

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

CRIMINAL APPEAL NO. AAU 49 OF 2019
In the High Court at Lautoka HAC 137 of 2015

BETWEEN : **DAYA PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Mr G. O'Driscoll for the Appellant**
Ms J. Fatiaki J for the Respondent

Date of Hearing : **11 September, 2023**

Date of Judgment : **28 September, 2023**

JUDGMENT

Prematilaka, RJA

[1] I am in agreement with Mataitoga, JA that the appeal should be dismissed.

Mataitoga, JA

[2] The appellant had been indicted in the High Court of Lautoka on two counts of Indecent Assault contrary to Section 212 (1) of the Crimes Act, 2009 and three counts of Rape contrary to section 207(1) and (2) (a) of the Crimes Act, 2009 committed at Nadi in the Western Division from 01 August 2014 to 20 November 2014.

[3] The information read as follows

First Count

Statement of Offence

Indecent Assault: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad between the 1st day of August, 2014 and the 31st day August, 2014 at Nadi in the Western Division, unlawfully and indecently, assaulted Shayal Shivangini Lata.

Second Count

Statement Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad between the 27th day of September 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Third Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 10th day of October, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Fourth Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 18th day of October, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Fifth Count

Statement of Offence

Indecent Assault: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 20th day of November, 2014 at Nadi in the Western Division, unlawfully and indecently, assaulted Shayal Shivangini Lata.

- [4] At the conclusion of the summing-up on 28 March 2019 the assessors had unanimously opined that the appellant was not guilty as charged. The learned trial judge had disagreed with the assessors in his judgment delivered on 8 April 2019, convicted the appellant and sentenced him on 18 April 2019 to 13 years, 11 months and 2 weeks of imprisonment with a non-parole period of 9 years, 11 months and 2 weeks.
- [5] The brief facts for each count of the charges, which were set out in the sentencing order are as follows.

Count 1 – Indecent assault

In August 2014 during the second term school holidays the victim was learning to drive from you. When she was learning to drive you started touching her thighs over her cloths while driving. You squeezed her breasts. The victim didn't like it, but you told her not to tell anyone about it. The victim reported the incident to her mother. But her mother did not believe her saying that you were part of the family.

Count 2 – Rape

On 27 September 2014 the victim was told by her mother to deliver some food to your place. The victim didn't want to go, but her mother forced her to go. When the victim brought the food, you asked her to come inside the house. You locked the grill door and forced her to your room. You forcefully took off her clothes. You pushed her on the bed and got on top of her. You tried to kiss her, but the victim started moving her head. The victim kept on shouting, but no one could hear her as there was loud music played at your house. You separated her legs with your legs while holding her hands tightly. You inserted your penis into her vagina. The victim didn't like it. She called for help by shouting, but no one could hear her. She was shocked, and she didn't know for how long you did it. The victim said that she did not expect that from her uncle.

Count 3 – Rape

On 10 October 2014 the victim went to your place with her mother to make some sweets. Her mother had to go back home leaving the victim at your place as her mother needed something. You then locked the grill and grabbed her to the sitting room. You played a sex movie and told her to watch it. You held her tight and forced her to watch the movie. You then grabbed her to your room. You took off her clothes and your clothes. You then placed your mouth on her vagina. You were holding her hands and she shouted for help. No one could hear her as the music was loud. You then inserted your penis into her vagina. The victim didn't like it. It was painful for her. She tried to push you and she bit your arm. You threatened her not to tell the incident to anyone.

Count 4 – Rape

On 18 October 2014 the victim was asked by her parents to go with you to Sigatoka to deliver some sweets. When you were returning in the night you stopped the vehicle on the way. You took a torch and checked around. You asked her to come to the back of the van. When the victim refused you grabbed her. You tried to kiss her, and she kept on moving her head. She didn't like it. You took off her clothes. You inserted your penis into her

vagina. She tried to push you, but you over powered her. You held her tight. The victim tried to shout but there was no one around.

Count 5 – Indecent assault

On 20 November 2014 the victim was told by her mother to go with you and exchange a packet of milk. On your way back, you parked your vehicle for the victim's sister to come and pick her up. While waiting in the vehicle you came and started touching her. You touched her thighs and breasts. You held her hands when she tried to stop you. The victim didn't like it and you continued to touch her thighs and breasts until her sister came.'

