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

CRIMINAL APPEAL NO. AAU 0058 OF 2022
High Court No. HAC 14 of 2022

BETWEEN : **SOLOMONI QURAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
Mr L D Baleilevuka with Mr R LKumar for Respondent

Date of Hearing : **4 March, 2024**

Date of Ruling : **14 March, 2024**

RULING

1. The Appellant was charged for the offence in the Information dated 11th February 2022 set out below:

COUNT ONE

Statement of Offence

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

Particulars of Offence

SOLOMONI QURAI on the 26th day of December 2021, at Nasinu, in the Central Division, penetrated the vagina of **SALATA TAGIMURI,** with his fingers without her consent.

2. Following a trial in the High Court the appellant was convicted and on 14 June 2022, he was sentenced on 14 June 2022 to 8 years and six months imprisonment with a non-parole period of 5 years and 6 months.

3. On 4 July 2022 the appellant submitted an application for Leave to Appeal against conviction through the Correction Service which was filed in the Court Registry on 20 July 2022. Given the incarcerated condition of the appellant the Notice of Appeal is timely.

Appeal Grounds

4. The appellant had submitted several submissions to the court outlining his grounds of appeal against conviction. They are summarised as follows:

   (i) The trial judge erred in law and fact in taking a perverse view of the defence evidence and failing to consider its probability in a real-life situation.

   (ii) The trial judge erred in law and fact in accepting the evidence of the prosecution despite the contradiction and inconsistent statement with each other.

(iii) The trial judge erred in finding a conviction despite that the room was dark with light switched off and the possibility of the victim seeing a bent finger of a fleeting view in the dark.

(iv) The trial judge erred in law in entering conviction without the medical report or medical evidence or explanation by the court or prosecution.

(v) The trial judge erred in law in not using his discretionary powers to direct himself of the great danger of 'the statutory fleeting glance chronology'.

(vi) The trial judge had failed in admonishing and directing the legal aid counsel in not explaining the impact of agreed facts on the appellant's constitutional right, affecting his fair trial and a miscarriage of justice.

(vii) The trial judge erred in law in shifting the burden proof from the state to the appellant at paragraph 31 of the judgement.

5. This is a timely appeal, therefore under section 21(1)(a) and (b) of the Court of Appeal Act, leave of the Court is required for appeal involving grounds alleging errors of law and facts. In assessing each of the grounds urged on the Court by the appellant, they must be arguable [**Dip Chand v State** [2008] FJCA 53] in the sense that it must have reasonable prospect of success in the court of appeal: **Caucau v State** [2018] FJCA 171.

Assessment of the Grounds

6. As regards ground (i) in paragraph 4 above. First thing to note about this ground is that there is no specific reference to the 'perverse view of the defence evidence' by the trial judge submitted by the appellant. The court is left to guess what evidence is being claimed as the basis of the failure of trial judge to consider probability in real life situation. At Paragraphs 16 to 19 of the judgement, the trial judge assessed the defence evidence and at the end of it all, it showed an extravagant attempt to confuse the evidence of the appellant's criminal acts, with the able support of his wife. This ground has no merit and is dismissed.

7. **Ground (ii),** again as in (i) above, there is no basis of making the appellant's claim. The trial judge's carefully approach the issues of inconsistencies and perceived contradictions in the prosecutions previous statements and evidence at the trial. At paragraph 24 line 9 stated:

> *"There are certain contradiction and omissions which I have already considered and has concluded that those contradictions and omissions have arisen not due to the utterance of falsehood but due to faulty memory. The defence did suggest to Salata that she is falsely implicating Qurai because she was jealous of Qurai and Litia, as admitted and also revealed in evidence Salata and Viliame have invited their sister and the Accused and was in the process of even helping them to construct a house on Viliame's land. On that day too Qurai and wife were invited to the party and in fact at one stage Salata has been dancing and has invited the Accused Qurai to join. When Salata was somewhat high in spirits it was Litia who brought her back to the shed. Going beyond that Litia that night looked into the welfare by checking the room and doors and windows of the house. Both Qurai and Litia admitted that their relationship as at that day was good. Therefore, I see no reason to infer that Salata and Viliame had any reason to falsely implicate and the suggestion is baseless."*

8. The trial judge in convicting the appellant considered the totality of the evidence called by the prosecution and the defence and this mitigates the claim made by the appellant in this ground of appeal. The ground has no merit.

9. **Ground (iii) and (v)** are considered together as they cover kindred issues of law fleeting glance identification. This is not a case where identification was an issue. All the relevant people knew each other well and are related. They are familiar with each other. It now appears that the appellant is using the intoxicated state of the complainant and others who were consuming alcohol to confuse and create doubt by suggesting that he saw a person went past the house where the offence was committed but could not identify it. His difficulty is that he was the only person who saw that person, no else did.

10. At paragraphs 30 to 31, the trial judge addressed the issue of intoxication directly thus:

> *"30. Qurai was a person known to Salata, she could recognize him. He is no stranger. The identifying features she had immediately narrated the bent finger in the left hand, haircut and the build. These were observed immediately near the door soon after the incident and she had the opportunity and occasion to*

observe him within 1 to 1½ feet, face to face. Thus, she had the opportunity to observe these features and recognize the Accused in the first instance. Then she also had the second chance of seeing the Accused immediately thereafter he went towards the kitchen along the passage. Considering these two opportunities she had sufficient occasion opportunity and light and was able to observe what she saw and recognize Qurai.

31 It is admitted that she drank and she was after so consuming liquor. The evidence does indicate that she was somewhat intoxicated that night. Thus, was she able to observe and recall what she saw? If one considers that she had the alertness to kick the intruder to get up and shout for help and also to talk to Litia immediately thereafter and narrate the identifying features, it shows that Salata though after liquor was sufficiently alert in her faculties to observe, recall and recount what she had seen. Accordingly, I hold Salata's evidence is reliable and accurate and safe to act upon."

11. It is clear that this ground of appeal has no merit.

12. **Ground (iv)** this submission has no merit for the following reasons:

    (a) It does not specify why is the medical report so critical to his case

    (b) If the appellant was suggesting the need for the medical report was to corroborate the evidence of the complainant, section 129 of the Criminal Procedure Act clearly states that it is not needed.

13. **Ground (vi) -** the allegation made under this ground is baseless in law. The appellant had legal counsel who appeared for him at his trial. Both him and his legal counsel considered and endorsed the Agreed Facts by signing it, to signify their consent. Now the appellant's claims the agreed facts were not explained to him, and this violated his right to fair trial. In the absence of any specific reference to the procedures that was followed with his consent, to show how his fair trial rights was not observed, this ground has no merit. It is dismissed.

14. **Ground (vii) –** this ground alleges that the trial judge erred in law by shifting the burden of proof from the state to the defence. The appellant misunderstands the trial judges ruling on this issue. In the judgement at paragraphs 36 to 38, the trial judge sets out the burden of proof thus:

"36. Thus, I hold that the prosecution had proved beyond reasonable doubt that a finger was inserted to the vagina of Salata as narrated by her. This was done without her consent; and it was the Accused, and the Accused himself and no other who had come into Salata's room and so inserted his finger. In the

circumstances, of this case I hold that the Accused knew that Salata was not consenting to the Accused inserting his finger into her vagina. This act has been committed by the Accused in the early hours of 26th December 2021 at Nasinu in the Central Division. I hold that all these ingredients have been proved beyond reasonable doubt by the prosecution.

> *37. Accordingly, I find the Accused's denial is false and not true and* ***the defence has not been able to create any reasonable doubt in the prosecution case.***

> *38.* ***Thus, I find the prosecution has proved the Accused's guilt of the count of Rape as charged beyond reasonable doubt.***

15. The reference in paragraph 37 that the defence has not been able to create any reasonable doubt in the prosecution is not about shifting the burden of proof in the case from the state to the defence. It is simply a summary statement referencing that the defence have not been able to create doubt in the prosecution case.

16. This ground has no merit and is dismissed.

ORDERS

1. Leave to appeal is refused.

Isikeli U Mataitoga
Resident Justice of Appeal