

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

**CRIMINAL APPEAL NO.AAU 145 OF 2019**  
**[Lautoka High Court Criminal Case No. HAC 09 of 2016]**

**BETWEEN** : **JAINENDRA NARAYAN PAL**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : Prematilaka, RJA  
Clark, JA  
Andrée Wiltens, JA

**Counsel** : Mr. S. Heritage for the Appellant  
Ms. S. Shameem for the Respondent

**Date of Hearing** : 9 September 2024

**Date of Judgment:** 27 September 2024

**JUDGMENT**

**Prematilaka, JA**

1. I have had the benefit of reading in draft the judgment of Clark, JA and agree that the appeal against conviction should be refused.

## Clark, JA

### Introduction

2. On 29 August 2019, the appellant was found guilty and convicted on one charge of rape.<sup>1</sup> He was sentenced to 10 years and 11 months' imprisonment.<sup>2</sup> The Judge did not set a non-parole period. By the time this Court heard the appellant's appeal against conviction he had been released.

### Facts

3. The facts may conveniently be taken from *Rangajeeva Wimalasena AJ's* sentencing decision:

*You were employed as a lab technician at the Nadi Hospital. On 15 December 2015 the complainant visited the Nadi Hospital to get a blood test done. Her blood sample was taken by a female at the lab. When the complainant was waiting at the waiting area you approached her and informed her to come back in the evening for the blood report. You also informed the complainant that she has a sexually transmitted disease. You gave your mobile number to the complainant to call you. When the complainant came to the hospital around 6pm you asked her to lie down on a bed and to take off her mini shorts and her undergarment. You wore gloves and started touching her vagina. You inserted two fingers into her vagina and told her that you would be able to find her disease by doing that. Then you told the complainant that it is not safe there and to wear her clothes. You asked her to go through the back door to another room. You also told the complainant to inform the security officers that she is a friend of your cousin. You took her to a room and asked her to lie down on the bed. You wore gloves and inserted your fingers into her vagina again. You also asked her to remove her T shirt to see her breasts to find out the disease. You inserted another object like cotton wool into her vagina and told her that you would take it to Lautoka to check for results. Later you told the complainant to go to the bathroom and clean herself as she was having menstruation. When she was in the bathroom you entered into the bathroom naked and tried to touch her vagina. The complainant pushed you away and ran to the room where she left her clothes. She then ran out of the hospital after putting her clothes on. The next day the complainant came to the hospital. She informed you over the phone that she is going to see another doctor. You then met the complainant and gave her some pills, namely Amoxicillin and asked her to go back home. When she was going to see a doctor, you went and told the doctor not to believe the complainant. The complainant met the doctors and complained about the*

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<sup>1</sup> *State v Pal* [2019] FJHC 929; HAC09.2016 (29 August 2019).

<sup>2</sup> *State v Pal* [2019] FJHC 927; HAC09.2016 (25 September 2019).

*incident. Further the doctors informed the complainant that she does not have any STD. The matter was thereafter reported to the Police.*

### **Leave To Appeal Hearing**

4. The appellant applied for leave to appeal. As at trial, the appellant was represented by counsel.
5. Seven grounds of appeal were advanced. The single Judge characterised the grounds as having been “framed in very general terms,” all alleging shortcomings in the trial Judge’s summing up yet without specifying the nature of the deficiencies.<sup>33</sup> Due to the appellant’s “scatter gun” approach and lack of detail or particulars the State had not been able to make relevant submissions on the grounds of appeal and the learned Judge was consequently unable to determine whether any ground could reach the threshold of reasonable prospect of success.
6. Leave to appeal was consequently refused. His Honour warned that future notices of appeal filed in disregard of the requirements for substantiated and particularised grounds of appeal ran the risk of being dismissed as frivolous or vexatious under s 35(2) of the Court of Appeal Act.

### **Full Court Hearing**

7. On 13 October 2020, the appellant filed a fresh application for leave to appeal against conviction, again, through counsel. The notice of appeal contained precisely the same grounds of appeal that had been criticised in the single Judge’s Ruling given 24 September 2020. However, the written submissions that counsel filed detailed the respects in which it was said the trial Judge had erred and the Court heard detailed submissions from counsel at the hearing.

### **Grounds of appeal**

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<sup>33</sup> *Pal v State* [2020] FJCA179; AAU145.2019 (24 September 2020), at [19].

