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

CRIMINAL APPEAL NO. AAU 0050 OF 2022
[Lautoka High Court: HAC 130 of 2018]

BETWEEN : **PARMESH CHANDAR**

Appellant

AND : **THE STATE**

Respondent

Coram : Mataitoga, P

Counsel : Appellant in Person
Nasa J. for the Respondent [ODPP]

Date of Hearing : 19 November, 2024
Date of Ruling : 3 February, 2025

RULING

1. The appellant was charged in the High Court at Lautoka, pursuant to an Information by the DPP for the following offences:

Count One

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act 2009.

Particulars of Offence

PARMESH CHANDAR on the 25th day of June 2018 at Nadi in the Western Division, unlawfully and indecently assaulted "RC" by touching her thighs and breasts.

<u>Count Two</u>

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

PARMESH CHANDAR on the 25th day of June 2018 at Nadi in the Western Division, unlawfully and indecently assaulted "RC" by sucking her breasts.

<u>Count Three</u>

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

PARMESH CHANDAR on the 25th day of June 2018 at Nadi in the Western Division, penetrated the vagina of "RC" with his fingers without her consent.

<u>Count Four</u>

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

PARMESH CHANDAR on the 25th day of June 2018 at Nadi in the Western Division, penetrated the vagina of "RC" with his penis without her consent.

2. At the trial, the prosecution called two witnesses, before it closed its case. Following that the High Court ruled that the appellant had a case to answer in respect of all the offences charged. The appellant was then explained his rights to give evidence or not and he opted to give evidence and called a witness.

3. At the end of the trial the appellant was found guilty of all the charges brought against him. He was convicted on 30 May 2022 and sentenced on 14 June 2022 to an aggregate sentence of 8 years and 11 months imprisonment, with a non-parole period of 7 years and 11 months, for the 2 counts of Rape and 1 count of sexual assault.

Filing of Appeal

4. On 12 July 2022 on behalf of the Appellant, a Notice of Appeal and Application for Leave to Appeal against conviction and sentence, was lodged setting out the 10 grounds of appeal against conviction and 2 grounds against sentence. The appeal was timely.

5. On 21 May 2024, the Appellant filed Notice of Amended Grounds of Appeal **against conviction only**. This time the grounds of appeal was limited to 5 only.

6. After some delay, Leave Application was finally heard on 19 November 2024.

Relevant Law

7. All the grounds of appeal submitted by the appellant involves questions of law and fact. Section 21 (1)(b) of the Court of Appeal Act 2009 requires leave of the court to be granted before appeal may proceed further.

8. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** see: **Caucau v State [2018] FJCA 171**; **Navuki v State [2018] FJCA 172** and **State v Vakarau** [2018] FJCA 173; and **Sadrugu v The State** [2019] FJCA 87.

Assessment of the Grounds of Appeal

9. Ground 1 states: the trial judge erred in law and fact when he failed to warn or direct himself on the issue, whether it was possible to carry out sexual intercourse in the limited and confined space of the front passenger seat of the motor vehicle.

10. On the facts of this case, the only issue in dispute was consensual sexual intercourse or not. On this issue, the evidence as narrated by the trial judge in his judgement, for the prosecution and the appellant were exact opposites. The appellant states that the complainant consented but the complainant said she did not.

11. Against that background it did not really matter if the sexual intercourse took place in the front or back seat of the motor vehicle. Both agreed that sexual intercourses did take place.

12. The trial judge at paragraph 69 and 70 of the judgement stated:

> *"69. The accused stated that nothing happened in the front seat of the vehicle since there is not enough space there. The complainant is huge, he is tall and big as well. The seat is not big enough to fit both of them, the gear area and the console box are in between. The accused maintained nothing happened in the front passenger seat as mentioned by the complainant and they had sex at the back seat.*
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> *70. The accused denied tying the complainant's hands with the seat belt, hitting her on the back when she tried to open the door, and pinching her thighs. The accused maintained they had consensual sexual intercourse at the back seat of the van. The accused denied having sex for half an hour."*

13. The crux of the appellant's ground is that the trial judge failed or did not warn himself of his claim that it would be impossible to have sexual intercourse with the complainant in the front seat of the car they were in. Even if the trial judge did consider the issue raised in the ground it does not give rise to miscarriage of justice as claimed.

14. This ground has no merit.

15. Ground 2 states: the trial judge erred in law and fact by holding against the appellant that his counsel did not cross examine that there was not enough space in the front compartment of the vehicle for the alleged offence to occur causing miscarriage of justice.

