

IN THE SUPREME COURT OF FIJI
AT SUVA

CRIMINAL PETITION NO: CAV 0002 of 2020
Criminal Appeal No. AAU 0004 of 2015

BETWEEN : **SAKIUSA TOKALAU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Acting Chief Justice Salesi Temo**
Acting President of the Supreme Court

The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

The Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel : **Petitioner in Person**
Ms. J. Prasad for the Respondent [ODPP]

Date of Hearing : **07 June 2023**

Date of Judgment : **29 June 2023**

JUDGMENT

Temo, AP

- [1] I had read the draft judgment of His Lordship Mr. Justice Isikeli Mataitoga. I fully agree with his views, reasons and conclusions.

Gates, J

- [2] I have read in draft the judgment of Mataitoga J. I am in full agreement with it and its orders.

Mataitoga, J

Background

In High Court

- [3] The appellant Sakiusa Tokalau was charged with the following offences in the High Court at Suva:

COUNT 1

Statement of Offence

RAPE: *Contrary to Section 207 (1) (b) of the Crimes Decree No. 44 of 2009*

Particulars of Offence

SAKIUSA TOKALAU *on the 15th day of February 2012, at Nadawa in the Central Division, penetrated the vagina of M.A.M. with his finger without her consent.*

COUNT 2

Sexual Assault: *Contrary to Section 210(1) (b) of the Crimes Decree No 44 of 2009*

Particulars of Offence

SAKIUSA TOKALAU *on 15 day of February 2012, at Nadawa in the Central Division, unlawfully and indecently assaulted M.A.M.*

COUNT 3

Statement of Offence

Sexual Assault: *Contrary to Section 210(1)(b) of the Crimes Decree No 44 of 2009*

Particulars of Offence

***SAKIUSA TOKALAU** between the 22 day of December 2013 and 31 st day of January 2014, at Nadawa in the Central Division, unlawfully and indecently assaulted M.A.M. by kissing her neck.*

COUNT 4

Statement of Offence

Sexual Assault: *Contrary to Section 210(1) (a) of the Crimes Act Decree No. 44 of 2009*

Particulars of Offence

***SAKIUSA TOKALAU** between the 1st day of January 2013 and the 31st day of January 2013, at Nadawa in the Central Division, unlawfully and indecently assaulted M.A.M. by fondling her breasts.*

- [4] The trial in the High Court was held on 17 and 18 November 2014. The Assessors unanimously found the Appellant not guilty on Count 1 – Rape but found him guilty on the 3 counts of Sexual Assaults as charged.
- [5] The trial judge overturned the assessor’s assessment of a not guilty verdict on count 1 and found the Appellant guilty. The Trial judge accepted the unanimous guilty verdict on the 3 counts for sexual assault. The Appellant was found guilty on all 4 counts and sentenced to 14 years imprisonment. Having already served 18 months in prison awaiting trial, the period served was taken into account, leaving 12 years 6 months to be served.

Court of Appeal

Leave To Appeal before a Justice of Appeal

- [6] On 21 January 2015 the Applicant filed Notice and Grounds of Appeal against conviction and sentence. There were 4 grounds of appeal submitted for the appeal against conviction and 4 grounds against sentence. On 22 April 2016 [date received at CoA Registry] the applicant submitted amended grounds and this time there are 6 grounds urged against conviction and 2 grounds against sentence.

- [7] Meanwhile the Legal Aid Commission [LAC] filed another set of Amended Grounds of Appeal on behalf of the Appellant. This time there are only two grounds of appeal against conviction. The first relates to the claim of consistency in the evidence of the appellant gave the police and his evidence during the trial. The second is a claim for lack of direction by the trial judge regarding late reporting of sexual abuse to the police in assessing the credibility of the victim.
- [8] For the Leave to Appeal hearing before the single judge in the Court of Appeal, both the grounds articulated by the LAC were considered. On the first ground, the Justice of Appeal, found that the evidence of sexual assaults was overwhelming, which the appellant did not dispute. He further held that as far as the charge of rape was concerned, it was open on the evidence to conclude, that the appellant had digitally penetrated the victim's vagina without her consent.
- [9] With regards to the late reporting of sexual abuse to the police. The appellant had submitted that the delay in reporting was an issue going to the credibility of victim's evidence. The Judge alone considered this matter and held that it was not raised during the trial by the appellant and therefore the trial judge was not obliged to give any directions on evidence not led at the trial.
- [10] Both grounds of appeal against conviction, urged in support of the Leave Application were rejected as unarguable by the judge alone, resulting in the court refusing leave to appeal.

Full Court

- [11] On 9 November 2017, the Appellant submit his application for Leave to Appeal to the Full Court. He did not file any new grounds, instead choosing to rely on the grounds advanced before the single Justice of Appeal. The full court decided to grant leave and hear the appeal based on the grounds urged by the appellant. It should be noted that the appellant advanced only two grounds of appeal before the judge alone.

[12] These grounds are the grounds urged by the appellant in the Court of Appeal:

Prior Inconsistent Statements

(i) *the learned trial judge erred in law, when he did not properly consider the consistency of the applicant's evidence in relation to all the counts of the charges, particularly on the count of rape from his record of interview to the evidence at the trial which makes him a credible witness thus resulting in miscarriage of justice;*

Recent Complaint

(ii) *the learned trial judge erred in law and in fact when he did not direct the assessors on the lateness of the report.*

[13] After reviewing the evidence and trial judge's summing up and judgement, the court concluded that this ground is misconceived. In his summary of the relevant evidence on this issue, including the caution interview of the appellant and his evidence at the trial, the trial judge was impressed with the complainant's evidence because it was not embellished, honest and compelling. The complainant did not have any negative feeling towards the applicant, which might lead her to make up her story. The learned trial judge stated in his judgement:

'The evidence of the girl was convincing, honest and compelling. I believed her evidence as she gave it and I was impressed with her reluctance to embellish it in any way. The circumstantial evidence of penetration being by the accused finger is irresistible and I therefore reject the opinion of the assessors on count one and find him guilty of the charge of rape. There is no evidence that the complainant had any negative feelings towards the accused which might lead her to make up her story.'

[14] The Court of Appeal was not able to disagree with the assessment of the evidence undertaken by the judge alone on this ground of appeal. The full court accepted this finding of the trial judge and concluded that this ground had no merit

[15] Ground 2 and the delay in making the complaint, goes to the issue of credibility and consistency of the complaint. However, the essence of the complaint on this ground is that the learned trial judge should have directed the assessors to consider the late report of sexual abuse to police in assessing the credibility of the victim's evidence.

[16] The Supreme Court case in **Raj v State** [2014] 12, CAV 0003/2014 at paragraph 33 stated:

*[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*

[17] Applying the principles enunciated in the above case here, and noting the following:

- (i) that this was case where the appellant admits to sexual assaults of the complainant but denies rape;
- (ii) that the appellant is a stepfather and the pressure placed on the complainant to cater for and ensure the welfare of her other siblings; and
- (iii) this ground was not raised at trial and when raised on appeal, the Court of Appeal dismissed this ground as having no merit.

[18] After careful and detail assessment of the relevant evidence, the Court concluded that leave to appeal be declined and conviction confirmed.

Supreme Court

[19] On 6 January 2020, the Petitioner filed an Application for Special Leave to Appeal and Notice of the grounds of Appeal [Page 1 Supreme Court Record]. It is noted that the Special Leave application is based on the Court of Appeal decision delivered as final judgement on 7 March 2019.

[20] Rule 4 Supreme Court Rules requires that petition of appeal and the supporting affidavit must be lodged at the Court Registry within 42 days from the date of the decision from which appeal is sought. But in this case the Petition was lodged late by 9 months 6 days. There was no attempt to provide any reasons for the delay.

- [21] Without seeking this Court's agreement to appeal out of time, by enlarging time to file appeal. On 22 May 2023, the petitioner on his own motion, filed in the Court Registry [handwritten] another set of grounds [handwritten] of appeal and a further set of grounds [typewritten] was purported to be introduced by the petitioner during the hearing. This incremental approach to filing grounds of appeal is unfair, confusing and shows disrespect for the rules of the court. It is unfair to the respondent who must be given time to respond; confusing to the Court in not knowing with clarity the real grounds of appeal and a violation of the Rules of Procedure of the Court.
- [22] It is disturbing that this case has been allowed to come this far, without following the correct procedure set out in the Supreme Court Rules. This abuse of the procedures of the court must stop and in the future failure to follow proper procedures in filing grounds of appeal will be dispatched summarily.
- [23] Rule 46 of the High Court Rules and Court of Appeal Rules and forms prescribed, apply with necessary modifications to practice and procedures of the Supreme Court. See **Josua Raitamata v State** [2008] FJSC 32; CAV 0002/2007:

"[7] The petitioner seeks, in effect, leave to bring out of time an application under s 122(2) (b) of the Constitution for special leave to appeal against the decision of the Court of Appeal. Order 6 of the Supreme Court Rules says:

6. A petition and affidavit in support must:

(a) be lodged at the Court Registry within 42 days of the date of the decision from which special leave to appeal is sought; and

(b) be served upon the Registrar and all parties to the proceedings who are directly affected by the petition.

Order 46 of the Rules provides:

'46. The High Court Rules and the Court of Appeal Rules and the forms prescribed in them apply with necessary modifications to the practice and procedure of the Supreme Court.'

[8] The High Court Rules do provide for that Court to enlarge the time prescribed by any provision of those Rules for taking any step. On that basis it may be accepted that there is a general power in the Supreme Court to extend time limited for filing a petition for special leave to appeal against a decision of the Court of Appeal."

[24] The Supreme Court is the final court of appeal, and the procedure, save where leave has been granted beforehand by the Court of Appeal, is by way of special leave to be sought upon petition. The decision to grant special leave to hear an appeal, whether timely or not, lies with the court. At this final level, special leave could allow a late appeal in cases meeting the leave criteria of section 7(2) of the Supreme Court Act or where in a rare case there is irremediable injustice otherwise compelling the intervention of the Supreme Court: see The State v Elik Mototabua CAV0005.09 9th May 2012; Fernandopulle v Premachandra de Silva and Others [1996] LKSC 14; [1996] 1 Sri: LR 70.

[25] Notably, the new grounds submitted via the Court Registry dated 22 May 2023, do not comply with relevant Rules of the Court nor do they follow proper procedure.

Court's Power to Grant Special Leave to Appeal

[26] The Supreme Court's power to grant special leave to appeal is set out in the Supreme Court Act 1998 [the Act]. Section 7(2) of the Act states:

"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; or

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

(c) substantial and grave injustice could otherwise occur."

[27] It is clear from the language used in the above provision of the Supreme Court Act that special leave should not be granted as a matter of course. This Court observed in Aminiasi Katonivualiku v. The State [2003] FJSC 17; CAV0001.1999 (17 April 2003) at page 3, -

"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 that 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." [emphasis added]

[28] The above passage has been cited with approval in subsequent decisions of this Court in **Raura v The State** [2006] FJSC 4; CAV0010/2005S (4 May 2006), **Chand v The State** [2012] FJSC 6; CAV14/2010 (9th May 2012) and **Chaudhry v The State** [2014] FJSC 14; CAV0018/2014 (14 November 2014). These decisions were clear in defining the scope of section 7(2) of the Supreme Court Act which highlighted the concepts of "general legal importance", "substantial question of principle" and "substantial and grave injustice" to guide the Court in deciding whether to grant special leave. The other clear requirement in Section 7(2) is that 'Special leave **must not be granted**' if the threshold requirements are not met.

Review of the grounds

[29] The grounds of appeal submitted and received in registry on 22 May 2023 via the handwritten submission of the petitioner are the ones under review and relevant to this Court's determination of this Special Leave Application. There are 2 grounds submitted for appeal against conviction and are discussed further below.

Ground 1 - Recent Complaint

[30] On the ground of recent complaint. The petitioner seeks to once again pursue an issue that was not raised at trial. This issue, was however, considered and rejected by the Court of Appeal.

[31] In the Court of Appeal, this ground of appeal was fully ventilated and the court referred to the relevant evidence relied upon by the trial judge to give relevant directions. These are quoted and set out below:

"[39] As regards the evidence, the learned trial judge referred to the following:

*(i) ... Thereafter, Xavier Tikomailomai (aka **Eseroma Vakacegu**) went out to collect his marks sheet from Marella House. But, he came back very quickly. After his arrival, the victim wanted to go home but was not allowed (**paragraph 20**);*

(ii) ... At the bus stand, though she met two of his friends, she did not tell anybody about the incident. She then got into the Cunningham bus and reach home after six o'clock. Though her parents inquired why she was late, she lied to them as she did not had the courage to tell them what had

happened. On Sunday, after she came from church, she told her father about the incident. She did not tell her mother as she is a sickly person. ... (Paragraph 22);

(iii) Sakaraia gave evidence on behalf of the accused. According to him on 18/01/2013, at about 4.00pm when he was going to Totogo Police Station he met the accused with a girl. The girl seemed to be normal (paragraph 31)

(iv) She clearly narrated the ordeal she encountered on 18/01/2013. She admitted that she went to Sunset Motel on the request of the accused. But she never consented for sex. She could not escape from the accused when he went to Ministry of Education as he had locked the door. She doesn't know where Totogo Police Station is situated. Also does not know where Wesley Church and the bank are situated. She only informed the incident to her father after she returned from church on Sunday. The doctor had noted fresh hymeneal laceration at 6 o'clock position in her vagina. In her history to the doctor, she had narrated the same. As assessors and judges of facts you have to consider her evidence with great care (paragraph 32).

[40] Therefore, it would appear that the learned judge had not only referred to the matters of credibility in assessing the evidence of the complainant; but, also had summarized the salient points of the complainant's evidence and cautioned the assessors that her evidence had to be considered with great care in view of the attendant factors that could shake her credibility and the weight of her evidence."

[41] I am, therefore, of the view that the learned judge had reasonably adverted to the relevant principles of law in assessing the credibility of the complainant and referred to the relevant points of her evidence that need be borne in mind in accepting the evidence. The learned judge, in my view, had adequately invested the assessors with required knowledge to deal with the complainant's evidence as primary triers of fact. The case, in the circumstances, did not appear to be one of those cases where the assessors were deprived of the requisite knowledge so as to affect their duty to decide on facts."

[32] The Court of Appeal's outline of the relevant evidence in the trial court set out above, establishes that there is no merit to this ground of appeal. Therefore, after careful consideration of ground 1, I am of the view that this ground as advanced by the Petitioner does not meet any of the threshold requirements set out in section 7(2) of the Supreme Court Act. Special leave to appeal on this ground of appeal is refused.

Prior Inconsistent statements

- [33] It is necessary to examine whether this ground urged in submissions made, by the Petitioner in his Notice of Appeal seeking special leave to appeal from the judgment of the Court of Appeal, are of sufficient substance to cross the stringent threshold laid down in section 7(2) of the Supreme Court Act.
- [34] This Court in **Livia Matalulu & Anor v DPP** [2003] FJSC 2; [2003] 4 LRC 712 their Lordships expressed the role of the Supreme Court of Fiji in special leave to appeal matters in the following words:

“The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice”

Thus, it is clear that the Supreme Court, in exercising its powers vested under section 7 (2) of the, is not required to act as a second court of criminal appeal, but will only consider as to whether the question of law raised is one of general legal importance or a substantial question of principle affecting the administration of criminal justice is involved or whether substantial and grave injustice may occur in the event leave is not granted.

*[33] In the case of **So Yiu Fung v Hong Kong Special Administrative Region** [1999] 2HKCFAR 539; [2000] 1 HKLRD 179 the Court of Final Appeal of the Hong Kong Special Administrative Region considered the residual safeguard provided under the limb, “substantial and grave injustice” and held as follows;*

...Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court [Court of Appeal in Fiji]. If the matter proceeds further to this Court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought on the ‘substantial and grave injustice’ limb of S.32 (2) of the Hong Kong Court of Final Appeal Ordinance to succeed, it must be shown that there has been to the appellant’s disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice.”

- [35] From the grounds of appeal urged by the Petitioner and the supporting submissions given in support in this court, it is clear that he is not arguing that his conviction and or

sentence or the procedure followed in the High Court and Court of Appeal constitute a departure from accepted norms, such that that departure is so serious as to result in a substantial and grave injustice. His arguments in support of ground 2 is in the nature of the rehearing of his criminal appeal. The petitioner has not submitted any grounds that raise issues of general legal importance. This ground is dismissed as having no merit.


[36] The Petitioner's case does not satisfy the requirements of section 7(2) of the Supreme Court Act, therefore Special Leave to Appeal is refused.

ORDERS:

1. Special Leave to Appeal refused;
2. Conviction and Sentence in the High Court affirmed.



The Hon. Acting Chief Justice Salesi Temo
Acting President of the Supreme Court



The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court



The Hon. Mr. Justice Isikeli Matantoga
Judge of the Supreme Court