[6] The appellant's timely application for leave to appeal against conviction and sentence had been signed in person on 14 May 2019 and received by the CA registry on 22 May 2019. On 15 May 2019 Iqbal Khan & Associates also had filed a notice of appeal and an application for leave to appeal against conviction and sentence on behalf of the appellant.

[7] At the Leave to Appeal hearing both counsels relied on the written submissions they have already filed.

Court of Appeal

Reasonable Prospect of success

[8] The appellant may appeal against conviction and sentence only with leave of court. The test for leave to appeal is that the grounds of appeal must have 'reasonable prospect of success': Caucu v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172

[9] In S v Smith [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa described the test of reasonable prospects of success as the correct approach to decide whether leave to appeal by the High Court should have been granted or not as follows:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (emphasis added)

Grounds of Appeal Before Judge Alone

- [10] There were 7 grounds of appeal submitted against conviction by the Appellant
- [11] At Leave to appeal hearing, the Appellant had reserved his right to argue and/or file further grounds of appeal upon receipt of the Court records in this matter. This right was never exercised.
- [12] The Respondent submitted that due to lack of particulars in the written submissions filed on behalf of the appellant, they have not been able to make any relevant submissions on the grounds of appeal. The result is this court has been deprived of any assistance from the respondent in coming to any determination on the questions of leave to appeal. This court cannot and would not make a ruling, on issues in the submissions, without properly hearing the respondents on matters relating to the grounds of appeal.
- [13] The Single Judge tried to make sense from the shortcoming in the manner in which grounds of appeal were drafted, which offered little elaboration and insufficient details to clearly identify the alleged deficiency claimed in the grounds of appeal. The appellant has not followed the clear terms of Rule 35(4) of the Court of Appeal Rules, which requires the notice of appeal to precisely specify the question of law upon which the appeal is brought: **Isikeli Kini v State** [2004] FJCA 55.
- [14] The Judge exercising the powers vested in him under section 35(2) of the Court of Appeal Act may dismiss all grounds of appeal as frivolous and vexatious.

Full Court

- [15] At the hearing of the Appeal on 11 September 2023 Counsel (Mr O'Driscoll) appearing for the Appellant informed the court that he has no further submission to make as he has not received any brief from instructing counsel. The appellant through his counsel had submitted written submission dated 19 October 2022. Mr O'Driscoll informed the court, that he was asked to appear for the appellant but no written brief was provided from instructing counsel (Mr. Iqbal Khan) on the matter. He could not assist the court further, but to rely on the written submissions already filed in court for the Appellant.
- [16] On 19 October 2022, the appellant submitted 4 grounds of appeal against conviction as follows:
- (i) *that the Learned Trial Judge erred in law and in fact in not adequately directing/ misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.*
 - (ii) *that the Learned Trial Judge erred in law and in fact in not adequately directing the Assessors the significance of Prosecution witnesses conflicting evidence during the trial.*
 - (iii) *that the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*
 - (iv) *that the Learned Trial Judge erred in law and in fact in not directing himself and /or the Assessors the appellant exercised his rights to remain silent and as such no adverse inference ought to be taken against him and failure to do so cause substantial miscarriage of justice.*

Court Rules Pertaining to Drafting of Grounds and Submissions

- [17] It was pointed out by the Court of Appeal in Gonevou v State [2020] FJCA 21, at paragraph II as follows:

"Regarding a hearing by the Court of Appeal, Rules 35(4) of the Court of Appeal Rules states that a notice of appeal shall precisely specify the grounds (including, if any, questions of law) upon which the appeal is brought. The same should obviously apply to notice of application for leave to appeal as well. When an appeal is lodged from the high court in

its appellate jurisdiction, the notice of appeal shall state precisely the question of law upon which the appeal is brought [vide Rule 36(1) of the Court of Appeal Rules.]

- [18] The Court of Appeal recently stated the need for parties to precisely define the issues of law and fact that they claim have been violated by the trial judge. In **Waqaninavatu v State** [2023] FJCA 72, the Court of Appeal stated

*14] Due to the haphazard way in which the grounds of appeal have been put together and submitted to the court registry, it was difficult to focus the court's assessment of the claims made and the supporting evidence in a coordinated way. This was clear derogation from the requirement in **Rule 35(4) Court of Appeal Rules** which states that the Notice of Appeal shall precisely specify the appeal grounds. Further, **Rule 36(1) of the Court of Appeal Rules**, requires that the precise question of law, upon which the appeal is brought must be set out in the Notice of Appeal. Despite these rules, the appellant was allowed to submit barebones claims of unfairness and unreasonableness by the trial judge without reference to any basis in law or evidence adduced in court*

[15] This appeal should have not been listed until the above rules were fully satisfied. I hope for the future, these rules will be better implemented to avoid the situation in this appeal, where the grounds of appeal have been amended so often; even on the day of the hearing further amendment were being sought by the appellant, to be considered."

