

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

CRIMINAL APPEAL NO. AAU 010 of 2023
[In the High Court at Lautoka Case No. HAC 190 of 2020]

BETWEEN : **JOSEFA DRAVULEVU TAGICAKI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
: **Ms. S. Swastika for the Respondent**

Date of Hearing : **25 June 2024**

Date of Ruling : **01 August 2024**

RULING

1. The appellant was charged in the High Court at Lautoka, with the following offences:
 - i) One count of Assault contrary to section 247 (a) of the Penal Code;
 - ii) One Count of Rape contrary to section 149 and 150 of the Penal Code;
 - iii) One count of Rape contrary to section 207(1) and (2) of the Crimes Act 2009
2. Following a trial in the High Court at Lautoka, the appellant was found guilty and convicted on 29 September 2022, of one count of Rape [Count 3 in the Indictment] contrary to section 207(1) and (2) of the Crimes Act 2009. The complainant in this rape was I.D.
3. He was found, not guilty of the other two counts: assault, contrary to section 247(a) of the Penal Code and Rape [Count 2 in Indictment] contrary to section 149 and 150 of

the Penal Code, for which he was also charged. This is count two in the indictment filed by the DPP, which relates to the rape charge in which the complainant was S.V.

4. On 20 October 2022, the appellant was sentenced for Rape charge he was found guilty of, to 14 years 10 months and 5 days imprisonment.
5. The appellant was represented by counsel at the trial in the High Court.

Appeal

6. By letter dated 18 November 2022, the appellant submitted his Notice of Appeal against conviction and sentence. The appeal was timely. The grounds submitted for the appeal against conviction is that the conviction is unreasonable and not supported by the totality of the evidence. The ground submitted against sentence was that the sentence was harsh and excessive.
7. The appellant submitted 12 additional grounds of appeal on 12 March 2024. The court had great difficulty understanding the precise allegation made by the appellant, as regards the error of law and fact made by the trial judge, despite the clear findings made by court on matters of facts before the trial.

The Law

8. In terms of section 21(1) (b) and(c) of the Court of Appeal Act, the appellant may appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction is 'reasonable prospect of success': *Caucu v State*¹ and *Navuki v State*²
9. Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take

¹ [2018] FJCA 171 (AAU No: 0029 of 2016)

² [2018] FJCA 173 (AAU No: 0038 of 2016)

into account some relevant considerations [vide Naisua v State³, House v The King⁴ [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No.AAU0015].

Leave Hearing

10. At the hearing of the leave application, the appellant advised the court that he relies on the submission he had had filed earlier on 14 April 2024. When this matter was called on 14 April 2024, the appellant had indicated that he will file additional grounds of appeal. In the end it was not a new or additional ground just the same claim about a withdrawal letter by the complainant, which he claimed was ignored by the trial judge.
11. The review of the grounds submitted by the appellant are under various heads of evidential claim made.

Fabrication & Collusion by witnesses in giving evidence

12. Grounds 1 and 2 relates to a claim of fabrication and collusion between the police officers and the complainants with regard the motivation behind the allegations made against the appellant. The appellant has not provided any basis for this claim. It is based on what the appellant thinks must have taken place. It was never raised by his counsel at the trial and may not have been explored in cross examination.
13. At paragraph 92 of the Judgement, the trial judge in setting out the evidence noted:

"..the defence says the allegations raised by the complainants are made up story. The motivation behind the allegations is that the eldest sister of both complainants Vasemaca and the accused are separated. The two complainants in collusion with Vasemaca have raised the allegations in the hope that once the accused goes to prison Vasemaca will be able to take all the properties of the accused."

³ [2013] FJSC 14

⁴ (1936) 55 CLR 499; [1936] HCA 40

14. At paragraphs 124, 125 and 126 the determination by the trial judge after considering the evidence are:

- i) *The appellant did not tell the truth as witness*
- ii) *He only told the court his version, which was implausible on the totality of the evidence*
- iii) *When cross-examined he was not forthcoming and it was evident that he was withholding information*
- iv) *The court does not accept the proposition that the allegation against him was a ploy to take the appellant's properties by the wife, who is the older sister of ID.*
- v) *The proposition about the property, lacks common sense since the ownership of the property cannot be lost by him in the circumstances of this case.*

15. These grounds lack merit.

Seeking Forgiveness, Yaqona Ceremony & Withdrawal Letter

16. Grounds 3, 4, 5, 6 and 10 relates to the traditional ceremony on seeking forgiveness and the withdrawal letter that was signed the ID, the complainant. To deal with these grounds, reference to the relevant passages in the judgement regarding the court's analysis of this matter, are set out in paragraphs 90 and 91 and the conclusion at paragraph 127:

“90. One day the accused came to Pita Nasara's home with some yaqona seeking forgiveness for what he had done to the complainant. In the presence of the complainant the accused started asking for forgiveness for what he had done to the complainant. Pita accepted the yaqona but the complainant did not forgive and forget what the accused had done to her. In 2017 the matter was reported to the police after the first complainant revealed to the second complainant that the accused had also assaulted her.

91. Finally, the prosecution submits that both complainants were misled into signing two documents which mentioned that they wanted to withdraw their complaints against the accused because they had raised a false complaint which were not authentic. They were told to sign a false pretext that if the accused goes to jail so will their brothers. In any event, the two documents in question were prepared by the accused brother for the benefit of the accused. The two complainants came to court and gave evidence is reason enough that they wished to proceed with their complaints.”

17. At paragraph 127 the trial judge stated:

*"I am unable to accept that the yaqona ceremony was for anything other than **what the accused had done to the complainant in the bathroom**. The accused himself had stated that discipline was a normal aspect of his responsibility towards the complainant. In this regard, there was no reason for the accused to seek forgiveness for his discipline of the complainant."*

18. At the hearing of Leave to Appeal hearing, the main issue raised by the appellant was the '**Withdraw Letter**' signed by both complainants withdrawing their complaint against the appellant. The appellant had great difficulty understanding why the trial judge did not accept the withdraw letter and therefore terminate the proceedings against him.

19. It was pointed out to him during the leave hearing, that the letter seeking to withdraw the complaints against him was not evidence at the trial and therefore cannot be considered here. However, what the appellant was not able to explain was what the trial judge referred to in paragraph 90 of the Judgement where he stated:

"One day the accused [appellant] came to Pita's home with some yaqona seeking forgiveness for what he had done to the complainant. In the presence of the complainant the accused started asking for forgiveness for what he had done to the complainant. Pita accepted the yaqona but the complainant did not forgive and forget what the accused had done to her."

20. The traditional forgiveness through the yaqona ceremony, requires the appellant to seek forgiveness for what he did to I.D. It was an admission of the fact that the appellant did commit the rape was prosecuted for.

21. These grounds are meritless.

No Basis on the Totality of the Evidence

22. Grounds 7, 8, 9, 11, 12, 13, 14, 15 and 16 these are not grounds that claim any specific error of law based on facts of the case. They are unsubstantiated claims by the appellant on his own version of the facts with no correlation to the total of the evidence adduced and cross-examined at the trial. All of them are frivolous.

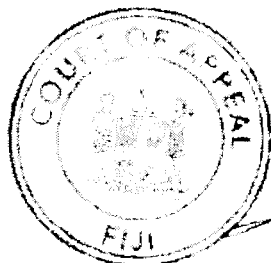
23. When you take into consideration the fact that the appellant was ably represented by the Counsel from the Legal Aid Commission at his trial, and that none of this matter were raised. When the appellant gave evidence in court, the trial judge formed the opinion that he told lies and his version was untenable given the totality of the evidence.
24. The appellant's problem is that he imagines a lot of things about his case, but they are not supported by the evidence that were adduced at the trial.
25. These grounds are meritless.

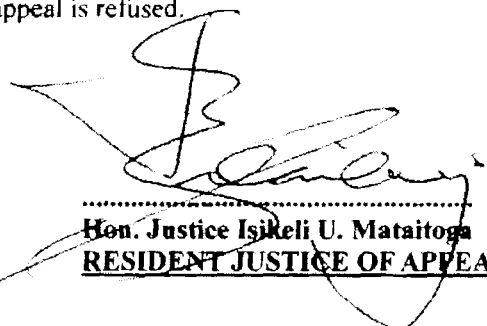
Unfair trial Alleged

26. In one of the earlier submission the appellant that his right to fair trial under section 15(1) of the Constitution was "brushed aside by a pre-determined court system." There was no submission provided to substantiate this claim.
27. On the basis of the judgement and sentence ruling that was delivered by the trial judge in the High Court, there is no basis to this claim. A Claim with no merit.
28. At the conclusion of the review of the grounds of appeal submitted by the appellant, there were no grounds that has a reasonable prospect of success if it went on appeal. Leave to appeal is refused.

ORDERS:

1. The appellant's application for leave to appeal is refused.




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Hon. Justice Isikeli U. Maitoga
RESIDENT JUSTICE OF APPEAL

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent