IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 0070 OF 2023
High Court Action No. HAC 77 of 2022

BETWEEN	:	**KAMLESH PRASAD**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, RJA**
Counsel	:	**Mr A. Kholi for Appellant**
		Mr R. Kumar for Respondent
Date of Hearing	:	**23 April 2024**
Date of Ruling	:	**30 April 2024**

RULING

1. The appellant **[Mr. KAMLESH PRASAD]** was charged with one count of **Rape** against the victim **Sunita Sonia Kumari**, as below:

COUNT ONE

Statement of Offence

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

Particulars of Offence

KAMLESH PRASAD on or about the 11th day of April 2022, at Savusavu, in the Northern Division, had carnal knowledge of **SUNITA SONIA KUMARI** without her consent.

2. When the charge was read in court on the 2 September 2022, the appellant understood it and pleaded not guilty. On 7 July 2023 the appellant was found guilty and was convicted as charged. The appellant was sentenced on 4 August 2023, to a total sentence of 7 years 6 months imprisonment with a non-parole period of 7 years imprisonment.

The Appeal

3. The appellant through his counsel filed Notice of Appeal and grounds of appeal, which was received in the court registry on 24 August 2023. The appeal was against conviction only. The appeal against conviction is late by 17 days, but if was against sentence it would be timely. In this instance the delay is minimal and in the context of the merits of appeal is of no significance.

Leave to Appeal

4. Before considering the grounds of appeal, the legal principles governing the assessment of the grounds submitted by appellants in support of their leave to appeal application is stated. Under Section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of 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)].

5. The appellant submitted ten (10) grounds of appeal against conviction, which is set out below:

i) The trial judge erred in law in failing to consider that when the appellant had raised evidence of alibi it was incumbent upon the prosecution to disprove the evidence of alibi beyond reasonable doubt.

ii) That the trial judge erred in law and in fact in failing to consider that the appellant had given alibi notice and the alibi witnesses were the very persons whose statements had been obtained by police and that the burden of proof was on the prosecution to disprove the alibi evidence

iii) The trial judge erred in law and in fact in finding that there was no evidence le by the defence to categorically demonstrate the presence of the appellant elsewhere when the accused and his witnesses clearly stated that the appellant slept at the house of DW3

iv) The trial judge erred in law and in fact in failing to consider the evidence of DW3 who said that he had locked the door and there was no way that the appellant could go out

v) The trial judge erred in law and fact in speculating that DW3's brother had a key to the house and that the appellant could have left the house in the absence to the contrary.

vi) That the trial judge erred in law and fact in coming to a finding that it was not difficult with anyone with common sense to recognise the impact of 5 alcoholic drinks would have done to the complainant aged 50 years in the absence of the evidence of the complainant

vii) The trial judge erred in law and fact in failing to take into consideration that the complainant when medically examined by PW2 Dr Turaga on 11 April 2022, had failed to inform the Doctor that the appellant or any other person had sex with her.

viii) The trial judge erred in law and fact in failing to take into consideration that the finding of a doctor that the history related by the complainant was not consistent with her evidence.

ix) The trial judge erred in law and fact in failing to take into consideration that the independent medical evidence did not confirm that the complainant was raped.

x) The trial judge erred in law and fact in finding that the defence was not successful in challenging the veracity of the testimony of the prosecutrix.

6. For the purpose of assessing the grounds of appeal, above, I will undertake it in two stages. First, the grounds 1 to 5 and 10 are considered together because they all relate to claims by the appellant regarding errors of law and fact relevant to alibi evidence in this case and how it was assessed or not, by the trial judge. Grounds 6, 7, 8 and 9 will be assessed after if necessary.

7. The Court of Appeal in **Lino Ferei v State** [2024] FJCA 23 (AAU 073 of 2019) discussed in some detail the law of alibi in Fiji, the requirements of section 125 of the Criminal Procedure Act 2009 and relevant case law. It also discussed how a trial judge should address what is known as the intermediary position when an alibi notice is given, which was highlighted in an earlier ruling of the Court in **Munendra v State** [2023] FJCA 65 (AAU 023 of 2018). In dealing with how the prosecution can disprove an alibi, in Munendra, the court stated as follows:

> *'[17] One way in which a prosecutor can try to refute an alibi defense is by showing that the accused never gave notice of alibi at all or there was no reasonable explanation for the belated alibi notice. On a trial before any court the accused shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused has given notice in accordance with section 125 of the Criminal Procedure Act, 2009. The mere fact that the necessary information has not been given within the stipulated time does not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for alibi evidence to be called. However, non-compliance of the statutory period for alibi notice stipulated in section 125 of the Criminal Procedure Act, 2009 is a matter that goes to the weight of an alibi [vide **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)]. Requiring the accused to file notice of alibi in advance is to give the prosecution time before trial to take steps, if it so wishes, and to check the veracity of alibi notice. If true, it may result in the prosecution not putting the accused to trial at all. If not, the prosecution has time to get ready to disprove the alibi*
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> *[18] The prosecution also can refute an alibi defense by questioning the accused's alibi witnesses and challenging their credibility. It can also lead evidence in rebuttal either before or at the discretion of the court after the defence evidence. The latter is a quasi-exception to the general rule that all the prosecution evidence must be adduced before it closes its case unless something arises totally ex improviso in the defence case which could not reasonably have been foreseen.*
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> *[19] Further, if the prosecution establishes beyond reasonable doubt that the accused was present at the crime scene by its own evidence, then alibi evidence has obviously failed to create a reasonable doubt in the prosecution case and the alibi would not succeed.'*
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> *'[20] However, in proving beyond reasonable doubt that the accused was at the crime scene, the prosecution must remove or eliminate a reasonable possibility of him being somewhere else according to the alibi evidence. This could be considered the intermediary position with regard to an alibi the result of which is that if the fact finders neither reject nor accept the alibi but alibi evidence still make them regard it to be reasonably true, then the accused will have to be acquitted.'*

8. From the judgement at pages 5 and 6, paragraphs 17, 18 and 19 the following was stated as the defence case.

> *'17. The Accused informed Court that he closed the shop around 11 pm, where **SUNITA (PWI)** was outside the shop on her phone. Thereafter, from the shop he had gone to his cousin's house in Buca with two of his friends who were drinking with him earlier to watch the finals of Singapore Rugby 7s by taxi. **SUNITA (PWI)** had been outside his shop when he was leaving.*
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> *18. At his cousin's place after watching the Singapore 7s final he had slept in that house in Buca. He had woken up at 7 am the next day and gone to his shop at around 8am. It is his firm position that **SUNITA (PWI)** would not have fallen asleep in his shop that night. He confirmed Court that he didn't have sex with **SUNITA (PWI)** that day and that he didn't know about **SUNITA (PWI)** coming back to the shop and to his knowledge when he left the shop in the night **SUNITA (PWI)** had been sitting on the verandah of his shop.*
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> *19. Testifying in Court,**(DW2) Melvin Prasad** and **(DW4) Nitendra Deo** confirmed Court that the Accused closed his shop at around 11 pm on the night of the 10th April 2022 and they went to Buca to the house of Defense witness 3 **Shiva Prasad** to watch the Singapore Rugby 7s finals. Giving evidence, witness **Shiva Prasad** testified that the Accused watched the Singapore Rugby 7s finals at his house in Buca after 11 pm on 10/04/2022 and went to sleep at his house in Buca. He confirmed that the Accused and he slept in different rooms in his house. He further alluded that after the Accused went to sleep after the match, he didn't see the Accused till 6 am in the morning on 11/04/2022, where the Accused left to his shop by 8 am. He further informed Court that his house is kept locked at night for safety, where he has a key to the locks and his brother who lives with him in that house has another key to unlock the doors.'*

9. These passages from the judgment establish that alibi evidence was led at the trial by the defence but in dealing with it a error of law was made by the trial judge and this is clear from the assessment of the evidence he gave at paragraph 20 of the Judgement, wherein he stated:

> *'20. Through the evidence of the Accused and Defense witnesses Defense informed this Court that the Accused couldn't have raped the prosecutrix in his shop as claimed by (PW1), since after watching Singapore Rugby 7s finals he went to sleep in Buca. With regard to the Accused watching the Rugby match in Buda there is no evidence to challenge that position. Therefore, this Court is compelled to accept this position of the Defense. However, in this matter the prosecutrix **SUNITA SONIA KUMARI** has complained that she was raped by the Accused at around 3 am on 11/04/2022. In this regard, there was no evidence led by the Defense to categorically demonstrate the presence of the Accused elsewhere,*

*since though **DW3 Shiva Prasad** had stated that the Accused slept in a different room in his house that night after the match, his brother also has had an entry key to his house and he had not seen the Accused till 6 am in the morning of 11th April 2022. Therefore, **Shiva Prasad** was speculating that the Accused slept at his house after the match till 6 am the next day, but couldn't confirm with certainty. However, the Accused was not kept under lock and key at **Shiva Prasad's** house on the night of 10/04/2022.'*

10. As evident from the above evaluation of the defence case, the trial judge accepted the appellant's evidence that he was in Buca to watch Singapore Rugby 7s Finals and slept there. There were two other defence witnesses who deposed to this matter in support of the appellant's evidence. That finding to be displaced, will have to be rebutted by evidence proven beyond reasonable doubt adduced by the prosecution, to disprove the alibi. That was not done here. Without reference to any supporting evidence that would justify his accepting the evidence of Sunita [PW1] evidence as rebuttal which is required by the **Munendra principle** to be satisfied beyond reasonable doubt. The trial judge's reliance on "divisibility of credibility" principle, to not accept the evidence of alibi adduced at the trial and accepting the evidence of PW1 to rebut the appellants evidence, which he had already accepted. The law is that the prosecution must remove or eliminate all reasonable possibility of the appellant being somewhere else according to the alibi evidence. The reliance on the divisibility of credibility rule of evidence, by the trial judge was an error without proper explanation as to which evidence is it being applied to. This is an error on the part of the trial judge.

11. At the hearing the respondent conceded grounds 1, 2, 3, 4, 5, and 10 and agreed that it best to be allowed to go to the full court for consideration with the benefit of the full court records.

12. Leave to appeal on these grounds regarding alibi evidence are allowed.

13. Ground 6 of the appellants ground of appeal alleges subjectivity on the part of the trial judge. It was open to the trial judge to make that observation, albeit subjective in nature. It does not on its own assail the conviction of the appellant.

14. Grounds 7, 8, and 9 alleges that the medical examination by Dr Turaga and how the trial judge erred when he held at paragraph 14 that it corroborates the charged against the appellant.

15. The judge was wrong to use the medical examination as corroboration and secondly as a matter of evidence the medical doctor's examination could not be used it to support the rape charged against the appellant when on the submission of the appellant there were at least two other persons that had sexual intercourse with the complainant and that the redness observed around the labia and vagina would have been caused within the 24-hour period prior to the examination. In that regard the doctor's medical examination results, was neutral at best. On this evidence the finding of the trial judge at paragraph 14 of the Judgement is correct:

> *'14. Further, the evidence of Prosecution witness 2* ***Dr. Jone Turaga*** *corroborated the evidence of PW I, where he testified that the redness he observed in the labia area of the prosecutrix could have been caused by some sexual activity that happed within 24 hours before his examination.'*

16. In light of the above, the appellant should be allowed to make his case against conviction, with regard to these grounds before the full court. Leave to appeal is granted.

17. At the hearing for the first time counsel for the appellant stated he intend to file Notice of Motion to Adduce Fresh Evidence. The court encourage this Notice to be submitted early.

ORDERS:

1. Leave to appeal against conviction is granted.

COURT OF APPEAL FIJI

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Isikeli U Mataitoga
Resident Justice of Appeal