- [19] The principles just referred to in the cases above, is there to ensure for the efficient and effective discharge of the court's duties in deciding appeals that come before it. It also serves to ensure that issues and submissions that are urged before the court are first notified to all the parties and second precisely identify the issues and supporting submissions and is not a scatter-gun approach. But this is sadly missing from the submissions filed on behalf of the appellants in this appeal.

Assessment of Grounds of Appeal

- [20] Before the full court there were 4 grounds of appeal urged by the appellants. Grounds 1 and 2 were submitted during the Leave to Appeal Hearing before the single judge. Grounds 3 and 4 are new and have not been raised before. As a result, the court disregarded it as frivolous and vexatious because it has been introduced in a manner without due regard to the rules of the court.

- [21] Turning to consider grounds 1 and 2 and a major defect is obvious. The grounds have been framed in very general terms and both of them allege shortcomings in the summing-up. The written submissions in support of the grounds of appeal, offer no help in referring the court to the specific passage in the trial judges summing-up that is complained about. A broad claim is urged on the Court without supporting grounds in the submissions. The precise claim must be clearly stated, but this was not pointed out.
- [22] As was observed by the Single Judge in the court ruling at the Leave to Appeal dated 24 September 2020.

“The appellate court cannot and should not be expected to go on a voyage of discovery to find out what purported errors on the part of the trial judge have given rise to an appellant’s grounds of appeal or the factual or legal foundations thereof. As stated in Silatolu v The State [2006] FJCA 13; AAU0024.2003S (10 March 2006) it would not be an unfair description to suggest that the counsel has used a ‘scatter gun’ approach in drafting the grounds of appeal and not substantiated them with sufficient details at least in the written submissions.”

- [23] In the case of Rokodreu v State [2016] FJCA 102; AAU0139.2014 (5 August 2016) the Court of Appeal stated as follows.

[4] I have read the appellant’s written submissions. In his submission, apart from reciting case law, counsel for the appellant made no submissions on the grounds of appeal. The grounds of appeal are vague and lack details of the alleged errors. The Notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.

[5] In the present case, the State was not able to effectively respond to the grounds because they were vague and lack details. It appears that the alleged errors concern directions in the summing up. A copy of the summing up, the judgment and the sentencing remarks were made available to the appellant after the conclusion of the trial. In these circumstances, the appellant cannot be excused for not providing better particulars of the alleged complaints in the summing up. Without reasonable details of the alleged errors, this Court cannot assess whether this appeal is arguable.’

- [24] The grounds of appeal will now be considered with the governing legal principles enumerated in the above case law and the relevant evidence raised on specific issues alleged in the grounds of appeal.

Ground 1 – Prosecution did not Prove Case beyond Reasonable doubt

- [25] The Appellant's submission on this ground, alleges that there were serious doubts in the evidence adduced at the trial and the trial judge erred in not giving the benefit of the doubt in favour of the appellant.
- [26] In the written submission made by Appellant there are 3 bases of the claim they are making to support this ground. The first related to the dates in which the complainant's statement to the police was recorded (page 124 Copy Record) and the second is the date of the caution interview of the appellant recorded on 6 January 2015 (Page 293-297 Copy Record). It is not made clear what is the significance of these two dates and how it creates doubt in the prosecution case. This issue was not raised during the trial by the Appellant's counsel either for the trial judge to address in the summing up or in their cross examination of the witnesses to highlight their concern.
- [27] The third relate to the claim that the evidence of recent complaint was hearsay and that the trial judge erred. There were, no precise reference to trial evidence in support this claim also.
- [28] It is not possible for the court to precisely understand and make a determination of the issues and grounds of appeal submitted because of the muddled and confused way in which they are drafted. The ground is has no merit and is dismissed.

