

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 028 OF 2017
Lautoka High Court No. HAC 155 OF 2013

BETWEEN : **VISHAL KRISHNA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Prematilaka, RJA
Mataitoga, JA
Qetaki, JA

Counsel: In Person - Appellant
Ms J. Fatiaki (Office of the DPP) for the Respondent

Date of Hearing : 01 May, 2023

Date of Judgement : 25 May, 2023

JUDGEMENT

Prematilaka, RJA

[1] I have read in draft the judgment of my brother Mataitoga JA and agree that the finding against conviction and sentence should be dismissed.

Mataitoga, JA

[2] The appellant had been charged in the High Court at Lautoka on one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009, two counts of rape contrary to section 207(1) & (2) and 207(1) & (2) (b) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1)(a) of the Crimes Act, 2009 committed at Sigatoka in the Western Division between 01 April 2012 and 01 May 2013.

[3] The information read as follows.

First Count

Indecent Assault: Contrary to section 212(1) of the Crimes Decree 44 of 2009.

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, unlawfully and indecently assaulted A.A by caressing her breasts.

Second Count

Rape: Contrary to section 207(1) and (2) of the Crimes Decree 44 of 2009.

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, inserted his penis into the vagina of A.A without her consent.

Third Count

Sexual Assault: Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, unlawfully and indecently assaulted A.A by rubbing his penis on her vagina.

Fourth Count

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

Particulars of Offence

Vishal Krishna between the 1st of April 2012 and the 1st of May 2013 at Sigatoka in the Western Division, inserted his fingers into the vagina A.A without her consent

- [4] The trial judge in sentencing the appellant summarized the facts as follows.

'The prosecution alleges that the accused has committed these four offences on the victim between 1st day of April 2012 and 1st day of May 2013. In respect of the first count, the prosecution alleges that the accused touched the breast of the victim while she was revising her notes in her bed room. In respect of the second and third count, it has been alleged that that accused came behind the victim while she was cleaning the bed room of her aunty and pushed her on to the bed. He then unbuttoned her top and lifted her skirt. The accused then indecently rubbed his penis on her vagina. He then inserted his penis into the vagina of the victim without her consent. In respect of the fourth count, the prosecution alleges that the accused came to the victim while she was sleeping in her room in the night and inserted his finger into her vagina.

The accused in his evidence denies these all allegations and states that he never done such things to the victim.'

- [5] After the case was summed-up by the trial judge on 23 August 2016, the assessors returned a unanimous verdict of guilty on all four counts. The learned trial judge agreed with the unanimous opinion of the assessors in his judgment delivered on 24 August 2016, convicting the appellant on all 4 counts charged. He sentenced the appellant on 25 August 2016 to 03 years of imprisonment on the first count, 15 years of imprisonment on the second count, 06 years of imprisonment on the third count and 13 years of imprisonment on the fourth count (all sentences to run concurrently) with a non-parole period of 14 years.

Before Judge Alone

[6] This case came before this Court as a Leave Application pursuant to section 21 of the Court of Appeal Act Cap12, before a Justice of Appeal alone. The appellant submitted grounds for his leave to appeal against conviction and sentence on 19 September 2016. The Legal Aid Commission had filed an amended notice of application for leave to appeal against conviction and sentence and written submissions on 15 October 2020. The State had tendered its written submissions on 26 November 2020.

[7] The statutory basis of the Leave to appeal application was canvassed and relevant Fiji case law discussed. The court referred to section 21(1)(b) and (c) of the Court of Appeal Act, and confirmed that the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal was set out by the Court of Appeal in **Chand v. State** AAU0035 of 2007: 19 September 2008 [2008] FJCA 53 and it is as follows

'To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal'.

[8] Before the Judge alone, the appellant urged the following 4 grounds against conviction and 2 grounds against sentence:

Against Conviction

Ground 1

The Learned Trial Judge may have erred in law and in fact when providing an inadequate direction on the issue of prior inconsistent statement which was fundamental to the credibility and reliability of the witness.

Ground 2

The Learned Trial Judge may have erred in law and fact in not cautioning the Assessors that the medical report was inconclusive.

Ground 3

The Learned Trial Judge may have erred in law and in fact to convict the Appellant when the conviction was unreasonable and cannot be supported by the evidence

when there was a belatedness in reporting the matter thus gravely and fundamentally tainted the complaint as a credible and reliable witness.

Ground 4

That Learned Trial Judge may have erred in law and in fact to convict the Appellant when the conviction was unreasonable thereby causing a grave miscarriage of justice to find that complainant's evidence and explanation given for the inconsistent nature of the evidence and the statement made to the police did not adversely affect the credibility of the evidence given by the victim.

