IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Lautoka

CRIMINAL APPEAL NO. AAU 0010 of 2019
[High Court Criminal No. HAC 0107 of 2018]

BETWEEN	:	**ATISH NATH SHARMA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, AP**
		Andrews, JA
		Clark, JA
Counsel	:	**Appellant in Person**
		Shameem, S for the Respondent
Dates of Hearing	:	**11 November 2024**
Date of Judgment	:	**28 November 2024**

JUDGMENT

1. The appellant was charged in the High Court at Lautoka with one count of Rape, contrary to section 207(1) and (2)(a) of the Crimes Act 2009. The trial was held with assessors and at the end of it, they unanimously opined that the appellant was guilty as charged. This verdict was endorsed by the trial judge, who then found appellant guilty and convicted

him as charged on 24 July 2018. On 6 August 2018, the appellant was sentenced to 9 years and 11 months imprisonment with a non-parole period of 8 years.

2. The appellant being dissatisfied with the outcome of his trial in the High Court, filed an appeal against conviction and sentence, which was untimely by 3 ½ months. The lateness of the appeal was assessed at the Leave to Appeal hearing and the judge alone was satisfied with the reasons provide by the appellant and agreed to hear the appeal.

3. At this hearing there were two grounds of appeal; one against conviction and one against sentence. The grounds urged by the appellant were:

Against Conviction:

> *The trial judge erred in law and fact when it relied on the medical evidence of the complainant in the absence of a medical report or expert witness.*

Against Sentence:

> *The trial judge erred in his sentencing discretion when he had considered digital penetration as an aggravating factor.*

4. After considering the submissions made on behalf of the appellant and in reviewing the judgement of the court, the Resident Justice of Appeal refused leave to appeal on both counts in a ruling dated 20 August 2021.

The Appeal

5. After the Ruling for the Leave Hearing, the appellant submitted 2 sets of Grounds of appeal. The first was dated 22 November 2021 and the second was dated 4 September 2023. On the day of the hearing of the substantive appeal on 11 November 2024, the appellant requested the court if he could be allowed to file another set of grounds of appeal and submissions, making it his third set of appeal grounds and submissions.

6. When asked by the court whether the appellant would be relying on all the 3 sets of submissions for his substantive appeal, he confirmed that for his appeal, he abandons his

earlier submissions filed in court on 22 November 2021 and 4 September 2023 respectively.

7. The appellant renewed his appeal under section 35(3) of the Court of Appeal Act 2009 and Rule 37(1) of the Court of Appeal Rules and submitted an Amended Notice of Appeal Against Conviction and Sentence, with the following grounds of appeal:

i) The trial judge erred in law when he failed to warn himself and the assessors of the inconsistencies, omissions, discrepancies and contradictions in the complainant's evidence in court compared to her previous police statements and with other witnesses' statements causing miscarriage of justice.

ii) The trial judge erred in law and in fact when he failed to direct the assessors and himself on the 'totality of the circumstances test', thus causing miscarriage of justice

iii) The trial judge erred in law and in fact when he shifted the burden of proof to the appellant.

iv) The trial judge erred in law when he did not make an independent assessment of all the material facts and the totality of the evidence before affirming the verdict of guilty which was unreasonable and unsafe causing miscarriage of justice

v) The trial judge erred in law and fact by not directing himself and omitted to direct the assessors on recent complaint to substantiate whether the complainant conduct was consistent with her honesty

vi) The trial judge erred in law and fact when he did not put the case of the appellant to the assessors in a fair, balanced and objective manner;

vii) The trial judge erred in law in his sentencing discretion when he failed to take into account some relevant consideration

viii) The trial judge erred in law in acting on the wrong principle, mistaking facts and failed to take into account some relevant consideration resulting in the sentence being manifestly harsh and excessive.

New Grounds of Appeal - Should the court consider them?

8. It is obvious from the above grounds of appeal that they were not raised at the Leave to Appeal Hearing. This is the first time they have been submitted before the court. At the end of the summing-up in the High Court trial, none of the issues complained about now on appeal, were raised when the trial judge asked if redirections were sought on any matters in his summing-up to the assessors. The appellant told the court that his counsel advised him not to raise this. This may be true but it may also be self-serving because he is confronted now with it. This practice is not condoned by the court. The court will not allow new grounds of mixed law and fact to be argued. The court will limit its consideration to the grounds that raise issues of law only.

9. In **Uluicicia v State [2016] FJSC 12,** the Supreme Court provided the following guideline for cases such as this one:

> "In considering the issue of whether new issues should be allowed to be argued in the appellate court when it was not raised in the trial Court ***Justice L' Heureux-Dube in R v. Brown, [1993] 2 SCR 918, 1993 CanLii 114 (SCC)*** in his dissent said:
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> > ***"****Courts have long frowned on the practice of raising new arguments on appeal, only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely* ***to be received, as ordinarily they do not require further findings of*** *fact. Three prerequisites must be*

satisfied in order to permit the raising of a new issue,..., for the first time on appeal: first there must be a sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result...".

10. In dealing with this appeal the principle enunciated in the case above will be followed.

11. The court raised a preliminary issue with the appellant. This relates to the fact that all the grounds of appeal submitted by the appellant, against conviction and sentence filed after the ruling on 20 August 2021, were new grounds. The document does not meet the requirements of section 35(3) Court of Appeal Act, which deals with renewed appeal grounds. The grounds now submitted by the appellant are all new, not one was raised before the single judge or even in the trial court.

Relevant Legal Principle

12. The Supreme Court in **Tuwai v State [2016] FJSC 35** adopting the above statement of principle in R. v Brown (supra)provided the reasons why the court will not consider a new ground of appeal as follows:

"...In addition, the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at the trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of

justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted".

13. The Court of Appeal in **Rokete v State [2019] FJCA 49** stated the following

"9] I consider this renewal application under Rule 37(1)(b) of the Court of Appeal Rules as the State had been served with a copy and it had filed written submissions in reply. Grounds 11-13 are the same as 01-03 grounds urged at the leave stage and the rest are completely fresh grounds of appeal. However, I am constrained to reiterate the sentiments expressed by the Supreme Court in ***Tuwai v State*** *[2016] FJSC 35 with regard to totally new set of grounds of appeal being brought before the Full Court which, I believe, is advanced more in desperation than in conviction. Time and resource of any appellate court are too precious to be sacrificed for such an exercise.*

82. It is improper that litigants be allowed to argue their cases on piece meal basis. Once a set of appeal grounds are unsuccessful, they raise another set to test whether that will hold some substance. If stringent rules are not applied where necessary, there will never be an end to litigation and there can be huge disruptions to case management in the appellate court.

83.The Courts time is not only for a particular litigant. Access to justice is meant for all the users of the Court and if these users are allowed to come to Court as and when they think of a point that may be arguable, I say without hesitation, that a lot of the Courts resources are going to be shamefully wasted.'

14. The following are relevant factors for the court to consider in this appeal: at the end of the summing-up the trial judge gave an opportunity to the parties if they have issues for re-directions. None were raised by either State or the appellant. At the Leave to Appeal Hearing these new grounds were not raised at all, suggesting that they were not raised

earlier for tactical positioning on the part of the appellant. I am satisfied in reviewing the summing-up and the judgement and the totality of the evidence led at the trial and the disclosures, that it was open to the assessors to reach the unanimous verdict they did of guilty as charged, on the part of the appellant.

How may the interest of justice be promoted in this case?

15. The interest of justice is best served in this case, by the court only considering the grounds that claims errors of law by the trial judge. In terms of the 3 factors highlighted by the supreme court in **Tuwai** (supra) namely:

    (i) Sufficient evidentiary record available to allow fair assessment of the grounds of appeal;

    (ii) The submission of new grounds so late, is not a tactical decision by the appellant and his advisers;

    (iii) Be satisfied that no miscarriage of justice will occur if the new grounds are dismissed.

16. Another factor should be added as the fourth factor, is the respondent's [the State's] right to respond to the new grounds and submissions and not unfairly prejudiced.

17. The scales of justice in this case, are balanced if the court considers the grounds of appeal raising issues of law only. Why this approach? Because it does not require preparation of additional evidentiary record to that already undertaken by the Court Registry.

18. Applying the above principle to this case, out of the 8 new grounds submitted in Court on the day of the hearing, only 3 may have raised issues of law as for the conviction appeal and 1 for the sentence appeal. These are set out below:

    i) The trial judge erred in law to shift the burden of proof on to the appellant.

ii) The trial judge erred in law when he did not make an independent analysis and assessment of all the material facts and the totality of the evidence before affirming the verdict of guilty which was unreasonable and unsafe causing miscarriage of justice. This covers grounds 2 and 6.

iii) The trial judge erred in law in not directing the assessors on the issue of recent complaint

iv) On sentence grounds 7 and 8 may be considered as raising an issue of law in the factors that were not considered by the trial in exercising his sentencing discretion.

Assessments of the Grounds

Burden of Proof Shifts to Defence

19. The first ground above is misconceived. At no time in his summing-up and in the judgement is there evidence to support this claim by the appellant. The appellant refers to paragraph 49 of the summing up which states:

> *"It is up to you to decide whether you accept the version of the defence and it had created a reasonable doubt in the prosecution case.'*

20. What the appellant did not refer to is paragraph 50, which provides the context of what the judge directed the assessors on in paragraph 49. Paragraph 50 of the summing-up states:

> *'If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence,* ***still the prosecution should prove its case beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accuse at any stage of the trial."***

21. This ground is dismissed.

Unreasonable Verdict

22. Ground 2 above in paragraph 18 above, claims that the trial judge erred in law in not making an independent analysis of the evidence in totality before affirming the guilty verdict which was unreasonable and results in miscarriage of justice.

23. 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."*

24. This court has assessed the evidence at the trial namely, of the cautioned interview of the appellant, the agreed facts, medical report on the complainant, evidence of the complainant, especially her cross-examination by appellant's counsel and the fact there was no request by appellant's counsel for re-directions on issues now raised on appeal, when the trial judge asked counsel if they had re-direction issues shows that it was

reasonably open on the totality of the evidence for the trial judge to conclude beyond reasonable doubt that the appellant was guilty as charged.

25. This ground of appeal is dismissed.

No Directions on recent complaint

26. The essence of the argument by the appellant is that the trial judge made reference to recent complaint evidence in paragraphs 25 and 36 of his summing-up and in his judgement at paragraphs 4 and 12 the trial judge addressed the issue of recent complaint as relevant in determining the credibility of the complainant.

27. The appellant submits that the above reference to the recent complaint confirms that no witness was called to confirm that the complaint was promptly made to support credibility of the complainant.

28. The Court Record at pages 217-218, it covers Q &A the examination in chief of the complainant evidence, regarding the complainant she lodged directly with the police as soon as she returned to the residence where she was staying.

Page 217:

Q: Now Ms Sharma when you reached home what had happened?

A: When I got home I went straight into my room and I locked the doors

Q: Now Ms Sharma, what happened to you cousin?

Page 218

A: Nothing, he was in the house and he acted like nothing had happened and then because I hadn't taken my phone with me so when I got home I called the police.

Q; And then what happened after you called the police?

A: After I called the police and told them what had happened, they told me they will be coming home shortly and then I stayed in my room until they got here.

…….

Q: Can you recall what time you reached home?

A: Maybe around 12.00 or 1.00

Q: What time did the police arrive?

A: after an hour I had called them.

29. It is again clear that the complaint was made promptly and in the circumstances that supports the finding of guilty by the trial judge and assessors. The appellant appears to suggest there was no witness called, when the complainant herself gave the evidence. This ground is dismissed.

Sentence – Alleged Double Counting of Aggravating Factors

30. This ground of appeal was advanced without any submissions pointing out how and what factors were double counted. The appellant referred to several cases warning about the danger of double counting when selecting the starting point of the sentence. He did not submit the exact manner in which the sentence in this case was wrong because of double counting of aggravating factors.

31. In reviewing the sentence on the basis of the principles in **Kim Nam Bae v State [1999] FJCA 129,** there is no basis for finding any error of law by the trial judge. Firstly. The tariff of 7-15 years for adult Rape was noted based on tariff decided in **Kasim v State [1994] FJCA 25.** A starting point of 8 years was selected by the trial judge after taking into consideration the degree of force and injuries to the complainant's vagina and mindful of the objective seriousness of offence. The aggravation and mitigating factors were accounted for and the non-parole period set addressed the requirements of section 18(1) of the Sentencing & Penalties Act.

32. The final sentence was 9 years imprisonment and 11 months with a non-parole period of 8 years imprisonment is unimpeachable.

33. This ground of appeal has no merit and is dismissed.

ORDERS:

1. The appellant's appeals against conviction and sentence are dismissed.

2. The conviction and sentence of the appellant in the High Court is affirmed.

Hon. Justice Isikeli Mataitoga
ACTING PRESIDENT, COURT OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Justice Karen Clark
JUSTICE OF APPEAL