

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION NO: CAV 0023/2016
[On Appeal from Court of Appeal No. AAU 0078/2012]

BETWEEN : **LIVAI TAMANADEVU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Chief Justice Anthony Gates, President of the Supreme Court**
The Hon. Mr. Justice Sathya Hettige, Judge of the Supreme Court
The Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court

Counsel : **Mr. S. Waqainabete for the Petitioner**
Mr. Y. Prasad for the Respondent

Date of Hearing: **13 October 2016**

Date of Judgment: **27 October 2016**

JUDGMENT

Gates, P

1. I have read in draft the judgment of Hettige J. I agree with His Lordship's conclusions and reasons and with the proposed orders for dismissal.

Sathyaa Hettige, J

2. This is an application for Special Leave to appeal against the Judgment of the Court of Appeal (Calanchini P, Jayamanne JA and P. Fernando JA) dated 27th May, 2016, affirming the conviction and sentence imposed on the petitioner by the High Court at Suva.
3. The petitioner was charged with one count of Indecent Assault contrary to section 154 (1) of the Penal Code Cap. 17 for unlawfully and indecently assaulting Rajjeli Katarina between 1st day and 31st January 2010 at Kuku, Bau in the Central Division and the petitioner was charged with a second count of Indecent Assault on Rajjeli Katarina between 1st February 2010 and 14th May 2010 at Kuku, Bau in the Central Division contrary to section 212 (1) of the Crimes Decree No.44 of 2009. The petitioner was charged with one count of rape in that the petitioner had carnal knowledge of Rajjeli Katarina on 15th May 2010 at Kuku, Bau Tailevu in the Central Division without her consent contrary to section 207 (1) and section 207 (2) of the Crimes Decree No. 44 of 2009. On the second count of rape contrary to section 207 (1) and section 207 (2) of the Crimes Decree 2009 the petitioner was charged with having carnal Knowledge of Rajjeli Katarina without her consent at Kuku, Bau, Tailevu in the Central Division between 1st August 2010 and 31st August 2011.
4. Following a trial which lasted for 4 days in the High Court at Suva on all four counts, the trial Judge convicted the petitioner on a unanimous verdict of guilty of the assessors in respect of each count against the petitioner on 20th August 2012.
5. The learned trial Judge sentenced the petitioner on 24th August 2012 as follows:
 - (1) Two and half years imprisonment on each of the indecent assault convictions
 - 14 Years of imprisonment on each of the rape convictions.

The trial Judge ordered all the sentences to be served concurrently. The petitioner was sentenced to a term of 14 years imprisonment with a non-parole period of 12 years effective from 24th August, 2012.

6. The petitioner being dissatisfied with the decision of the High Court sought leave to appeal before a single Judge of the Court of Appeal against the conviction and sentence and the petitioner's application for leave was dismissed by the single Judge of the Court of Appeal on 30 September 2015 on the basis that none of the grounds of appeal against the conviction and the sentence appeal was arguable.
7. The petitioner filed on the 5th October 2015 a letter seeking to renew his leave to appeal application under section 35 (3) of the Court of Appeal Act. The Full Court of Appeal after hearing the renewed application for leave on fresh grounds of appeal made by the petitioner dismissed the appeal against the conviction and sentence on 27th May 2016.
8. The petitioner seeks leave to appeal before the Supreme Court under section 7 (2) of the Supreme Court Act of 1998 on the following grounds of appeal contained in a petition which was received in the Registry of the Supreme Court on 8th July 2016.
 - (i) That the Court of Appeal erred in law in not properly addressing the grounds of appeal.
 - (ii) That the Court Appeal erred in law in holding that there was no substantial miscarriage of justice and thereby applying the provision to 23 of the Court of Appeal Act despite earlier findings merits in the petitioner's grounds which relates to the paucity of directions on the recent complaint as per paragraph 16 and 25 of the impugned judgment.
 - (iii) That the Court of Appeal erred in law in wrongly purporting to overrule or not follow the recent Supreme court ruling in

Praveen Ram CAV001/2011 and in particular the reasoning of the Supreme Court in Suresh Chandra v State CAV 21/2015 where the court in that instance endorsed the principles in Ram, in view of the petitioner's initial complaint that the trial Judge did not properly and/or independently assess the evidence after the verdict of the assessors.

(iv) The Court of Appeal thereby erred in holding in paragraph 30 that Ram must be read in a manner that is consistent with the provision of 237 of the CPD in light of the overriding provision in section 98 of 2013 Constitution, the Supreme Court, sub section 7, binding on all other courts of the State.

9. However, according to the appeal submissions filed by the petitioner dated 14th September 2016 the main grounds of appeal can be limited to the following:

(i) The Fiji Court of Appeal erred in law when it did not consider the issue of non direction on the inconsistent statement of the complainant during the trial and lack of direction on recent complaint evidence.

(ii) The petitioner alleges the lack of reasoning and independent evaluation of evidence by the learned trial Judge after the verdict of the assessors were given.

10. It is relevant to consider the facts briefly in this case before dealing with the grounds of appeal of the petitioner.

BACKGROUND FACTS

11. The female complainant was born on 24th July 1994. She was the child of the petitioner's wife's younger sister. She was the niece of the petitioner by marriage. In December 2009

she lived with her relatives in Nadi. She was 15 and half years old at that time. Her parents were residing in the United States. In January 2010 it was discovered that she was 4 - 5 months pregnant. The petitioner and his wife offered to take her to village at Kuku and look after her and her child. The petitioner and his wife accordingly agreed to allow her to stay with them. Shortly after the petitioner's family returned to Kuku village in Tailevu with the victim in January 2010 she became a part of the family. As soon as the victim arrived in the petitioner's house at Kuku village the petitioner started to abuse her by fondling her breasts, body and kissing her in the neck and mouth. The petitioner repeatedly abused her on numerous occasions between January and May in 2010. The complainant alleged in her evidence further that the petitioner continued to rape her when the petitioner's wife and his daughter were away from the house.

The victim alleged in her evidence that the petitioner raped her on the previous day of the birth of the child and one week after the child's birth. The petitioner continued to rape the complainant twice a week without her consent thereafter until she left the house in August 2011 as she was fed up and could not take it any further. The victim stated that she told her aunty on at least, two occasions but she did not believe what she told her. It was revealed in the course of her evidence that she was treated like a "house-girl". She also admitted under cross-examination that she was hit by the petitioner with a stick.

12. According to the above facts and evidence elicited at the trial, it must be stated that the offence of rape involved in this case is a serious one. It is a worst form of sexual assault on the complainant. The victim had to undergo the trauma for a long period of time during her stay in the petitioner's house in Kuku village.
13. It is also important to refer to the agreed facts before considering the grounds of appeal.

The following facts were agreed on 28 June 2012 by the prosecution and the defence in terms of section 135 of the Criminal Procedure Decree No. 43 of 2009.

1. That the victim Rajjeili Katarina was the accused's niece.
2. That the victim fell pregnant and came to live with the accused and his wife.
3. That the victim resided with the accused and his wife at their home in Kuku Village, Bau Road during the time of the alleged offending.
4. That the victim resided with the accused family until giving birth.

It is pertinent to state that the agreed facts are admissions and they are sufficient proof of the facts admitted and there is no legal requirement to prove them.

GROUND OF APPEAL

14. We will deal with the main grounds of appeal as stated in paragraph 8 above based on the submissions of the petitioner. The main grounds of appeal on inconsistencies of statements and recent complaint issue as contained in the appeal submissions are dealt with based on the material and all the submissions made by both parties. We observe that the Court of Appeal has carefully discussed the above grounds of appeal in paragraphs 13, 14, and 15 of the judgment and reached the correct conclusion that there was no miscarriage of justice or unfair trial.

INCONSISTENCIES OF STATEMENT

15. The contents in Paragraph 14 is reproduced as follows:

“ (14) To the extent that there were inconsistencies in the complainant's evidence, it must not be forgotten that at the time when the offences commenced the complainant was 15 and half years old and pregnant. She had been offered and accepted accommodation during her confinement and following the birth of her son. The trial was over two years later by which time the complainant had turned

18. *It should not be surprising that her memory of the details of events that had occurred at a time when she was extremely vulnerable were inconsistent during the course of her evidence and cross-examination. Her evidence on the elements of the offences were entirely consistent throughout the trial. In my judgment there were no material inconsistencies in the complainant's evidence that would require comment by the learned Judge in his summing up. (Emphasis added)*

16. We also observe that even though there are some inconsistencies in relation to the medical report when the complainant told the doctor that she was hit by the petitioner with a rope having previously claimed that she was hit with a stick, the evidence of the complainant was consistent with the elements of the offences of rape and indecent assault with which the petitioner was charged.
17. However, we find that the learned trial Judge in his summing up at paragraphs 26 and 31 has correctly directed the assessors on the issue of credibility of the complainant as a witness.

Paragraph 26 states as follows:

“As assessors and judges of fact your decision in this case, will largely depend on how you decided on the credibility of the complainant as against the accused, as a witness. In other words, after observing the two give evidence from the witness box and watching their behavior and general demeanour in the court room, and given your general experience as members of the community, who do you find as more credible of the two witnesses. Your answer to this question will determine your answer to the questions posed in paragraph 8 hereof.”

And in paragraph 31 the learned trial judge left it entirely to the Assessors to decide whether or not to accept the complainant's evidence.

18. It is important to mention that there is no evidence or any indication that the complainant was cross-examined on the issue of inconsistencies and in fact when this matter was heard court posed this question on the inconsistencies of statements of the complainant to the counsel who represented the petitioner and he admitted that the issue on inconsistency of statement was never raised in the trial court. As such there does not appear to be any error on the part of the trial Judge to give any direction to the assessors. (**Sudhakar v The State AAU 105** of 2010) (5/12/2015) It was submitted by the learned counsel for the respondent that the petitioner was represented by a counsel during the trial proper and none of the material inconsistencies were cross-examined and challenged by the defending counsel. If the witness was not cross-examined on the inconsistencies the petitioner cannot raise that issue on appeal. (Per **Lord Morris in Browne v Dunn H.L. (1893) R 6. 67 P**).

RECENT COMPLAINT

19. The petitioner has urged in the next ground of appeal that the learned Judge failed to direct the assessors on belatedness of the complaint made to the police. The reason for not making a timely complaint to the police was obvious. The victim was treated like a "house-girl and she was under the direct control of the petitioner in the house. She was only 15 and half years old. The complainant, immediately after leaving the petitioner's house duly complained to relatives in Nadi and the police after the confinement. The learned trial Judge adequately addressed this issue in his summing up.

In **Jonkers v Police (1996) 67 SASR 401** Matheson J observed the following on recent complaint.

"The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. What is the first reasonable opportunity will depend on the

circumstances including the character of the complainant and relationship between the complainant and to whom she complained and the persons to whom she might have complained did not do so.”

20. It is to be noted that the complainant in fact had told the neighbor Ms Vadei about what happened to her and that the petitioner was troubling her and the trial Judge has referred to it in his summing up. The neighbor, Ms.Vadei testified in court and confirmed that the victim was raped by the petitioner. In paragraph 27 of the summing up at page 71 of the SC Record learned trial Judge directed the assessors as follows:

“Ms Vadei said, she lived in a home which was three footsteps away from the accused’s family house in Kuku village. She said she knew the accused’s family and the complainant well, and she got on well with them. She said she resided in Kuku village from 2009 to 2011. She said the complainant normally shared things with her. She recalled the complainant coming to her one day and complained that the accused’s family was making her work hard. She also said she was crying at the time and she told her that Livai was touching her and having sex with her . She said Livai beat her, and she was showing her bruises on her leg. She said she cried with her. As assessors and Judges of fact, you must consider this evidence carefully. It does not prove truth of what the complainant alleged against the accused, but it does tend to prove what was occupying the complainant’s mind and her general demeanour, at the time, she confided in Ms Vadei. It is evidence which you will have to consider , with other evidence , when you deliberate in the case.” It is the credibility of the complainant when giving evidence that has to be considered. We conclude that the grounds of appeal on inconsistency of statement and on issue of recent complaint fail and should be refused due to lack of merit.

TRIAL JUDGE'S FAILURE TO ASSESS THE EVIDENCE INDEPENDENTLY

21. This ground of appeal is a fresh ground which was not raised in the Court of Appeal. This court is not inclined to make any observations on this ground of appeal as the Court of Appeal did not have the opportunity to look into issue raised by the petitioner. However, we observe that the trial Judge has given proper directions to the assessors on each aspect of evidence and the law in his summing up.
22. It can be seen from a line of authorities in Fiji and other jurisdictions that the Supreme Court has been reluctant and have refused to excise its jurisdiction in allowing the new points to be taken up or to be argued in the Apex court if the new point had not been argued in the court below.
As such, we refuse and dismiss leave to appeal on this ground of appeal.

LEAVE TO APPEAL BEFORE SUPREME COURT

23. The petitioner's application for leave to appeal is subject to the threshold criteria specifically contained in section 7 (2) of the Supreme Court Act No. 14 of 1998 which reads as follows:-

(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-

(a) A question of general legal importance is involved;

(b) A substantial question of principle affecting the administration of criminal justice is involved; or

(c) Substantial and grave injustice may otherwise occur.

24. In **Dip Chand v State** CAV0014/2012 (9 May 2012) the Supreme Court observed as follows:

“ Given that the criteria set out in section 7 (2) of the Supreme Court Act No. 14 of 1998 are extremely stringent, and special leave to appeal is not

granted as a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave to appeal have not been raised in the Court of Appeal makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult.”

25. It is manifestly clear from the above provisions contained in the section 7 (2) of the Supreme Court Act special leave should not be granted as a matter of course. The Supreme Court in *Aminiasi Katonivualiku v State* (2003) FJSC Crim. App. No. CAV0001/1999S, 17th April 2003 clarified the jurisdiction of the Supreme Court at page 3 as follows:

“It is plain from this provision that the Supreme Court is not a Court of criminal appeal or general review nor is there an appeal to the Court as a matter of right and , whilst we accept in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal which in this instance, was an order for a new trial.”

26. It is to be noted that the above passage in Aminiasi case (supra) was cited with approval in subsequent Supreme Court decisions such as *Raura v The State* (2006) FJSC 4; CAV0010U. 2005S (4th May 2006), and *Chand v The State* (2012) FJSC6; CAV14/2010 (9th May 2012).
27. As stated above the stringent threshold criteria in section 7 of the Supreme Court has been discussed and decided in a series of cases in the Supreme Court of Fiji. See *Bulu v Housing Authority* (2005) FJSC 1 CBV 0011.2004S 8 April 2005.

28. It can be observed that from the above decisions that special leave is not granted unless the case is one involving a matter of public interest, or some important question of law.
29. The extra-ordinary power of the Supreme Court in Fiji will be exercised under section 7(2) of the Supreme Court in its discretion, only if the threshold criteria encapsulated therein is met by a petitioner notwithstanding the right of appeal granted to an aggrieved party to seek special leave.
30. **Chandra, J**

I agree with the reasons and conclusions of His Lordship Hettige, J.

CONCLUSION

31. In considering the facts and evidence and written submissions of both the petitioner and the State Counsel in this case both in the trial court, Court of Appeal and Supreme Court we do not find that the Court of Appeal had fallen into any error as alleged by the petitioner and there is no miscarriage of justice suffered by the petitioner. We also do not find that the petitioner has sustained any substantial and grave injustice. The petitioner has failed to satisfy the threshold requirements contemplated in section 7 (2) of the Supreme Court Act of 1998 and in the result the petitioner has failed to satisfy us on any of the grounds of appeal urged before this court and we reach the conclusion that the petitioner's application should be dismissed.
32. For the reasons set out above this court in exercising its extra ordinary power under section 98 (3) of the Constitution would not be justified in granting special leave to appeal in this case

33. Accordingly, we make the following orders :

- 1) Leave to appeal application is refused.
- 2) The Judgment of the Court of Appeal dated 27th May 2016 is affirmed.



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Hon. Chief Justice Anthony Gates
President of the Supreme Court



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Hon. Mr. Justice Sathya Hettige
Judge of the Supreme Court



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Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner
Office of the Director of Public Prosecutions for the Respondent.