*First, second and sixth grounds of appeal*

8. As at the hearing of the appeal, grounds 1, 2 and 6 will be considered together. At their collective heart is a concern about the adequacy of the trial Judge's approach to inconsistencies and omissions.
9. Grounds 1, 2 and 6 allege errors on the part of the trial Judge in:
  - 9.1 not adequately directing that there were serious doubts about the prosecution case because the complainant's version was "lies" and there were discrepancies in her evidence at trial;
  - 9.2 not adequately directing the assessors as to the significance of conflicting evidence from the prosecution witnesses; and
  - 9.3 not adequately directing the assessors, and himself, on a previous inconsistent statement by the complainant.
10. The key objections emerging from these grounds is that at trial the complainant gave evidence of two occasions of rape but in her statement she mentioned only one occasion. Further, at trial the appellant said the first occasion of rape took place on a bed in the laboratory room but she subsequently acknowledged there was no bed in that room.
11. The following is a summarised account of the complainant's evidence at trial relevant to the points raised in the above three grounds of appeal.
  - 11.1 The appellant advised the complainant (contrary to the true outcome of her blood test) that the test showed she had a sexually transmitted disease (STD). He gave her his phone number and suggested she return to the hospital for the result. (At the hearing before us counsel for the appellant, Mr Heritage, agreed the complainant wanted the hard copy result and returned to the hospital for that purpose.)

11.2 In her evidence-in-chief the complainant said she returned to the hospital around 6 pm and the appellant took her to the lab and told her to lie down on a bed there. He told her to take off her “shorts and panty” then inserted two fingers inside [her] vagina. This was the first incident of rape.

11.3 The second rape occurred when the appellant said it was not safe in the lab (meaning, this Court was led to understand, that it was too public) and he took her to a room physically connected to the hospital. The complainant understood the room to be a hospital room but in fact it was the appellant’s hostel room. There he inserted his fingers into her vagina having asked her to remove her top so he could see her breasts and in this way would be able to see the nature of the disease she had.

*Omission from Police statement*

12. In her Police statement, the appellant recounted being told to lie on a bed in the lab, removing her shorts and panty then being told to dress and being led out of the lab room because it was not safe there. The complainant did not say in her statement that the appellant had digitally penetrated her at that time.

13. She was cross-examined about this omission:

*Q: Now let me take you to ... your statement ... Jay told you to wear your shorts again because it's not safe in the lab room. I put it to you that Mr Jay did not penetrate his finger at any time inside the blood test room?*

*A: That's the lie my Lord.*

*Q: But your statement is very clear, your statement does not state anywhere that Mr Jay penetrated his finger inside your vagina in the lab?*

*A: Yes my Lord it's not in my statement but I know what happen[ed] to me on that day.*

14. The day after the incidents in the lab and the appellants’ hostel room the complainant went to the hospital to tell the doctors who ordered the blood tests all that had happened the previous day. Dr Terry Fesaitu described his

discussion with the complainant on 16 December 2015. Prior to seeing her however, the appellant had approached Dr Fesaitu to say he had noticed the complainant in the waiting room and wondered why she had returned as he had given her some amoxicillin and oral antibiotics the previous day for her sore throat. The appellant added that Dr Fesaitu should not believe what the complainant was going to tell him because her story was not true.

15. Dr Fesaitu said the appellant began her discussion with him with an inquiry about the results for her STD test. She then described an examination by a “young Fijian of Indian decent male doctor” who had taken her back to the dormitory and performed a vaginal examination in order to obtain a vaginal swab. Dr Fesaitu said the complainant wanted to know if that was normal procedure. His further evidence was that he had not been expecting such a story from a patient and given what she had been through he felt it best that she deal with a female medical officer. Dr Fesaitu referred the complainant to Dr Elenoa who worked in the next room.
16. Dr Elenoa said the complainant met the appellant for the first time on the morning of 15 December at the Nadi Hospital laboratory. Dr Elenoa gave the following evidence of the complainant’s account of the events the previous day:

*So at 11,00 am when she went to receive her blood test from Mr Jainendra, he informed her, she had a sexually transmitted infection but could not give her the result and it had to be taken back to Namaka Health Centre where she was initially seen. ... since it was a hassle for her to return to the Namaka Health Centre ... Mr Jainendra then asked her to return at 6 pm – 7 pm that afternoon. He gave her his number and told her to call him once she got there. ... he also asked her whether she was in a relationship and she did not like Indian boys. That afternoon Your Lordship when she returned to Nadi Hospital she gave him a call and she was told to come to the lab. When she arrived at the laboratory, she was asked by Mr Jainendra to take off the pants she was wearing so that he could perform a vaginal examination. As she was undressing, ... Mr Jainendra had told her that the laboratory was not safe and that they needed to go to another room. As they exited the back door of the lab, Mr Jainendra told Ms Vilisita, if the security asked who she was to tell them that she*

*was a cousin's friend. When they arrived at the dormitory, he again asked her to take off the pants she was wearing and then he proceeded to place his two fingers in the area of her genitalia saying that he needed to do this so that she could produce vaginal secretion for the testing. He had also asked her to remove the t-shirt she was wearing to perform a breast examination whilst his fingers were also examining her genitalia.*

17. When asked about the complainant's demeanour, Dr Elenoa said she seemed "very frightened and confused".

*Inconsistent evidence about a bed in the laboratory*

18. In her police statement the complainant said when she returned to Nadi hospital at 6 pm as the appellant had suggested, he called her into the lab and told her to lie down on the bed. The complainant was cross-examined about the bed:

*Q: And now you will agree that there is no bed **in** that particular blood test room?*

*A: There is no bed there my Lord.*

*Q: Ms Vilisita I am putting it to you that you are lying to this Court since there is no bed **in** the blood test room?*

*A: My Lord it is, there is a bed there **beside** the blood test room.  
[Emphases added]*

*Q: We are talking about the blood test room where you've stated in your statement, there is no bed in your statement?*

*A: No my Lord there is no bed **in** the blood test room.  
[Emphases added]*

19. The appellant submits the trial Judge failed to consider the complainant lied on oath and failed to consider the many discrepancies in her evidence. The appellant also submitted that the complainant knew what had happened to her on the day of the alleged rapes and should therefore have told the police straight away while it was fresh in her mind.
20. Addressing that last point first, the appellant of course knew of the physical acts in which the appellant had engaged but she understood at the time that the appellant was a doctor and she assumed at the time that the examinations were orthodox and necessary. The appellant did not know until the next day when Dr Elenoa advised her to report the appellant's conduct to the police



that what the appellant had done was an offence. The delay in reporting, such as it was, was attributable to the complainant needing to understand the nature of what had occurred; as she put it at trial “to know the truth”. There is nothing in this ground of complaint.

21. As to the broader grounds of appeal based on an argument the appellant lied at trial and that the Judge should have directed the assessors to draw an inference against her, the trial Judge’s directions were unimpeachable. At [39] and [41] of his summing up, his Honour specifically addressed the evidence relating to the twin issues of the omission in the police statement and the bed in the lab room. His Honour’s references to the evidence are to be seen in the context of his earlier directions as to how to approach inconsistencies and omissions and how to use credible and reliable evidence.
22. There is no error in the Judge’s directions. The complainant’s evidence about the first rape fell to be considered in light of all her evidence and whether that was regarded as truthful and reliable. She was honest in her admission there was no bed **inside** the lab room. She said it was **beside**. That was her explanation and that explanation was not challenged.
23. Dr Fesaitu was questioned about the lab and what was inside. As far as he could recall there was “a small recreational area inside the lab at the corner”. When the complainant described the bed as being “beside” the blood test room it was entirely possible she was referring to the so-called recreational area but it was not clarified with her.
24. It is apparent that the complainant did not report, either in her police statement or to Dr Elenoa, the first digital penetration in the laboratory about which she testified in court. That omission does not detract from her overall consistency. The day after the offending, the complainant told the doctor almost exactly what she said in court four years later. Her evidence at trial was substantially supported by the two medical witnesses called by the prosecution who testified to her recent complaint evidence. Having been



properly directed on omissions and inconsistencies in evidence, the assessors and Judge determined, against the backdrop of all the evidence, that the complainant was credible and she gave truthful testimony.

25. It is important to note that the backdrop of all the evidence included several significant admissions by the appellant. For example—
  - 25.1 When asked if it was normal for a lab technician to give a personal phone number to patients he answered “*No*”. When asked if it was in breach of his role as a lab technician he answered “*Yes*”.
  - 25.2 The appellant agreed amoxicillin was a prescription medicine and he accepted he was not authorised to give medicines to patients. He agreed he breached his professional duties in doing so.
  - 25.3 In his evidence the appellant said he had told the complainant he was a lab technician. But he also said, that when he gave the complainant the amoxicillin, she said “*vinaka vuniwau*”. He accepted vuniwai means doctor.
  - 25.4 The appellant agreed that most of the things he did on the 15<sup>th</sup> and the 16<sup>th</sup> were “*very questionable*”.
26. Evidence further supporting the complainant’s credibility was given by Dr Fesaitu. He said he found it unusual for a lab technician to be hanging around as the appellant did. The doctor said the lab technicians work from 8 am until 4.30 pm but the appellant came into the doctor’s office around 5.30 pm Dr Fesaitu found it unusual that a lab technician “would have so much interest in a patient”.
27. For the foregoing reasons, the first, second and sixth grounds of appeal have no merit.