16. Paragraph 42 of the judgement refers to the prosecution case:

> *"The complainant denied they had gone to Wailoaloa because she had agreed. The complainant denied the suggestion that when the accused had parked the vehicle at the Wailoaloa Beach near the golf area both had gone to the back seat of the vehicle. The complainant denied at the back seat both had kissed each other for 5 minutes and then both had removed their clothes. The complainant denied lying on her back and then the accused started touching her private part from on top and then she asked the accused to lick her private part."*

17. This ground raised the same issue already dealt with in ground 1 above. But it must be noted that the offence of Rape and sexual assault is not denied by the appellant. His main defence at the trial was consensual sex. Why the issue of where it took place in the car is so important to him or his case as it relates to the issue of consent in not clear.

18. This ground has no merit.

19. Ground 3 states: the trial judge erred in law and fact when he found in paragraph 105 of the judgement that the "the defence did not raise any motivation on the complainant to falsely implicate the accused."

20. In support of this ground, the appellant submitted that at paragraph 46 ***"the complainant denied that the only reason she cried Rape was to save her relationship with her partner."***

21. The appellant submits that the motivation that underpins the complainant's claim that she was raped, was to avoid humiliation and embarrassment about the fact she consented to have sexual intercourse with the appellant while she was in relationship with another women and that the relationship had broken after this incident.

22. The judgement states at paragraphs 101 and 102 as follows:

> *"101. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand vigorous cross examination and was not discredited as to the main version of her allegations.*
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> *102. The complainant was steadfast in what she had encountered that afternoon and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty. It is also noteworthy that the complainant had promptly reported the matter to the police. I agree with Dr. Vaniqi that it is not necessary for injuries to be seen on a complainant to suggest forceful sexual intercourse and other abuses."*

23. It is clear from the above assessment of the trial judge, that the complainant's evidence was believable and given the prompt report of the Rape to the police coupled with her

ability to withstand cross-examination on her evidence, the evidence was sufficient to prove the charges brought against the appellant beyond reasonable doubt.

24. This ground has no merit

25. Ground 4 states: the trial judge erred in law and fact in holding that the appellant's version of the event is not tenable or plausible on the totality of the evidence, therefore finding the charges against the appellant proven beyond reasonable doubt.

26. In support of this ground the appellant submits that given the nature of the evidence being **'her word against his word'** the trial judge should have given a 'Liberato direction.' This submission is misconceived. Liberato Direction are given to a jury/assessor by the trial judge before they retire to consider their verdict. This was a trial without assessors.

27. The full court in **Rokocika v State [2023] FJCA 251**(AAU 040 of 2019) at paragraphs 41 to 47 set out the explanation when the Liberato direction may be applied in Fiji.

28. In terms of totality of the evidence, the trial judge set out in summary the prosecution case and the defence case. He then undertook an assessment of the evidence [determination] from paragraphs 99 to 114 and then set out his conclusion from paragraph 115 to 118. The appellant has not raised any matters considered by the trial judge in discussing the prosecution evidence to show that his conclusion was wrong or unreasonable. The finding of guilt against the appellant was reasonable and open for the trial judge to conclude given the totality of the evidence in this case.

29. This ground has no merit.

30. Ground 5 states: the trial judge erred in law and fact in finding the complainant's version truthful and credible, therefore overlooking the complainant's contradictions to that of Dr Vaniqi and the medical report.

31. The claim of contradictions by the appellant is based on the evidence given by the complainant that her hand was tied with the seat belt of the car which left a red mark bruising and she was also punched. Dr Vaniqi who was called by the appellant as a witness at his trial; in her evidence said there was no bruising. Further the claim by the complainant that the appellant used his finger to penetrate her vagina, was not substantiated by the medica report of Dr Vaniqi.

32. The trial judge explained how he considered Dr Vaniqi's evidence, stating the following in his judgement:

> *"82. In cross examination the witness stated that even though there were no injuries noted, in this case rape of the patient could not be ruled out. <u>In her experience in rape cases most of the patients had injuries but not all</u>.*
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> *83. This court has heard the evidence of Dr. Vaniqi who had been called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.*
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> *84. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.*
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> *85. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence."*

33. In the light of the evidence of Dr Vaniqi and the assessment of the trial judge of the same. This ground of appeal has no merit.

ORDERS:

1. Appellant application for leave to appeal against conviction is refused.

Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL