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

CRIMINAL APPEAL NO. AAU 063 OF 2024
[Lautoka High Court: HAC 217 of 2019]

BETWEEN : **ULAIASI GONEVOTI**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Appellant In-Person
Mr. E. Samisoni for the Respondent

Date of Hearing : 15 August, 2025
Date of Ruling : 30 September 2025

RULING

(A). Background

[1] The appellant was charged with another with the following offences:

Count 1- *Rape contrary to section 207(1), (2) (b) and (3) read with section 45 and 46 of the Crimes Act 2009;*

Count 2- *Attempted Rape contrary to section 208 read with section 45 and 46 of the Crimes Act 2009;*

Count 3- *Rape contrary to section 207(1) and (2) (b) and (3) read with section 45 and 46 of the Crimes Act 2009;*

Count 4- *Indecent Assault contrary to section 212(1) of the Crimes Act 2009.*

[2] The Appellant pleaded not guilty to the said Information filed by the Director of Public Prosecutions. On 30th July 2024, the Appellant was convicted of Count 1 *(Rape)* and Count 3 (*Rape)*, and acquitted of Count 2 *(Attempted Rape)* and 4 *(Indecent Assault).*

[3] The Appellant was sentenced on 13th August 2024 to 7 years 11 months and 2 weeks imprisonment with a non-parole period of 5 years 11 months and 2 weeks imprisonment.

[4] The appellant filed his Notice and Grounds of Appeal In-Person, on 12 September 2024 urging six grounds of appeal.

(B). Facts

[5] The facts as accepted by the Court, and adopted from paragraph 2 of Sentence are as follows:

> "*On 17 November 2019 after midday at Lololevu Settlement, Vatukoula, the victim SV was seated under a mango tree near a shed used for church service, while other children were running around and there were other people at the shed. SV was playing alone, using sticks to roll and throw them. The two suspects came, and they forcefully held SV with his hand to the ground. The 1st suspect together with the 2nd suspect then pulled his pants down and they poked the inside of SV's anus with the index finger. SV then kicked them and hurried home and informed his parents, who promptly reported the matter to the police.*
>
> *Furthermore, on the same date and time, when children were playing and running around whilst people were resting at the shed, and women washing dishes, the two suspects approached and forcefully restrained LFNT and put him to the ground. The 1st suspect was holding LFNT on his head, while the 2nd suspect held the victim from behind as LFNT was in a kneeling position. The 2nd suspect then proceeded to lift up the victim's wrap-around sulu and forcefully inserted an unripe banana into his anus. LFNT felt pain then stood and went to his home whilst other children were laughing at him. He then informed his parents as well, and the matter was promptly reported to the police. Both suspects were*

subsequently arrested, interviewed under caution and charged for alleged offences."

(C). Grounds of Appeal

[6] The Appellant urged six grounds of appeal, as follows:

1. *That the trial Judge erred in law and fact when he convicted the Appellant for two counts of Rape after failing to consider the inconsistencies of the complainant's witness evidence during cross examination and their credibility.*

2. *That the trial Judge erred in law and in fact when he did not consider the inconsistency of the recent complaint evidence during cross examination to support the credibility of PW1 (1st complainant) as to the evidence of distress.*

3. *That the trial Judge erred in law and fact when he did not properly consider the evidence of the doctor as there was no penetration recorded in the medical report and the inconsistent evidence submitted as opposed to what was recorded in the medical report of PW1 (1st complainant).*

4. *That the trial Judge erred in law and fact when he did not consider that the 2nd complainant had given evidence during cross examination that it was not the Appellant who he had referred to a Bear that had poked his bum.*

5. *That the learned Judge erred in law and fact when he did not consider the evidence by the 2nd complainant during cross examination when he had pointed to a diagram given by the State and tendered as evidence to indicate as to where he was poked. The 2nd complainant had pointed to top of the bum which is not the anus.*

6. *That the learned trial Judge erred in law and fact when he did not properly take into account the evidence by the Appellant.*

(D). The Law

[7] Section 26 of the Court of Appeal Act allows the Appellant to appeal to this Court giving notice of his/her application for leave to appeal in such manner as may be directed by rules of Court within thirty days of the date of conviction.

[8] The test for leave to appeal against conviction is *"reasonable prospect of success"*- **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018) and in line with similar authorities on *"arguable grounds"*: **Chand v State** [2008]FJCA 53;AAUoo35 of 2007 (19 September 2008), **Chaudry v State** [2014]FJCA 106;AAU 10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14;CAV 10 of 2013 (20 November 2013).

(E). High Court Judgment-Delivered on 30th July 2024, per Samuela. D. Qica Judge)

[9] The judgment were in parts as follows:

Introduction- paragraphs 1 -5.

Brief Prosecution Evidence - paragraphs 6 to 9.

Brief of Defence Evidence - paragraphs 10 and 11.

Issue & Law/Analysis - paragraphs 13 to 34.

Conclusion - paragraphs 35 to 38.

(F). Appellant's Case

[10] The Appellant had submitted a written submissions and also raised oral submissions at the hearing. His case is briefly summarized below.

[11] **Ground 1:** That the complainant did not specifically and precisely corroborate the allegations against the Appellant. The learned trial Judge had based his findings by observing the complainant and the evidence led at trial. The judgment is based on observations only and "without expert evidence". The Appellant submits that the learned judge was mistaken in interpreting the complainant's statement by holding that it was the Appellant who held the complainant. In cross-examination the complainant changed his statement stating that it was the first accused who held him down with force. There was mistaken identity by the trial judge. The inconsistencies raised are significant and they affect the veracity of the allegations against the Appellant, and prejudicial to his right to a fair trial.

[12] **Ground 2:** The Appellant submits that the court had not considered all the evidence including the inconsistencies during the trial. For example, at paragraph 27 of the

judgment. It is argued that the narration may be applied to the 1st and 2nd complainants as they are young. But it does not apply for the recent complaint (PW2) Appellant's father. In cross examination it was clarified that the message was verbally conveyed to him. There were inconsistencies entertained by the learned trial judge raising questions and doubts about the assessment of the evidence, for example, in paragraph 27 of judgment. The inconsistencies create uncertainty and doubt causing a substantial miscarriage of justice.

[13] **Ground 3:** The Appellant submits that the court had not properly considered all the evidence and the inconsistencies during the trial. In paragraph 8 of the judgment, unwritten medical report was admitted, the learned judge states "in his professional opinion although not written in the medical report." This indicated and proves that no legal and written report of the examination was presented at all. The Appellant's conviction on hearsay evidence as "he did not record it." The Appellant argues that most allegations tend to be verbal beginning from the recent receiver of the complaint and no documentation of the statement was provided up until the complaint lodged to the police. Therefore, causing a substantial miscarriage of justice.

[14] **Ground 4:** The Appellant argues that the learned trial judge did not consider that the 2nd Complainant had clarified under oath that he agreed that the person he identified in court wearing the shirt (meaning DW1 Simeli) was the one who poked him and not Bear. There is a possibility of mistaken identity as there were other people present and the complainant himself stated. Two of them poked his bum and Appellant did not know the name of the other person. The Appellant argues that he may be mistaken by their identity. There were other people present and the 2nd complainant did not know Bear. That was the first time the complainant knew Bear. The observation made by the learned judge on identity of Appellant is not supported by evidence. There was a substantial miscarriage of justice.

[15] **Ground 5:** The Appellant submits that the learned trial judge did not consider the evidence that there were no precise or corroborating factors. The 2nd complainant state that impact or contact was applied to the top of the bum which is not anus. It is also argued that the findings is proved on the statement in relation to the diagram presented by the prosecution. There was no form of contact between him and 2nd complainant and no form of aiding was confirmed by the accused in person. That the

Appellant was not involved in forcibly holding and pushing. Therefore, there is a substantial miscarriage of justice.

[16] **Ground 6:** The Appellant submits that interpretation and effect of (PEX-2) reflected in paragraph 11 of the judgment, was mistaken. The Appellant stated he just lightly poked PW1 bum over his clothes and that impact over the bum cannot cause bruising to the anus. The Appellant argues that contact was felt on his buttock which is not the anus, as clearly stated in the judgment. He also marked on a diagram (PEX-2) the place on his body (buttocks) he was referred to. The Appellant's rights to seek leave to appeal is supported by the complainant's statement. Later on in the narration the complainant stated (paragraph 9) that the person who poked his bum was the one wearing a shirt in court and he pointed to the suspect Simeli. This narration correlates the mistaken identity in this case. Therefore, there is a substantial miscarriage of justice.

[17] In conclusion, the Appellant submits that the discrepancies and implausibility addressed above has a bearing on the reasonableness of the conviction and had the learned trial judge considered and evaluated the inconsistencies and implausibility raised herein, he would have entertained a reasonable doubt as to the guilt of the Appellant.

(G). Respondent's Case

[18] **Grounds 1 and 2:** The Respondent submits that the Court had considered all the evidence and inconsistencies during the trial. It relies on **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2011), it was held:

> *"[13]…….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 Hirijbhai v State** [1983] AIR 753, 1983 SCR (3) 280.)*
>
> *[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and*

discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being is cannot be expected to be attuned to absorb all the details of the incidents, minor discrepancies are bound to occur in the statements of witnesses.

[19] The Respondent submits that the trial Judge had considered the inconsistencies in the evidence of both complainants (PW1 and PW4) and recent complaint (PW2) but stated that it did not undermine their credibility. See paragraph 27 of judgment. Further, the Respondent submits that, the trial Judge continued to address other inconsistencies and omissions put to the complainants with regard to cross examination questions dealing with other people around the vicinity at the place of offending. The trial Judge stated that it is possible that the individual inside the shed and those washing dishes were not alerted or made aware of the incident. This in fact does not undermine the credibility of both complainants because it did not go to the root of the issue before the court.

[20] The Respondent submits with regard to the recent complaint that, the court was satisfied that the evidence given by PW2 was credible and reliable. This witness was cross examined by defence but remained firm in his evidence. The court considered the relationship between PW1 and the Appellant, and stated that PW1 had no animosity towards the Appellant. The fact that the matter was reported to the police was due to the Appellant's actions and nothing else. At the conclusion, the court believed the prosecution witnesses.

[21] This ground has no merit.

[22] **Ground 3:** The Respondent submits that PW1 had informed the court that the Appellant inserted an unripe banana into his anus and it was very painful. He rushed home after the incident and informed his parents and was taken to hospital for medical examination. That the Doctor confirmed in evidence that the history of injury give to him was consistent with his findings. Although the Doctor did not specifically write a medical opinion. The Doctor was given many suggestions as to what could have caused the injuries to PW1's anus, however, he maintained that the injuries were consistent with what was relayed to him from the complainant. The Court accepted

the evidence of the Doctor to be trustworthy and highly credible. This ground is without merit.

[23] **Ground 4:** The Respondent submits that the prosecution was running its case on aiding and abetting as per section 45 and 46 of the Crimes Act 2009. In **Amena Araibulu v State** [2014] FJCA 144;AAU102.2013 (15 September 2014 the single judge of the Court of Appeal when discussing aiding and abetting said:

> *"[9] In order to prove an aiding and abetting, the prosecution must prove firstly an intent to encourage, and secondly an act of omission which amounted to a positive act of assistance (Reg v Coney (1882) 8OBD 534. In order to prove both limbs, it must be shown or inferred from the circumstances that the offender knew that the offence was going to be committed, or was being committed (Iliaseri Saqasaqa v The State Criminal Appeal No. HAA098 of 2004S). Whether the appellant knew an offence was being committed, was a question of fact for the trial judge. Knowledge is a matter of inference. In this case the trial judge at paragraph 9 of his judgement made a finding that the appellant intentionally assisted his co-accused in importing an illicit chemical. In other words, the trial judge was satisfied that the appellant knew an offence was being committed and the appellant intentionally encouraged his co-accused by accompanying him to collect the illicit substance from Customs. The use of a fictitious name for the consignee, the concealment of the true identity of the co-accused by the appellant, and the offer of a bribe to the officers were evidence from which the trial judge was entitled to infer the guilty knowledge or intention. The ground is not arguable."*

[24] The Respondent submits that PW4 stated that the Appellant held his hand, made him lie down on the ground and the juvenile poked his bum. The fact that the Appellant held down PW4s hands and the juvenile poked PW4s bum indicated that he is also guilty of committing the offence. The Appellant was aiding the juvenile to commit this offence, hence why PW4 identified both the Appellant and the juvenile in Court. PW4 may have mistaken the name of the juvenile as being "Bear" but he identified both the Appellant and juvenile as the persons who committed this act on him.

[25] This ground it is submitted, lacks merit.

[26] **Ground 5:** PW4 stated in his evidence that the Appellant held his hand, pushed him down on the ground and the juvenile poked his bum. The State used a diagram to allow PW4 to specify which part of his bum was poked and PW4 pointed to the buttocks. During cross examination it was suggested to PW4 that he was poked on top of the buttocks, he denied this. In paragraph 27 the Court noted, that considering the differences in memory, both PW1 and PW4 maintained their evidence and their credibility was not undermined. The Court accepted that the Appellant and the juvenile committed these acts against both complainants hence found them guilty as charged.

[27] This ground lacks merit.

[28] **Ground 6:** The Respondent submits that this ground is misconceived because the court considered all the evidence of both parties. The evidence of the Appellant was considered in paragraph 11 of the judgment and the Court noted that the Appellant had stated that he just lightly poked PW1s bum over his clothes. This fact was never put to PW1in cross examination. Therefore, the Court stated that this was a significant impact on the Appellant's credibility hence not believing the defence witness.

[29] This ground lacks merit.

[30] In conclusion the Respondent submits that the grounds of appeal against conviction has no reasonable prospect of success.

(H). Discussion

[31] **Grounds 1 and 2:** The law on inconsistencies in evidence is well settled. The weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule can 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 given undue importance: **Bharwada Bhoginbhai Hirijbhai v State** (supra).

[32] In **Nadim v State** (supra), it is stated:

> "*[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an*

undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a huma being cannot be expected to be attuned to absorb all the details of the incidents, minor discrepancies are bound to occur in the statements of witnesses."

[33] The appellant had not demonstrated that the inconsistencies, discrepancies, omissions in the evidence against his acts and conduct had shaken the basic version of the prosecutions witnesses. Discrepancies which do not go to the basic version of the prosecution witnesses cannot be given undue importance. Grounds 1 and 2 are not arguable.

[34] **Ground 3:** The Appellant submits that in relation to paragraph 8 of the judgment (on Dr Grounder's evidence), the learned trial judge did not properly consider the evidence of the doctor as there was no penetration recorded in the medical report, and the inconsistent evidence submitted as opposed to what was recorded in the medical report of PW1 (1st complainant).

[35] Dr Grounder medically examined the 2nd complainant, LFNT. He confirmed that the history related to him by LFNT and his medical findings, correlated. Although his professional findings was not written in the medical report, he found that the injuries sustained at the edges of the anus suggests that there was penetration of the anus. On cross examination by counsel, the doctor agreed that his findings of bruises were around the perianal region. The doctor also stated that, it would highly be unlikely for the complainant to have received the said bruises in that region as a result of horse riding, and he disagreed that such bruising could have been caused by constipation, as the injuries are noted inside and not outside. He also disagreed that the scratching could have caused the bruises. At end of paragraph 8 of judgment (on Dr Grounder's evidence), the learned trail judge stated:

"In re-examination he stated that he didn't record it but in his professional opinion, injuries are recent and consistent with history. Looking at the history and his medical findings even though he didn't specifically say that there was penetration, given the history and the injuries they are consistent and correlating."

The learned trial judge found the Dr Grounder was not discredited (paragraph 30 of judgment), and that he displayed a strong and unwavering demeanor and his evidence was trustworthy and highly credible.

[36] **Ground 4:** In this ground the Appellant alleges that the learned trial judge did not consider that the 2nd complainant (LFNT) had given evidence during cross examination that it was not the Appellant who he had referred to as Bear that had poked his bum. This count was pursued by the prosecution on the premise that the Appellant aided and abetted the co-accused in line with Sections 45 and 46 of Crimes Act 2009. Section 45 states:

> *"Complicity and common purpose*
>
> *45-(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*
>
> *(2) For the person to be guilty-*
>
> *(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and*
>
> *(b) the offence must have been committed by the other person*

[37] In **Amena Araibulu v State** (supra), this Court had adopted the principle that, in order to prove an aiding and abetting, the prosecution must prove firstly an intent to encourage, and secondly an act of omission which amounted to a positive act of assistance, established long ago (1882) in **Reg v Coney** (supra).

[38] In order to prove both limbs, it must be shown or inferred from the circumstances that the offender knew the offence was going to be committed or was being committed: **Iliaseri Saqasaqa v The State** Criminal Appeal No. HAA098 of 2004S. Whether the Appellant knew an offence was being committed, was a question of fact for the trial judge. Knowledge is a matter of inference. In this case PW4 stated the Appellant held his hand, made him lie down on the ground and the juvenile poked his bum. The Appellant assisted or aided the juvenile to commit the offence, hence both were identified in Court. PW4 may have mistaken the name, but there was no real doubt created as PW4 identified both the Appellant and the juvenile as the persons who

committed the act on him. The identification of the Appellant is not in question-see paragraph 23 of judgment. This ground is not arguable.

[39] **Ground 5:** This ground contends that the learned trial judge was mistaken when he did not consider that the 2nd complainant, in reacting to a diagram (PEX-2) pointed to top of the bum which is not the anus. PW4, clarified the part of the body poked in cross examination-paragraph 9, at bottom of page 6 of judgment. The Court noted that, considering the differences in memory, both PW1 and PW4 maintained their evidence and their credibility was not undermined. In paragraph 27, the learned trial judge commented on the manner in which both complainants, PW1 and PW4 stood up to cross examination at the trail, as follows:

> *"27…………..Based on my observation, both complainants maintained a strong and unwavering stance in their testimonies regarding the main issue at hand. They remained steadfast and their credibility was not undermined in that regard. I trust their credibility and reliability. I have no reason to doubt their credibility and accept their honesty."*

[40] The Court accepted that the Appellant and the juvenile committed these acts against both complainants and found them guilty as charged. This ground is not arguable.

[41] **Ground 6:** The Appellant argues that the learned trial judge did not properly consider his evidence, as reflected in paragraph 24 of judgment. The Appellant had stated that he just lightly poked PW1s bum over his clothes and the impact over the bum cannot cause bruising to the anus. An exhibit (PEX-2) was assessed to point out the area poked.

[42] The ground is misconceived because the learned trial judge considered all the evidence that is from the prosecution and the defence. The Appellant's evidence was considered in paragraph 11 of the judgment, and the Court noted that he just lightly poked PW1's bum over his clothes. This fact was never put to PW1 in cross examination, which has a significant impact on the Appellant's credibility- see paragraph 34 of judgment.

[43] This ground is not arguable.

Order of Court

1. *Application for leave to appeal against conviction is disallowed.*

Solicitors
Appellant In-Person
Office of the Director of Public Prosecutions for the Respondent