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

CRIMINAL APPEAL NO. AAU 101 OF 2022
High Court No. HAC 012 of 2021

BETWEEN : **ISIMELI CAGICA BALEIONO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in Person**
Mr L. Burney for Respondent

Date of Hearing : **1 March 2024**

Date of Ruling : **12 March 2024**

RULING

1. The appellant, (Isimeli Baleiono) was tried in the High Court at Suva on an Information containing three counts of offences set out below:

COUNT ONE

Statement of Offence

RAPE: contrary to Section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ISIMELI CAGICA BALEIONO between 14th July, 2020 to 6 November, 2020 at Lakeba in the Eastern Division, penetrated the vulva of **M.B** a child under the age of 13 years, with his tongue.

COUNT TWO

Statement of Offence

RAPE: contrary to Section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ISIMELI CAGICA BALEIONO between 14 July, 2020 to 6 November, 2020 at Lakeba in the Eastern Division, had carnal knowledge of **M.B** a child under the age of 13 years.

COUNT THREE

Statement of Offence

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

Particulars of Offence

ISIMELI CAGICA BALEIONO on 25 November, 2020 at Lakeba in the Eastern Division, unlawfully and indecently assaulted **M.B** a child under the age of 13 years, by touching her buttocks.

2. The appellant was found guilty on 12 August 2022 of all the offences he was charged with. On 18 August 2022, the appellant was sentenced to an aggregate term of 21 years imprisonment with a non-parole period of 14 years 4 months from the date of sentencing.

The Appeal

3. By handwritten letter dated 5 September 2022, the appellant submitted his Application for Leave to Appeal Against Conviction and Sentence through the Correction Service which by letter dated 30 September 2022 submitted this application to the Cour Registry received on 30 September 2022. The effective date from which timely appeal is calculated is 5 September 2022. This appeal is therefore timely.

Appeal Grounds

4. There are three grounds against conviction submitted by the appellants and they are:

   (i) The trial counsel for the appellant erred in law when he wrongfully conducted the case for the appellant at the trial by telling the appellant to remain silent without giving proper advice about the effect of remaining silent and the benefit of giving evidence and has unfairly declined the appellant's instruction during trial.

(ii) Trial judge erred in law and facts in considering the inconsistent statements of the complainant (M.B) and PW2 the mother of the complainant.

(iii) The trial judge erred in fact in accepting the delay of the complaint in making the complaint which creates serious doubt of the counts of rape.

5. At the hearing of the application on 1 March 2024, the appellant withdrew ground 2 of the grounds against conviction appeal set out above in paragraph 4.

Assessment

6. **Ground 1: Incompetent Counsel** - This ground alleges the following: that counsel for the Appellant at the trial told the appellant to remain silent and not give evidence at his trial, without canvassing the advantages or disadvantages if he remained silent. The appellant's claim of incompetency by his defence counsel at time of trial was reported to the Legal Practitioners Unit of the High Court. It is necessary to review caselaw that assist the court determine this ground of appeal.

7. The Court of Appeal of New South Wales in **R v. Birks** (1990) NSWLR 677, stated the principle to use when confronted with a claim of incompetent counsel by an appellant as follows:

> *"1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.*

2. *As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.*

3. *However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise, they will attract appellate intervention"*

8. In **TKWJ v The Queen** [2002] HCA 46, the High Court held that the course taken at trial reflected a forensic choice which was reasonably open to counsel. Gleeson CJ observed at [8], [16]:

"8. On the face of it, that was an understandable decision. It was certainly not self- evidently unreasonable, or inexplicable. It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts.

...

16. It is undesirable to attempt to be categorical about what might make unfair an otherwise regularly conducted trial. But, in the context of the adversarial system of justice, unfairness does not exist simply because an apparently rational decision by trial counsel, as to what evidence to call or not to call, is regarded by an appellate court as having worked to the possible, or even probable, disadvantage of the accused. For a trial to be fair, it is not necessary that every tactical decision of counsel be carefully considered, or wise. And it is not the role of a Court of Criminal Appeal to investigate such decisions in order to decide whether

they were made after the fullest possible examination of all material considerations. Many decisions as to the conduct of a trial are made almost instinctively, and on the basis of experience and impression rather than analysis of every possible alternative. That does not make them wrong or imprudent, or expose them to judicial scrutiny. Even if they are later regretted, that does not make the client a victim of unfairness. It is the responsibility of counsel to make tactical decisions, and assess risks. In the present case, the decision not to adduce character evidence was made for an obvious reason: to avoid the risk that the prosecution might lead evidence from K."

9. In **Nudd v The Queen** [2006] HCA 9, Gleeson CJ, however, said at [6]:

> *"... Even though it is impossible and undesirable to attempt to reduce miscarriages of justice to a single formula, there is at least one circumstance in which a failure of process cannot be denied the character of a miscarriage of justice on the ground of the appellate court's view of the strength of the prosecution case. That is where the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant. There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed."*

10. Callinan and Heydon JJ, in a joint judgment, similarly placed particular emphasis upon the strength of the prosecution case, concluding at [162]:

> *"This is a case which does cause concern. It is most unfortunate that a person charged with such a serious crime as the appellant was, should come to be represented by a person whose competence fell short of the standard which a court should be entitled to expect. However, just as in medicine there may be terminal cases which not even the most brilliant surgeon can remedy, there will*

be prosecution cases which an accused could not successfully defend with the aid of the most resourceful and competent of counsel. We have come to the conclusion that this was such a case. That does not mean of course that a person against whom the case is a very strong one, is not entitled to a fair trial. But unlike in the operating theatre, there is in the criminal court a suitably qualified judge, detached from the protagonists and whose duty it is to intervene and make such corrections as need to be made to ensure a fair trial. Trial judges may only correct errors that become apparent to them, but in this case such errors as might otherwise have caused the trial to miscarry, were duly corrected by way of her Honour's summing up and insistence that instructions be duly obtained."

11. Gummow and Hayne JJ referred to the appellant's complaint that his trial counsel had failed to give him proper advice and continued at [27]:

> *"... But a failure to give proper advice to the appellant would be significant only if, as a result of that failure, something was done or not done at trial that was, or occasioned, a miscarriage of justice. For the reasons given in TKWJ, the inquiry about miscarriage must be an objective inquiry, not an examination of what trial counsel for an accused did or did not know or think about. The critical question is what did or did not happen at trial, not why that came about."*

12. With respect to the complaint that his counsel did not call him to give evidence, their Honour's said at [27]:

> *"It would have been well open to competent counsel to conclude that the very slight gains that might be obtained by putting forward a positive defence, of the kind that the appellant said he had, were well and truly outweighed by the disadvantages that would likely be suffered were the appellant to give evidence. It would, then, have been well open to competent counsel to conclude that the appellant should be advised against giving evidence in his defence. That being so, the fact that the appellant did not give evidence at his trial has brought about no miscarriage."*

Is evidence from trial counsel admissible on appeal where incompetence of counsel is alleged?

13. In this case the allegation made by the appellant against his trial counsel (Mr Timoci Varinava) was submitted as a complaint to the Legal Practitioners Unit [LPU] of the High Court for investigation. A copy of Mr Varinava's response to the appellant's claim was submitted to the LPU, which included Client Instruction Sheets. Whether these statements can be used for the purpose of evaluating the appellant's claim in this appeal this appeal is not possible given the fact that it would be inadmissible on account of the that it would not take the matter of miscarriage of justice no further, than inferences available from the course of the trial.

14. In **Alkheir v R** [2016] NSWCCA 4, Macfarlan JA (with the agreement of Rothman J and Bellew J) reviewed the authorities and identified the following principles as relevant to the determination of the appeal at [31]:

> *"(1) To the extent possible, an appellate court should determine an appeal involving complaints about a trial counsel's conduct of a case by examining the record of the trial to determine from the objective circumstances whether the accused has had a fair trial.*
>
> *(2) Ordinarily, an affirmative answer to this question is required where the impugned conduct is capable of being rationally explained as a step taken, or not taken, in the interests of the accused. This is so even if the accused alleges on appeal that he or she did not authorise the conduct because the nature of the adversarial system means that the client is bound by the manner in which the trial is conducted on his or her behalf.*
>
> *(3) Only in exceptional circumstances will an appellate court find it necessary to resort to subjective evidence concerning the appellant's legal representatives' reasoning at trial or to evidence as to communications between the appellant and those representatives.*

(4) The ultimate question for an appellate court is whether the appellant has established that what occurred at the trial gave rise to a miscarriage of justice in the sense that the appellant lost a chance of acquittal that was fairly open."

15. In **Ahmu v R; DPP v Ahmu** [2014] NSWCCA 312, a question arose as to the relevance of an affidavit of trial counsel, adduced by the prosecution as evidence of how prejudicial material came to be made available before the jury. The appellant was convicted of a number of sexual assault offences. In the course of cross-examination of the complainant at trial, prejudicial evidence was adduced by his counsel. The appellant appealed against conviction arguing that his trial counsel was incompetent in adducing such evidence. The appeal was ultimately dismissed, but there was a divergence of opinion regarding the relevance of trial counsel's affidavit.

16. In reliance on **Nudd** at paragraph10, Basten JA emphasised that the focus for such a question should be on the objective features of the trial process and held that the affidavit from trial counsel was inadmissible finding that: *"it took the matter of miscarriage no further than the inferences available from the course of the trial"* at [31]. Adams J disagreed, finding that the affidavit was admissible on that basis that it elucidated trial counsel's reason for taking his chosen course and countered what would have been a misleading impression that would have arisen from the objective circumstances alone. Fullerton J did not find it necessary to decide on the admissibility of the affidavit.

17. In the light of the above discussions of the legal issues and guidance on the approach to take when dealing with a claim and incompetent counsel

in an appeal hearing, the following issues are determine the outcome of his leave application: i) if the strength of the prosecution case is such that even if the appellant gave evidence it would not have changed the outcome; ii) whether the appellant has established that what occurred at the trial resulted in miscarriage of justice in the sense that his chance of acquittal was squandered.

Strength of the Prosecution case at the Trial

18. There were prosecution witnesses the victim, the mother and the medical doctor. Their respective evidence at the trial were carefully assessed by the trial judge separately and from paragraphs 45 to 50 of the judgement the trial discussed the basis of his finding that the charges against the appellant was proven beyond reasonable doubt. Consent was not an issue as in law a girl under the age of 13 cannot consent to sexual violation. The Agreed Facts admitted at the pre-trial stage provided useful circumstantial evidence to support the personal circumstances of the victim. The trial judge assessed the evidence given by PW2 and PW 3 medical doctor as follows:

> *30. Both these witnesses gave evidence before me and I observe that they narrated extremely complicated series of events running into several weeks and months. I did not observe any inconsistency or contradiction either per se or inter se. considering the age of the girl in the normal course of the event it is not possible to narrate such a complicated story unless she had actually experienced it. M.B was very prompt and precise in her evidence. When answering I observed that she was recalling reliving and narrating an experience which is a hallmark of a truthful witness.*
>
> *31. Similarly, her mother Kalolaini narrated these events in greater detail then the daughter and as she went to recall painful events and incidents, she was visibly emotional which was spontaneous and natural. Both these witnesses were not showing any undue malice*

towards the accused especially in the cross examination. Therefore, I observe that their demeanour and deportment of both these witnesses was unusually good and was consistent with that of a truthful witness

19. In reference to the defence no giving evidence, the trial judges stated at paragraph 51:

> *"51. The accused did not give evidence and remained silence. It is his right to do so and he remaining silent cannot be the reason for any adverse inference or comment. This will in no way prove the prosecution case or the charges. Prosecution should prove all ingredients beyond reasonable doubt by its own evidence. As evaluated above on the evidence of the victim and her mother the ingredients to prove the three counts is available. I would now consider it by any of the suggestions put forward by the defence or otherwise if there be any cause for any doubt on the prosecution case. The defence position as suggested is that the mother Kalolaini Raga has made up a false story because of her suspicion that the accused was continuing with a relationship with his ex-girlfriend. I have considered this in detail already and decided that this is improbable and it cannot be thus it cannot create any doubt."*

20. The trial judge also considered appellant's conduct and stated:

> *"53. The evidence establishes that the accused was increasingly becoming violent and aggressive when the mother was questioning and finding out of the abuse. So much so, the Accused threatened the mother with that if she ever tries to run-away this threat was made using a chopper. The last two weeks when this issue was gradually coming to light the accused had remained at home without going to the plantation. This proves that the Accused was of one mind to pursue his sexual abuse of MB. To this end he had taken advantage of the isolated geographical setting of their house.*
>
> *54. The defence elicited that Kalolaini Raga was as ex-police officer, this coupled with the fact of the false allegation was of concern to me. I have considered and ruled out that this certainly is not and cannot be a false allegation. The only aspect to be considered is why could not Kalolaini have by some means inform the police or any other between the 16th and 25th of November if in fact she found out about this. She did try to run-away on the 16th but*

was not successful the Accused came to the beach and also to Ana's house and she was brought back with MB. She had three other siblings who were younger to MB. The utterances of the Accused did convince Kalolaini that harm can come about to others if Kalolaini runs away. This was the specific threat made on the night of the 25th. Further, she was in alien land in the territory of the Accused so to speak, isolated and away from the authorities. She was financially weak and dependent on the Accused. Therefore, not informing anyone between 16th and 25th of November is extremely probable. As for she being an ex-police officer to my mind it is her police background that enable her to successfully escape in this manner with all the children and bring this to the notice of the police. If not for her tact and intelligence this offending would never have been exposed. Therefore, the said matters raised and suggested by the defence has not caused any doubt on the prosecution case."

21. From the above narration of the evidence of the trial, considered and assessed by the trial judge, it is clear that it is very strong prosecution case against the appellant.

22. Did the appellants failure to give evidence resulted in miscarriage of justice in that, the nature and quality of the evidence that the appellant may have given, may have led to his acquittal? The proven facts of this case and the totality of the evidence at the trial is such, that even if the appellant had given evidence it would not have changed the outcome of the trial. The proven facts on all the charges were strong and incontrovertible.

23. This ground of appeal has no merit. Leave to appeal is refused.

24. **Ground 3:** This ground alleges delayed complaint by the victim give rise to doubt about the truthfulness/credibility of the complainant evidence. This issue was directly addressed by the trial judge in the judgment at paragraphs 35 to 39.

25. This ground is meritless and is dismissed.

Against Sentence

26. The appellants submits that the sentence of 21 years imprisonment with a non-parole period of 14 years 4 months is harsh and excessing.

27. I have reviewed the sentencing ruling of the trial judge at paragraphs16-19. He has provided adequate basis for imposing the sentence he had set for the appellant. I find no basis for holding that the sentence was harsh and excessive given the inhuman and degrading manner in which the appellant treated young woman [MB] who was a daughter to him, for all intents and purpose.

28 In his written submission, the appellant specifically requests the lowering of the non-parole period, to allow him to be released early. He does not provide any reasons for such request. However, I reviewed the principles to assess the submission of the appellant.

29. The Supreme Court in **Timo v State** [2019] FJSC 1 (CAV No: 022 of 2018) Stated:

> *"37. But how long should the non-parole period be for? The Court went on to address that question in para 6 of its judgment in Bogidrau. It said:*
>
> *"Section 18(4) of the Sentencing and Penalties Decree provided that a non-parole period had to be at least 6 months less than the head sentence, and a number of authorities have addressed how long the non-parole period should be, subject, of course, to that provision. Two principles can be identified:*
>
> *(i) '[T]he non-parole period should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term*

and the head sentence be such as to be ineffective as a deterrent'; per Calanchini P in Tora v The State [2015] FJCA 20 at [2].

(ii) '[T]he sentencing Court minded to fix a minimum term of imprisonment [under the provision in the Penal Code equivalent to section 18] should not fix it at or less than two thirds of the primary sentence of the Court. It will be wholly ineffective if a minimum sentence finishes prior to the earliest release date if full remission of one third is earned. Experience shows that one third remission is earned in most cases of those sentenced to imprisonment': Raogo v The State [2010] FJCA 13 at [24]."

38. *The very small difference between the non-parole period and the head sentence in Timo's case offends the first of these two principles. It was far too close to encourage good behaviour on Timo's part while he was in prison. Subject to an important complicating factor which needs addressing, for a head sentence of 12 years' and one month's imprisonment, a more appropriate non-parole period would have been in the region of 10 years.*

30. Applying the above principles, to the facts of this case, where the non-parole period is around the two third of the period of the head sentence and in the absence of any clear evidence of the rehabilitation factors which the court may consider, the sentence is not unreasonable.

ORDERS

1. Leave to appeal against conviction and sentence is refused.

Isikeli U Mataitoga
Resident Justice of Appeal

COURT OF APPEAL FIJI