

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 53 OF 2022

BETWEEN : **SENITIKI TUVOU**
Appellant

AND : **THE STATE**
Respondent

Coram : **Mataitoga, RJA**

Counsel : **Mr. J Cakau for Appellant**
Ms. A. Ratukalou for Respondent (DPP)

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

Date of Ruling : **23 April, 2024**

RULING

1. The appellant was charged and convicted by the High Court at Suva following a trial on 3 June 2022, on 1 count of Rape, contrary to section 270(1) (2) (b) of the Crimes Act 2009 and 2 counts of Sexual Assault, contrary to section 210(1)(b) of the Crimes Act 2009.
2. On 22 June 2022 the appellant was sentenced to 14 years of imprisonment with 12 years non-parole period.

3. On 21 July 2022 the appellant filed Notice and grounds of appeal against conviction in the Court Registry. This is a timely appeal.

Grounds of Appeal

4. The appellant filed 4 grounds of appeal against conviction. These are:
 - (i) Trial judge erred in law ad fact when she failed to properly consider the absence of evidence satisfying the requirement penetration as required by law, the failure of which led to a judgement that was unsafe and unsatisfactory
 - (ii) Trial judge erred in law and fact in not properly addressing the inconsistent evidence by the complainant which showed different version of the complaint disclosed by the complainant in her police statement and her evidence in court.
 - (iii) Trial judge erred in law and fact in not properly addressing and failed to give weight to the inconsistent evidence led at the trial by the complainant, in particular the inconsistent evidence of the doctor who medically examined the complainant, which is absent in the judgement resulting in unsafe judgement.
 - (iv) Trial judge erred in law and fact for allowing respondent to file supplementary closing submissions days after trial judge had heard both parties closing submissions, and failed to give the appellant the opportunity to respond to the supplementary closing submissions filed by the respondent on 25 May 2022, before judgement on 3 June 2022, which resulted in a judgement that is unsafe, prejudicial and amounts to miscarriage of justice.

Relevant Legal Principles

5. Under Section 21(1)(b) and (c) of the Court of Appeal Act, the appellant may appeal against conviction and sentence only with leave of the court. For a timely appeal, the test for leave to appeal against conviction and sentence is ‘reasonable prospect of success’ [see Caucau v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Waqasaqa v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will

distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

Assessment of Grounds of Appeal

6. The grounds of appeal are already outlined in paragraph 4 above. It will not be repeated here, instead reference will only be made to them.

No penetration

7. **Ground 1** – alleges that there the trial did not properly consider the absence of evidence satisfying the requirement of penetration as required by law. This ground claims that there was an absence of evidence of penetration and the absence of this requirement makes the judgement unsafe and results in miscarriage.
8. At paragraph 20 of the judgement, the trial judge outlined the evidence of penetration at the trial thus

“When she went into the room the accused stood up and closed the door, He made her lie down on her mother’s bed, put her hands between her thighs, moved her panties and inserted two of his fingers into her vagina. The accused did this for about a minute. It was painful.”

9. In response to the above, the accused [now appellant] under cross examination at the trial simply denied all the acts that the complainant said were perpetrated on her by him, including denial of inserting his two fingers in the complainant vagina.: 3rd Q & A from top of Page 116 CR HAC 083 of 2021]
10. In the light of the above, the trial judge did not err in accepting the evidence of the complainant against the bare denial of the appellant. This ground has no merit.

Inconsistent Statements

11. Ground 2 – This ground of appeal has no merit. They were some inconsistencies in the evidence of both complainant and the appellant during the trial. The trial judge considered those inconsistencies in paragraphs 43 to 51. Her assessment of the inconsistent evidence and decision to consider them peripheral in the overall context of the evidence at the trial clearly explained in the judgement.
12. The relevant principle to guide courts in Fiji regarding claim of inconsistent statements was set out in **Nadim v State** [2015] FJCA 130, the Court of Appeal having considered several previous decisions including **Singh v The State** [2006] FJSC 15; CAV0007U of 05S (19 October 2006); **Ram v State** [2012] FJSC 12; CAV0001.2011 (09 May 2012), set down as to how to evaluate discrepancies, contradictions, inconsistencies or omissions:

*“[13]be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O’Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

*[44] In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280 the Indian Supreme Court said on discrepancies as follows:*

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

13. Applying the above principles in this case, it cannot be disputed that the trial judge considered certain inconsistencies as peripheral and does not shake the complainant’s

evidence in this case and the trial judge was at liberty to accept those evidence, which was the case here.

14. The appellant's claim in ground 2 has no merit.

Medical Doctors Evidence

15. **Ground 3** - This ground is meritless. In paragraphs 36, 37, 42 and 42 of the judgement, the trial Judge correctly analyzed the doctor's evidence and was detailed in assessing it.
16. **Ground 4** – the alleged error of the trial judge raised by this ground of appeal is not substantiated by the evidence of what actually transpired. Both parties were given opportunities to file closing written submission. It is an exaggeration of the trial judge did in allowing the State to correct an error in their earlier written supplementary submission. Ground has no merit.
17. Having assessed the 4 grounds of appeal submitted by the appellant in seeking leave to appeal under section 21(1) (b) Court of Appeal Act, not one has a reasonable prospect of success if leave is granted. The conclusion is leave to appeal is not granted.

ORDER

1. Application for Leave to Appeal is refused.



[Handwritten Signature]
Isikeli U Mataitoga
Resident Justice of Appeal