Against Sentence

Ground 1

That the Learned Trial Judge may have erred in fact and law to allow extraneous or irrelevant matters to guide or affect him when choosing the starting point.

Ground 2

That the Learned Trial Judge may have erred in fact and law by failing to take into account some relevant considerations to decrease the sentence.

[9] The main task at the leave stage is to differentiate the arguable grounds of appeal from the non-arguable grounds of appeal. However, **Chand** does not state how to distinguish an arguable ground from a non-arguable ground. Ordinarily, an arguable ground should mean a ground which is capable of being argued plausibly.

[10] In **S v. Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa outlined the following approach in determining whether leave to appeal by the high court should have been granted or not:

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)

[11] Applying the above guiding principles to the evidence in this case, the judge was not persuaded that the grounds of appeal against conviction, urged by the appellant were valid and dismiss them. In addition, taking the evidence led during the trial in totality the verdict was not unreasonable and there was evidence before the court that would support the guilty verdict.

Against Sentence

[12] There were two grounds submitted in support of the appeal against sentence. They were:

Ground 1

That the Learned Trial Judge may have erred in fact and law to allow extraneous or irrelevant matters to guide or affect him when choosing the starting point.

Ground 2

That the Learned Trial Judge may have erred in fact and law by failing to take into account some relevant considerations to decrease the sentence.

[13] On the appeal against sentence, the appellant's complaints were that the trial judge had taken extraneous matters and did not consider relevant matters into account when imposing the sentences. The extraneous matters complained of relate to factors the judge took into consideration when picking the starting point of sentence.

[14] The Justice of Appeal who heard the Leave Appeal hearing followed, the correct guidelines for leave to appeal, which are well settled see: Naisua v State CAV0010 of 2013; 20 November 2013 [2013] FJSC 14; Kim Nam Bae v The State Criminal Appeal No.AAU0015 and Chirk King Yam v The State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case.

[15] The aforesaid guidelines are as follows.

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration.

[16] Having heard the submissions of the appellant on all the grounds submitted against conviction and sentence, and having assessed them in light of the evidence at the trial, the Justice of Appeal issued his ruling dated 18 February 2021, in which he refused leave to appeal against conviction and sentence.

Before the Full Court of Appeal

[17] At the start of the hearing of the appellant's case on 1 May 2023, the following documents were submitted to the Court Registry:

(i) A Renewed Leave Application Notice dated 14 October 2021;

(ii) Notice of Application for Leave to Appeal

(iii) Application for additional grounds [not urged before the sole Judge]

[18] It should be noted that the Appellants grounds of appeal that were initially filed in support of the renewed leave application were the same as those advanced for his leave to appeal applications. The court sought clarifications from the appellant on what exactly are the grounds he is urging the court to consider on this renewed appeal. His amended grounds of appeal against conviction had 4 grounds which revolved around prior inconsistent statements or omissions which he alleges affected the credibility and truthfulness of the witnesses, making the finding of the judge during the trial unreliable.

[19] After the Court sought clarifications from the appellant, only one ground of appeal was confirmed:

"The single Judge of the Court of Appeal had failed to consider that the trial judge did erréd in law and fact when he failed to test the truthfulness of the witnesses prior statement to the police which was materially inconsistent to the evidence in court affecting the credibility of the witnesses.

- [20] The appellant in his oral submissions referred to alleged inconsistencies during the trial in terms of the complainant evidence, as well as the second prosecution witness. These alleged inconsistencies were not articulated nor were references made by the appellant to the parts of the trial judges summing up in the court record that he claim the error of fact and/or law occurred. In this regard the court is grateful to learned counsel for the respondent in identifying the relevant passages in the trial judges summing up that were relevant to the appellant's ground of appeal. These are set out below.

The Alleged Inconsistencies

- [21] The following inconsistencies were highlighted during the trial:

"PW1: Archal Atishma Krishma

(i) Threaten to Kill

Judge: He didn't threaten you that he will kill you?

A: No he didn't threaten me in killing.

Q: So you want to say that, that particular line is incorrect?

A: Yes.

Q: And it was only the police who put that down in your statement?

A: Yes.

(ii) Differences in dates regarding 2nd and 3rd Counts

Q: and then the third incident, this was according to you when your uncle Vishal rubbed his penis on your vagina and inserted his penis and ejaculated thereafter?

A: Yes.

...

Q: *in your statement with the police you mentioned that, that was what happened in April but before this Honorable Court you mentioned that this took place after April, months after April what can you say about that.*

A: *It took place months after April but here the officer might have made a mistake because I mentioned to the officer that my uncle he kissed me on April and even aunty asked me I also told her the same thing.*

(iii) Difference in what was 'worn'

Q: *in evidence in chief when you was examined by my learned friend you mentioned that your uncle had his own on*

A: *yes maam he had his own on*

Q: *you mentioned that your uncle only had his own around himself but in your statement which you just read you mentioned that he put his clothes on*

A: *I told the officer about the towel and she mentioned clothes here I have no idea about that once she wrote the statement I just signed I never read it again I just signed at the bottom*

(iv) Omissions

Q: *the first incident that you alleged to have happened in the month of April, the 2nd incident where you mentioned that this happened after the month of April whereby the victim touched your breast and body and again the 5th incident where you alleged your uncle Vishal was on top of you whilst you were sleeping at the lounge while everyone was sleeping, all of these is not mentioned in your statement mentioned to the police so I put to you that all allegation that you have against your uncle Vishal is not true*

A: *But I have mentioned it to the police*

Q: *But this are not recorded in the statement*

A: *I have no idea about that*

PW2: Amrita Vandana Naidu

(i) Difference in dates

Q: *and that happened around February 2013 correct*

A: *yes*

Q: *this in your statement to police you mentioned that this happened around April 2012 which was last year from the date your statement was taken is that correct*

A: *yes*

Q: *I put to you that what you alleged that happened in February 2013 is not true*

A: *Not it is not true I have a confusion about the date and time but what I saw is true*

[22] The Trial Judge in addressing the Assessors and himself during his Summing Up on the inconsistent nature of the prosecution witnesses evidence stated as follows:

"The victim said that the accused did not threaten her that he will kill her if she informed anyone else. The victim said that the statement made to the police that extent is not correct. The victim further said that the incident of sexual intercourse took place sometimes after the month of April. She has told the police officer who recorded her statement about it, but it has been written down as it happened in the month of April. She had told the police about all those incidents that she stated in her evidence, but the three of such incidents have not been recorded in her statement. She has no idea why it was not recorded by the police."

Judges Directions

[23] This criticism of the trial judge's directions on three inconsistencies which are in fact omissions and his decision to convict the appellant in the light of those omissions, are set out in paragraph 69 of the summing-up.

[69] The learned counsel for the defence cross examined the victim and Amrita about the inconsistent nature of their respective statements made to the police and their evidence given in court. Three of the incidents that the victim alleged in her evidence has not been recorded in her statement. They are the kissing of her lips by the accused, the touching of her breast by the accused while she was revising her notes in her bed room and the incident that he came on top of her and forced her to have sex while she was sleeping on the floor at the lounge. The victim in her evidence stated that she told the police everything, but they have not recorded them in the statement. Amrita has stated in her statement made to the police that the incident of accused coming on top of the victim was taken place sometimes in April last year. She made her police statement on the 15th of July

2013, Amrita in her evidence stated that she was confused with the time, but that incident actually took place."

[24] When issues pertaining to inconsistent statements are raised, a trial judge is required to direct and guide the assessors on how to act on the inconsistencies or contradictions or omissions. (*vide Prasad v State* [2017] FJCA 112; AAU105 of 2013 (14 September 2017).

[25] The Court of Appeal examined the law relating to omissions, contradictions and discrepancies in *Nadim v State* AAU0080 of 2011: 2 October 2015 [2015] FJCA 130 and stated:

'[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.'

[26] In considering whether the inconsistencies alleged in this case are such that it goes to the heart of the matter and shake the basic version of the witness statement. I think not. In this case the inconsistent omissions cover peripheral matters only, and not undermine the reliability of the evidence of the complainant. The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* [1983] AIR 753, 1983 SCR (3) 280)

'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. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3). It is unrealistic to expect a witness to be a human tape recorder;'

[27] In Abourizk v State AAU0054 of 2016:7 June 2019 [2019] FJCA 98 the Court of Appeal once again quoted from the following judgments of the Indian Supreme Court in relation to the importance attached to discrepancies, deficiencies, drawbacks, embellishments or improvements and other infirmities in evaluating the evidence.

[107] State of UP v. M K Anthony (1985) 1 SCC 505

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'

[108] State of UP v. Naresh (2011) 4 SCC 324

'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.'

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 v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280)

[28] The trial judge's directions on this complaint of the appellant, are at paragraphs 69 to 72 of the summing up. At Paragraphs 70 and 72 of the summing up, it states:

[70] I now explain you the purpose of considering the previously made statement of a witness with his or her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the witness is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents. The evidence is what the witness testified in court on oath.

[72] If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

[29] Having assessed the directions given by the trial judge on the issue of omissions, against the relevant case law espoused in Prasad v State (supra) on the guidelines and in Nadim v State (supra) regarding the nature of the directions to be given by trial judges when there are claims of inconsistent statements in the form of omissions, I conclude that the directions in the summing up, is adequate and as it does not undermine the reliability of the complainant's evidence adduced at the trial, which was accepted by the assessor and the trial judge.

[30] The Supreme Court observation in Sharma v State [2017] FJSC 5; CAV 0031.2016 is also salient here.

'..In addition the trial judge would have had the benefit of observing the demeanor and deportment of the witnesses before deciding to act on the evidence. As such I am of the view that this court ought not to disturb such findings unless the petitioner is capable of establishing a grave miscarriage of justice had occurred.'

[31] On the basis of the assessment I have made above, I find that the appellant's case against conviction have no merit and is dismissed.

Against Sentence

[32] On the appeal against sentence the following grounds were urged by the appellant:

Ground 1

That the Learned Trial Judge may have erred in fact and law to allow extraneous or irrelevant matters to guide or affect him when choosing the starting point.

Ground 2

That the Learned Trial Judge may have erred in fact and law by failing to take into account some relevant considerations to decrease the sentence.

[33] The appellant had indicated that he wanted to withdraw his appeal against sentence at the start of the hearing of the appeal, but changed his mind. He did not provide any elaboration on what exactly is the nature of his complaint against the sentence imposed by the trial judge in the High Court. He stated that he relies on the submission made at the Leave to Appeal stage.

[34] But some indications may be gleaned from the submission made on behalf the appellant by the Legal Aid Commission at the Leave stage. There are 2 objections raised about the sentence without reference to why it is an error of law or what irrelevant factors were considered by the trial judge when computing the sentence against the appellant. The two grounds are:

(i) what error as regards the principle of sentencing was the trial judge acted upon?

(ii) the trial judge only reduced by 1 year, for the fact that the appellant was a first offender.

[35] In considering whether the appellant have a reasonable prospect of success on merits in the sentence ground of appeal, the appellant has to show that the trial judge has committed a sentencing error within the legally recognised parameters. Appellate courts will interfere with a sentence if it is demonstrated that the trial Judge made one of the following errors;

(i) *Acted upon a wrong principle:*

(ii) *Allowed extraneous or irrelevant matters to guide or affect him:*

(iii) *Mistook the facts;*

(iv) *Failed to take into account some relevant consideration.*

(Vide Naisua v State CAV0010 of 2013; 20 November 2013 [2013] FJSC 14 following House v The King [1936] HCA 40; (1936) 55 CLR 499 as adopted in Bae v State AAU0015u of 98s; 26 February 1999 [1999] FJCA 21).

[36] Before sentence was passed, the following mitigating factors were submitted for the trial judge's consideration in sentencing the appellant:

- (i) 40 years old and married with 7 children;
- (ii) Operates a business fixing gear boxes and undertake temporary work as Helping Hand;
- (iii) First Offender;
- (iv) Time in remand to be deducted

[37] In reviewing the appellant's submission, his complaint is that in choosing the starting point the trial judge have included aggravating factors in determining the starting point of the sentence. In particular the appellant claims that the 'breach of trust' aggravating factor was used by the trial judge to select the starting point. Is this claim correct?

[38] Turning to paragraph 16 of the sentence ruling at page 7, the trial judge stated:

"Having considered the seriousness of the offence, the purpose of sentencing, the level of harm and the degree of culpability in respect of the offence of rape as charged under count two, it is appropriate to select the starting point from the middle range of the tariff limit. I accordingly select thirteen [13] years as the starting point."

[39] It is clear from the above passage that the 'breach of trust' was **not a factor** used to select the starting point of the sentence. It was used as aggravating factors after the starting point of 13 years was selected. This ground has no merit. It is dismissed.

[40] The second ground advanced was that the 1 year reduction for good character for someone who is a first offender at 40 years of age was low. This reduction of only 1 year for good character after 40 years of living, is not an error of law. While this submission has an artificial attraction to it, it should be noted that the appellant was found guilty of two counts of Rape, contrary to section 207(1) and (2) of the Crimes Act 2009 and two other counts, namely, indecent assault contrary to section 212(1) of the Crimes Act 2009 and sexual assault contrary to section 210 (1) of the Crimes Act 2009.

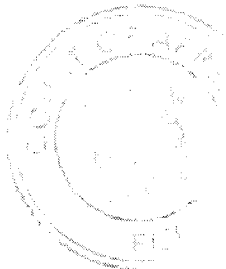
[41] This ground has no merit and is dismissed.

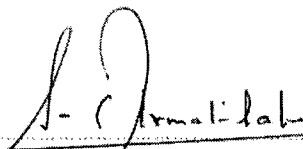
Qetaki, JA


[42] I have read in draft the judgment of my brother Mataitoga JA and agree that the finding against conviction and sentence should be dismissed.


ORDERS:

1. Appeal is dismissed
2. Conviction and sentence affirmed.




Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL


Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL


Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL