IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO: CAV0010 OF 2021
Court of Appeal No. AAU 102 of 2015

BETWEEN	:	**RICHARD KASHMIR KUMAR**
		Petitioner
AND	:	**THE STATE**
		Respondent
CORAM	:	**Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court**
	:	**Hon. Mr. Justice William Calanchini, Judge of the Supreme Court**
	:	**Hon. Mr. Justice Filimone Jitoko, Judge of the Supreme Court**
COUNSEL	:	**Petitioner In Person**
	:	**Ms. Shameem S for the Respondent**
Date of Hearing	:	**14 June 2023**
Date of Judgment	:	**29 June 2023**

JUDGMENT

Gates J

[1] I agree with the succeeding judgment of Jitoko J.

Calanchini J:

[2] I have read in draft form the Judgment of Jitoko J and agree with his reasoning and his conclusions.

Jitoko J:

The Proceedings

[3] The petitioner was charged with one count of rape contrary to section 149 and 150 of the Penal Code, an alternative count of defilement of a girl under 13 years of age contrary to section 155 (1) of the Penal Code, and one count of indecent assault contrary to section 154 (1) of the Penal Code. At the election of the petitioner (then defendant), the hearing was in the Suva Magistrates Court over two (2) days, on 14 March and 28 July 2014 respectively.

[4] At the end of the trial, the learned Magistrate on 14 November 2014, convicted the petitioner on the charge of rape and transferred the case to the High Court for sentencing. Sentencing submissions, having being heard on 28 November and 18 December, 2014, the Honorable Madigan J on 30 January, 2015, sentenced the petitioner to 14 years imprisonment, with a non-parole period of 12 years.

[5] The petitioner filed his appeal before a single judge under the provisions of section 21 (1) of the Court of Appeal Act 1949, which, because the grounds of appeal involved a mixed question of law and fact, required leave of the Court. The three (3) grounds of appeal (the fourth having being abandoned by the petitioner in the course of the hearing) were deemed unarguable and leave to appeal was, on 22 March 2017, refused.

[6] The petitioner, through the Legal Aid Commission, then filed a new application for leave to appeal before the full Court of Appeal relying on a single ground of appeal, which

Counsel for the petitioner submitted, was an amalgamation of all the other previous grounds of appeal, to whit:

> *"The Learned Trial Magistrate erred in law and in fact when he failed to adequately direct his mind on the compound improbabilities that emanated from the totality of evidence thus raising doubt on the evidence and prejudicing the appellant on his right to a fair trial."*

[7] The submission in support argued that the verdict of guilt was unreasonable and could not be supported by the evidence given before the Court below, notwithstanding the acknowledged fact of the advantage in the assessors seeing and hearing the witnesses.

[8] His Lordship, Prematilaka JA, embarked on a detailed analysis of the law to the facts of this case, including the examination of the landmark Australian High Court case of **Pell v The Queen** [1920] HCA 12, and in a clearly-reasoned judgment stated (paras. [23] – [25])

> *"[23] Therefore, it appears that where the evidence of the complainant has been assessed by the assessors to be credible and reliable but the appellant contends that the verdict is unreasonable or cannot be supported having regard to the evidence the correct approach by the appellate court is to examine the record or the transcript to see whether by reason of inconsistencies , discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellant court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence. These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.*
>
> *[24] However, it must always be kept in mind that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85: AAU0048.2005S)22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33: CAV0009,*

0016, 0018, 0019.2016 (26 August 2016]. Therefore, there is a second layer of scrutiny and protection afforded to the accused against verdicts that could be unreasonable or cannot be supported having regard to the evidence.

[25] The Magistrate had thoroughly ventilated all the evidence led by the prosecution at the trial. He had also fully considered the appellant's evidence. The Magistrate had been satisfied that the complainant was truthful in her evidence."

[9] His Lordship, after reviewing the totality of the evidence and especially the testimony of the victim, concluded;

"[34] Therefore, I do not find that there are any improbabilities in the victim's testimony or in the testimony of any other witness for the prosecution that are capable of creating a reasonable doubt as to the appellant's guilt. In my view, upon the whole of the evidence it was open to the Magistrate to be satisfied of the appellant's guilt beyond reasonable doubt. On an examination of the record, I do not find any inconsistencies, discrepancies, omissions, or other inadequacies of the victim's evidence or in other evidence upon which this court can be satisfied that the Magistrate acting rationally, ought to have entertained a reasonable doubt as to proof of guilt.

[35] In the circumstances, leave to appeal is refused and the appellant's appeal must stand dismissed."

Appeal and Grounds of Appeal to the Supreme Court

[10] On 10 June 2021, the petitioner in person, filed his application for leave together with grounds of appeal before the Supreme Court. The four (4) grounds advanced by the petitioners are:

"1. - THAT: The learned trial judge erred in law when he found the appellant guilty on inconsistent evidence presented by the complainant and her mother in their previous statements and testimony given under the oath. Failure to do so has caused the conviction unsafe to stand in all circumstances.

2. – THAT: The learned Magistrate erred in law when he failed to fully and properly considered the issue of delay reporting of the complaint thus

questioning the reliability and credibility of the victim and the veracity of her complaint. Failure to do so have caused the conviction to be unsafe.

3. – *THAT: The learned Magistrate erred in law when he failed to consider the inadequate and incompetency of the defence counsel in not advising the appellant to elect a High Court trial with the benefit of assessors who have a proper opinion of the facts of the case. Failure in his duty to take into account this incompetency by the defence counsel created an imbalance trial to the appellant.*

4. – *THAT: The learned trial Magistrate erred in law by failing to establish the essential elements for the offence of rape when he found the appellant guilty from the evidence of the prosecution case. Penetration is not proved therefore making the judgment to be unreliable."*

[11] The petitioner further submitted on 19 May, 2023, two (2) new additional grounds of appeal as follows:

*"**Ground One***

That the learned trial Magistrate erred in law:

(i) In not directing himself that the testimony of the substitute doctor was entirely based on hearsay contents of the medical legal report prepared by another doctor who was not called as a witness.

(ii) In not explaining thoroughly in his summing up the vital distinction between hearsay admissible and hearsay inadmissible, in respect to the contents contained in the medical legal report prepared by the doctor who was not called as a witness and allowed himself to be guided by the testimony of the substitute doctor when giving evidence on the contents of the medical legal report which was hearsay.

Ground Two

That the learned trial Magistrate erred in law when his Lordship:

(i) Did not direct himself that the evidence of PW1 [name omitted] in respect of count one should be viewed with caution in that her evidence was based on the recollection and memory of events some six years earlier when she was twelve years old.

(ii) Did not direct himself that before accepting [PW1's] evidence, he must take heed of the fact that because PW1's age at that time of the alleged incident, her evidence was suspect on the basis that it may be unintentionally unreliable. This lack of reliability is heightened by the fact that the evidence has been given six years later in the trial."

Special Leave to Appeal to the Supreme Court

[12] For the petitioner to be granted favour of leave to appeal under section 98 (4) of the Constitution, he must satisfy this Court that the pre-requisite conditions set out under section 7 (2) of the Supreme Court Act 1998 are met, namely, that:

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

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

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

[13] As it had been stated so many times on numerous appeals before this court, [**Swadesh Kumar Singh v The State** [2006] FLR 310; **The State v Apolosi Bolatuku & Nemani Betau** [2013] MAC 420/13; **Joeli Tatatatau v The State** [2018] CAV 8/17; **Mohammed Alfaaz v The State** [2018] CAV 9/18], the Supreme Court is not a court of criminal appeal. Leave may only be granted in exceptional cases where any or all of the S 7 (2) requirements are satisfied. For example, application relating to calculations of remissions may raise a matter of *"substantial question of principle affecting the administration of criminal justice"*, justifying special leave to appeal against sentence as per: **Ilaisa Bogidrau v The State** [2016] CAV 31/15. In **Sachida Nand Mudaliar v The State** [2008] CAV 1/07, the Supreme Court granted special leave when the issue raised in the appeal was whether the Court of Appeal had correctly approached its task when considering whether there has been a miscarriage of justice when the judge's decision cured defects in summing up. This court held the view that it raised a question of general legal importance, as well as a substantial question of principle affecting the administration of criminal justice.

