

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 073 OF 2023

BETWEEN: **MOHAMMED RIYAZ**

Appellant 1

VIKASHNI KAJAL KUMAR

Appellant 2

AND: **THE STATE**

Respondent

Coram: **Mataitoga, RJA**

Counsel: **In-Person for the Appellants**
Ram P for the Respondent

Date of Hearing: **16 July 2024**

Date of Ruling: **19 August 2024**

RULING

1. The first Appellant [Riyaz Khan] was charged as per the Amended Information dated 17th April 2023 with 2 counts of Rape contrary to section 207(1) and 2) (a) of the Crimes Act 2009. The second appellant [Vikashni Kajal Kumar] was jointly charged with the first appellant on 1 count Sexual Assault contrary to section 210 (1)(b)(ii) of the Crimes Act 2009 and 1 count of Domestic Trafficking in Children, contrary to section 117(1)(b)(c) (i) of the Crimes Act 2009.

COUNT ONE

Statement of Offence

RAPE: contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED RIYAZ, between the 1st day of January 2016 and the 31st day December 2016, at Koronivia, in Nausori, in the Eastern Division, had carnal knowledge of **NB**, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MOHAMMED RIYAZ, between the 1st day of January 2018 and the 31st day December 2018, at Koronivia, in Nausori, in the Eastern Division, had carnal knowledge of **NB SHAHEEN BIBI**, without her consent.

COUNT THREE

Statement of Offence

SEXUAL ASSAULT: contrary to Section 210 (1) (b) (ii) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED RIYAZ and VIKASHNI KAJAL KUMAR, between the 1st day of January 2018 and the 31st day December 2018, at Koronivia, in Nausori, in the Eastern Division, procured **NB**, to witness **MOHAMMED RIYAZ and VIKASHNI KAJAL KUMAR**, having sex.

COUNT FOUR

Statement of Offence

DOMESTIC TRAFFICKING IN CHILDREN: contrary to Section 117 (1) (a) and (b) and (c) (i) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED RIYAZ and VIKASHNI KAJAL KUMAR, between the 1st day of January 2018 and the 31st day December 2018, at Koronivia, in Nausori, in the Eastern Division, facilitated the transportation of **NB**, a person under the age of 18 years, from Koronivia in Nausori to Siri's Apartment in Nausori, with intent that **NB** be used to provide sexual services to another at Siri's Apartment in Nausori.

2. Both appellants pleaded not guilty and they were represented by counsel during their trial. The trial commenced and the Prosecution led in evidence six witnesses. PW1 Janifa Bibi (mother of victim), PW2 NB, PW3 Doctor Guna Goundar, PW4 Doctor Nikotimo Bakani, PW5 Doctor Shelvin Kapoor and PW6 Mohammed Haniff and closed the prosecution case. At the end of the prosecution case, the trial judge found a case to answer. The defence was called for and their rights were explained to each appellant. Both the appellants gave evidence on their behalf and the following witnesses were called on behalf of both the Accused as witnesses for the defence. They are DW3 Nivita Narayan, DW4 Anjela Devi and DW5 Zohra Begum.
3. Upon the close of the Defence, both parties were granted time to obtain the transcript and to file their closing submissions in the written form. Written submissions were filed on 12th May 2023 and the judgment was delivered on 19 May 2023.
4. The first appellant was found not guilty on the Rape charges set out in counts 1 and 2 of the indictment. Both appellants were found not guilty on count 3 alleging Sexual Assault. However, both appellants were found guilty of Domestic Trafficking in Children in count 4 of the indictment.
5. The sentence¹ passed on the appellants on 29 June 2023, were as follows:

“20. Accordingly, the actual sentence is as follows:

(i) 1st Accused Mohammed Riyaz a period of 13 years and 10 months and 15 days imprisonment with a non-parole period of 9 years and 10 months and 15 days.

(ii) 2nd Accused Vikashni Kajal Kumar a period of 13 years and 11 months imprisonment with a non-parole period of 9 years and 11 months.”

