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

CRIMINAL APPEAL NO.AAU 0028 of 2018
[In the High Court at Suva Case No. HAC 199 of 2017]

BETWEEN	:	**UMENDRA KUMAR**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Mr. M. Vosawale for the Respondent**
Date of Hearing	:	**11 August 2021**
Date of Ruling	:	**13 August 2021**

RULING

[1] The appellant had been indicted in the High Court at Suva on one count of abduction of young persons- contrary to Section 285 of the Crimes Act 2009 and three counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed at Nasinu, Nadi and Rakiraki in the Central and Western Divisions in 2014.

[2] The information read as follows:

COUNT 1

Statement of Offence (a)

ABDUCTION OF YOUNG PERSONS: *Contrary to Section 285 of the Crimes Act 2009.*

Particulars of Offence (b)

UMENDRA KUMAR *on the 10th day of January 2014, at Nasinu, in the Central Division, unlawfully took* ***RRD,*** *a young person being under the age of 18 years, out of the possession and against the will of her mother* ***RANITA DEVI.***

COUNT 2

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR *between the 11th day of January 2014 and the 12th day of January 2014, at Nadi, in the Western Division, penetrated the vagina of* ***RRD*** *with his penis, without her consent.*

COUNT 3

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR *on the 12th day of January 2014, at Nadi, in the Western Division, penetrated the vagina of* ***RRD*** *with his penis, without her consent.*

COUNT 4

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR *on the 13th day of January 2014, at Rakiraki, in the Western Division, penetrated the vagina of* ***RRD*** *with his penis, without her consent.*

[3] At the end of the summing-up, the majority of assessors had opined that the appellant was guilty of all four counts. The learned trial judge had agreed with the assessors' majority opinion and convicted the appellant of all four counts. The trial judge had

sentenced the appellant on 21 March 2018 to an imprisonment of 03 years on count 01 and 15 years of imprisonment each with a non-parole period of 12 years on counts 02, 03 and 04 (effective serving period being 14 years and 09 months on account of the period of remand with a non-parole period of 11 years and 09 month); all sentences to run concurrently.

[4] The appellant in person had appealed against conviction and sentence in a timely manner. He had subsequently filed amended and further grounds of appeal from time to time against conviction and sentence. The appellant had sought to abandon his sentence appeal by his application in Form 3 in terms of Rule 39 of the Court of Appeal Rules on 01 September 2020. He had again tendered 12 amended grounds of appeal against conviction and written submissions on those grounds on 15 December 2020. The state had addressed those 12 grounds of appeal in its written submissions filed on 20 January 2021. The appellant without leave of court had filed a reply to respondent's submissions on 09 March 2021 and even submitted some amended grounds of appeal coupled with submissions on 24 March 2021 which the state had no opportunity of responding to. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The grounds of appeal urged on behalf of the appellant are as follows:

Conviction (15 December 2020)

Ground 1

THAT the Applicant's counsel failed in informing the appellant on relevant details of his charge and case which caused a gross miscarriage of justice.

Ground 2

THAT the appellant is only class three educated and did not fully understand the Court proceedings which caused a gross miscarriage of justice.

Ground 3

THAT the defence counsel failed to call relevant witnesses to the trial of this case which caused a gross miscarriage of justice.

Ground 4

THAT the defence counsel namely Krishneel Chang misadvised the appellant to advise him to take a position that no sexual intercourse had happened.

Ground 5

THAT the prosecution changed the case number from HAC 22 to HAC 199 of 2017 thereby rendering the disclosures of HAC 22 of 2014 null and void which caused a gross miscarriage of justice.

Ground 6

THAT the prosecution failed in its duty by providing incomplete disclosures which caused a gross miscarriage of justice.

Ground 7

THAT the prosecution failed in its duty by not doing a proper investigation which caused a gross miscarriage of justice.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when he relied on circumstantial or insufficient evidence presented by the prosecution evidence carries serious doubts and as such benefit of doubt should be given to appellant.

Ground 9

THAT the Learned Trial Judge erred in law and in fact when he placed too much emphasis or weight in the inconsistencies evidence of the complainant and her friend.

Ground 10

THAT the complainant and her friend had several opportunities to escape and seek help or to raise alarm, but did not do so, this creates doubt if any force or threat was used at all, and therefore the benefit of doubt should be given to the appellant and this has caused a gross miscarriage of justice.

Ground 11

THAT the conduct of the complainant and her friend while they were with the appellant does not match and is inconsistent with the conduct of a kidnapped person.

Ground 12

THAT the Learned Trial Judge erred in law and in fact when he relied on the fabricated evidence provided by the prosecution, the complainant and her friend.

Amended grounds (24 March 2021)

Ground 1

THAT the Learned Trial Judge erred into not taking relevant matters than irrelevant matters.

Ground 2

THAT the Learned Trial Judge erred in failing to enquire if the appellant understood the allegation against him or he understood the charges put to him.

Ground 3

THAT the Learned Trial Judge misdirected himself and also the assessors that one of the element of the offence necessary to prove the charge of rape has to be penetration of the vagina with the penis.

Ground 4

THAT the learned trial judge has mistaken the facts and cause of the whole matter.

Ground 5

THAT the prosecution has failed to proceed with the charges of abduction and defilement only first put to the appellant on 17th January 2014 as confirmed by DC 3538 Parnesh.

[7] The trial judge had stated in the sentencing order that the prosecution had proved the following during the trial through the evidence of the complainant and another witness called Sonia who had by and large given evidence consistent with that of the complainant, the complainant's mother and the doctor:

> *'**[4]** It was proved during the trial that, on the 10 January 2014, at Nasinu, you abducted the complainant, a young person being under the age of 18 years, by unlawfully taking her out of the possession and against the will of her mother Ranita Devi.*
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> ***[5]** It was also proved that, between 11 January 2014 and 12 January 2014, at Nadi, you raped the complainant by penetrating her vagina with your penis, without her consent.*
>
> ***[6]** It was further proved that, on 12 January 2014, at Nadi, you raped the complainant by penetrating her vagina with your penis, without her consent.*
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> ***[7]** And lastly it was proved that, on 13 January 2014, at Rakiraki, you raped the complainant by penetrating her vagina with your penis, without her consent.*
>
> ***[8]** The complainant was 14 years of age at the time you committed the above offences on her (her date of birth being 28 May 1999), and as such, she was a juvenile.*
>
> ***[9]** The complainant testified in Court as to how you abducted her on the night of 10 January 2014 from Nasinu and thereafter forcibly took her to the West and the horrifying ordeal she underwent. You had kept the complainant in virtual captivity for 5 days, until 15 January 2014, when she was rescued by the Police.*

[8] The trial judge had set out the appellant's position in the judgment as follows:

> *'**[34]** In this case, the accused is taking up a total denial of all the charges against him. His position is that Sonia has stopped his taxi on Friday (10 January 2014) night. The complainant and Sonia had got into his taxi as passengers and on their own free will. He states that due to the manner*

in which they had been behaving he had thought that the complainant and Sonia were big girls; and that the complainant was over 20 years of age.

[35] *Although the accused admits that the complainant and Sonia were with him until Wednesday (15 January 2014), he totally denies having sexual intercourse with the complainant on any occasion, either in Nadi or in Rakiraki. His position is that while at Nadi he was with his family and that his mother, step-father, sister, brother-in-law and their two children were present at home. Similarly, while at Rakiraki his uncle and aunty and their son were present at home. Thus, his position is that there was no possibility for him to have sexual intercourse with the complainant.'*

01st to 04th grounds of appeal

[9] The gist of the appellant's complaint under the above grounds of appeal amounts to criticism of or allegations against his trial counsel.

[10] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal laid down judicial guidelines regarding the issue of criticism of trial counsel in appeal and the procedure to be adopted when allegations of the conduct of the former counsel are made the basis of ground/s of appeal urged on behalf of the appellant. The appellant had not followed those guidelines and therefore these appeal grounds cannot be even pursued in appeal.

[11] The Court of Appeal in **Prakash v State** [2016] FJCA 114; AAU44 of 2011 (20 September 2016) expressed the view that complaints of incompetence of trial counsel must be approached with healthy skepticism by the appellate court and for the appellant court to disturb the conviction the alleged failure on the part of the defense counsel should have been of such a fundamental nature as to deprive the appellant of due process of law and consequently of a fair trial.

[12] The counsel from Legal Aid Commission had represented the appellant at the trial and it appears from the summing-up and the judgment that they had defended the case on behalf of the appellant competently and professionally. So much so, the defence counsel had managed to persuade one assessor to express 'not guilty' opinion.

[13] In **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) the Court of Appeal stated on the same matter as follows:

> *'[26] ……In **R. v. Turner** (1970) 54 Cr.App.R.352, C.A., [1970] 2 Q.B.321 it was held that the counsel must be completely free to do his duty, that is, to give the accused the best advice he can and, if need be, in strong terms…'.*

[14] In **Masicola v State** [2021]; AAU 073.2015(29 April 2021) the Court of Appeal said:

> *'In **Ensor** [1989] 1 WLR 497 the Court of Appeal held that a conviction should not be set aside on the ground that a decision or action by counsel in the conduct of the trial which later appeared to have been mistaken or unwise. Taylor J said in **Gautam** [1988] Crim. LR 109 CA (Crim Div)*
>
> > *' … it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground of appeal.'*

[15] The Supreme Court in **State v Samy** [2019] FJSC 33; CAV0001.2012 (17 May 2019) also had usefully referred to the professional relationship between the defense counsel and the accused and how far the court would concern itself with it:

> *'[21]……. It is not for a court to inquire into the advice tendered by counsel to his client. The Respondent has not deposed in an affidavit, that is, on oath, as to wrongful advice given by his lawyer. In argument it was suggested there was pressure. But the court cannot substitute its own view of what it considers should have been the areas of questioning or advice to be given by a lawyer to his client…..'*

[16] Therefore, there is no reasonable prospect of success in these grounds of appeal.

05th ground of appeal

[17] The appellant argues that the changes of case numbers from HAC 22 of 2014 to HAC 199 of 2017 rendered the disclosures null and void.

[18] The respondent has submitted that when the proceedings were first instituted in the High Court under HAC 22 of 2014 the information contained only charges of 'Defilement' and 'Abduction' and the High Court remitted the matter to the Magistrates' court to hear the case under extended jurisdiction. Later, the prosecution after reviewing the material and conferencing the witnesses decided that additional and more serious charges could be laid and accordingly the matter was transferred to the High Court where it was given the number HAC 199 of 2017.

[19] This administrative and judicial process certainly cannot affect the validity of disclosures. Therefore, there is no reasonable prospect of success in this ground of appeal.

06th ground of appeal

[20] The appellant complains that the prosecution had provided incomplete disclosures.

[21] Had there been any inadequacy in the disclosures the defense counsel were in the best position to demand required disclosures and brought it to the notice of the High Court Judge. No such application or request had been made. The respondent submits that all relevant disclosures had been given to the defense.

[22] Therefore, there is no reasonable prospect of success in this ground of appeal.

07th ground of appeal

[23] The appellant alleges that no proper investigation had been carried out by the prosecution.

[24] This is not an appeal point at all but a trial issue. These are matters that should have been canvassed during the trial. If the appellant's complaint relates to lack of corroboration then in terms of the law there is no need to look for corroboration in sexual offences. In any event, witness Sonia had indeed corroborated the complainant's evidence in material particulars.

[25] Therefore, this ground of appeal is misconceived and has no prospect of success in appeal.

08th ground of appeal

[26] The appellant argues that the trial judge erred in relying on circumstantial or insufficient evidence presented by the prosecution.