[14] It is necessary to examine whether any grounds argued, and submission made, by the petitioner from the Court of Appeal decision, are of sufficient substance to cross the stringent threshold under S 7 (2). For example, this court, in **Mahendra Pal Chaudhry v The State** [2014] CAV 18/14 (apf AAU 10/14) 14 November, 2014, concluded that the petitioner had failed to demonstrate any excess of jurisdiction in conviction and sentence under the Exchange Control Act, which would give rise and meet the threshold under S 7 (2) of questions of general legal importance or substantial questions of principle affecting the administration of criminal justice or that substantial or grave injustice will ensue.

[15] In this instance, the petitioner must prove to this Court's satisfaction that *"substantial and grave injustice"* will ensue, if the decision of the court below, is allowed to stand.

The Test for Substantial and Grave Injustice

[16] It is accepted that it is the petitioner that carries the burden of satisfying the court that the grounds of appeal meet the requirements of section 7 (2) of the Supreme Court Act to whit, that they raise questions of general legal significance and substantial and grave injustice will ensue if leave is not granted.

[17] This court in **Sharma v. The State** [2017] FJSC 5; CAV 0031.2016 (20 April 2017) expressed it this way:

> *"It is to be observed that the injustice that is said to have occurred must not only, be one that is substantial but also one that is grave. As such, even if the party succeeds in establishing that some injustice has been caused that by itself may not be sufficient to obtain relief unless the party is capable of establishing that the injustice referred to is one that meets the threshold laid down in section 7 (2) paragraph (c) of the Supreme Court Act."*

[18] In the Court of Final Appeal of the Hong Kong Special Administration Region, in **So Yiu Fung v Hong Kong Special Administration Region**: Final Appeal No. 5 of 1999 (Criminal) (On Appeal from CACC No. 546 of 1997) their court also dealt with the similar

provisions to Fiji's section 7 (2), in their section 32 (2) of the Hong Kong Court of Final Appeal Ordinance, Cap.484 which provides:

> *"Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the High Court, as the case may be that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done."*

[19] The Hong Kong final appellate court of five justices, held [pp 451 – 452]:

> *"This Court's primary role in the administration of criminal justice is to resolve real controversy on points of law of great and general importance. For this Court does not function as a court of criminal appeal in the ordinary way. However, the "substantial grave injustice" limb of S.32 (2) exists as a residual safeguard to cater for those rare and exceptional cases in which there is a real danger of something so seriously wrong that justice demands an enquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of a great and general importance. To obtain leave to appeal under this limb, an appellant has to show - and this appellant had shown - that it is reasonably arguable that substantial and grave injustice has been done..."*
>
> *"Reviewing the convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court. 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 under 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."[at p.543].*

[20] This pronouncement echoes Lord Watsons's statement of what constitutes *"substantial and grave injustice"* in the Privy Council case: **Re Dillet** (1987) 12 App (as 459, as follows:

> *"the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."*

Consideration

New Grounds of Appeal

[21] In addition to the four (4) grounds of appeal, the Petitioner had filed two (2) new grounds of appeal. These grounds had not been raised and/or argued before the Court of Appeal.

[22] Time and again, this Court is being asked to take into consideration fresh grounds of appeals that had not been ventilated in the Court of Appeal. Time and again the Supreme Court has emphasized that it will only consider matters or issues that had been heard and argued in the Court of Appeal and sanctioned as part of its *"final judgment"*. Without this sanction, this Court does not have, as the respondent Counsel correctly argued, jurisdiction to consider these grounds.

