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

CRIMINAL APPEAL NO. AAU 0051 OF 2023
[Lautoka High Court: HAC 114 of 2020]

BETWEEN : **MOHAMMED TAHIR**

Appellant

AND : **THE STATE**

Respondent

Coram : Mataitoga, P

Counsel : Appellant in Person
Shameem S. for the Respondent [ODPP]

Date of Hearing : 16 October, 2024

Date of Ruling : 3 February, 2025

RULING

1. The appellant was charged by the DPP and tried at the High Court in Lautoka of the following offences:

Count One

Statement of Offence

SEXUAL ASSAULT: contrary to section 210 (1) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED TAHIR between the 1st day of January 2018 and the 30th day of June 2018 at Buabua, Lautoka in the Western Division unlawfully and indecently assaulted SHAREEN SHARUL BANO, by biting her breast/chest.

Count Two

Representative Count

Statement of Offence

RAPE: Contrary to section 210 (1) and [2] [a] of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED TAHIR between the 1st day of January 2018 and the 30th day of June 2018 at Buabua, Lautoka in the Western Division had carnal knowledge of **SHAREEN SHARUL BANO**, without her consent.

2. The matter proceeded to trial when the appellant pleaded not guilty to the charges. At the ensuing trial, the prosecution presented the evidence of the complainant, her father Mohammed Shariff and closed its case. The appellant was put to his defence when the Court found a prima facie case against him.

3. The appellant opted to give evidence on his behalf.

4. At the end of the trial the appellant was found guilty as charged and convicted of the both counts, on 8 May 2023. He was sentenced to 9 years imprisonment with a non-parole period of 7 years imprisonment on 16 May 2023

Filing For Leave to Appeal

5. The appellant submitted a Notice for Leave to Appeal Against Conviction and Sentence on 20 May 2023, which was filed in Court on 14 June 2023. This makes the leave application timely.

6. The Notice of Leave to Appeal dated 20 May 2023 articulated 4 grounds of appeal against conviction and 1 ground against sentence.

7. On 26 April 2024 amended grounds of appeal against conviction and sentence were filed in the registry. The grounds of appeal against conviction, is now 10 and 2 against sentence. These are the grounds that is assessed for the application for leave to appeal.

8. On 26 April 2004, the appellant also filed an application for enlargement of time to appeal against sentence. This was unnecessary because the initial Notice was on time.

Applicable Law

9. All the grounds of appeal submitted by the appellant involves questions of law and fact. Section 21 (1)(b) of the Court of Appeal Act 2009 requires leave of the court to be granted before appeal may proceed further.

10. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** see: **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 of Appeal

Against conviction:

11. I agree with the State that grounds 1 to 4 and 10, of appeal deal with claim of inconsistent statements and should be dealt with together. Those grounds are:

> *"1) That the Learned trial judge erred in law and in fact by finding the appellant's evidence untruthful and unreliable not taking into account the explanation given for the previous inconsistent statement comparison to the previous inconsistent statement given by the complainant without any merit explanation but found to be truthful and reliable.*
>
> *2) That the Learned trial judge erred in law and in fact by not giving weight to the previous inconsistent statement of the complainant which go to the root of the matter and to the credibility and reliability also failed to direct himself om how to approach such*

inconsistent statement, such failure give raise to a question of legal importance, affecting the administration of criminal justice thus, caused a substantial miscarriage of justice.

3) *That the Learned trial Judge erred in law and in fact by failing to consider that the complainant presented a cloud version of the complaint at trial which showed embellishment and exaggeration and point towards fabrication.*

4) *That the Learned trial judge erred in law and in fact where analyzing and evaluating the evidence adduced before him misdirecting himself in paragraph 50 of his impugned judgment which contradicts the evidence given by the complainant resulting in a verdict which was unsafe, unsatisfactory and unsupported by the evidence which has given rise to a substantial miscarriage of justice."*

12. The respondent has submitted that the inconsistencies relied upon by the appellant must be evaluated according to the statement of principle enunciated in **Swadesh Singh v State [2006] FJSC 15**, at paragraph 51 the Supreme Court stated:

"**[51]** *Thirdly, where a witness has made a statement on oath directly inconsistent with evidence he or she gives in court and particularly when that evidence implicates the accused person, the assessors should be informed of the importance of statements made on oath. They should also be told that they should be cautious before they accept a witness's sworn evidence that conflicts with a sworn statement the witness previously made. The judge should remind the assessors of the explanations given by the witness for the earlier sworn statement and instruct them that the evidence in court should be regarded as unreliable unless the assessors are satisfied in two particular respects. Firstly, that the explanations are genuine. Secondly, that, despite the witness previously being prepared to swear to the contrary of the version the witness now puts forward, he or she is now telling the truth (cf Gyan Singh v Reginam [1963] 9 FLR 105; Hari Pal v Reginam [1968] 14 FLR 218; Bijai Prasad v Reginam [1984] 30 FLR 13; R v Zorad [1979] 2 NSWLR 764 at 770-771). The need for these cautions is particularly acute in the case of a witness who is also an accomplice."*

13. At paragraph 48 of the Judgement the trial judge addressed the issue of inconsistent statement:

"*48. Under cross- examination, the complainant in an answer to a leading question expanded the scope of the threat and said that she was assaulted or rather slapped. It was suggested that she had never told police in her statement that she was assaulted. The Defence Counsel contends that this is a material contradiction that goes to the root of the matter. I am unable to agree. Her witness statement had been a very brief one consisting only of a few lines and even in that brevity, she had mentioned how she was threatened. That inconsistency, if at all it is a contradiction, does not in my opinion discredit the version of the complainant."*

14. Furthermore, at paragraph 50 the trial judge stated:

"*There is evidence that there are houses in her neighbourhood. If they were occupied at the times when the offence took place, the attention of the neighbours should have been drawn to the screams if the complainant in fact had raised alarm. However, I am unable to agree that a non-intervention of anybody from the neighbourhood to save her must necessarily suggest that she had never raised alarm or that she was never raped. It is possible that, being confronted with such a situation, the complainant had frozen or muted. There is no set form of behaviour how a person faced with such a situation would react. Different people react differently and specially a woman of her calibre. Given the intellectual capacity of the complainant and her demeanour which I observed in court, I am convinced that the complainant was telling the truth in Court."*

15. It is clear that the inconsistencies claimed by the appellant were immaterial and the trial judge found the evidence of the complainant truthful and credible.

16. Grounds 1, 2, 3, 4 and 10 have no merit.

17. Ground 5 states: the trial judge erred in law and fact, by finding in his judgement at paragraph 45 that the complainant was mentally incapable to give consent as there was no concrete evidence produced by the prosecution to prove beyond reasonable doubt that the mental status of the complainant as consent was in dispute at the trial.

18. Paragraph 45 of the judgement state:

"45. The accused said he never at any point felt that the complainant is weak or intellectually not stable. She was always normal to

him, he said. Defence Counsel contends that the Prosecution failed to produce a medical report or medical history to show that the complainant was mentally handicapped. It is also stated that the complainant had done housekeeping and cooking etc. and was capable of understanding the questions and providing answers like a normal person thus should have had full mental capacity to give consent to a sexual intercourse. I am unable to agree. The way the complainant was giving evidence in Court was far from normal. She was giving short answers while smiling at the same time. I do not need the evidence led in trial to be supplemented by medical evidence in order to conclude that the complainant is intellectually handicapped. I am convinced that the complainant did not have necessary mental capacity to give informed consent to a sexual intercourse."

19. The appellant have not provided specific submissions that address the evidence that point to the issue mental capacity of the complainant, which was discussed by the trial judge.

20. This ground has no merit.

21. Ground 6 is mischievous in that the appellant admitted having sexual intercourse with the complainant. The issue at the trial was whether there was consent or not. At paragraph 31 of the judgement it states:

> *"31. Under cross-examination, Tahir admitted that in 2018, Shareen was 20 years younger to him. He admitted that, in 2018, between January and June, he had had sexual intercourse with Shareen. He agreed that Shareen used to be alone at home when he visited her."*

22. Ground 7 states: trial judge erred in law and fact, by not deliberately evaluating the evidence before him as the argument was advanced by the defence during trial in regards to recent complainant and failed to direct himself adequately thus a miscarriage of justice.

23. The trial judge assessed the delayed complaint in these terms in the judgement:

> *"46. It is in that setting that the contentions advanced by the Defence should be determined. It is true that the complainant had not made any complaint to anyone until the doctor confirmed that she was 32 weeks pregnant- that was nearly 8 months after the*

alleged incidents. When questioned by her father, she appears to have finally realised the connection between her pregnancy and what the accused had been doing to her. She eventually opened up and named the accused the father of the child.

47. In addition to that, the complainant provided acceptable reasons as to why a prompt complaint was not made to anyone. The accused had warned her not to tell anyone about what he had been doing to her. His warning appears to be capable of sending mixed signals, both soft and hard, in terms of compliance. He used to tell her that if she is good with him and lives with him he will support her. He had promised to support her in every possible way, even to buy things like undergarments. Those promises would have incentivised her to keep everything under the carpet. The hard warning had come in the form of threat of assault. In the circumstances of this case, the belated complaint does not in my opinion discredit the version of the complainant."

24. I am satisfied that the trial judge had adequately and correctly addressed the issue of delayed complaint in his judgement.

25. This ground has no merit.

26. Ground 8 raises the issue of pre-trial delay. This should have been raised at the trial stage. From the judgement it is not apparent that this issue was raised by the appellant. It cannot now be raised in this court.

27. Ground 9 states: trial judge erred in law and fact when he failed to consider that the prosecution failed to call witnesses which was vital to prove beyond reasonable doubt the alleged Rape, thus deprive the appellant of his fundamental right under section 14(2)(l) of Fiji Constitution 2013.

28. This is both misconceived and confused in its claim. Misconceived in that it claims that the trial judge did not call witnesses at the trial. It is not for judges to decide witnesses to be called, it is the sole prerogative of the prosecution. It is confused because section 14 (2)(l) of the Constitution gives the right to the appellant to call witnesses, challenge evidence etc at his trial. It does not confer that right on the trial judge.

29. This ground has no merit.

30. Ground 10 has no merit and its raises issues already discussed under grounds 1 to 4 above.

Against Sentence

31. When a sentence is challenged the Court of Appeal in **Kim Nam Bae v State [1999] FJCA 21, (AAU 15/98)**, stated that the appellant must demonstrate that the trial judge did one of these factors:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant maters to guide him
(iii) Mistook facts
(iv) Failed to take into account relevant considerations

32. Having reviewed the sentence Ruling in this case and in light of the above guidelines and in the absence of any relevant submission of the appellant to the contrary, I am satisfied that the sentence in this case has observed relevant principles of sentencing and took into account all the relevant factors.

33. The two grounds submitted by the appellant have no merit.

ORDERS:

1. Appellant application for Leave to appeal on all grounds is refused.
2. Appeal against sentence is refused.

COURT OF APPEAL FIJI

Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL