

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

CRIMINAL APPEAL NO. AAU 059 of 2022

BETWEEN : 1. SHAFIL SHIMRAZ ALI  
2. MOHAMMED JAVED  
3. MOHAMMED NAUSHAD

*Appellants*

AND : THE STATE

*Respondent*

Coram : Mataitoga, RJA

Counsel : Appellants in Person  
: Semisi K for the Respondent

Date of Hearing : 19 July 2024

Date of Ruling : 15 October 2024

RULING

1. The appellants were charged by the Director of Public Prosecutions with the following offences:

FIRST COUNT

*Statement of Offence*

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Act.*

**Particulars of Offence**

**SHAFIL SHIMRAAZ ALI**, on the 23<sup>rd</sup> day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, without her consent.

**SECOND COUNT**

***Statement of Offence***

**RAPE**: Contrary to Section 207 (1) and (2) (b) of the Crimes Act.

**Particulars of Offence**

**SHAFIL SHIMRAAZ ALI**, on the 23<sup>rd</sup> day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, with his finger without her consent.

**THIRD COUNT**

***Statement of Offence***

**RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Act.

**Particulars of Offence**

**MOHAMMED JAVED**, on the 23<sup>rd</sup> day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, without her consent.

**FOURTH COUNT**

***Statement of Offence***

**RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Act.

**Particulars of Offence**

**MOHAMMED NAUSHAD**, on the 23<sup>rd</sup> day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, without her consent.

2. The three appellants pleaded not guilty to the respective charges they were charged with. The trial was held over 8 days at the Suva High Court. At the trial the appellants were represented by counsel.
3. The appellants were found guilty of the charges laid against each of them and were convicted on 20 April 2022. They were sentenced as follows:
  - i) Appellant 1 [Shafil Shimraz ALI] 16 years and 8 months imprisonment, non-parole period of 14 years and 8 months imprisonment;
  - ii) Appellant 2 [Mohammed JAVED] 14 years and 8 months imprisonment with a non-parole period of 12 years and 8 months imprisonment;
  - iii) Appellant 3 [Mohammed NAUSHAD] 14 years imprisonment and 8 months with non-parole period of 12 years 8 months imprisonment.

### **The Appeal**

4. The Appellants being dissatisfied with the outcome of their trial in the High Court filed their joint Notice of Appeal via letter they wrote which was signed by all the three appellants and dated 7 July 2022. There were 2 generic grounds of appeal set out in the letter. This letter was received in the Court Registry on 15 July 2022.
5. Apart from this joint initial Notice of Appeal with the two grounds of appeal against conviction, each of the Appellants submitted additional grounds separately. None of the grounds submitted later addressed the generic grounds of appeal they all relied on to technically meet the timely appeal requirement.
6. With regard to dates of the separate grounds of appeal: Appellant 1 Shafil ALI filed his ground of appeal on 8 January 2024, some 1 year 4 months late; appellant 2 Mohammed JAVED file his grounds of appeal on 5 September 2023, 1 year 1 month later and Appellant 3 Mohammed NAUSHAD on 6 June 2023, 11 months later. If these are dates of their leave to appeal application were taken as the date to apply, the 30 days rule to file leave to appeal, then in each case, the delay is very substantial. The leave to appeal should be not be granted on this basis alone for all of the appellants.

7. The appellants joint Notice of Appeal was untimely by 6 weeks, given that judgement appealed against is dated 20 April 2022. The appeal grounds by all three appellants covered grounds not initially submitted in the timely notice of appeal and they all are substantially late. Please note this time the appeals are not consolidated but separate with different AAU Number for each appellant. They are for all intents and purpose different appeals and should have been addressed separately.
8. I believe this matter should proceed to the judge alone stage hearing as an application for Enlargement of time to appeal. There was no application submitted by the appellants to seek enlargement of time to file application for leave to appeal.

#### **Enlargement of Time to Appeal**

9. This matter was raised with the appellant's and but they were not informed the court that they believe their leave to appeal was timely. Despite the court best effort to explain to them that their joint Notice of Leave to Appeal was untimely by 6 weeks, they did not apply for enlargement of time. They were adamant that their appeal was timely.
10. For the purpose of this hearing the court will review the grounds of appeal submitted by all the appellants and determine whether there is merit in any of the grounds submitted by the appellants and to assess if enlargement of time is not granted, miscarriage of justice will be caused to the appellants.
11. In **Rasaku v State [2013] FJSC 4**, the Supreme Court stated the following, as factors to be considered by a Court in Fiji when considering an application for enlargement of time:

*'[21] In paragraph 4 of his judgment in Kamalesh Kumar v State; Sinu v State [2012] FJSC 17; CAV0001.2009 (21 August 2012), Chief Justice Anthony Gates has summarized the factors that will be considered by a court in Fiji for granting enlargement of time as follows:-*

*(i) The reason for the failure to file within time.*

*(ii) The length of the delay.*

*(iii) Whether there is a ground of merit justifying the appellate court's consideration.*

*(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*

*(v) If time is enlarged, will the Respondent be unfairly prejudiced"*

12. The above principles of law will be applied in assessing the leave applications submitted by each appellant in this case.
  