[23] With respect to the hearsay issue of the medical report prepared by a different doctor to the doctor who testified and was questioned on the report, the recent 2022 Supreme Court decision of **Ilai Navaki v The State** Criminal Petition No: CAV 0028 of 2019; AAU0087/15; HAC 198 of 2012 is authority for the propositions premised on section 133 of the Criminal Procedure Act, as per Gates J, that:

> *"(i) the medical examination report is admissible provided that it had been served on the accused 21 clear days before the trial;*
>
> *(ii) the accused may give notice to the prosecution for the author of the report to attend as a witness 14 clear days before the commencement of the trial;*
>
> *(iii) where the original doctor is not available for whatever reason, the report remains admissible only as to content, but "maybe referred to and commented upon by any other expert called as a witness... "*

[24] In this instance, the doctor who was called by the prosecution, and questioned on the medical report of another doctor, was only asked of the contents of the report. He was an expert of some 20 years work experience in the field of gynaecology. He did no more, in my opinion, than affirm the contents of the report and comments are permissible under section 133 (5) of the Criminal Procedure Act.

[25] As to ground 2 on the delay of the victim making and lodging a complaint, I merely wish to affirm *"the totality of the circumstances test"*, underlined in **The State v Serelevu** [2018], FJCA 163; AAU 141.2014 (4 October, 2018), was correctly analysed and applied in the court below.

[26] In any case, for the reasons I had explained above, both new grounds of appeal are hereby dismissed.

Other Grounds of Appeal

[27] It must be born in mind, that the Petitioner, through the Legal Aid Commission, had relied on a single ground of appeal to the Court of Appeal submitting that it constituted an amalgamation of all the Petitioner's previous grounds of appeal. In essence, the ground of appeal stressed that the learned Magistrate had failed to direct his mind on the *"compound improbabilities"* that arose from the *"totality of evidence"* that would have entertained a doubt as to the Petitioner's guilt.

[28] In his submission to the Court of Appeal, the Petitioner referred to various evidence produced in Court by the prosecution, which would in their totality, created *"compound improbabilities"* as to the Petitioner's guilt. These include:

- *the accused wife complained*
- *the accused wife first brought the issue of rape*
- *the accused was in the sitting room*
- *complainant gave statement in 2010, while the incident was in 2009*
- *complainant did not volunteer the information of rape*
- *inconsistent evidence of complainant of sleeping arrangement*

[29] In **Pell v The Queen** (supra), the compound improbabilities the court identified include:

(i) *the applicant's movements after the Mass*

(ii) *the applicant was always accompanied within the Cathedral and*

(iii) *the timing of the assaults and the "hive of activity"*

[30] These evidence, inter alia, were in the court's view, adequate that *"notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was not capable of excluding a reasonable doubt as to the applicant's guilt."* On their own maybe not, but taken together, they open the possibility of creating a reasonable doubt of the defendant's guilt in the minds of the jury or assessors.

[31] It is important to note that these compound improbabilities are caused by unchallenged evidence.

[32] In this case, the evidence identifies and referred to by the Petitioner, had been fully analysed and assessed both courts below. Each was satisfied beyond reasonable doubt as to the veracity of the complainant's evidence.

[33] To the extent that the original grounds of appeal filed against the judgment of the Court of Appeal in refusing leave to appeal while dismissing the appeal, are elaborations of the single ground of appeal based on compound improbabilities, they do nevertheless constitute new grounds as such; but even otherwise, these grounds had thoroughly been analysed in both the trial court and in the appeal. This court is in total agreement with their findings and conclusions.

[34] We can find no reasons to upset their judgments

Conclusion

[35] In the ultimate, the Petitioner's application for special leave to appeal is refused.

[36] **Orders**

1. *Special leave to appeal refused*
2. *Appeal is dismissed*
3. *No order as to costs*

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

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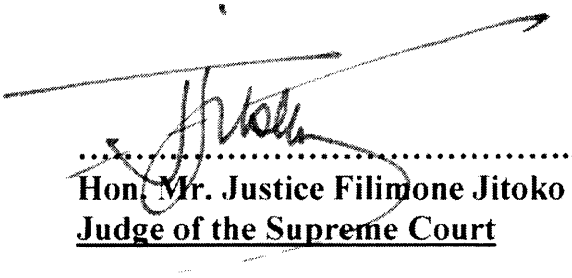
Hon. Mr. Justice William Calanchini
Judge of the Supreme Court



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Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court