

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 097 OF 2022

BETWEEN: **ILIESA LAGAVAKATINI**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, RJA**

Counsel: **Mr. Ratidara L for First Appellant**
Mr. Ratukalou U for Respondent

Date of Hearing: **25 June 2024**

Date of Ruling: **1 August 2024**

RULING

1. The appellant, Iliesa Lagavakatini, was charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

Iliesa Lagavakatini, on the 29th day of February, 2020 at Nadi in the Western Division had carnal knowledge with "A.R", without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

Iliesa Lagavakatini, on the 29th day of February, 2020 at Nadi in the Western Division unlawfully and indecently assaulted "A.R" by touching her breast and kissing her neck.

COUNT THREE

Statement of Offence

ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE: Contrary to section 211 (1) of the Crimes Act of 2009.

Particulars of Offence

Iliesa Lagavakatini, on the 29th day of February, 2020 at Nadi in the Western Division unlawfully took "A.R", an unmarried girl under the age of 18 years out of the possession and against the will of her mother namely **Asinate Sukabula** who had the lawful care of the said "A.R" with intent to have carnal knowledge.

2. The Appellant pleaded not guilty to all charges and the matter formally proceeded to trial on 1st, 2nd, 3rd and 4th August 2022 at the Lautoka High Court. At the trial, the State called three witnesses and closed its case. The Court found a case to answer against the appellant and asked him to present his defense. The Appellant chose to give evidence and also called another witness.
3. The Appellant was found guilty and was convicted in a judgment delivered on 10th August 2022 for one count of Rape, one count of Indecent Assault and one count of Abduction of a person under the 18 years of age with intent to have carnal knowledge as per the third count. The Appellant was sentenced on 30th August 2022 to an

aggregate sentence of 14 years, 7 months and 10 days imprisonment, with a non-parole period of 13 years.

4. The appellant was dissatisfied with the High Court ruling and decided to appeal. For this leave hearing I will take the 19 September 2022 as the date the appeal was lodged; not the 29 September 2022. The delay is 10 days late. But there was a further delay in the appeal being prosecuted by the appellant until 16 March 2024. The court is not privy to this delay, even though there is an explanation in the affidavit of the appellant dated 16 March 2024.

The Appeal

5. The appellant with the assistance of Legal Aid Commission [LAC] filed a Notice of Motion dated 26 March 2024, seeking hearing for an application to:
 - (i) Enlargement of time to appeal against his conviction;
 - (ii) Leave to appeal be granted to the appellant to appeal against conviction
6. The appellant filed an affidavit dated 26 March 2024 and also his submission for Leave to Appeal against conviction.
7. Both matters will be dealt with together.
8. There is only one ground of appeal against conviction:

“That the conviction on the three counts is unreasonable considering the totality of the evidence.”

Governing Law - Enlargement of Time to Appeal

9. In Rasaku v State¹ 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

¹ [2013] FJSC 4; (CAV 009 of 2013)

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?

Length and Reason for the Delay

10. As regards factors i) and ii) above, the appellant's affidavit of 26 March 2024 provided the reason for the delay and why it took so long. These are:

- i) Following his conviction at the High Court in Suva, he was transferred to Natabua Prison at Lautoka
- ii) He had great difficulty in getting a legal advice to assist in his appeal submission
- iii) An inmate friend finally assisted him and then LAC also assist by filing amended grounds

11. The delay in this case was 10 days. In **Julien Miller v The State**² Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave. The appellant in that case was 11½ months late and leave was refused. *For an incarcerated unrepresented Appellant up to 3 months might persuade a court to consider granting leave if other factors are in the Appellant's favour.*

Merit in the Ground of Appeal

12. The appellant ground of appeal claims that on the totality of the evidence in this case, the verdict is unreasonable and a miscarriage of justice.

² [2007] FJCA (AAU 0076 of 2007)

13. The Supreme Court in **Lole Vulaca v The State**³ this Court endorsed the above principles at paragraph [67]:

"As was observed by the High Court of Australia in Mackenzie v R (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, "is one of logic and reasonableness." In the course of its judgment, the High Court of Australia cited a passage in an unreported judgment of Devlin J in R v Stone (13 December 1954), to the effect that an accused who asserts that two verdicts are inconsistent with each other, "must satisfy the court that the two verdicts cannot stand together"."

14. In this case, the trial judge set out fully the prosecution case from paragraphs 29 to 54 of the judgement and also the case for the defence from paragraphs 57 to 83 of the judgement. The judgment then proceeded from paragraph 85 to 101 undertake an assessment which was strong on the explaining why the trial judge accepted the prosecution case but lacks addressing in some detail some of the evidence adduce on behalf of the appellant.