### *Ground three*

28. In his third ground of appeal the appellant submits the trial Judge failed to direct himself or the assessors on any possible defence and by this failure there was a substantial miscarriage of justice.
29. The appellant's submissions expand on the ground. The concern seems to be that the medical evidence showed "*no sign of forceful penetration, blood stained, vaginal vault, hymen not intact*". The appellant draws significance from this evidence coupled with the fact that "*despite the fact that she was scared of what had happened to her on 16 December 2015 she still called the appellant on 16 December 2015*".
30. Addressing first the appellant's reliance on the fact the medical examination showed no signs of "forceful penetration", at no stage did the complainant allege force. She was compliant. And she acceded to the examination in the belief the appellant was a doctor and believing therefore the justification he gave her and the necessity for the vaginal examinations. It must be remembered that these examinations took place after the appellant had lied to the complainant about the results of her blood test and with her therefore believing she had an STD the nature of which she was told could be further identified following vaginal examination and swab.
31. Further and significantly, Dr Elenoa's medical report stated: "*No obvious signs of forceful penetration seen but this does not exclude sexual assault*" (emphasis added).
32. As to the alleged failure of the Judge to sum up on possible defences based on evidence, the Judge's recitation of the case for the defence was detailed fulsome and accurate.
33. The third ground of appeal is without merit.

#### *Ground four*

34. Ground four is largely repetitive of the appellant's third ground. The appellant's case under this ground is that the trial Judge erred in not adequately putting the defence case to the assessors. When asked during the hearing of the appeal in what respects the summing up and directions were inadequate counsel submitted the evidence of Mr Dharmend Singh corroborated the appellant's evidence and therefore, the Judge should have directed the assessors to believe the appellant.
35. Mr Singh said he was working at the hospital mortuary on 15 December 2015 and as he was approaching the security booth he saw the appellant walking with a girl. Mr Singh and a security officer walked with the appellant and a girl towards the appellant's quarters. He left them at steps near the maternity entrance and went to switch on a light. When he returned some 2 to 3 minutes later they were still there. The thrust of his evidence was that the appellant asked the security officer to wait with the complainant while the appellant went to his room for tablets.
36. Mr Singh described what the complainant was wearing. His description coincided with the description of her clothes given by the security officer who had since died. When asked why he remembered this occasion in 2015 Mr Singh said he had noted it in a small book. But he did not have his book with him. He said it was at home – his small daughter had played with it.
37. Mr Heritage submitted that if the trial Judge did not direct the assessors that Mr Singh corroborated the appellant's evidence, then he did not direct himself.
38. In his summing up the Judge canvassed Mr Singh's evidence but (unsurprisingly) did not direct the assessors as to whether they should believe him. Following their return of a unanimous opinion that the appellant was guilty of rape, the Judge reviewed the evidence. He "was not inclined to

believe” the evidence of the defence witnesses not being satisfied their evidence was credible and reliable.

39. The fourth ground also fails.
40. The fifth ground (misdirection on standard and burden of proof) was not pursued.

#### **To summarise**

41. The Judge summarised the appellant’s evidence effectively. His Honour explained clearly in his judgment the reasons why he agreed with the opinions of the assessors. The complainant was cross-examined at length. Where cross-examination had highlighted “a few inconsistencies” in her evidence the Judge found they were insignificant and not material. As well, the complainant had given explanations for those inconsistencies. Despite the lengthy cross-examination her evidence remained intact.
42. Once accepted, the evidence of the complainant, outlined in the summing up, was sufficient to establish the charge of rape beyond reasonable doubt.
43. Finally, it seems necessary to say – once again – that the time to raise concerns about directions is at trial. As the Supreme Court stated in *Raj v State*:<sup>4</sup>

*[35] The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client’s interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the Judge.*

#### **Andrée Wiltens, JA**

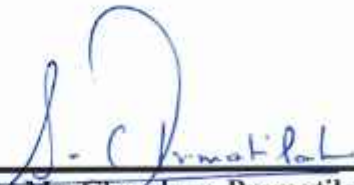
44. I concur with the decision and the reasons for it.

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<sup>4</sup> *Raj v State* [2014] FJSC 12; CAV0003.2014 (20 August 2014).

## Orders of Court

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



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**Hon. Mr. Chandana Prematilaka**  
RESIDENT JUSTICE OF APPEAL



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**Hon. Madam. Justice Karen Clark**  
JUSTICE OF APPEAL



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**Hon. Mr. Justice Gus Andrée Wiltens**  
JUSTICE OF APPEAL