

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 025 OF 2023

BETWEEN: **MUSTAQ ALI**

Appellant

AND: **THE STATE**

Respondent

Coram: **Mataitoga, RJA**

Counsel: **In-Person for the Appellant**
Mr. Kumar. S for the Respondent

Date of Hearing: **31 July 2024**

Date of Ruling: **19 August 2024**

RULING

1. The Appellant (Mustaq ALI) was charged with one count of Rape, contrary to section 207(1) and (2)(a) of the Crimes Act 2009. The allegation was that the appellant between 1st of April and 30 June 2011, at Lautoka, in the Western Division, had carnal knowledge of Yashmin Nisha, the complainant, without her consent.
2. The appellant pleaded not guilty to the charge and the trial started on 18 January 2023 and concluded on 20 January 2023. Following the trial the appellant was found guilty and was convicted on 25 January 2023.

3. On 27 January 2023 the appellant was sentenced to 15 years imprisonment with a non-parole period of 12 years.
4. The appellant was dissatisfied with the judgement and sentence in this case. He filed a timely appeal on 24 February 2023 against conviction and sentence. The appellant was represented by counsel during his trial in the High Court in Lautoka.

The Appeal

5. The Notice of Appeal, Application for Leave to Appeal Against Conviction and Sentence was filed on 24 February 2023. There were 9 grounds of appeal against conviction and one ground against sentence.

Grounds of Appeal

6. The following grounds of appeal were submitted by the Appellant,

Against Conviction:

- (i) That the trial judge erred in law and fact in misdirecting himself on the pervious inconsistent statements/evidence of the prosecution witnesses resulting in miscarriage of justice;
- (ii) That the trial judge erred in law and fact in not giving adequate consideration of the evidence of appellant's witnesses and accepting the complainant's evidence, resulting in miscarriage of justice;
- (iii) That the trial judge erred in law and fact in not adequately directing himself that the prosecution evidence before the court had not proved beyond reasonable the prosecution case and as such the benefit of the doubt ought to have been given to the appellant;
- (iv) That the trial judge erred in law and fact in stopping the counsel for the appellant to cross-examine witnesses and instead directing to submit those issues and in doing so obstructed the appellant's counsel in rendering his professional service to his client; resulting in an unfair trial;

- (v) That the trial judge erred in law and fact in not adequately considering the defense case before finding the appellant guilty as charged;
- (vi) That the trial judge erred in law and fact in not taking into consideration the complainant's belated complaint to the police and the delayed charges laid against the appellant by the police, which affects the complainant's credibility;
- (vii) That the trial judge erred in law and in fact in admitting the DNA Report despite the fact that the prosecutions own witnesses contradicted each other;
- (viii) That the trial judge erred in law and fact in not dealing adequately with the fact that the Appellant's DNA samples was part of the DNA of two other persons, one of which is Maushum Ali who claims to be the father of the child;
- (ix) That the trial judge erred in law and fact when he rejected appellant Counsel arguments on the issue of DNA and accepted as accurate the DNA Test results.

Against Sentence

- (x) That the appellant's sentence is harsh and excessive;
- (xi) That the trial judge erred in law and fact is not taking relevant considerations when sentencing the appellant.

Relevant Legal Principles

7. The grounds of appeal above alleges errors of law and fact by the trial judge, therefore in terms of relevant provision of the Court of Appeal Act 2009, section 21 (1) (b) is relevant. Under this provision leave of the court is required to appeal.
8. For a timely appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success' [see **Caucu 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 **Waqasqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry 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)].

9. The guidelines to be followed when a sentence is challenged on appeal, was set out by the Court of Appeal in Kim Nam Bae v State [1999] FJCA 21 (AAU No: 0015/18) and endorsed by the Supreme Court in Naisua v State [2013] FJSC 14 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 into account some relevant considerations.

Assessment of the Grounds of appeal

10. Having reviewed the nine grounds advanced by the appellant against conviction, which is set out in paragraph 6 above, and applying the test of whether there is one, with reasonable prospect of success, the conclusion I have reached is, none would meet the test. Nevertheless, I will refer to them briefly.
11. The trial judge in analyzing the evidence at the trial stated that there are two conflicting versions of the events. The case of the prosecution will stand or fall on the testimony of the complainant. This puts into context the reason for the dedicated attempt by the appellants, to challenge the evidence of the complainant.
12. The case of the defense is a total denial of the rape allegation. The defense position is that the complainant made up the story to take revenge on the mother and step father and to demand money from them.
13. The trial judge noted that the complainant's evidence was that she was vaginally penetrated by the accused, who is her step father, with his penis, without her consent, six to seven times between April and June 2011.
14. Grounds 1 and 2, cover allegation of inadequate consideration by the trial judge of inconsistent statements of the complainant in the statements she gave to the police and

her evidence given in court. There is no specific reference to this in the submission of the appellant.

15. The trial judge at paragraph 52 of the judgement stated the following in analyzing the evidence:

"52 The Defence contended that the complainant had not in her statement to police talked about the complaint she had made over the phone to Nazreen. According to her previous statement, she had told the police only about the complaint she had made to Nazreen upon her arrival in June or July. That omission in her previous statement regarding the complaint made over the phone is justified in view of her explanation that the officer did not ask everything in detail while recording her statement. Furthermore, this omission is on a peripheral issue that would not amount to a contradiction as far as the rape allegation is concerned. On the other hand, if the rape incidents took place during the period between April and June, a complaint made in June or July cannot be considered as a belated one.

16. This evaluation of the evidence is correct given the circumstances of the case. There is no substance to the allegation in the grounds of appeal 1 and 2.
17. Ground 3 of the appeal grounds is made by the appellant, without any reference to any evidence in the trial that would support his claim that the case of the prosecution has not been proven to the required standard of beyond reasonable doubt. On the contrary the trial judge set out the prosecution case and the defence case and undertook the analysis of the evidence and address directly the three areas of concern, namely, alleged inconsistent evidence of the complainant; delayed reporting and DNA Report/evidence.
18. The trial judge's reasoning is set out clearly in paragraphs 53 to 56 of the judgement and it is correct:

"53 In view of that, this is not very much a case that lacks a recent complaint, rather a case allegedly lacking a 'credible' recent complaint. The fact remains that the police had received a complaint as late as 16 June 2016, approximately five years after the alleged incidents. Does the late complaint to police affect the credibility of the complainant's evidence?

54. Why was the matter not promptly reported to police, either by the complainant or by her mother? In the circumstances of this case, should the belated complaint to police and delayed charge justify an attack on complainant's creditability? Considering all the evidence led in this case, those are the questions that must be answered before coming to a conclusion as to the credibility of the complainant.

55. The complainant's explanation for not being able to report the matter to police is quite reasonable. When she was asked why did she not inform anyone else or report

the matter to police, her explanation was that - how can I expect anyone else to believe me when my own mother did not believe me when I told her that I was raped? The complainant's confidence in informing or reporting the matter to anybody else would have been shattered by the conduct of her own mother.

56. Why then Nazreen should have suppressed the matter? I can see two reasons for Nazreen to suppress the complaint received from her daughter. One relates to credibility and the other to reliability. The accused is none other than her husband on whom she is dependent for everything. Whereas the complainant from her perspective appears to be a discarded person. Nazreen would have wanted to prevent her husband from going to jail rather than to protect complainant's interests. In view of that, Nazreen must have had a strong motivation to prevent the matter being reported to police."

19. Ground 4 cannot be assessed, because there is nothing in the judgement that suggested that such acts of the trial judge which is claim in the ground of appeal took place.
20. Ground 5 and 6 is a repeat of issues raised in grounds 1, 2, and 3 and have been discussed above. They have no merit.
21. Grounds 7, 8 and 9 refers to the DNA report evidence in the trial. The DNA samples were collected from the appellant, the child and Maushim the latter claiming to be the father of the child whose paternity is in doubt. The claim of the appellant was directly dispelled as groundless, from the evidence analyzed by the trial judge and set out in full in paragraphs 66 to 69 of the judgement.
22. At paragraph 67 of the judgement trial judge stated:

67. The Scientific Officer Nacanieli Gusu giving evidence on the analysis done on the DNA samples extracted from the child Mohammed Shiraz, the accused, the complainant and Moushim Ali confirmed that the child is a biological child of the accused and the complainant. He explained the three tire process of his testing, analysis and matching and the machines used to come to that conclusion. He has come to that conclusion on the basis of the test result that the mother of the child and Mustaq Ali each equally contributed towards the child's DNA. He categorically ruled out the possibility that Maushim Ali could be the father of the child. This conclusion has been reached on the basis that DNA of the child did not match on all 28 locations of Moushim Ali's DNA. It only matched at 19 locations.

23. After the DNA evidence was accepted by the trial judge there was really nothing in the other evidence adduced at the trial that would otherwise have moved him, to conclude as he did.

24. The conclusion is there is not merit in grounds submitted for the appeal against conviction.

Against Sentence

25. At the hearing there was no submission made to elaborate the generic grounds submitted that the sentence is harsh and excessive in that the trial judge did not take relevant factors into consideration when computing the sentence.

26. A brief review of the principles and case authorities relied upon by the trial judge in reaching the sentence, it is clear that he followed the sentencing tariff for rape of a child from 11 to 20 years: **Aitcheson v State**¹. He considered the relevant factors under section 4 of Sentencing & Penalties Act 2009. He clearly set out what aggravating factors and the mitigating factors.

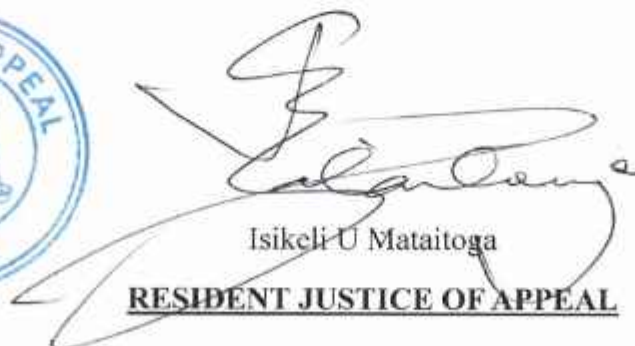
27. The trial judge selection of 12 years as the starting point of the sentence computation in the overall context of this case is correct. From the totality of the evidence in this case and factors that needs to be considered, the sentence is correct.

28. The grounds of appeal against sentence have no merit.

ORDERS:

1. Leave to appeal against Conviction is refused.
2. Leave to appeal against sentence is refused.




Isikeli U Maitaitoga
RESIDENT JUSTICE OF APPEAL

¹ [2018] FJSC 29 (CAV 0012 of 2018)