¹ State v Riyaz & Anor [2023] FJHC 431 (HAC 092 of 2022)

The Appeal

6. The appellant's filed Notice to adduce fresh evidence. The appellant's will need to address this application to the full court because the single justice of appeal do not have the power to grant leave to introduce fresh evidence under section 35(1) of the Court of Appeal Act 2009.
7. The first Appellant submitted Notice of Appeal dated 10 July 2023 for both appellants. This is a timely appeal. From the two grounds set out in the initial Notice of Appeal it is clear that the appeal is against conviction only. They are:
 - (i) The trial judge erred in law and fact in his own understanding believed and accepted the agreed facts of the case and not by law, as shown in paragraph 11 of the judgement.
 - (ii) The trial judge erred in law and fact in his own understanding accepted the story of the complainant which she stated in the court of law giving evidence which were all lie and fabricated;
8. The Notice of Appeal stated that the appellants will seek to add or amend the grounds of appeal.

Additional Ground of Appeal & Submissions

9. On 18 February 2024, the appellants filed in court Consolidated Grounds of Appeal. In this leave hearing the Consolidated Grounds of Appeal are the ones that will be assessed to determine whether leave to appeal should be granted or not. At the hearing the first appellant Mohammed Riyaz speaking for both appellants, confirmed that they are relying on the consolidated grounds for the leave to appeal application filed on 18 February 2024.
10. The additional grounds submitted are:
 - (i) The trial judge erred in fact and law by failing to determine the correctness of the Child Trafficking or Domestic Trafficking in Children evidence in totality, to also consider and evaluate the reasonableness on, to, of the defence evidence that was denied focusing and concentrating entirely on the circumstantial

evidence from the complainant perspective, thus violating the appellant's constitutional right to fair trial;

- (ii) The trial judge erred in fact and law by failing to correctly determine and evaluate the correctness and reasonable motive of the NB allegations considering NB's July 2018 to September 2018 sexual activities.

Relevant Legal Principles

11. The grounds of appeal above alleges errors of law and fact by the trial judge, therefore in terms of relevant provision of the Court of Appeal Act 2009, section 21 (1) (b) is relevant. Under this provision leave of the court is required to appeal.
12. For a timely appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success': *Caucau v State*², *Navuki v State*³ and *Sadrugu v The State*⁴.

Assessment of the Grounds

13. Ground 1 [at paragraph 6(i)] alleges that the trial judge misunderstood the law applicable to Agreed Facts and in this case he just believed and accepted the Agreed Facts. This ground is confused and misconceived by the appellants. Paragraph 11 of the Judgement simply restated the Agreed Facts between the parties and the reference to section 135 of the Criminal Procedure Act 2009 (CPA) is simply stating the legal basis under which Agreed Facts are accepted by the court and that such admission shall be sufficient proof of the fact or element agreed.
14. The trial judge did not make an error law and the facts. This ground has no merit.
15. Ground 2 [at paragraph 6(ii)] alleges that the trial judge erred in believing the evidence of the complainant because they were lies and fabrication. This ground misunderstands the role of a trial judge, for example that in accepting the evidence of the complainant or some part of it does not mean that he necessarily accepts the lie or fabrication.

² [2018] FJCA 171 (AAU 029 of 2016)

³ [2018] FJCA 172 (AAU

⁴ [2019] FJCA 87 (AAU 057 of 2015)

16. An example of the kind of evidence assessment a trial judge undertakes in this case is at paragraphs 91 to 93 quoted below:

91. *“Now I will consider the consistency of her evidence. No doubt her statements were belated and has been made in February 2018 and March 2020. When she testified in 2023 several omissions and contradiction were elicited. Let me consider the effect of these contradictions and omissions. She said of a “lie detector test” threat made by the mother as being the reason to disclose the allegations against the father. This was not in her statement. When she is taken to the police she will narrate the incidents and unless specifically asked it is very unlikely that the reason that prompted her to disclose will be stated. This was something that transpired during cross-examination. Therefore, certainly not a fabrication. Thus, I do not consider this as a significant omission.*

92. *In evidence she narrated that Shane Nolan came to the house and had sex with her for the first time at home during mid-day. This incident is not in her statement and is an omission. No doubt this is a relevant omission. However, when a victim had suffered sexual abuse for a long period and is reluctantly disclosing the same it is natural for her to have some mental block in making a full disclosure to the police. However, when giving evidence in court in a much more relaxed environment with probing it is probable that she would disclose more incidents and details. That by itself will not make her evidence false and unreliable.*

93. *The most significant contradiction that was elicited is her first statement made on the 25th of November, 2018. She had alleged sexual intercourse with the father and appears to have narrated a certain subsequent event. However, within a few days she changes and retracts and admits the first statement was false. It is in evidence that the allegation made was one of sexual intercourse with the first Accused. It is admitted that NB has in that statement said it was with consent. Therefore, this statement as revealed in evidence contains three things. Firstly, the fact of intercourse with the father, certain events of that day and then consent. However, as to exactly what the false accession in that was not elicited either by the prosecution or the defence. The bottom line is as far as “consent” is concerned there is certainly an inconsistency which remains unclarified. Subject to this except for some inconsistencies by large her evidence remains consistent. When a victim of this nature narrates an incident several years after it is natural for there to be some inconsistencies.*

17. It is plain from the above reference that the trial judge explained the basis of accepting the evidence of the Complainant that this ground has no merit.
18. Ground 3 [at paragraph 9(i)] alleges that the trial judge erred in law and fact in that he did not consider the evidence of the defence and decided the case solely of the complainant evidence. It may seem that way to the appellants because in this trial NB’s evidence is critical to the success of the prosecution case and the trial judge as expected

carefully analyse all aspects of the NB's evidence. The appellants are not required to prove anything in law.

19. In doing that the trial judge is being fair to the appellants not unfair because he is seeking to ensure that the standard of proof is met by the prosecution. In this case, three out four counts of charges brought against the appellant were discharged by the court because in evaluating the evidence it fell short of the required standard of proof.
20. Ground 4 [at paragraph 9(ii)] alleges that the trial judge failed to correctly determine and evaluate the correctness and reasonable motives of the NB allegations. This ground is frivolous to say the least.
21. In support of this ground, the appellants submitted a series of suggestion relating the evidence of NB's mother as being fabrication, sexual activities of NB etc. The trial judge addressed these at paragraph 94-96 of the judgement stated:

94. The defence suggested that this was a false fabrication instigated by her mother. The defence is that of a fabrication and a total denial. It was also suggested that she is fabricating and making a false alrelying to sexual activities of legation due the influence of the mother. The position suggested by the defence is that these are false allegations and things that did not happen. It was suggested that the fabrication was by Janifa to take revenge. Let me consider this suggestion. In the normal course of events if Janifa wanted to maliciously fabricate it is unusual for her to wait for over one years after NB return to her. Then in the first instance in February 2019 there is no allegation made against Riyaz of rape. If she wanted to falsely fabricate it is highly improbable that she would create a fictitious story involving Nolan who is a complete outsider. Further, it is not normal and natural to fabricate and extremely complicated story running into several years in this form. Therefore, the allegation of fabrication is not probable and cannot be in this instance.

95. In these circumstances it is extremely unrealistic and highly improbable that an allegation of this nature will be randomly fabricated against the accused and a third-party Nolan in this form and in this manner. Thus, this suggestion is baseless.

96. In the above circumstances I am satisfied that NB is a truthful and credible witness. Her evidence is reliable. As for PW1 Janifa she appeared to be somewhat agitated at certain times but she did not add or exaggerate her evidence. She just said what she knows. I did not find any significant omission or contradiction that affect her credibility. Overall I accept that her to be truthful witness. As for the other prosecution witness they merely narrated what they knew and had no reason to utter anything false. Accordingly, I accept the prosecution evidence as being reliable and truthful.

22. The submissions from the appellants on this ground is meritless.
23. In light of the above assessment of the grounds of leave to appeal against the judgements of this case in the High Court, all the four grounds were meritless.

ORDER:

1. Leave to appeal on all grounds submitted is refused.




Isikeli U Mataitoga
RESIDENT JUSTICE OF APPEAL