

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

**CRIMINAL APPEAL NO. AAU 0041 OF 2023**  
**[Suva High Court: HAC 103 of 2022]**

**BETWEEN** : **APENISA DRUVA** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Mataitoga, P

**Counsel** : Fesaitu, M for the Appellant  
Shameem, S for the Respondent [ODPP]

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

**Date of Ruling** : 18 February, 2025

**RULING**

1. The appellant [Apenisa Druva] was tried and convicted in the High Court at Suva of the following offences:
  - i) Count 1 – Rape contrary to section 210(1)(a) Crimes Act 2009;
  - ii) Count 2 – Rape contrary to section 212 (1) of the Crimes Act 2009;
  - iii) Count 3 – Rape contrary to section 212(1) of the Crimes Act 2009;
  - iv) Count 4 – Sexual Assault [Representative count] contrary to Crimes Act section 210(1)(a) and (2);
  - v) Count 5 – Rape, [Representative Count] contrary to section 207 (1), (2)(a) Crimes Act 2009.

2. The appellant gave evidence on his behalf, after the trial judge found that there was a case to answer.
3. The Appellant was found guilty as charged and was convicted vide the judgement dated 4 April 2023. He was sentenced on 4 April 2023 to a total term of 14 years imprisonment with a non-parole period of 10 years.

### The Appeal

4. The appellant submitted a Letter of Appeal Against Conviction addressed to the Registrar, which was received by the Court Registry on 6 April 2023. The letter set out 2 grounds of appeal against conviction as follows:
  - i) The trial erred in fact and law when he did not consider the lack of identification evidence in the first and second incidents of Rape;
  - ii) The trial judge erred in fact and law because he did not consider the demeanor of the complainant when she gave evidence as she was smiling recounting the first count whereby the counsel asked her if something was funny.
5. This appeal is timely.
6. The Legal Aid Commission [LAC] for the appellant filed 2 additional grounds of appeal against conviction on 12 June 2024 and there are:
  - i) Trial judge erred in law in failing to direct himself on the Liberato Direction and applying the principle of the Direction;
  - ii) The trial judge erred in law in failing to give cogent reasons as to why he did not accept the appellants version.

### Applicable Law

7. Since the grounds of appeal involve questions of law and facts, section 21(1)(b) of the Court of Appeal Act is the relevant provision to review this leave application. In

terms of section 21(1) (a) and (b) of the Court of Appeal Act the appellant may appeal against conviction and sentence only with leave of court.

8. For a timely appeal, the test for leave to appeal against conviction is ‘reasonable prospect of success’: Caucau v State [2018] FJCA 171; Navuki v State [2018] FJCA 172 and State v Vakarau [2018] FJCA 173; and Sadrugu v The State [2019] FJCA 87.

#### Assessment of the Grounds

9. In total the appellant submitted 4 grounds of appeal against conviction and each of these will now be assessed against the relevant law referred to in paragraphs and 7 and 8 above.

#### *No Identification Evidence*

10. This ground of appeal alleged that the trial judge erred in law and fact because he did not consider the lack of identification evidence in the first and second incidents of Rape. These incidents took place on 27 April 2019 and 10 October 2020 respectively, at Nukui Village in Rewa.
11. At the trial the appellant did not raise the issue of identification. His main contention was: i) that the sexual intercourse was consensual and ii) claim that on the dates of the offence he was in Makoi, Suva helping his brother move residence i.e. claiming alibi.
12. At paragraph 33 of the Judgement it states:

*“[33] The complainant gave a detailed account of the incident that allegedly occurred on 27 April 2019. She struck me as an honest and reliable witness. Although the alleged incident occurred at nighttime, the complainant had ample opportunity to recognize the accused. They knew each other. They are cousins. They lived in the same village. She recognized him because he made bodily contact with her. Nothing obstructed her view. Her recognizance of the accused is reliable. Her account of the event is reliable and honest. Her explanation for not complaining to anyone is reasonable. She was a 12-year-old female child and her mother was living somewhere else at the time. The accused was an older male cousin living in the same village as her. She*

*was confused and embarrassed to tell anyone. I believe her account that on 27 April 2019 the accused forcefully took her to Tai Ledua's house and penetrated her vagina with his penis."*

13. This ground of appeal is an afterthought. It has no merit.

*Demeanour of Complainant – Smiling while giving evidence*

14. This ground of appeal alleges a specific behaviour of the complainant while giving evidence. The appellant alleges that while giving evidence in reference to the first incident of rape, the complainant was smiling, attracting appellant's counsel to inquire of her, if there was something funny. But the alleged behaviour is not referenced in the judgement.

15. It is possible that the full record of the trial may show more on this claim. On its face if the claim it is in fact true, it should have been commented on by the trial judge to be sure of its context. It may be a claim that has no factual basis at all, but at the Leave to Appeal Hearing without the full court record it is not possible to assess the impact of the alleged action of the complainant.

16. In terms of the need to be satisfied that this ground has a reasonable prospect of success on appeal, I conclude that it has no merit.

*Failure to Give Liberato Directions*

17. As a legal principle governing of trial evidence and cross-examination, Liberato Directions are given in the following circumstances:

*"a Liberato direction serves to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt. As such, a Liberato direction should be given in cases in which the trial judge perceives that there is a real risk that the jury might view their role in this way, whether or not the accused's version of events is on oath or in the form of answers given in a record of police interview."*

**De Silva v Queen [2019] HCA 48**

18. In Fiji, the final arbiter of law and fact at a trial is the trial judge. Where assessors are used, there may be circumstances where the Liberato Directions is needed. This was not a trial with assessors and therefore once the trial judge is careful to ensure that the standard of proof that the prosecution must meet from the evidence it adduces and in evidence led by the defence at the trial, the requirement for Liberato Directions is not necessary. The trial judge is not in any doubt in accepting the credibility of the complainant's evidence. A Liberato Direction is not necessary, after all it is a practice direction to ensure fairness of the trial: **Tuitoga v State [2024] FJCA 80**.

19. This ground has no merit

*No Cogent Reasons for Not Accepting Appellant's evidence*

20. The approach of the trial judge was to set out in summary the evidence of the prosecution, followed by the summary of defence case.

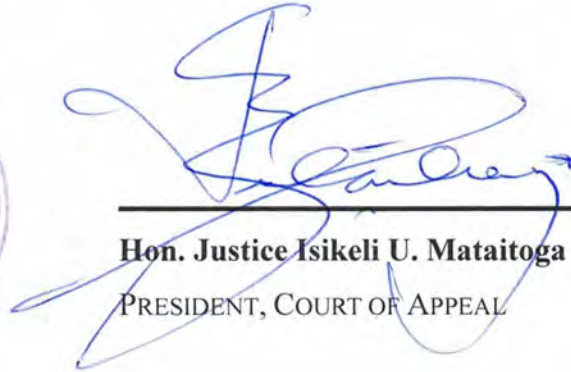
21. From paragraph 30 to 46 of the judgement the trial judge set out his analysis of the evidence and he gave his reasons for accepting and rejecting the evidence of the complainant and or the appellant.

22. The appellant had not provided examples of evidence which the appellant claims were not accepted for which no reasons were given. The fact is that the appellant approach at the trial was to deny that he was at the scene of the crime as alleged in the charge statements. When that was untenable because the alibi evidence fell apart, he denied rape in the sense that the complainant consented to the acts of sexual intercourse. These were not accepted by the trial judge and he gave his reasons at paragraphs 31 to 37.

23. This ground has no merit.

**ORDER:**

1. Leave to Appeal Against Conviction on all ground declined.



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**Hon. Justice Isikeli U. Maitoga**  
PRESIDENT, COURT OF APPEAL