IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 0062 OF 2021
High Court No. HAC 272 of 2019

BETWEEN	:	**PITA TUNI VUNI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, RJA**
Counsel	:	**Appellant in Person**
		Ms Shameem S. for Respondent [ODPP]
Date of Hearing	:	**18 March 2024**
Date of Ruling	:	**2 April 2024**

RULING

1. The appellant was charged with 2 counts of offences, count of Indecently Annoying Any Person, Contrary to Section 213 (1) (b) of the Crimes Act 2009 and count 2 of Rape, Contrary to Section 207(1) and 2 (a) and (3) of the Crimes At 2009. Following the appellant's not guilty plea; his trial was held in the High Court at Suva. The appellant was convicted of the Rape charge on 15 March 2018, and he was sentenced on 16 March 2018, to life imprisonment with a non-parole period of 20 years.

2. In the High Court trial, the appellant was represented by legal counsel. The following offences were in the information laid against the appellant:

"First Count

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) (b) of Crimes Act 2009.

Particulars of Offence

PITA TUNI VUNI, sometime between 01 September 2018 and 30 September 2018, at Nasau Village, Nabukelevu, Kadavu in the Southern Division, intruded upon the privacy of MTLN by pulling up her school uniform, an act likely to offend the modesty of MTLN.

Second Count

Statement of Offence

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

Particulars of Offence

PITA TUNI VUNI, on 12 July 2019, at Nasau Village, Nabukelevu, Kadavu in the Southern Division, with his penis, penetrated the vagina of MTLN, a child under the age of 13 years."

3. At the end of the prosecution case, the trial judge asked counsels of both parties, for submission on whether there was a case to answer. After hearing the submission, the trial judge ruled as follows:

> *"At the end of the prosecution's case, the parties were invited to make submissions on whether or not there was a case to answer against the accused on both counts. After hearing the parties, the court found the accused had no case to answer on count no. 1, but he had a case to answer on count no. 2."* {paragraph 4 of Judgement}

4. After that ruling the trial proceeded to address the evidence pertaining to the second count of Rape. The appellant was found guilty of Rape and was sentenced as earlier advised.

The Appeal

5. By letter dated 5 April 2021 submitted a Notice of Motion for Leave to Appeal Against Conviction and Sentence. The appellant's letter was submitted to the Court Registry on 16 April 2021. The date for deciding on the timeliness of the Notice of Motion is 5 April 2021, that is the date on handwritten letter of the appellant. The delay, has nothing to do with the appellant but to the clumsy bureaucratic method of processing such application. On that basis this appeal is timely.

6. There are 6 grounds of appeal advanced by the appellant, all alleging errors of mixed law and fact by the trial judge. It will now be assessed to decide whether leave to appeal may be granted.

The Principle Governing Timely Appeal

7. This right to appeal is set out in section 21 (1) (b) of the Court of Appeal Act; it states:

> *"(1) A person convicted on a trial held before the High Court may appeal under this part to the Court of Appeal –*
>
> *(b) with the leave of the Court of Appeal..... .....on any ground of appeal which involves a question of fact alone, or question of mixed fact and law or any other ground which appears to the court to be a sufficient ground of appeal."*

8. For a timely appeal like this one, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'**: **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: **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

Appeal Grounds & Assessment

9. Ground 1 – allege that the trial judge did not independently assess the prosecution evidence to prove the guilt of the appellant for the Rape charge, implicit in these grounds is the claim the guilty verdict is unreasonable or inconsistent with evidence at the trial.

10. At the appeal stage, the Court is required only to ascertain whether there was evidence to convict the appellant. The principle was adopted in **Balemaira v State** [2013] FJSC 17 at paragraph:

> *"[21] Whether a guilty verdict is unreasonable or inconsistent requires careful consideration of the evidence. The principles to be applied in such cases were summarised by the Court of Appeal in **Nemani Tuinavavi & Semi Turagabete** Criminal Appeal No. HAC0002/2005L at paragraph [23]:*
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> > *"The law on inconsistent verdicts is accepted by both Appellants and respondents is as it is summarized by the Canadian Supreme Court in **R v. Pittiman** [2006] 1 SCR 381. It is similar to that of the High Court of Australia in **Mackenzie v. The Queen** (1966) 190 CLR 348 (per Gaudron, Gummow and Kirby JJ), and in **Osland v. The Queen** [1998] HC 75. It is that a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts. It is the Appellant who must satisfy the court that the verdicts are unreasonable or "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty" (**Mackenzie v. The Queen** at page 368). See also **R v. Darby** [1982] HCA 32; (1982) 148 CLR 668 (per Murphy J).*
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> *[22] More recently, in **Lole Vulaca v The State** Criminal Appeal No. CAV0005 of 2011 (21 November 2013), this Court endorsed the above principles at paragraph [67]:*
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> > *"As was observed by the High Court of Australia in Mackenzie v R (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, "is one of logic and reasonableness." In the course of its judgment, the High Court of Australia cited a passage in an unreported judgment of Devlin J in R v Stone (13 December 1954), to the effect that an accused who asserts that two verdicts are inconsistent with each other, "must satisfy the court that the two verdicts cannot stand together."*

11. The appellant has not specified the nature of evidence he submits is unreasonable in the trial judge's decision to find the charges of rape against him proven to the right standard. It is the appellant's duty to satisfy the court that his (appellant's) assessment is correct. The confusion on the part of the appellant's claim on this ground, arose from his lack of comprehension/understanding that the case against him can be both by direct evidence and also by circumstantial evidence. On the evidence in this case, which the trial judge

referred to his judgement at paragraphs 10 to 14 and 15-21 is reasonable for him to find the appellant guilty as charged with Rape of the complainant.

12. Ground 1 has no merit. Leave to appeal refused.

13. Ground 2 – alleges error of law and fact by trial judge in convicting appellant when the medical report cannot support his conviction.

14. The evidence in this case is clear that the Medical Officer confirmed that there was penetration of the complainant's vagina but there was no laceration within the vagina. The medical officer also noted in her evidence that the complainant's belly button down to her thighs were tender and painful, suggesting that someone was on top of her while penetrating her vagina. The evidence of the medical officer was not challenged by counsel for the appellant at the trial. The evidence of the Medical Officer was credible and reliable.

15. This ground is meritless. Leave to appeal refused.

16. Ground 3 – alleges error of law and fact that trial judge inadequately directed himself on the alibi evidence causing prejudice to the fairness of the appellant's trial.

17. In his evidence at his trial the appellant gave evidence that he was asleep at home at the time of the rape. The court noted his evidence at paragraph 22 to 24 of the judgement as:

> *"22. What do the above circumstantial evidence tell the court? The totality of above circumstantial evidence appears to point to the accused as the alleged perpetrator. But I must pause and consider the defence's case.*
>
> *23. According to the accused, he was at home, at the material time. He denied the complainant's allegation against him. He said, he did not rape the complainant, at the material time. He said, he was at home asleep and was preparing to take his daughter to school. He called his wife as his witness. The wife confirmed he was at home at the material time.*
>
> *24. I have looked at and carefully considered the evidence of the five prosecution's witnesses, including the defence's three witnesses. I have carefully considered the parties' closing submission. I have carefully examined the demeanours of all the witnesses. I had*

carefully considered the child complainant's verbal evidence, as against the accused's verbal evidence. I have considered the prosecution's circumstantial evidence, as against the accused's denial and alibi defences."

18. The evidence of Ulamila Marama which confirm that when she met the appellant at 7 am on the morning of 12 July 2019, near the rubbish dump, he was wearing a yellow and green T-shirt. This evidence displaced the alibi evidence of the appellant and his wife.

19. This ground is meritless. Leave is refused.

20. Ground 4 – claim an error in the identification of the appellant.

21. This ground is meritless in light of the clear evidence from the complainant that when she regained consciousness, she saw the appellant clearly and there was no impediment to her vision. In the questioning that took place during the trial, the guidelines in Turnbull were followed according to the submission of the respondent.

22. Ground 5 – alleges similar claims that is covered under ground 1 above. The discussion I have made in assessing grounds 1 to 3 above, shows that there was enough evidence in the total circumstances of the case for the guilty verdict against the appellant. The verdict was not unreasonable.

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

24. Ground 6 is frivolous and is dismissed.

ORDERS:

1. Leave to Appeal is refused.

COURT OF APPEAL FIJI

Isikeli U Mataitoga

Resident Justice of Appeal