15. Under the heading Determination, the trial Judge made the following findings:

At paragraphs 116 to 120 of the judgement. Note how each of these paragraphs started:

Paragraph 106 ..Her **demeanor** was consistent with her honesty.

Paragraph 117 – It appeared to me.....

Paragraph 118 – Meli the cousin of the accused....

Paragraph 120 – the failure to follow **Brown v Dunn** rule

16. The failure to follow the **Brown v Dunn**⁴ rule is fatal in rejecting the appellant evidence of consent without first putting it to the complainant. As was observed by the High Court of Australia in **MacKenzie v R**⁵ the test to be applied in dealing with question of inconsistent or unreasonable verdicts is one of 'logic and reasonableness.' On that test alone the verdict in this case is unreasonable. It is the evidence of the appellant on consent and friendship between the complainant and the appellant

³ [2013] FJSC 16; (CAV 005 OF 2011)

⁴ [1893] 6. R. 67

⁵ (1996) 150 CLR 34, at 366-7; followed in **Vulaca** (supra)

should have been put to the complainant. This ground of appeal has merit to go forward to the full court.

Prejudice to the Respondent

17. The respondent did not address this matter in their submission. But it is unlikely on the fact here, to be any prejudice to the respondent.
18. I am satisfied that the appellant submission has raised sufficient merit for me to conclude that the full court should be given the opportunity to review the issues raised by the appellant submission.
19. Enlargement of time to appeal to appeal is allowed for the appellant.

Leave to Appeal

20. The appellant had submitted the one ground of appeal set out in paragraph 8 above. With enlargement of time granted, the leave to appeal will be briefly explored.
21. The court jurisdiction to consider an application for leave to appeal to the Court of Appeal, on a matter of law and fact, is pursuant to section 21(1) (b) of the Court of Appeal Act. The guiding principle remains that with the Court of Appeal outlined in **Caucu v State**⁶ that of **reasonable prospect of success**.
22. The reliance on **demeanor** of the complainant as the basis of accepting her evidence relating to consent and rejecting all the relevant evidence of the appellant on the same facts, shows the inconsistencies that were present in this case.
23. In **Dauvucu v State**⁷ the Court of appeal state

18] The Judge's view on demeanor was clearly not the only one, as the assessors unanimously came to the opposite conclusion, having been guided by the Judge's summing up. A difficulty with the Judge's assessments of demeanor is that it is subjective. His descriptions of how the various witnesses appeared to him in the witness box is not related to the coherence or likelihood of their

⁶ [2018] FJCA 171 (AAU 0029 of 2016)

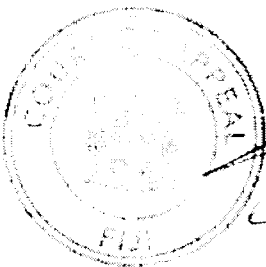
⁷ [2024] FJCA 108 (AAU 0152 of 2019)

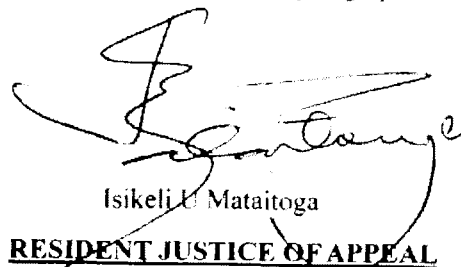
competing narratives being true, to enable the conclusions he drew to be objectively revisited and tested. Nor does the judgment include an analysis of the consistency or otherwise of evidence on various topics.

24. The inconsistencies in the ruling alleged by the appellant extend to the procedures that was not followed as regards the *Brown v Dunn* approach. This meant that the evidence of the appellant was not put to the complainant and yet the trial judge was able to determine at paragraphs 123 and 124 of the judgement, that all the prosecution witnesses' evidence was reliable and credible.
25. With the benefit of the full court record of the trial in the high court that will be available on appeal, the leave to appeal on the grounds identified has reasonable prospect of success.
26. In light of the above, I would grant leave to appeal on the one ground submitted by the appellant and for the full court to consider the failure to observe the principle in **Brown v Dunn** at the trial.

ORDERS:

1. Application for Enlargement of Time to appeal is granted
2. Leave to appeal is granted for the grounds stated in paragraph 8 above.




Isikeli U. Mataitoga
RESIDENT JUSTICE OF APPEAL