

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

CRIMINAL APPEAL NO. AAU 083 of 2023

BETWEEN : **JOJI SESEVU RAQIO** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, RJA**

Counsel : **Naivalu. M for the Appellant**
: **Latu. L for the Respondent [DPP]**

Date of Hearing : **27 August 2024**

Date of Ruling : **30 September 2024**

RULING

1. The appellant was charged by the Director of Public Prosecutions (DPP), with the following offences in the Suva High Court:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

JOJI SESEVU RAQIO, between the 1st day of January 2010 and the 29th day of April 2010, at Malake Island, Ra, in the Western Division, unlawfully and indecently assaulted ***JN***.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

JOJI SESEVU RAQIO, on the 21st day of April 2011, at Malake Island, Ra, in the Western Division, unlawfully and indecently assaulted ***SV***.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

JOJI SESEVU RAQIO, between the 17th day of May 2010 and the 20th day of August 2010, at Malake Island, Ra, in the Western Division, unlawfully and indecently assaulted ***JV***.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

JOJI SESEVU RAQIO, between the 16th day of May 2011 and the 19th day of August 2011, at Malake Island, Ra, in the Western Division, unlawfully and indecently assaulted ***KR***.

2. The accused pleaded not guilty to the four charges and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

3. The appellant was found guilty as charged on the three counts of Sexual Assault on 12 May 2023. He was sentenced to 4 years imprisonment with 2 years non-parole period on 19 September 2023.

The High Court Trial

4. The trial of the charges against the appellant proceeded usually and at the end thereof the appellant was found guilty as charged and sentenced.
5. The appellant submitted his Notice of leave to appeal and grounds of appeal timely.

Before Judge Alone

6. This appeal is made pursuant to section 21(1)(a) of the Court of Appeal Act [CAP 12], which required that the appellant have been tried in the High Court where he was convicted and sentenced. If the grounds of appeal submitted involves question of law alone, no leave is required. The Judge Alone may need to review the grounds to be sure that they indeed raise issues of law alone.
7. The appellant through counsel filed A Notice of Application for Leave to Appeal and Grounds of Appeal on 18 October 2023, against conviction and sentence. In that submission, there were three grounds of appeal against conviction and two grounds against sentence.
8. The Amended Grounds of appeal were submitted for this Leave Appeal Hearing dated 21 August 2024. These grounds are:
 - (i) The trial Magistrate erred in law when he failed to allow adequate time for the unrepresented appellant, despite his plea of adjournment given the seriousness of the offence he was charged with to enable him to prepare for trial, including engaging a counsel of his own choice;
 - (ii) The trial Magistrate erred in law when he failed to properly exercise the requisite election to the appellant before the charges were put to him at Rakiraki Magistrate Court before transferring the matter to

High Court as mandated by section 4(1)(b) of the Criminal Procedure Act 2009 (CPA);

- (iii) The trial Judge in the High Court erred in law in failing to check on the Magistrates compliance with section 4(1)(b) of the CPA, given that the offences were triable summarily rendering the entire trial a nullity.
- (iv) As a result of the above, the rights of the appellant under section 15(1) of the Constitution were breached.

9. The above grounds were the ones requested by the Counsel for the appellant for the Judge alone to assess for purpose of their leave to appeal application.

Assessment of Grounds

Grounds (ii) and (iii) above – Failure to provide right of Election

10. Grounds (ii) and (iii) allege errors of law by the Resident Magistrate in Rakiraki, who first heard the case against the appellant and transferred the case to the High Court for trial without giving the (accused) appellant an opportunity to make his election to be tried in the Magistrate or High Court.
11. Section 4 (1)(b) of the CPA is clear if election is not given to the accused (the appellant in this case) and the trial is proceeded with in the Magistrate or High Court, that trial is a nullity. The offence of Sexual Assault under the Crimes Act is an indictable offence that may be tried summarily hence the need for the appellant be given election: section 210 (1) Crimes Act 2009.
12. On the records available at this stage there is no reference in the judgement about the election being administered. This point may be cleared when the full record is available to the full court. It raises an issue of law alone.
13. The respondent conceded this ground when, it stated in their written submission dated 26 August 2024 [per Mr. Taitusi Tuenuku] paragraph 17 the following:

'I have perused the judgement and sentence of the learned trial judge and I could not find any record that the learned trial judge had made in relation to the election being put to the accused.'

14. I am satisfied that in the interest of justice, this matter should be allowed to go to the full court.

Lack Fair Trial – Contrary to section 15(1) of the Constitution

15. This ground raises an important point of law, which was narrated in the first ground of appeal that the court's failure to give adequate time to the appellant to seek a counsel of his choice violates his right to a fair trial.
16. Counsel for the appellant may need to provide more substantive submission on this point before the full court.
17. Leave is granted to appeal on the grounds referred to above.
18. Appeal against sentence is moot at this stage awaiting the determination of the above grounds of appeal against conviction in the full court.

ORDERS:

1. Leave is granted for the appeal to the High Court on the grounds against conviction discussed in this ruling.


Hon. Isikeli U Maitoga
RESIDENT JUSTICE OF APPEAL

