IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 0047 OF 2022

BETWEEN : **KAMLESH LAL**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Mr M. Fesaitu [LAC] for Appellant**

Ms J. Fatiaki [ODPP] for Respondent

Date of Hearing : **1 March 2024**

Date of Ruling : **19 March 2024**

RULING

1. The appellant was charged with one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act and one Count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are:

Count 1

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: *Contrary to Section 209 of the Crimes Act 2009.*

Particulars of Offence

KAMLESH LAL *on the 17th day of April 2015 at Nausori in the Central Division, assaulted* ***LENORA KING*** *with intent to commit rape.*

Count 2

Statement of Offence

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

Particulars of Offence

KAMLESH LAL *on the 17th day of April, 2015, at Nausori in the Central Division, had carnal knowledge of* ***LENORA KING****, without her consent.*

2. The appellant was convicted on both counts following a retrial. He was sentenced on 22 June 2022, to 14 Years imprisonment with a non-parole period of 12 years. After taking into account the time already served of 7 years, the final sentence is 7 years imprisonment with non-parole period of 5 years.

3. The appellant appeal against conviction and sentence, pursuant to Notice of Motion dated 1 July 2022. This appeal is timely. This Notice of Appeal submitted 4 grounds of appeal against conviction and 3 grounds against sentence.

4. By an Amended Notice of Appeal dated 31 October 2023, the appellant reduced his ground of appeal to 1 against conviction and 1 against sentence.

Background Facts

5. There was a trial before this one, in which the appellant was also charged with 1 count of Kidnapping making 3 counts altogether. The trial judge in the first trial acquitted the appellant for the Kidnapping charge at the no case to answer stage i.e. before the defence evidence was given in the first trial. In other words, the Kidnapping charge was not proven to the required standard of beyond reasonable doubt at that stage and the appellant was acquitted. The respondent did not appeal against the acquittal.

6. The appellant appealed against his conviction and sentence to the court of appeal and he was successful and the case was ordered for retrial in the High Court. At the retrial the information only refers to 2 counts: Assault with Intend to Commit Rape and Rape. The appellant was found guilty and was convicted. He was sentenced 14 years imprisonment with 12 years non-parole period. After considering time served of 7 years, the sentence ordered was 7 years imprisonment with non-parole of 5 years.

This Appeal

7. Since the grounds of appeal alleges errors of law and facts on the part of the trial judge, section 21(1)(b) and (c) of the Court of Appeal applies and it requires leave of the court for both grounds of appeal.

8. For a timely appeal, the test for leave to appeal against sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171;, **Navuki v State** [2018] FJCA 172; and **State v Vakarau** [2018] FJCA 173; **Sadrugu v The State** [2019] FJCA 87; and **Waqasaqa v State** [2019] FJCA 144; that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; **Chaudry v State** [2014] FJCA 106; and **Naisua v State** [2013] FJSC 14;] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84.

Grounds of Appeal

9. The appellant through counsel submitted two grounds of appeal – one against conviction and one against sentence.

Appeal against Conviction

10. The appellant submitted the following ground against conviction alleges:

> *"The trial judge erred in law and fact in allowing prosecution to adduce evidence from the complainant that she was taken forcefully to the appellant's house and having considered such evidence in reaching a decision to convict the appellant considering that the appellant was acquitted for the offence of kidnapping in the first trial."*

11. The appellant submitted that in the retrial before Rajasinghe J. the prosecution proceeded with the charge of Assault with Intent to Commit Rape, contrary to section 209 of the Crimes Act 2009. The appellant had raised objection against prosecutions for adducing evidences from the complainant as to the events of when she was taken from town forcefully to the appellant's house. In this regards the appellants submit that the trial judge erred as a matter of law by allowing such evidence to be adduced in the retrial for offences which the appellant has been acquitted. By making that allowance the trial judge was unfair to the appellant, resulting in miscarriage of justice.

The Effect of Acquittal on Subsequent Proceedings

12. The law covering the use of evidence in a charge from which the appellant has been acquitted in an earlier, trial arising from the same group of facts or actions was stated by the Privy Council in **Sambasivam v Public Prosecutor, Federation of Malaya** [1950] AC 458) PC); per Lord McDermott, thus

> *"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro Veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence."*

13. The rule in **<u>Sambasivam</u>** has the effect that the prosecution is precluded from advancing at a later trial, propositions inconsistent with innocence on any count on which there has been a prior acquittal. The rule has been challenged by the Law Commission for England and Wales, criticised by the English Court of Appeal and recently overturned by the House of Lords in: **<u>R v. Z</u>** [2000] 3 WLR 117. Lord Hutton who delivered the leading judgment in which the other Law Lords agreed, said:

> *"My Lords, I consider, with great respect, that the distinction drawn between the prosecution adducing evidence on a second trial to seek to prove that the defendant was, in fact, guilty of an offence of which he had been earlier acquitted and the prosecution adducing evidence on a second trial to seek to prove that the defendant is guilty of the second offence charged in that trial even though the evidence may tend to show that he was, in fact, guilty of an earlier offence of which he had been acquitted is a difficult one to maintain. The reality is that when the Crown adduces evidence in a criminal trial for a second offence it does so to prove the guilt of the defendant in respect of that offence. In order to prove the guilt in respect of the second offence it may wish to call evidence which, in fact, shows or tends to show that the defendant was guilty of an earlier offence, but the evidence is adduced not for the purpose of showing that the defendant was guilty of the first offence but for the purpose of proving that the defendant is guilty of the second offence. Moreover, I think that a distinction cannot realistically be drawn between evidence relating to a specific issue (such as intention or knowledge) and evidence which shows that, in fact, the defendant was guilty of the offence of which he had been acquitted because in some trials the proof of a single disputed issue will establish the guilt of the defendant. <u>I also think that it is difficult to draw a distinction between evidence that shows that the defendant was, in fact, guilty of an earlier offence of which he has been acquitted and evidence which tends to show that he was, in fact, guilty of that offence</u>."*

14. More recently the courts have developed a general principle of public policy that prevents a party in later proceedings from making a collateral attack on a subsisting decision of a Court of competent jurisdiction. This principle was enunciated in the civil case of **<u>Hunter v Chief Constable of West Midlands Police</u>** [1982] AC 529. Although its application has been seen as uncertain in England, in New Zealand the principle has been applied in criminal cases to prevent collateral attacks on decisions in earlier criminal cases: **<u>Ferris v Police</u>** [1985] 1 NZLR 161. When the decision under consideration is a verdict of acquittal the effect of the principle against collateral attack appears to be the same as the rule in **<u>Sambasivam</u>**. One New Zealand authority held that either or both of these

principles may sometimes lead to the exclusion of evidence which is necessarily inconsistent with a previous acquittal: **R. v. Wilson** [1997] 2 NZLR 161.

15. In **R. v. Carroll (2002) 194 A.L.R 1**, the High Court of Australia held that, where the defendant had given evidence at his trial for the murder denying the killing and his conviction has been quashed on appeal, his subsequent prosecution for perjury at his murder trial (the false evidence alleged being his denial of the killing) should have been stayed as an abuse because the prosecution inevitably sought to controvert the earlier acquittal.

Fairness to the accused

16. To avoid miscarriage of justice, a fundamental issue that must be considered is the protection of the appellant from unfairness. The court needs to recognise that the general rule that all charges arising out of one incident should normally be dealt with in a single trial. In Fiji, section 15(1) of the Constitution gives an accused person the right to a fair trial. This includes procedural fairness to be observed by the prosecution, in not abusing the power to recharge accused person following an acquittal on similar facts, especially when there was no appeal by the prosecution against the acquittal.

17. It was said by Lord Devlin in **Connelly v DPP** [1964] AC 1347, that:

> *"The judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that "are founded on the same facts, or form or are a part of a series of offences of the same or a similar character" ... and power to enforce such a direction (as indeed is already done in the civil process) by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first ..."*

18. The NZ Court of Appeal in **R. v Davis** [1982] 1 NZLR 584, stated that the Court has a "special discretion" in criminal cases to prevent unfairness to the accused. This, rather

than the narrower principle of **Sambasivam**, may sometimes be relevant when there have been multiple charges and proceedings.

19. In the absence of the trial court records, I am unable to determine with some degree of certainty whether in this case, the evidence adduced by the prosecution in the second trial are the same evidence adduce to prove the charge which was acquitted. If it is the same or similar evidence are again used by the prosecution, the fairness to the appellant protected by sections 15(1) and 26 (1) of the Fiji Constitution would dictate that the count of Assault with Intent to Commit Rape should not have been preferred.

20. This is an issue which the full court should have the opportunity to consider with assistance of the court records of the evidence adduced at the second trial and make the relevant determination.

21. Leave is granted for appeal against conviction

Appeal Against Sentence

22. The final sentence in this case is correct, given the amount violence that was committed against the complainant by the appellant. The appellant's submissions referred to some errors committed by the trial Judge in arriving at the sentence suggesting that the court should disturb the ultimate sentences. It should be noted that the sentence is within the tariff applicable to adult rape referred to **Rokolaba v State** [2018] FJSC 12 is 7 to15 years. The crucial issue is the ultimate sentence. It is the correct sentence.

23. The Supreme Court in **Koroicakau v The State** [2006] FJSC 5 said:

> "*This argument misunderstands the sentencing process. It is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and recognizing that the so-called starting point is itself no more than an inexact guide. Inevitably different judges and Magistrates will assess the circumstances somewhat differently in arriving at a sentence. It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is ultimate sentence rather than each step in the reasoning process that must be considered.*

Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation and mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process" (emphasis added).

24. I have considered the submissions by the appellant and from the respondent on sentence. In applying above statement of principle to the sentence in this case, it has to be said that the ultimate sentence was correct, even more favourable to the appellant. Conducting a review of the various steps in the reasoning process adopted by the sentencing judge, would not in my view assist the appellant's case, it may lead to an increase in the sentence.

25. I consider the application for leave to appeal against sentence has no reasonable prospect of success. Leave to appeal against sentence is refused.

ORDERS

1. Leave to Appeal is granted for the appeal against conviction.
2. Leave refused for the appeal against sentence.

Isikeli U Mataitoga

Resident Justice of Appeal