[27] It appears that the prosecution case had been based on the evidence of the complainant, her mother, the complainant's friend Sonia and the doctor. While the complainant had given direct evidence relating to all four counts, Sonia had testified directly to the events that took place on the night of 10 January 2014 up to the point where the Police had come and rescued her and the complainant in Rakiraki on the night of 15 January 2014. The complainant's mother had testified that she never gave consent or permission to the appellant to take the complainant with him. The doctor had provided expert opinion as to the result of examination of the complainant.

[28] Therefore, there is no merit in the appellant's complaint and no reasonable prospect of success in this ground of appeal.

09th ground of appeal

[29] The appellant complains about inconsistencies between the evidence of the complainant and Sonia.

[30] The trial judge had been quite mindful of this aspect and directed the assessors on the inconsistencies at paragraphs 19 and then addressed himself at paragraph 31-33 of the judgment on areas of inconsistencies between the two witnesses:

> *'**[31]** Sonia testified that prior to leaving the Pastor's House on the night of Friday 10 January 2014, the complainant had given her a taxi driver's number and asked her to call. Thus she testified that when the accused arrived in his taxi she had initially thought that it was the taxi she had called for.*

[32] *Sonia also stated that whilst in Lautoka the accused had taken them to Ron's house. Further, Sonia's evidence was that they were taken to Rakiraki on Sunday, and not on Monday as stated by the complainant in her evidence.*

[33] *Sonia's evidence was otherwise consistent with the evidence given by the complainant.'*

[31] 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 (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]. The trial judge seems to have left this position at paragraph 15 of the summing-up for their consideration.

[32] Therefore, there is no reasonable prospect of success in this ground of appeal.

10th ground of appeal

[33] The gist of the appellant's argument that the complainant and her friend Sonia had opportunities to escape but did not do so implies that they were a consenting party to what happened.

[34] However, the defence case had not run on the basis that the appellant had sexual intercourse with the complainant with her consent. His position as summarised by the trial in the judgment is as follows:

*'**[34]** In this case, the accused is taking up a total denial of all the charges against him. His position is that Sonia has stopped his taxi on Friday (10 January 2014) night. The complainant and Sonia had got into his taxi as passengers and on their own free will. He states that due to the manner in which they had been behaving he had thought that the complainant and Sonia were big girls; and that the complainant was over 20 years of age.*

[35] *Although the accused admits that the complainant and Sonia were with him until Wednesday (15 January 2014), he totally denies having sexual intercourse with the complainant on any occasion, either in Nadi or in Rakiraki. His position is that while at Nadi he was with his family and that his mother, step-father, sister, brother-in-law and their two children were present at home. Similarly, while at Rakiraki his uncle and aunty and their son were present at home. Thus, his position is that there was no possibility for him to have sexual intercourse with the complainant.'*

[35] In the light of the appellant's position at the trial his argument taken up under this ground of appeal goes contrary to his defence of total denial.

[36] In any event, looking at what the trial judge had stated at paragraphs 70 of the summing-up referring to the absolutely serious threats issued by the appellant on the two juveniles it is clear that they would have been in mortal fear of painful death in case of any defiance of the appellant.

[37] Therefore, there is no reasonable prospect of success in this ground of appeal.

11th ground of appeal

[38] The appellant submits that the conduct of the complainant and her friend Sonia is not compatible with that of persons abducted.

[39] In some way this is also connected to the above ground of appeal suggesting that the complainant and Sonia may have been consenting parties. In any event, these are trial issues that should have been canvassed during the trial to buttress the appellant's position that they got into the taxi voluntarily as opposed to acting under his threats. However, the prosecution evidence had revealed otherwise as narrated by the trial judge in the judgment:

*'**[17]** As they left the Pastor's house, a taxi came and stopped near them on the Matanikorovatu Road. The accused, who was the driver of the taxi, had asked where they were going. RRD had replied that they were going to her home at Navosai. The accused had said that he will go and drop them. However, she had said, it is okay, we are going to walk from here.*

[18] *Then the accused had come out of the taxi with a knife in his hand. He had put the knife on her neck and told Sonia to get inside the taxi. The witness demonstrated in Court as to how the accused had held on to her with a knife in his hand. She said that they were shouting out for help, but there was nobody nearby. The complainant described the knife as something like a dagger knife. She said the shape of the knife was a bit strange. Not like a normal knife which is used in the kitchen.*

[19] *After the accused had put the knife on her neck and grabbed her, he told Sonia to sit at the back seat of the taxi. Then he had pushed the complainant and told her to sit in the front seat. She had complied.'*

[40] When the entirety of evidence is considered it is clear that the conduct of the complainant and Sonia had been quite consistent with the two juveniles having behaved obediently under mortal threats issued by the appellant.

