IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS: CAV 0020 of 2016
[On Appeal from the Court of Appeal Misc. No. 28 0f 2011]

BETWEEN	:	**MAHENDRA KUMAR**
		Petitioner
AND	:	**THE STATE**
		Respondent
Coram	:	**The Hon. Chief Justice Anthony Gates** **President of the Supreme Court** **The Hon. Mr. Justice Suresh Chandra** **Judge of the Supreme Court** **The Hon. Mr. Justice Kankani Chitrasiri** **Judge of the Supreme Court**
Counsel	:	**Mr. M. Yunus for the Petitioner** **Mr. L. Fotofili for the Respondent**
Date of Hearing	:	**12 October 2016**
Date of Judgment	:	**27 October 2016**

JUDGMENT

Gates P

I agree with the reasons and conclusions reached in the judgment of Chandra J, and concur that this appeal must be dismissed.

Chandra J

[1] The Petitioner seeks special leave to appeal from the judgment of the Court of Appeal dated 27th May 2016 dismissing his appeal from the High Court.

[2] The Petitioner was charged in the High Court for having committed rape between 1st September 2010 and 31st October 2010 contrary to sections 207(1) and 207(2) of the Crimes Decree No.44 of 2009. After trial the Petitioner was convicted on 6 May 2011 and sentenced to 13 years imprisonment with a non-parole period of 9 years.

[3] The Petitioner sought leave to appeal from the judgment of the High Court and the single Judge granted leave to appeal to the Court of Appeal on the following grounds:

1. The summing up was unbalanced and therefore unduly prejudiced. This ground was based on the premise that the learned trial judge used the word 'forcefully' six times in describing the evidence of rape when in the evidence the word 'forcefully' was used only once.

2. That the sentence was harsh and excessive in all the circumstances of the case.

[4] The Court of Appeal dismissed the appeal of the Petitioner by judgment dated 27th May 2016.

[5] The Petitioner by letter dated 6th June 2016 indicated his intention to appeal the judgment of the Court of Appeal stating that he would advance the appropriate and proper grounds in due course as he was unrepresented.

[6] Thereafter the Legal Aid Commission had agreed to represent the Petitioner and filed an amended petition on 12 September 2016 on behalf of the Petitioner and sought special leave to appeal against the conviction only on the following ground :

"That the summing up was unbalanced and therefore unduly prejudicial".

[7] This was the same ground that was argued before the Full Court of the Court of Appeal which was on the basis that leave was granted by the single Judge namely that the learned High Court Judge had used the word 'forcefully' six times in describing the evidence of rape when in the evidence 'forcefully' was used only once.

[8] However, when filing the written submissions Counsel for the Petitioner has expanded the ground of appeal to include the following which have been summarized by Counsel for the Respondent as follows:

i. The Petitioner did not know the exact date he returned home but the learned judge summed up to the assessors that he returned on Fiji day.

ii. The doctor's evidence was not summed up fairly and was 'inclined to support the prosecution case'.

iii. The complainant in evidence at page 136 of the Court of Appeal record is recorded to have said that the Petitioner was not at home from the 24th of September to 11th November 2010 which supports the alibi of the Petitioner. The learned trial judge and the Court of Appeal failed to pick on this very vital piece of evidence.

iv. The learned trial Judge did not sum up the evidence of the 4 witnesses who gave evidence for the Petitioner during trial. At least one of them Hemant Kumar corroborated the alibi of the Petitioner.

v. The learned Judge failed to explain or give any directions to the assessors on the defence of alibi.

[9] The Petitioner's appeal was argued before the Court of Appeal only on the ground on which leave was granted by the single Judge, that the summing up was unbalanced focusing on paragraph 22 in the summing up which was as follows:

> "On the one hand, the complainant said, the accused on the 24th September 2010, forcefully took off her clothes, forcefully held her hands, forcefully kissed her and sucked her breasts, forcefully separated her legs, forcefully inserted his penis into her vagina and forcefully had sex with her for 5 minutes without her consent and well knew she was not consenting to sex, at the time. According to the complainant, the accused repeated the above on 25th, 26th, 27th September 2010 and in the daytime until 11th October 2010."

[10] In the written submissions of the Petitioner, as stated above at paragraph 8, different grounds, specially based on the defence of alibi, have been brought in, which were not argued before the Court of Appeal.

[11] The present application of the Petitioner is an application for special leave to appeal and the Supreme Court has spelt out clearly on many occasions that special leave will not be granted on grounds which were not raised in the Court of Appeal unless there are exceptional circumstances.

[12] The Petitioner was represented by Counsel in his appeal to the Court of Appeal and these new grounds could have been raised so that the Court of Appeal would have gone into

those grounds in the course of its judgment. That failure cannot be rectified by trying to take cover through an expansion of the only ground that has been relied upon by the Petitioner seeking special leave to appeal.

[13] Although the defence of alibi was not canvassed before the Court of Appeal, the observations of the Court of Appeal at paragraph [34] in its judgment would show as to why the Petitioner did not rely on the defence of alibi before the Court of Appeal. At paragraph [34] the Court of Appeal stated:

> "[34] ... ... this is not a case where the appellant has taken up a defence of consent. Whilst giving evidence, he denied having any kind of sexual relationship with the appellant. Further, he raised an alibi with regard to two days out of 18 days the victim had been detained. The victim was confined to the house of the appellant from 24th September to 11th October 2010. The victim stated that she was continuously raped during the said period. The charge relates to representative counts spanning over a two month period commencing from 1st September, 2010. Although the appellant took up a denial whilst giving evidence, his position during the cross-examination was that sexual act was done with the consent of the victim. Having realized that it was a mistake in admitting sexual intercourse, the appellant shifted his defence to denial and an alibi. He never put his alibi defence to the victim when she gave evidence." (Emphasis added)

[14] It was apparent therefore since the defence of alibi was cutting across the Petitioner's position that he had sex with the complainant with consent, which was put to the complainant when she was cross-examined, that the defence of alibi was not canvassed before the Court of Appeal.

[15] Therefore in this judgment the defence of alibi which as stated above was not argued before the Court of Appeal and which cannot be considered as an exceptional situation to grant special leave for the reasons set out above, will not be addressed any further.

Factual Matrix

[16] The facts leading to the charge have been set out in detail in the Judgment of the Court of Appeal from paragraphs [6] to [14]. However, for the purpose of this judgment it would be sufficient if a summary of facts are set out.

[17] The complainant aged 18 years who was a student, had been suffering from constant severe headaches and yellow fever. Her parents had been told by the Petitioner that he was a priest from India and that he could heal the sickness of the daughter. The Petitioner had visited the home of the complainant and conducted prayers and when the parents did not see any improvement in the condition of their daughter they had got angry to which the Petitioner had responded by threatening them and stating that he would not heal the daughter. As the condition of the daughter had become worse, the parents had sent the daughter to her Aunt's place, begged forgiveness from the Petitioner and pleaded with him to cure her. The Petitioner had given his mobile number and had wanted the Complainant to call him and when she called him, he had asked the complainant to come to his house to cure her. When she had obtained permission from her parents she had gone to the house of the Petitioner. The Petitioner had frightened her saying that he was not a priest but a person performing 'black magic' and that he would do 'black magic' on her family. He had threatened to kill her and her father and charm her mother and sister. She could not leave that place as the Petitioner's mother had been guarding her and she had been made to do all the house work.

[18] On 24th September 2010, when the complainant went to the room of the sister of the Petitioner to rest, the Petitioner had entered the room and wanted to have sex with her. When she refused the Petitioner had got angry and left the room. He had come back five minutes later and raped her. In the following two weeks she had been repeatedly raped during the day when the other inmates of the house were away. The mother of the Petitioner had told her that as she was going to get married to the Petitioner that she had to sleep with the Petitioner.

[19] The parents of the complainant had come on the 11th of October and she had managed to escape and at that time the Petitioner had not been at home. Subsequently her father had taken her to the Police and Police had referred her to a doctor for examination.

[20] The Petitioner conducted the trial by himself and in his cross-examination of the complainant, he suggested to her that he had sex with her with her consent which she denied.

[21] The medical evidence that was led was to the effect that the hymen of the complainant had been ruptured.

[22] The father and mother of the complainant also gave evidence, while the Secretary of the "Akhil Shree Sanatan Dharam Brahman Purohit Sabha" gave evidence stating that the Petitioner was not a priest or pundit in their organization.

[23] The Petitioner gave evidence and denied the allegation. He stated that he was not at home from the 24th of September to 26th of September and was in Bua for 4 days and returned home after Fiji Day. He stated that the complainant was not sick at all and that he did not pray for any sickness.

[24] The Petitioner's father, mother and two others gave evidence on behalf of the Petitioner.

[25] After the summing up the Assessors brought in a verdict of guilt unanimously and the learned trial Judge concurred with that view and the Petitioner was convicted. He was sentenced to 13 years imprisonment with a non-parole period of 9 years.

The Judgment of the Court of Appeal

[26] The appeal before the Court of Appeal was on the grounds of whether the summing up was balanced as the learned trial Judge had used the word "forcefully" six times regarding the evidence of the complainant regarding rape whereas the complainant had mentioned about "forcefully" only once in her evidence and whether the sentence was harsh and excessive.

[27] The Petitioner's submissions were based on paragraph 22 of the summing up which has been set out in paragraph 9 above. It is pertinent to state that in **Singh v Reginam** [1980] FJCA: Criminal Appeal No.46 of 1979 (30th June 1980) page 16 it was stated that:

> "It has been said time and again that a summing up must be read as a whole and it is quite wrong to take one or two phrases in isolation and examine them away from their context."

[28] The Court of Appeal in their judgment considered the summing up of the learned trial Judge in the manner in which the summing up was structured and arrived at the conclusion that the trial judge had meticulously divided his summing up into different categories, namely the prosecution case, the accused's case and analysis of the defence. Thereafter the Court of Appeal in considering this ground of appeal stated:

> [19] It appears that the objective of paragraphs 22 to 28 was to holistically look at the prosecution and defence case, arguments of the parties and possible inferences so that the assessors could have a clear understanding as to how the facts of the case would synchronize with the issues of law. The learned trial judge stressed that it was up to the assessors to decide the credibility and it was emphatically told to them that if the evidence of the victim was not believed beyond reasonable doubt, they must find the accused "not guilty". Since the facts had already been discussed in paragraph 17, it seems the intention of the judge was not to repeat them again in detail. In an analysis, a judge is not expected to merely repeat the evidence but show the assessors various views, interpretations and inferences that can be drawn. But those must be compatible with the entirety of the evidence and

must be reasonable as well. When a judge shows such inferences, he must consider whether arriving at such interpretations are justified and it was open for him to do so having regarding to the totality of evidence.

[29] Thereafter the Court of Appeal considered the evidence of the victim in its entirety and went on to state:

> "[29] One cannot determine the element of the absence or the presence of force and consent by merely referring to a few selected and isolated sentences of the evidence of victim and portions of the summing up. The entirety of the evidence and summing up must be considered in arriving at a conclusion. Certainly those issues cannot be decided according to a mathematical formula by merely referring to the number of times the word 'forcefully' was used in part of the summing up. If we were to follow such a mathematical formula, great injustice would be caused. In fact, one can claim that some injustice has been caused to the prosecution. For example, the victim referred to the word 'threat" and 'threatened to kill' six times but the trial judge did not refer to at least a single occasion to these words in his analysis. Even in his summary of evidence he used these words only twice (paragraph 17). The victim referred to the words 'frighten' and 'afraid' once respectively. But the trial judge never referred such words in his analysis. Even in his summary of facts, he only referred to the word 'frighten'. Therefore, if we were to apply the criteria suggested by the appellant, one would see that injustice has been caused to the prosecution. The evidence has to be evaluated on the entirety of the evidence of the victim and not on the frequencies of the words that judge or witness used.
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> ... ...
>
> [38] In view of the above analysis and reasons, I am of the view that there was no misdirection having regard to the totality of evidence. Even for the sake of argument if we were to assume that there was a misdirection, it has not caused a substantial miscarriage of justice. Even without reference to paragraph 22 of the summing up any assessor would have opined the guilt of the appellant. The assessors brought their opinions three days after the victim gave evidence. It would have been very much fresh in their minds. Whether the judge used the word 'forcefully' several times or not, the assessors would have remembered the victim's evidence relating to fear, threat, confinement, other circumstances

and victim's demeanour before deciding on the element of consent.

... ...

[41] Therefore I hold that paragraph 22 is not unbalanced or not prejudicial. Even if we assume the existence of unbalance, there had been no substantial miscarriage of justice caused."

[30] As has been stated by the Court of Appeal the question of whether the summing up was balanced cannot be determined by considering just one paragraph of the summing up. The entirety of the summing up has to be considered in the light of the entirety of the evidence led at the trial. The Court of Appeal dealt with this aspect in great detail and arrived at the conclusion that the summing up was balanced. This Court does not see any error in such reasoning and conclusion. Therefore this ground of appeal which was the only ground that was canvassed fails.

[31] The threshold set by section 7(2) of the Supreme Court Act (Cap.13) is very high unlike in an appeal from the High Court to the Court of Appeal which is based on whether a ground of appeal is arguable. An appeal against a judgment of the Court of Appeal to the Supreme Court must satisfy the threshold for special leave to appeal in the first instance. The grounds of appeal should be in respect of the judgment of the Court of Appeal of which there was only one ground in the present case and should not be on fresh grounds as sought in the written submissions of the Petitioner which have been dealt with above.

[32] The application of the Petitioner seeking special leave to appeal to the Supreme Court does not meet the threshold of S.7(2) of the Supreme Court Act and therefore the application is refused.

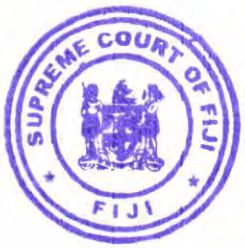
Chitrasiri J

I have had the opportunity of reading in draft the judgment of Chandra J and I agree with His Lordship's conclusions and reasons therein.

Orders of Court:

The application for special leave to appeal is refused.

Hon. Mr. Justice Anthony Gates
PRESIDENT OF THE SUPREME COURT



Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice Kankani Chitrasiri
JUDGE OF THE SUPREME COURT