13. It should be stated that the trial was conducted after agreed facts were accepted by the appellants. Paragraphs 38 to 41 of Judgement is set out below, because they directly relevant in mitigating the claim of consent that all 3 appellants claim:

*"[38] Based on the said agreed facts it is agreed that on the 23 October 2019, at Nakasi, the 1<sup>st</sup> accused inserted his finger in the complainant's vagina and thereafter that he had sexual intercourse with the complainant (that the 1<sup>st</sup> accused's penis penetrated the complainant's vagina). It is also agreed that the 2<sup>nd</sup> accused had sexual intercourse with the complainant (that the 2<sup>nd</sup> accused's penis penetrated the complainant's vagina). It is further agreed that 3<sup>rd</sup> accused had sexual intercourse with the complainant (that the 3<sup>rd</sup> accused's penis penetrated the complainant's vagina).*

*[39] Thus the only issue for determination is the issue of consent. The prosecution must prove beyond reasonable doubt that each of the accused penetrated the complainant's vagina with his penis (and in respect of count two that the 1<sup>st</sup> accused penetrated the complainant's vagina with his finger), without the consent of the complainant and that the accused knew or believed that the complainant was not consenting, or the accused were reckless as to whether or not she was consenting.*

*[40] I have summarized the evidence of the complainant and the three accused, which was led during the trial.*

*[41] The three accused have testified in Court and totally deny that they raped the complainant. The defence position is that the complainant consented to have sex with the three of them.*

## Assessment of Grounds of Appeal

### Shafil Shimraz Ali [A-1]

14. In the case of this appellant, his substantive appeal grounds which was filed 1 year 4 months late are:
- i) Trial judge erred in law and fact in his interpretation of section 129 of the Criminal Procedure Act [CPA] denying the appellant's rights to fair under section 15 of the Constitution which prejudice the appellant;
  - ii) Trial judge erred in law and fact in directing himself that section 129 of CPA totally infringes on the right to equality before the law under section 26 of the Constitution which prejudice the appellant;
  - iii) Trial judge erred in law and fact when he failed to consider in his judgement the discrepancies arising from the evidence of the complainant and the significance of the expert evidence from the medical report in determining force.
  - iv) Trial erred in law and fact when he failed to consider the chain of events leading to and during the act whereby consent was evident and deleting the elements thus nullifying the allegation and charges.
  - v) The trial judge erred in law and fact when he failed to consider the inconsistent evidence of the complainant and the significant medical evidence in determining any forced sexual intercourse resulting in a miscarriage of justice.
15. In terms of the **Rasaku** (supra) principles, this appellant was late in his leave to appeal by 6 weeks based on the joint notice of leave to appeal or based on the separate appeal grounds file by A-1 only, it was 1 year 4 months late. The delay was substantial indeed in both instances. This shows disrespect of the court rules and procedures must be sanctioned by the court.

16. In reviewing the grounds of appeal to establish if any merit consideration by the full court, the following is clear, for the grounds itemized in paragraph 13 above, the appellant, the first two grounds i) and ii) have no reasonable prospect of success. It was not raised at the trial by counsels acting for the appellants. This ground was added more as an afterthought. The appellant was given a fair trial and he was represented by counsel and there is no basis for claiming any prejudice or unfairness. There were no clear submission provided to support the claim. These grounds have no merit.
17. Grounds of appeal submitted as iii), iv) and v) in Paragraph 13 above, have no reasonable prospect of success because on the basis of the **Admitted Facts** of appellant A-1, in page 8 of the judgement, where paragraph 7, 8 and 9 of the admitted facts, A-1, directly contradicts the claim that A-1 had sexual intercourse with consent of the complainant, making ground iv) of A-1 grounds as having no merit.

*“7. While still in the vehicle going for a cruise, the group stopped the vehicle.*

*8. While inside the vehicle A1 inserted his finger in the complainant’s vagina, after A1 and the complainant had sexual intercourse i.e. A1’s penis penetrated the complainant’s vagina.*

*9. After the complainant was dropped off at the Valelevu Bus Stop.*

*10. On 24<sup>th</sup> October 2019, the complainant was medically examined by Doctor Evelyn Tuivaga.”*

18. The admission of the A-1 stated above means that grounds whose core claim was there was consent is totally rejected. This ground of appeal has no prospect of success.
19. For appellant 1 [Shafil Ali] his application for leave to appeal is refused

### **Mohammed Javed [A-2]**

20. The second appellant A-2 submitted the following grounds of appeal to support his claim:
- i) Trial Judge erred in law and fact when he failed to consider the inconsistent evidence of the complainant and the significant medical evidence in determining any forced sexual intercourse resulting in miscarriage of justice;

- ii) The trial judge erred in law and fact for not warning the prosecution about the danger of relying on the evidence of a witness who had made previous statement inconsistent her evidence in court;
  - iii) The trial judge made improper directions relating to circumstantial evidence, relating contradictory statement by the witness;
  - iv) Trial judge erred in law by failing to make an independent assessment of the evidence and the court affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to grave miscarriage of justice;
  - v) The trial judge erred in law and fact when he failed to consider in his judgement the inconsistent evidence of the complainant and the medical evidence in determining forced sexual intercourse, resulting in substantial miscarriage of justice
21. Grounds i), ii) and v) above, cover the same claim that the trial judge erred in dealing with the evidence of inconsistent statement. All the issues for which claims of error by the trial judge is adequately and correctly determined by him in paragraphs 50 to 57 of the Judgement. It is clear from those paragraphs that the trial was alive to issues and dealt within them and he correctly in law and in assessing the evidence of the complainant and concluding that in the totality of the evidence, he believed the complainant's evidence. The complainant's evidence which the trial judge quoted in full in the judgement starts at paragraph [28] on page 10 onward.
22. These grounds of appeal have no merit.
23. A-2 is his grounds iii) and iv) of appeal set out in paragraph 19 above, submits that the complainant was asked questions about where did you go after she was dropped:

**Q.189 Where did you go?**

**A: I went to Nasole. When I reached Nasole I was scared to go home**

**Q: 196: What happened when you arrive at your grandfather's place at Nadera?**

**A: There was no body at home. So I slept over there.**

24. These inconsistencies refer to peripheral matters and does affect the issue of consent.



25. The grounds of appeal by A-2 are meritless and his application for enlargement of time is refused and his leave to appeal is refused.

**Mohammed Naushad [A-3]**

26. A-3 submitted 12 grounds of appeal and I will briefly refer to each and assess its likelihood of prospect of success on appeal.
27. Ground i) trial judge erred in law and fact by not taking into account all the necessary elements of the charge which the prosecution must prove beyond reasonable doubt to establish the guilt of appellant [A3].
28. From paragraph [3] and [4] of the judgement the trial set out the burden and the standard of proof required, which the prosecution carry. At paragraph [5] to [12] the trial judge sets out the legal provisions and the elements of the offence, which correct in law and on the facts of this case.
29. Paragraph [13] specifically refers to the A-3 and sets out the elements of the charged that the prosecution must prove beyond reasonable doubt.
30. The trial issue was that of consent and the court carefully ventilate all the evidence pertaining to this and concluded that complainant had not consented to the sexual acts by all the appellants.
31. This ground has no prospect of success on appeal.
32. Ground 2 the trial judge erred in law and fact when he failed to consider in his judgement the inconsistent evidence of the complainant in comparison to the consistent evidence of the appellant.
33. The inconsistent evidence of the complainant such as the where she slept for the night after she was dropped off at Nadera are about peripheral issues in this trial, where consent

was the only issue contested and as already noted above. The defence at the trial raised this same issue and the trial judge addressed it as follows:

*“[42] When the complainant gave evidence in Court, she testified that it was the 1<sup>st</sup> accused, then the 2<sup>nd</sup> accused and finally the 3<sup>rd</sup> accused who had raped her in that order. This was her consistent position during the course of her testimony.*

*[43] When the three accused gave evidence their version was that it was 2<sup>nd</sup> accused who had first had sexual intercourse with the complainant, followed by the 3<sup>rd</sup> accused who had sexual intercourse with her and finally it was the 1<sup>st</sup> accused who had sexual intercourse with her and also inserted his finger into her vagina. However, this version or sequence of the events which took place on 23 October 2019, was not suggested or put to the complainant during her cross examination. It is to be noted that the complainant was cross examined at length by the Counsel for the Defence.*

*[44] Furthermore, during the course of his evidence the 1<sup>st</sup> accused denied that he inserted his finger into the complainant’s vagina. However, when the complainant was cross-examined it was suggested to her that that she gave her consent freely for the 1<sup>st</sup> accused to have sex with her and to insert his finger in her vagina, a suggestion the complainant denied. Furthermore, in the Admitted Facts signed by the 1<sup>st</sup> accused, it is clearly stated at paragraph 9 as follows: “While inside the vehicle A1 inserted his finger in the complainant’s vagina, after A1 and the complainant had sexual intercourse i.e. A1’s penis penetrated the complainant’s vagina.” As I have stated earlier in this judgment the “Admitted Facts” are considered to be proved beyond reasonable doubt.*

*[45] For the aforesaid reasons, it is my opinion, that the defence version cannot be accepted as truthful and reliable.”*

34. This ground of appeal has no prospect of success.

35. Ground 3 and 4 have no merit because the trial judge carefully evaluated all the evidence and outlined the elements of the offence for each of the charges against each of the appellants.

*9. A3 had sexual intercourse with the complainant i.e. A3's penis penetrated the complainant's vagina.*

*10. After the complainant was dropped off at the Valelevu Bus Stop.*

*11. On 24<sup>th</sup> October 2019, the complainant was medically examined by Doctor Evelyn Tuivaga.*

[26] Since the prosecution and the defence have consented to treat the above facts are proved beyond reasonable do

36. The appellants and the respondent both accepted the "Agreed facts" and they are deemed in law to be proved beyond reasonable doubt.

**ADMITTED FACTS (3<sup>rd</sup> accused)**

*"7. After they dropped Mr. Rajnil Kumar, A1, A2, A3, and the complainant proceeded to 'cruise' in the vehicle towards Nausori.*

*8. While still in the vehicle going for a cruise, the group stopped the vehicle.*

*9. A3 had sexual intercourse with the complainant i.e. A3's penis penetrated the complainant's vagina.*

*10. After the complainant was dropped off at the Valelevu Bus Stop.*

*11. On 24<sup>th</sup> October 2019, the complainant was medically examined by Doctor Evelyn Tuivaga.*

37. The complainant evidence on consent at the trial, as regards the A-3: Page 24 of judgement:

*“Q. Did you consent or agree for this third person to put his penis in your vagina?”*

*A. No.*

*Q. Did you tell him that you did not want him to do this to you?”*

*A. Yes.*

*Q. When did you tell him?”*

*A. Before he put his penis.*

*Q. When you were with the third person, where were the first and second persons?”*

*A. They were sitting in the front. The one with the tattoo on his neck was driving and the one with the tattoo on his hand was sitting beside the driver.*

38. It is not necessary to consider the other grounds of appeal because A3 as part of the agreed facts above agreed that he sexual intercourse [vaginal penetration with penis] with the complainant. As regards consent, the relevant paragraphs from the judgement are:

*“[47] The complainant testified that she did not give consent to the 1<sup>st</sup> accused or the 2<sup>nd</sup> accused or the 3<sup>rd</sup> accused to have sexual intercourse with her. She testified that she did not consent to the 1<sup>st</sup> accused inserting his finger into her vagina.*

*[48] She said at the time the three accused committed these acts on her she was feeling weak due to the alcohol and the marijuana that she alleged was forced on her by the accused. It is true that the complainant did not scream out or punch or scratch the accused with her hands or bite the accused at the time. It must be borne in mind that the complainant said she was feeling weak at the time and also the fact that she was confined in the vehicle with the three accused persons. Therefore, it was not reasonably possible for her to do any of the above acts so as to indicate that she was not consenting to the three accused having sexual intercourse with her.*

*[49] The law provides that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. Considering all the facts and circumstances of this case, it is my opinion that the complainant did not freely and voluntarily consent to the three accused having sexual intercourse with her. It is also my opinion that the three accused knew or believed that the complainant was not consenting, or that the three accused were reckless as to whether or not she was consenting. Simply put the three accused did not care whether the complainant was consenting or not.*

39. A-3 grounds of appeal against conviction are meritless and are dismissed.
40. It is clear from the above that of the appellant's grounds of appeal that have no grounds that merit consideration by the full court and no grounds have any reasonable prospect of success on appeal. Enlargement of time to appeal is refused and leave to appeal is refused for three appellants.

### **ORDERS**

1. Enlargement of Time to Appeal is refused;
2. Leave to Appeal against conviction for all three appellants is refused.

  
  
**Hon Isikeli U Maitoga**  
**Resident Justice of Appeal**