run concurrently) with a non-parole period of 11 years.

[3] The appellant's initial appeal only against conviction is dated 23 April 2020 and it appears that due to the restrictions following the outbreak of COVID pandemic his appeal had not reached the Court of Appeal Registry at least till June 2020. On 09 June 2020 the CA Registry had informed the senior court officer at Labasa High Court that an appeal had been lodged by the appellant. This must be a reference to his appeal dated 23 April 2020. Thus, his appeal should be regarded as a timely appeal. Subsequently, the appellant had tendered an application to lead fresh evidence which, of course, could be considered only by the full court if the appeal reaches that stage.

[4] 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)].

[5] The complainant, her mother, a female police officer in Taveuni and a neighbor were summoned by the prosecution. The appellant had not given evidence; nor had he called any other witnesses on his behalf. At the time of the alleged incident the appellant was a police officer serving in Taveuni.

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

> ***Ground 1***
>
> *THAT the police investigation was not conducted in good faith therefore calculated to prejudice the appellant and a substantial miscarriage of justice in the circumstance of this case.*

***Ground 2***

*THAT the flagrant incompetence of the defence counsel had caused a substantial miscarriage of justice.*

***Ground 3***

*THAT there is innocence shown on a reasonable doubt of guilt when the relevance authenticity and cogency of further evidence in the trial is considered by independent assessment of such evidence by the court of appeal.*

***Ground 4***

*THAT the Learned Trial Judge had failed to direct the assessors to consider whether the complainant had voluntarily complained to her mother of rape or out of oppression, fear and duress due to the beating by her mother in his direction on recent complainant.*

***Ground 5***

*THAT the Learned Trial Judge had totally failed to direct the assessors to consider the discrepancy between the original report in 2016 and the eventual charge in 2019 and the three progressively additional version contained in the three separate statement of the complainant and her mother.*

***Ground 6***

*THAT the Learned Trial Judge had failed to direct the assessors to weigh the evidence of both the complainant and Parmendra Vimal Prasad with caution on the basis of it being tainted with ulterior motive.*

***Ground 1***

[7] The gist of the appellant's submission is that the complainant's first complaint had contained only an allegation of sexual harassment and in her subsequent statements she had progressively elevated the allegations to attempted rape and rape. He seems to suggest that therefore, the police should have only probed into her initial allegation and not subsequent allegations which formed part of the information. He submits that he was charged for attempted rape and rape 02 years and 09 months after the initial complaint. The reason attributed by the appellant for this is that Labasa police had misplaced the original docket containing the statements of witnesses and subsequently they had to record fresh statements from witnesses wherein the allegations of attempted rape and rape appeared.

[8] It appears from paragraph 37 of the summing-up that the defence was in possession of police statements as disclosures and the complainant and her mother Merewalesi Novo had been in fact cross-examined with regard to their previous statements and omissions thereon.

[9] If the above allegations are true, they should have been ventilated fully at the trial and the defence could have summoned the relevant police officers to substantiate them. The appellant himself could have given evidence to place them before the trial judge. However, the defence for reasons best known to it does not appear to have done either and as a result the current version of the appellant does not appear to have before the trial judge or the assessors. At this stage, the appellant's allegations seem to be an afterthought.

***Ground 2***

[10] The appellant submits that the failure to call original investigator WDC 3184 Maca Baleinamoto (who recorded the first complaint), WPC 3244 Temalesi (on information related to her by the complainant recorded in the medical report on 18 April 2018), medical nurse Milika Vatusega (on medical examination on 18 April 2018 of the complainant for sexual assault & her statement on 12 October 2017) and Dr. Dinesh Lingam (on medical examination on 18 April 2018 of the complainant for sexual assault), sister Matelita Nabunobuno (admission to her by the complainant about her boyfriend) and the failure to cross-examine the complainant and her mother adequately and to produce his cautioned interview despite his instructions to the trial counsel and the trial counsel advising the appellant not to give evidence, are instances of flagrant incompetence of his trial counsel.

[11] In **Ensor v. R** [1989] 89 Cr App R, it was said that an appellate court will only interfere with a conviction on the ground that counsel has not conducted the case properly if it is satisfied that the manner in which it was conducted amounted to flagrant incompetence or in any other way was such that there had been a miscarriage of justice.

[12] The Supreme Court said in **Rakula v The State** [2005] FJSC 5; CAV0004.2004S (21 October 2005) that:

> *[15] In his petition to this Court, the petitioner set out seven issues which he sought to rely upon. He supported these in his written submissions and in oral argument under three heads. They were essentially that, because of the advice and conduct of his trial counsel, the trial was unfair and his case was not fairly presented; that the Court of Appeal erred in denying him the opportunity to present fresh evidence, and that his mistreatment by the police should not have been regarded as irrelevant since, he claimed, involuntary statements he made to the police were used in the investigation to obtain further evidence used against him at his trial.*
>
> *[16] There has not been presented to this Court any affidavit or other outline of further evidence that would have been given. Nor is there before the Court any evidence supporting the claims of counsel incompetence or of mistreatment of the petitioner by the police. These are factual matters in any event and could not be considered on a final appeal.*
>
> *[19] The second point relates to complaints on appeal of errors by or incompetence of trial counsel. In other, common law jurisdictions there has been a trend away from the use of tests such as of **"flagrant incompetence"** in recent years. The focus has been rather on the impact of any trial irregularity on the outcome rather than on the performance of counsel. Recent authorities are cited in **Sangsuwan v. The Queen** [2005] NZSC 57.'*

[13] Undoubtedly, these are serious allegations against the appellant's trial counsel which have not been substantiated at least by way of an affidavit. In **Sami v State** [2022] FJCA 46; AAU0025.2018 (26 May 2022) the Court of Appeal held:

> *'[46] Having regard to the above dicta it is clear that if one wishes to rely on a ground of appeal based on the fact that the trial counsel has failed in his duties, negligent or incompetent there shall be convincing evidence to show that as a result of the conduct of the trial concerned the appellant had suffered an injustice. In support of such a claim, additional information should be provided to conclude the trial counsel acted in defiance of the instructions given to him or did not consult the appellant prior to taking the course adopted in the trial over remits of taking proper instructions or any other factor that would make an appellate court convinced that a grave injustice has been caused to the appellant.'*

[14] In fact the Court of Appeal laid down an elaborate procedure to be followed when any ground of appeal based on criticism of trial counsel is raised by an appellant in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019). The appellant has not complied with the said procedure and therefore, this ground of appeal cannot be considered at this stage. Nor is there is any material currently on record to substantiate these allegations against the appellant's trial counsel.

***Ground 3***

[15] The complaint is somewhat based on the same issues the appellant had raised under the 02nd ground of appeal arising from the un-summoned witnesses. At the same time the appellant's submissions are based somewhat on the evidence which he had applied to lead by way of fresh evidence in appeal which could be considered only by the full court and not by the single judge. To that extent, this ground of appeal at this stage is hypothetical.

[16] In any event, the appellant submits that the fresh evidence would show that he should have been convicted only for sexual assault. He states that even the prosecutor suggested during her closing submissions that the assessors may consider the lesser charge of sexual assault. The respondent's reply is that it made that submission only in relation to the attempted rape charge and not for rape charge. However, there is no reference to any alternative course of action in the summing-up but at paragraph 18 of the summing-up the trial judge had invited the assessors to either find him guilty for attempted rape or acquit him of that charge altogether, possibly because there was no evidential basis for any direction for a lesser charge.

***Ground 4***

[17] The appellant's submission is that the trial judge had failed to direct the assessors that the appellant's mother's recent complaint evidence should be considered in the light of the evidence that the complainant came out with the fact that she had engaged in sexual intercourse with the appellant while she was being beaten-up by the mother. Put it another way, the appellant's argument is that the trial judge should have

directed the assessors about the possibility of the complainant coming out with the complaint of rape out of fear, oppression and duress exerted by her mother and not freely and voluntarily thus, the judge should have guided them as to how they should approach recent complaint evidence in the light of the evidence of her being beaten-up before she reported sexual abuse by the appellant.

[18] The appellant admits that the trial judge had referred at paragraph 35 of the summing-up to the complainant's evidence of her mother's beating before she disclosed the sexual abuse by the appellant but argues that that alone was inadequate but the judge should have warned the assessors to consider such recent complaint evidence very carefully because the complainant made it under fear, oppression and duress as opposed to voluntarily and freely. The appellant goes further and submits that the trial judge in the circumstances should have asked the assessors to disregard the recent complaint evidence.

[19] It appears that the trial judge had not directed the assessor in the manner articulated by the appellant though he had given the usual directions on recent complaint evidence at paragraph 36 of the summing-up. It is not clear whether the trial judge had given his mind to this aspect in the judgment, as in Fiji the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].

[20] However, what transpires from paragraph 41 of the summing-up is that after his directions on recent complaint evidence and inconsistencies in the prosecution case with out of court statements, the trial judge had told the assessors that the appellant's guilt or otherwise rested wholly on the complainant's evidence virtually taking away recent complaint evidence from the assessors' consideration. Most probably, the trial judge may have taken the recent complaint evidence out of the assessors'

consideration because of the matters stated by the appellant. Since the judge had directed himself according to the summing-up in the judgment it could be assumed that he had only considered the complainant's evidence in determining the guilt of the appellant. In the end it appears that both the assessors and the trial judge had considered only the complainant's testimony in arriving at the verdict of guilty. Thus, the omission to direct the assessors in the way called for by the appellant cannot be said to have caused a miscarriage of justice. In any event no substantial miscarriage of justice had resulted and if required the proviso to section 23(1) would readily come into play.

***Ground 5***

[21] The appellant's grievance is on alleged inadequacy in the summing-up on inconsistencies between the complainant's evidence at the trial with her previous police statements.

[22] It appears that as per paragraph 37 of the summing-up the trial judge had indeed referred to the defence counsel's cross-examination of the complainant and her mother with regard to their police statements and told them that the purpose of showing the discrepancies was to indicate that their evidence was unreliable. However, the complainant had not been confronted with all such out of court statements as are now referred to by the appellant. The defence counsel may not have done so as some of those statements did contain material unfavourable to the appellant's case.

[23] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), the Court of Appeal, having considered previous decisions stated as follows:

> *[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to*

*the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

*[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

[24] The appellant has not demonstrated what the alleged material discrepancies are and how they are supposed to go to the root of the matter and shake the basic version of the complainant.

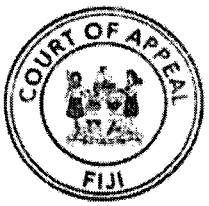
***Ground 6***

[25] The appellant argues that the trial judge had failed to warn the assessors that Parmendra Vimal Prasad's evidence may be tainted as the complainant was having an affair with him and because the appellant found it out. However, the appellant admits that she denied all suggestions to that effect in her evidence. Therefore, there was no evidential basis for the trial judge to warn the assessors of an ulterior motive on the part of Vimal Prasad.

[26] It appears that on the totality of evidence available to them it was reasonably open to the assessors to be satisfied of guilt beyond reasonable doubt [vide **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021)] and trial judge could have reasonably convicted the appellant on the evidence before him [vide **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014)]. Thus, the verdict cannot be said to be unreasonable or one cannot say that the verdict cannot be supported having regard to the evidence.

***Order of the Court:***

1. Leave to appeal against conviction is refused.

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

**Solicitors:**

Appellant in person
Office for the Director of Public Prosecutions for the Respondent