Ground 2 – Inadequate Directions to Assessors on Inconsistent Evidence

- [29] The appellant claims that since the dates of the offence for count 3 (10 October 2014) and count 4 (18 October 2014) were not detailed in the complainant's Police Statement, she was lying about those dates in court. The significance of this claim is not obvious because as a matter of law, witness statements to the police is not evidence. This is to support the claim of inconsistent statement alleged. The issue raised were not canvassed during the trial and this is the first time it has been brought before the court

[30] In Senibua v State [2022] FJCA 26, AAU 0079/2016 (26 May) the Court said:

[29] *This court has on many occasions emphasized the importance of considering as to whether the witness has been afforded an opportunity of explaining the reasons for any inconsistencies.*

[30] *It is very rarely that one does not find inconsistencies in evidence given by witnesses and in the case of Bharwada Bhoginbhai Hirjibhai v State of Gujarat (1983) SCC 217, which has often been cited by this court, the Supreme Court of India explained in lucid terms, why inconsistencies or discrepancies as they may be called, occur and their effect. Thakkar J stated: 'We do not consider it appropriate or permissible to enter upon a reappraisal or reappraisal of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious' and went on to identify them. He said 'The powers of observation differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder'. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment'.*

Having said so, he held that "Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important 'probabilities-factor' echoes in favour of the version narrated by the witnesses' (at pages 222 and 223).

[31] In Koroitamana v The State [2018] FJCA 89; AAU0119.2013 (5 June 2008) Suresh Chandra J opined; "as stated in Abhaya Raj's case (*supra*) the exact manner in which the accused acted need not be stated by the victim who had been the subject of the offence. There may sometimes be minor variations in the manner in which the victim describes the incident, but the question is whether such variation affects the credibility of the witness".

[32] The Supreme Court in the case of Swadesh Kumar Singh v The State [2006] FJSC 15 discussed in detail the consequence of inconsistencies between previous sworn statements and evidence given in court and went on to provide guidelines to ensure that trial judges deal adequately on matters pertaining to inconsistencies in their summing up. Relying on this case as well as several other English authorities, the Supreme Court in Praveen Ram v The State [2012] FJSC 12; CAV0001.2011 (09 May 2012) dealt with the approach to be taken when inconsistencies exist between a statement given to the police and evidence given in court.

[28] None of the inconsistencies or omission now claimed by the appellant as the basis of this ground of appeal was raised in cross-examination by counsel during the trial. It cannot now be raised at the appeal stage.

- [31] Applying the principles of law enunciated in the above cases, this ground of appeal must be dismissed because it was not raised at the trial so as to afford an opportunity to the witness if need be, to explain the inconsistencies during cross-examination.

Ground 3 – Failure to Give direction to Assessors of defence evidence was Miscarriage of Justice

- [32] This is a frivolous ground submitted without any supporting submission or reference to the legal principles that the trial judge had erred in following or not following. This ground has no merit and is dismissed.

Ground 4 – No Warning to Assessors that Accused not Giving Evidence at His trial is his right and no negative inference should be drawn from that

- [33] This ground is without merit. The trial judge at paragraph 69 of his summing up (Page 120 Copy Record) addressed this issue directly, in these terms:

“69. The Accused opted to remain silent. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.”

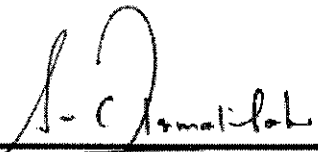
[34] In conclusion all the grounds advanced by the Appellant against his conviction have been reviewed and they are meritless. They are dismissed.

Qetaki, JA

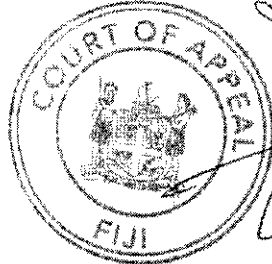
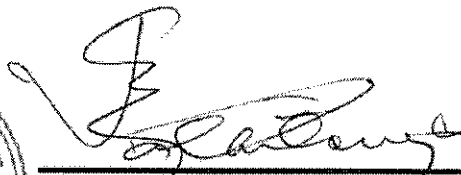
[35] I concur with the judgment, its reasoning and conclusion.

Order

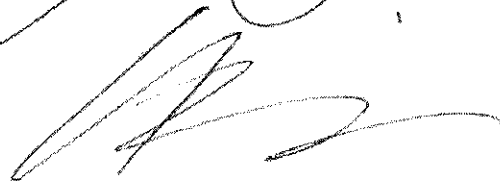
1. *Leave to appeal against conviction is refused.*
2. *Appeal is dismissed.*



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

The Hon. Mr. Justice Isikeli Mataitoga
JUSTICE OF APPEAL



The Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

SOLICITORS:

Iqbal Khan & Associates, Lautoka, for the Appellant
Office of the Director of Public Prosecutions, Suva, for the Respondent