[41] Therefore, there is no reasonable prospect of success in this ground of appeal.

12th ground of appeal

[42] The appellant submits that the trial judge had relied on fabricated evidence of the complainant and Sonia.

[43] This is yet another aspect that should have been canvassed at the trial and it is not an appeal point but a trial issue.

[44] The trial judge had placed all the evidence in a comprehensive manner before the assessors and he himself had considered them in the judgment.

[45] I am of the view, that on the whole of the evidence it was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

[46] Therefore, there is no reasonable prospect of success in this ground of appeal.

Amended 01st to 05th grounds of appeal (24 March 2021)

13th and 14th ground of appeal (01st and 02nd ground)

[47] The appellant seems to challenge matters relating to the cautioned interview recorded by DC 3538 Parnesh Dayal.

[48] However, the appellant's cautioned interview was not part of the prosecution evidence as the trial judge had ruled it inadmissible in the *voir dire* ruling on 26 January 2018.

[49] Therefore, there is no substance at all in this ground of appeal.

15th ground of appeal (03rd ground)

[50] The appellant argues that the element of penetration had not been proved.

[51] The following paragraphs in the judgment clearly show that the prosecution had indeed proved penetration of the complainant's vagina by the appellant with his penis:

> *'**[24]** She then went on to describe how the accused had forcefully had sexual intercourse with her that night (Saturday night). The witness said, that the accused had raped her. When asked to explain, she said the accused put his penis inside her vagina*
>
> ***[25]** Later on Sunday night, the accused came and pulled and dragged her from Sonia's room and took her to the room she had been the night before. The accused had then had forceful sexual intercourse with her that night as well. He had put his penis inside her vagina.*
>
> ***[28]** Later that night the accused came into the room she was in and closed the door of the room. The accused had then pressed her neck and sworn at her. The accused had said, remember what I said before, if you tell something to uncle and aunty, remember I am not scared of anyone, not even uncle and aunty. I will kill all of you. He had then had forceful sexual intercourse with the complainant. The accused had put his penis into her vagina.'*

[52] Therefore, there is no merit at all in this ground of appeal.

16th ground of appeal (04th ground)

[53] The matters raised by the appellant under this ground of appeal are similar to his argument under the 10th ground of appeal the gist of which is questioning why the complaint and her friend Sonia did not escape and run away. He also alleges the bad character of the two juveniles.

[54] I have dealt with the first matter earlier and needs no repetition. The bad character, if any, of the complainant and Sonia is a trial issue and not a matter of appeal. It also goes, if at all, to the aspect of consent which was not the appellant's stance at the trial.

[55] There is no prospect at all in this ground of appeal.

17th ground of appeal (05th ground)

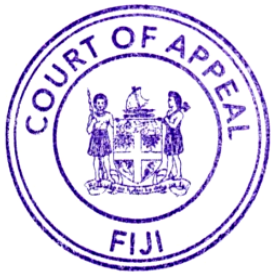
[56] The appellant appears to complain that only the charges of abduction and defilement were put to him at the investigation stage and not rape charges.

[57] The appellant has not submitted as to how this failure resulted in a substantial miscarriage of justice. Going by his defence taken at the trial, even if the charges of rape were put to him his position would have been a total denial of rape charges.

[58] The conviction seems inevitable when the assessors and the trial judge decided to act on the evidence of the complainant, Sonia, the complainant's mother and the doctor and rejected the appellant's version. Therefore, I cannot conclude that there has been a substantial miscarriage of justice [see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157 and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)].

Order

1. Leave to appeal against conviction is refused.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL