IN THE SUPREME COURT OF FIJI
AT SUVA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. CAV 0042 of 2016
[On Appeal from the Court of Appeal No. AAU 047 of 2012]

BETWEEN	:	**AKUILA VAKANITOGA**
		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 William Calanchini** **Judge of the Supreme Court**
Counsel	:	**Petitioner in person** **Mr. S. Vodokisolomone for the Respondent**
Date of Hearing	:	**10 July 2017**
Date of Judgment	:	**20 July 2017**

JUDGMENT

Gates P

[1] I have read the draft judgment of Chandra J. I am in agreement with its conclusions and the reasoning for it. I concur with the orders proposed.

Chandra J

[2] The Petitioner seeks leave to appeal to the Supreme Court from the judgment of the Court of Appeal dated 27 May 2016 dismissing his appeal.

[3] At the hearing of the application of the Petitioner, Counsel of the Legal Aid Commission appeared and moved to withdraw from the case since the Petitioner was seeking to dispense with the services of the Legal Aid Commission and wanted to rely on the written submissions filed by him on the grounds set out in his notice of appeal.

[4] The Petitioner had by letter dated 13th June 2017 sent to the Legal Aid Commission with copy to the Director of Public Prosecutions and the Registry of the Supreme Court indicated his decision to dispense with the assistance of the Legal Aid Commission and that he would be relying on his written submissions filed on the 11th day of January 2017.

[5] The application of Counsel for the Legal Aid commission to withdraw was allowed and the Petitioner was permitted to make submissions on his behalf.

[6] The Petitioner had filed his petition of appeal in June 2016 after the Court of Appeal had dismissed his appeal on 27 May 2016, but the appeal had been forwarded to the Registry by the Naboro Minimum Corrections Centre only on the 19th of July 2017 which was 11 days out of time. Although the application for leave to appeal was 11 days out of time, it was considered as a proper application as the delay in forwarding his application was by the Corrections Centre.

[7] The grounds of appeal set out in his application seeking leave to appeal are as follows:

1. That the Learned Trial Judge erred in law by failing to clearly direct the Assessors about each element of Rape that the prosecution needs to prove beyond reasonable doubt.
2. That his Lordships direction in relation to the burden and standard of proof was insufficient and not precise.

3. That the Learned Trial Judge erred in law by failing to direct the Assessors about the inconsistencies in the statement out of court and evidence on oath of the virtual complainant.

4. That the Learned Trial Judge erred in his summing up resulting in a miscarriage of justice, when he failed to direct the Assessors about the lies told in court about the virtual complainant.

5. That the Learned Trial Judge erred in his summing up, resulting in a miscarriage of justice when he failed to direct the assessors the following facts:

    i. That are not bound by the expert opinion of Dr. Salma Hanif

    ii. The findings of Dr. Salma failed to specifically state that the hymen was not intact due to sexual activities.

    iii. The findings of Dr. Salma is inconsistent with the allegation of Rape.

6. That the conviction and the verdict is safe unsatisfactory having regard to evidence inconsistencies and misdirection.

Factual Background

[8] The Petitioner was charged in the High Court at Lautoka for 3 counts of indecent assault contrary to Section 154(1) and two counts of rape contrary to sections 149 and 150 of the Penal Code. After trial before three assessors, the learned High court Judge found the Petitioner guilty on counts 1, 2 and 5 for indecent assault and on counts 3 and 4 for rape as charged. He was sentenced to 18 years imprisonment with a non-parole period of 15 years.

[9] The victim, 14 years of age at the time of giving evidence (2012), was the daughter of the Petitioner. The charges spanned from the year 2006 to 2010. The victim was living with her father (Petitioner), mother, two brothers and a younger sister. In her evidence she recounted the events that she encountered. Her grandmother to whom she had complained also gave evidence. Medical evidence was led through Dr. Salma Hanif who stated in evidence that the hymen of the victim was not intact. The Petitioner did not give

evidence nor did he lead any other evidence and relied on the cross examination of the prosecution witnesses.

[10] The Court of Appeal heard the arguments of the Petitioner on the grounds set out in his petition of appeal to the Court of Appeal which are different from the grounds of appeal filed in this Court. The grounds of appeal on which his appeal was argued before the Court of Appeal were as follows:

Against Conviction:

A. That the learned Judge had erred in law and denied the appellant a fair hearing, because of non-disclosure before or during trial of a letter dated 9 November 2011 purporting the allegation against the appellant to be false and fabricated.

B. That the learned Judge had erred in law and in fact when he failed to direct the assessors how to approach the expert opinion evidence.

C. That the learned Judge had erred in law and in fact when he failed to give a fair and balanced summing up.

Against Sentence:

A. That the learned Judge had erred in law and in fact when he failed to separately discount the 9 months the appellant had spent in remand.
B. That the learned trial Judge had erred in law when he subsumed the element of the offence as an aggravating feature.
C. That the sentence was in breach of section 14(2) (n) of the Constitution of the Republic of Fiji Islands.

[11] Of these grounds of appeal, the Petitioner had abandoned ground A of the grounds against conviction.

[12] The grounds of appeal set out in his application for leave to appeal to the Supreme Court would ex facie appear to be different from the grounds urged and argued before the Court of Appeal. However, grounds 1 to 4 and 6 relate to the summing up of the learned Trial Judge on different aspects and could be considered under ground C of the grounds of

appeal urged before the Court of Appeal and Ground 5 can be considered under Ground B of the grounds of appeal before the Court of Appeal.

[13] The jurisdiction of the Supreme Court is set out in Section 98(3) of the Constitution of Fiji which states:

> "The Supreme Court has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal".

Section 98(4) of the Constitution provides:

> "An appeal may not be brought to the Supreme Court from a final Judgment of the Court of Appeal unless the Supreme Court grants leave to appeal."

Section 7(2) of the Supreme Court Act, 1998 provides:

> "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."

[14] The threshold set by Section 7(2) 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 the 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.

[15] In the present application the Petitioner has urged that grave and substantial injustice has been caused to him. However, he has not set out the manner in which the Court of Appeal has erred in its judgment which has caused such grave and substantial injustice. He has canvassed the same grounds of appeal before this Court.

[16] I reiterate the views expressed in **Sachindra Nand Sharma v The State** Criminal Appeal No.CAV 001 of 2016 (26 August 2016) where I cited **Kosar Mahmood v HKSR** FAMC No.31 of 2012 (unreported) by Court of Final Appeal of the Hong Kong Special Administrative Region to the following effect:

> "We wish to stress that in all future applications on the substantial and grave injustice ground, the application for leave to appeal must identify the specific way in which it is submitted that the court below has departed from established legal norms; and why such departure is so seriously wrong that justice demands a hearing before the Court of Final Appeal notwithstanding the absence of any real controversy on any point of law of great and general importance. It will simply not be sufficient merely to set out the same arguments that were canvassed in the court below."

[17] In the present appeal what has to be seen is whether the grounds of appeal raised by the Petitioner give rise to a situation of grave and substantial miscarriage of justice for granting of leave.

Ground 1

[18] In this ground the Petitioner submitted that the learned trial Judge has failed to direct the Assessors regarding the elements of rape that have to be proved and referred to paragraph 17 of the summing up which states:

> "[17] The offence of Rape is defined in the Penal Code and the Crimes Decree. According to our law the Prosecution should prove that the accused had carnal knowledge of the virtual complainant. In simple terms the Prosecution should prove that the Accused penetrated the vagina of the virtual complainant."

[19] When the appeal was argued before the Court of Appeal, this aspect regarding the elements of rape had not been urged and therefore the Court of Appeal had not addressed its mind to same.

[20] The Petitioner's contention before this Court was that the direction of the learned Trial Judge was inadequate. The elements of rape were adverted to by the learned Trial Judge only in paragraph [17] cited above. It would appear that the learned Trial Judge has not stated anything about the consent of the victim. Counsel for the Respondent in his counter submissions stated that the victim in the case was under 13 years at the time of the commission of the rape and therefore the question of consent did not arise. On that basis it was his submission that there was no miscarriage of justice.

[21] It would have been better if the learned Trial Judge had elaborated more on the elements of Rape in his direction to the Assessors but since the question of consent was not material to the case before Court, there is no miscarriage of justice and therefore this ground would not assist the Petitioner.

Ground 2

[22] The second ground is that the directions of the learned Trial Judge on the burden and standard of proof were inadequate and reference was made to the fact that it was only mentioned in paragraph [5] of the summing up. This aspect of the summing up was not canvassed before the Court of Appeal and as a result the Court of Appeal had not addressed its mind to same.

[23] When considering the summing up of the learned Trial Judge, he has dealt with the burden and standard of proof in his summing up not only in paragraph [5] but also in paragraphs [29] and [33] of the summing up which was adequate. Therefore there has been no miscarriage of justice as urged by the Petitioner.

Grounds 3, 4 and 6

[24] Grounds 3 and 4 relate to the same aspect of the evidence of the victim and the summing up of the learned Trial Judge in relation to that evidence. It was the contention of the

Petitioner that the evidence of the victim was inconsistent and that she had lied in her evidence.

[25] The Petitioner was emphasizing on the last answer given by the victim under cross examination. When she was asked whether she agreed that the complaint of rape is false she had answered in the affirmative. It was unfortunate that the prosecution nor the learned Trial Judge had sought any clarification regarding this answer given by the victim under cross examination.

[26] The Court of Appeal dealt with this question and concluded thus:

> "[24] I have reproduced the related questions and answers in paragraphs 10 and 11 of this judgment. It is unfortunate for both the prosecuting counsel as well as the learned judge to overlook the answer given by the victim to a question that was put to her. Having considered all the questions answers given I am of the view that the answer given as "yes" would have been nothing but a slip. The learned counsel for the Respondent submitted that the failure of the learned counsel for the accused to address this issue in his address to the Assessors shows that this answer "yes" did not mean a denial of the incident. Omitting to refer to this solitary answer by the learned judge itself did not cause a miscarriage of justice."

[27] The Court of Appeal had dealt with this question taking into account the entirety of the evidence at the trial and had arrived at the conclusion that there was no miscarriage of justice. In view of that finding by the Court of Appeal these three grounds of appeal urged by the Petitioner would not have merit for granting leave to appeal.

Ground 5

[28] Ground 5 addresses the medical evidence led at the trial and the learned trial Judge's direction to the assessors regarding same being inadequate.

[29] The Court of Appeal dealt with this question in detail and stated as follows:

> "[19] The medical evidence is unchallenged. That evidence is that the hymen of the victim is not intact. At the time of giving evidence the victim was 14 years of age. There is no evidence of the victim associating with any males. The only man with whom she had had sex with was her own father. The medical opinion for the hymen not to be intact is due to vaginal penetration. That is due to having had sex with someone. The doctor cannot say who that someone is. The victim's evidence is that it is the father. Although it was suggested to the doctor that a girl of the age of the victim can lose the hymen due to vigorous sports activity, there is no such evidence. It is true that the learned judge had failed to analyse the evidence and explain that the Assessors are not bound by the opinion of the doctor that the losing of the hymen was due to vaginal penetration. The learned Judge said to the Assessors that they are Judges of facts. He also said that if an opinion had been expressed by him with regard to facts, that the Assessors are not obliged to accept it. The Assessors were told that they have to consider all the evidence and decide. It appears that there is no strict rule to say that the trial Judge is bound to tell the Assessors that they are not bound to follow the opinion of the doctor. It was held in **Fitzpatrick** [1999] Crim. L. R. 832 that a failure slavishly to follow this formula does not automatically render a conviction unsafe. In this case I am of the view that it would have been better if the Judge said to the Assessors that they are not bound by the opinion expressed by the doctor that the reason for the hymen not to be intact is due to vaginal penetration. In addition to the opinion expressed by the doctor the vaginal penetration has been established through the evidence of the victim and the grandmother. Therefore not giving a warning that the Assessors are not bound to follow the opinion of the doctor cannot be considered as fatal. However by considering the fact that the evidence led was short and it not being a complex case, no prejudice was caused and no miscarriage of justice has occurred."

[30] The Court of Appeal has dealt with this ground adequately and no error can be found regarding the conclusion reached regarding same.

Conclusion

[31] In the above circumstances, as the application for leave to appeal to the Supreme Court of the Petitioner alleging grave and substantial miscarriage of justice has not satisfied the

threshold required for granting such leave, his application is refused and the application is dismissed.

Calanchini J

[32] I agree that leave to appeal should be refused.

The Order of the Court

Leave to appeal is refused.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

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Judge of the Supreme Court

Hon. Justice William Calanchini
Judge of the Supreme Court