

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

CRIMINAL APPEAL NO. AAU 030 of 2022

BETWEEN : **ISEI NAQOVU**
Appellant

AND : **THE STATE**
Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellants in Person**
: **Semisi K for the Respondent**

Date of Hearing : **8 October 2024**

Date of Ruling : **15 October 2024**

RULING

1. The appellant was charged with 2 counts of Rape as follows:

COUNT ONE

Statement of Offence

RAPE: Contrary to section 207 (1) & 2 (b) & (3) of the Crimes Act 2009.

Particulars of Offence

ISEI NAQOVU on the 26th day of March, 2018 at Sigatoka in the Western Division, inserted his finger into the vagina of “RK”, a 9-year-old girl.

COUNT TWO

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

ISEI NAQOVU on the 26th day of March, 2018 at Sigatoka in the Western Division, inserted his penis into the vagina of “RK”, a 9-year-old girl.

2. In a judgment delivered on 23rd December, 2021 the court found the appellant guilty and convicted him for two counts of Rape as per the charges. On 25 January 2022 the appellant was sentenced to 15 years and 9 months imprisonment with a non-parole period of 13 years imprisonment. The court also Ordered permanent non-molestation and non-contact orders against the appellant.
3. The appellant filed a Notice of Application to Appeal against conviction and sentence, which he had to submit through the FCS process, which was received in the Court Registry on 29 April 2022. A further set of submission was filed in the Court Registry on 8 August 2024, which the appellant confirmed at the hearing as the submission the court should base its assessment of his application for Leave.
4. The court is prepared to accept that the Notice of Application for leave to appeal may have been submitted on time and the delay was due to the FCS internal process. This application is treated as timely.

Governing Law and Principles

5. This application does not raise an issue of law only, for which leave is not required pursuant to section 21 (1) (a) of the Court of Appeal Act. It raises issues of law and fact, therefore is government by section 21(1)(b) of the Court of Appeal Act, and for which leave is required.

6. The test for evaluating grounds of appeal at the leave to appeal stage is that of reasonable prospect of success: **Caucou v State [2018] FJCA 171; Sadrugu v State [2019] FJCA 87.**

Grounds of Appeal

7. The appellants submission lack clarity in terms of specific grounds of appeal against conviction or sentence. At the hearing the court explored with the appellant if he would give further submission using those he had already filed. He kept saying that the person who assisted him in writing the submission, did not explain to him, what he had written and what it means.
8. In **Waqaninavatu v State [2023] FJCA 72 (AAU 057 of 2008)** the Court of Appeal stated:

"[12] It should be stated that from the start, the difficulty this court faced was in trying to ascertain with some degree of certainty the number of grounds of appeal being urged by the appellant at various stages of this appeal process. Even on the day of the hearing of the appeal, the appellant was still seeking to submit new grounds of appeal and amendment some of the grounds already submitted and dealt with at the leave to appeal hearing stage.

*[13] This will need to be reviewed so that stricter observation of the rules of procedure for filing grounds of appeal enunciated in the following case need to be followed strictly. In **Gonevou v State [2020] FJCA 21**, the Court of Appeal said:*

'10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.

[11] Regarding a rehearing by the Court of Appeal, Rule 35(4) of the Court of Appeal Rules states that a notice of appeal shall precisely specify the grounds (including, if any, questions of law) upon which the appeal is brought. The same should obviously apply to notice of applications for leave to appeal as well. When an appeal is lodged from the High Court in its appellate jurisdiction, the notice of appeal shall state precisely the question of law upon which the appeal is brought [vide Rule 36(1) of the Court of Appeal Rules].

*[14] Due to the haphazard way in which the grounds of appeal have been put together and submitted to the court registry, it was difficult to focus the court's assessment of the claims made and the supporting evidence in a coordinated way. This was clear derogation from the requirement in **Rule 35(4) Court of Appeal Rules** which states that the Notice of Appeal shall precisely specify the appeal grounds. Further, **Rule 36(1) of the Court of Appeal Rules**, requires that the precise question of law, upon which the appeal is brought must be set out in the Notice of Appeal. Despite these rules, the appellant was allowed to submit barebones claims of unfairness and unreasonableness by the trial judge without reference to any basis in law or evidence adduced in court"*

9. The following issues feature in the submissions that were submitted by the appellant, to the court as grounds of appeal. These were not crafted in a manner required by Rules 35(4) Court of Appeal Rules.
 - i) Interest of justice requires attention to be focused on the express statutory criteria providing, the provisos are wide ranging but not exhaustive and arguable. Court must examine all the known facts and consider any material drawn to its attention on behalf of the appellant;
 - ii) Physical or actual evidence in key to modern forensic techniques that makes it possible that the Court exhibit in this case, the victims Medical Report adduced provide solid proof that would make witness statements largely redundant;

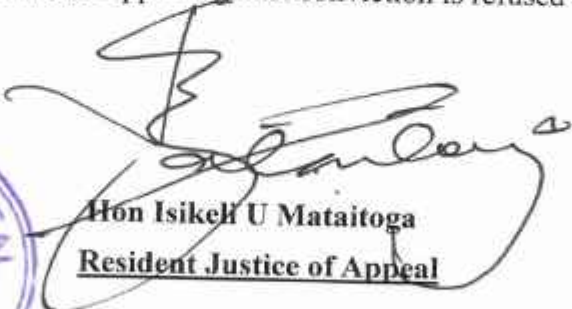
- iii) Failure of prosecution to subject the physical evidence or actual evidence of the Medical Report and reference to DNA;
 - iv) Presumption of Innocence.
10. Each of the above statements by the appellant is not linked to any specific grounds of appeal that he has submitted. They are stated in isolation and the court is left to discern what may be made out of it. They do lack any merit in the context of the evidence led at the trial and the court judgement.
11. In response, the respondent submitted the following:
- 1. Although not specifically detailed out, it appears that the gist of the appellant's complaint is against the medical evidence adduced at trial. The appellant seems to argue that although the medical finding was that the hymen was not intact and that sexual intercourse or sexual assault could not be ruled out, there was nevertheless no further scientific or laboratory analysis to determine any residual print of the appellant to tie him to the medical findings.
 - 2. In this case, the victim was 9 years old. The incident happened on 26th March, 2018. The appellant was the victim's uncle. She was medically examined the same day. The doctor gave evidence at trial and tendered the medical report as prosecution exhibit. Her evidence was summarized from paragraphs 38 – 47 of the Judgment and specific directions were given on expert evidence from paragraphs 48- 50. It was noted at paragraph 44 that whilst the medical findings were inconclusive, she was admitted for further tests. However, no further evidence was led on this regard. The Defence position regarding the medical evidence was outlined at paragraph 135 where they were of the view that the findings were inconclusive. There was no argument as to the absence of any DNA report, etc., as now contested by the appellant.

3. The learned trial judge in convicting the appellant had relied on the evidence of the complainant, the recent complaint evidence as well as the medical report. He acknowledged that it was also possible for there to be other possibilities for the hymen not to be intact.
 4. Although the medical findings were inconclusive, there was other evidence to sustain a conviction against the appellant. Given that the appellant did not raise the argument that there was no further scientific or laboratory analysis to determine any residual forensic print of the appellant to tie him to the medical findings at trial, it cannot be argued at this stage. His position at trial was that there were other possibilities as to the cause of the injuries noted in the medical report and that the findings were inconclusive; all of which the learned trial judge accepted.
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12. It is evident from the respondent's submission, that they too were unsure of the grounds of appeal. In fairness to their response, they had to try and compose what may be grounds of appeal.
 13. In conclusion this application for leave to appeal is refused. It has no prospect of success on appeal to the full court.

ORDER:

1. Application for Leave to Appeal against conviction is refused




Hon Isikeli U Maitoga
Resident Justice of Appeal