

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

CRIMINAL APPEAL NO. AAU 104 of 2023

BETWEEN : **APIMELEKI NAVATOGA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
: **Swastika, S for the Respondent**

Date of Hearing : **2 October 2024**

Date of Ruling : **29 October 2024**

RULING

1. The appellant [Apimeleki Navatoga] was charged with 1 count of Rape, contrary to section 207(1) and 2 (a) of the Crimes Act 2009.
2. At his trial at the High Court in Lautoka, the prosecution called two witnesses and after the prosecution closed its case. The court rule there was a case to answer.
3. The court explained to the appellant his options at the end of the prosecution case. He chose to give evidence and also called two witnesses.
4. At the end of the trial the appellant was found guilty as charged and convicted on 11 October 2023. He was sentenced to 13 years 10 months imprisonment with non-parole period of 11 years imprisonment.

Notice of Motion to Appeal

5. The appellant by letter dated 2 November 2023 submitted through Correction Services his Notice to appeal against conviction. This appeal letter is timely.
6. The letter of 11 November 2023 submitted 1 ground of appeal against conviction namely, the trial judge erred in law when he shifted the burden of proof to the appellant by requiring the appellant to prove his innocence in the judgement.

Relevant law and Principles

7. Section 21(1)(b) of the Court of Appeal is the relevant provision covering the facts here, given that the grounds of appeal submitted by the appellant involve questions of law and fact. Leave of the Court is necessary to appeal to the full court.
8. For section 21 (1) (b), the test for allowing leave is if the grounds submitted have reasonable prospect of success on appeal: **Caucu v State [2018] FJCA 171 and Saudrugu v State [2019] FJCA 87.**

Grounds of Appeal and Submissions

9. Appellant submitted 8 additional claims as follows:
 - i) The trial judge erred in law and fact in not directing his mind on how to approach the previous inconsistent statement of the witness;
 - ii) That the complainant did not voluntarily make the complaint against the appellant but inconsistent statements but was prompted by his father, which raised an issue of consensual sex;
 - iii) The complainant's father gave false evidence of redness around the anus of the complainant;
 - iv) The trial judge failed to consider that the complainant had raised the issue of sexual intercourse with one Baba and not the defence;
 - v) Trial judge failed to give cogent reasons for rejecting alibi witness;

- vi) That the appellant's conviction is unsafe, unsatisfactory and unsupported by the evidence.
10. The appellants submitted submission on 31 July 2024 covering each of the ground enumerate above.

Evaluation of the Grounds of Appeal

11. As regards grounds in paragraph 9 (i) and (iv) above the appellant submits that the complainant's father (Jeremaia) made inconsistent statements as follows: (a) gave the date of the offence as 21 March 2019, yet his police statement he stated it was 4 April 2019; (b) Jeremaia's police statement did not cover the detail of the appellant calling the complainant to his house and committing the offence; but in court this witness made these statements.
12. These inconsistent statements even if true is beside the point in terms of the charge because they are not relevant in proving the commission or otherwise of the charge. If may have been different if these inconsistent statements were made by the complainant. It would be directly relevant, especially as it related to the date of the offence and the manner in which the offence was committed. Those would be directly impacting the reliability and credibility of the complainant. But that is not case here.
13. In any case the trial judge was correct in dealing with inconsistent statement of the witnesses in his judgement: Refer to paragraphs 68 to 71
14. I find these grounds have no merit and dismiss the same.
15. As for grounds ii) and iii): the appellant submits because the complainant did not voluntarily make the complaint to the police, but only after the father pressured him to do so. The appellant submits that because of this fact, the sex with the complainant was with consent. It escapes the appellant, that it may be due to his threats to the complainant not to tell anyone what he did, that the complainant did not voluntarily make the report until he had the support of his father.

16. The appellant further submits that since the complainant did not resist the appellant's acts, by resisting, or shouting, indicates his consent.
17. This ground has no merit. It is dismissed.
18. As for ground v): this ground claims that the trial judge gave no reasons for rejecting the alibi witness of the appellant. In reviewing the judgement directly on the alibi evidence of the appellant's wife (Seruwaia), the trial judge first of all referred to the relevant issues that must be considered in evaluating the alibi evidence and caselaw to guide such assessment: see paragraphs 95 to 98 of the judgement.
19. *From paragraph 116 to 120 of the judgement, the trial judge set out in full the reasons for rejecting the alibi evidence adduced don behalf of the appellant.*
20. This ground of appeal has no merit.
21. As for ground vi): the ground submitted by the appellant claims that the verdict was unsafe, unsatisfactory and not supportable on the evidence.
22. The Supreme Court in **Rokete v State [2022] FJSC 11**, per Keith J at paragraph 109:

“Marsoof J’s observation about the appellate court having to evaluate the evidence and independently assess it has to be seen in its context. He was explaining what the appellate court has to do in its “supervisory” role. When the appellate court is independently assessing the evidence, it is doing so to satisfy itself, to use Marsoof J’s own words, “that the ultimate verdict is supported by the evidence and is not perverse”. In other words, the function of the Court of Appeal is to look at the totality of the evidence, and assess whether it was reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the accused was guilty of the charge he faced. It is not part of the Court of Appeal’s function to consider for itself whether on the totality of the evidence the accused is guilty. That would be to usurp the function of the trial judge

who saw the witnesses and was the person solely entrusted with determining the guilt or innocence of the accused.”

23. In reviewing the judgement in this case, the evidence led at the trial and the lack of any real evidence to rebut the prosecution case by the appellant, it is clear that on the totality of the evidence the conclusion of trial judge at paragraph 124 of the judgement was supported by the evidence let at the trial of the appellant.
24. This ground of appeal has no merit.

ORDERS

1. Leave to appeal against conviction is refused on all six grounds.



Hon Justice Isikeli Maitoga
Acting President

