

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 26 of 2022
Court of Appeal No. AAU 132 of 2016

BETWEEN: **PENI NAISAU**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Justice William Calanchini**
Judge of the Supreme Court

The Hon. Justice Lowell Goddard
Judge of the Supreme Court

The Hon. Justice Isikeli Mataitoga
Judge of the Supreme Court

Counsel: **Petitioner in Person**
Shameem, S. and Nofaga, H. for Respondent

Date of Hearing: **7 June 2024**

Date of Judgment: **27 June 2024**

JUDGMENT

Calanchini, J

[1] I agree with the reasoning and conclusion of Justice Mataitoga.

Goddard, J

[2] I am in agreement with the judgment of Justice Mataitoga

Mataitoga, J

- [3] According to the information filed at the High Court of Suva the only charge against the Petitioner had been Rape, contrary to Section 207(1) and (2) (c) and (3) of the Crimes Act (Decree) No.44 of 2009. The particulars of the offence state that the appellant on the 12th December 2012, at Flagstaff in the Central Division penetrated the mouth of SQ (name suppressed), a child under the age of 13 years with his penis. Following the conviction the trial judge imposed a sentence of imprisonment of 12 years, 10 months and 2 weeks with a non-parole period of 10 years 10 months and 2 weeks.
- [4] The petitioner filled a timely appeal against both the conviction and sentence and the single Judge of the court of appeal, granted leave to proceed against the sentence only. The petitioner being dissatisfied with the ruling of the single Judge renewed his appeal to the full court against the conviction. For the Single Judge's hearing the petitioner had the assistance the Legal Aid Commission Counsel, who prepared the grounds of appeal for him against the conviction. In the Court of Appeal, the petitioner relied on the same grounds against the conviction as were relied on in the Single Judges hearing.
- [5] Those grounds were as follows;
- “(i) the trial Judge erred in principle and fact by lacking to provide a fair and balance summing up when directing the assessors in particular to the following;
 - (a) directing to the assessors the experience regarding reaction of a child of rape and/or sexual offences; and
 - (b) directing the assessors on a different count; and
 - (c) directing to the assessors the complainant's understanding of the term 'balls' thereby resulting in establishing the State's case to prove beyond reasonable doubt the element of penetration of penis; and
 - (d) mentally and emotionally influencing and challenging the assessors when considering the evidence of complainant who is a child; and

- (e) directing the assessors to consider the inconsistencies of the appellant's case regarding the obtaining of his caution statement thereby influencing the minds of the assessors to consider the prosecution witnesses evidence to be more reliable and credible.
- (ii) That the conviction was unsatisfactory having regard to the totality of the evidence at the trial, in particular to the following:
 - (a) Reasoning and complainant referral to her 'balls' denoted the genitals generally and not to describe the testicles of the accused when no evidence was adduced by the prosecution to prove this is what the complainant meant."

Appeal against the Sentence

- [6] The Single Judge granted leave against the sentence at the leave stage. The ground of appeal against the sentence is as follows;

'That the learned trial judge erred in principle when sentencing the

- (a) double counting an aggravated feature to enhance the sentence; and*
- (b) relying on unsupported facts to enhance the sentence; and*
- (c) not properly considering the mitigating factors to adequately decrease the sentence. (sic)*

Based on the said grounds, the Counsel is seeking the intervention of this Court, presumably to adjust and alter the sentence imposed in the High Court.

In the Court of Appeal

Against Conviction:

- [7] In **Naisau v State** [2022] FJCA 108 (AAU 132 of 2016) The Court of Appeal considered the petitioner's grounds of appeal set out in paragraph 3 above and its assessment was as follows:

[28] A close examination of the aforementioned grounds would make it clear that the grounds are vague in nature and imprecise. The main complaint being that the evidence for the prosecution does not support the fact unequivocally that the appellant tricked the complainant to perform oral sex on his penis. The trial judge, based on the evidence for the prosecution, in his summing up as well as in his judgement had dealt with this aspect in the following manner;

Referring to summing up

"[77] The accused wants you to consider particularly the 4th inconsistency. The complainant has said in her examination in chief that the accused asked her to

suck his penis. She stated to Police that he told her that he would 'touch my ball and I have to touch his ball.' The accused admitted in his evidence that he got the complainant to lick his testicle after applying some cream on it. It is his claim that when the complainant said to Police 'balls' she was referring to his testicles and not his penis.

[78] The complainant, during her re-examination, stated when asked what 'balls' means she replied as 'a man's balls'. However, in considering these conflicting claims, it is also relevant to note that she had said to Police that the accused said that he would also touch her balls. It is up to you to decide in consideration of these items of evidence that the terms 'balls' used by the complainant in her statement to Police refers to the penis or to the testicles of the accused."

Page 69, paragraph 16. [Summing Up]

"[16] It is clear from this portion from the statement that AB referred to her balls as well and that simply means she had used this term to denote the genitals generally and not to describe the testicles of the accused. I concur with the opinion of the assessors."

[29] Further in the caution interview statement the appellant had admitted the following:

A.45 Yes that is true.

Q46. After she put off her clothes then what did you do?

A. I touch her private part (vagina).

Q47. It is alleged that after you put your penis out then you spread cream of the cake on your penis. What can you say about that?

A. Yes, that is true.

Q48. After that then what did you do?

A. I told Sai to suck my penis by putting it on her mouth which she did for a few minutes.

Q49. Who else was there in the kitchen?

A. Only myself and Sainiana.

Q50. Did anybody come to you that time?

A. No body.

Q51. How do you feel when you were doing that to Sai?

A. I was scared.

[30] In dealing with the issue of penetration the learned trial judge had placed these facts before the assessors clearly and had invited them to decide what may have been meant by the complainant when she stated the appellant asked her to feel his 'balls'.

Based on the directions given by the learned trial judge the assessors opined unanimously that the appellant is guilty as charged for rape by penetrating the mouth of the victim with his penis. Further, in relation to that matter the learned trial judge concluded in his judgment that the victim's reference to the 'balls' was in fact 'denoted' the genitals generally and not to describe the testicles of the accused. Accordingly, he had concurred with the opinion of the assessors. It is important to recall that the sister of the victim gave evidence at the trial and described how she observed the victim was sucking the sour soup stem, which had caused the suspicion in her mind as to the peculiar behaviour of the victim.

[31] I have perused the Victims Impact Statement of the complainant and according to the observations made by the medical experts the complainant is showing signs of being frightened and according to her mother's observations the complainant fears to be left alone and there are certainly signs of having an impact on the complainant as a result of the experience she had to undergo at the age of 7. These facts stand uncontroverted and unchallenged at the trial. In the circumstances I do not see any merits to any grounds of appeal against the conviction.

[32] The learned trial Judge had adequately dealt with these factual matters and the learned single judge was correct in refusing to grant leave to proceed on any grounds of appeal against the conviction as relied on by the appellant.

In the circumstances I do not see any merits to any grounds of appeal against the conviction."

- [8] After undertaking the review of the evidence set out in paragraph 6 above, the Court of Appeal concluded that there was no merit to any of the grounds against conviction.

Supreme Court

Jurisdiction

- [9] Section 98(3) of the Constitution allows the Supreme Court to hear and determine appeals from **final judgements of the court of appeal**, subject to such requirement as prescribed by law.

[10] Section 98(4) of the Constitution provides that an appeal **may not** be brought from a final judgement of the court of appeal, unless the Supreme Court grants leave to appeal.

[11] Section 7 (1) and (2) of the Supreme Court 1998 provides:

- (1) In exercising its jurisdiction under section 98 of the Constitution of the Republic of Fiji with respect to leave to appeal in any civil or criminal matter.
- (2) In relation to a criminal matter the Supreme Court **must not grant** leave to appeal unless:
 - (a) a question of general importance is involved;
 - (b) a substantial principle affecting the administration of criminal justice may occur; or
 - (c) Substantial and grave injustice may otherwise occur.'

Notice of Petition for Appeal

[12] The Petitioner's Notice of Appeal states that pursuant to section 98 (3) and (6) of the Constitution 2013, he registers his appeal against the Court of Appeal decision to dismiss his appeal and sentence from the High Court judgement.

[13] Paragraph 1.3 of the Petitioner's Notice states the grounds of his appeal to the Supreme Court against conviction as:

'That the learned Court of Appeal erred by failing to properly consider all the grounds of appeal.'

There are no submissions submitted by the Petitioner to elaborate the basis of his claim which he makes as his ground of appeal against conviction. This ground is frivolous and is dismissed.

[14] In Paragraph 1.4 the Petitioner submits his ground of appeal against sentence as follows:

'They learned Court of Appeal erred by failing to properly consider grounds of appeal against sentence.'

- [15] In support of this ground the petitioners are submitting that his sentence with starting point of 12 years as the starting point of the sentence computation is unfair and in breach of his right to equality before the law under section 26 of the Constitution 2013. This claim of inequality, is predicated on the claim that other convicts with more than 1 count of rape, the petitioner claims got the same or less sentence. There were no supporting cases submitted to substantiate this claim.
- [16] This submission was never made in the Court of Appeal and therefore the issue of law raised therein, has never been the subject of final determination of the Court of Appeal.

Should Special Leave be Granted

- [17] There are no grounds submitted by or on behalf of the petitioner to explain to the court how threshold requirements set out in section 7 (1) and (2) of the Supreme Court Act 1998 would be satisfied. Without special leave being granted, there is no appeal before the court. The granting of Special Leave engages the court to consider the ground and supporting submissions and make the final judgement.
- [18] This is the situation in the present case, where the petitioner simply filed grounds of appeal in a timely manner, but have not obtained the special leave to appeal to the Supreme Court. This failure to observe the rules of procedure of the Supreme Court, which clearly requires a two-stage procedure: first, to seek special leave to appeal and second, if leave is granted, to appeal with submissions to the court has not been observed here.

[12] In **Liberato v R** [1985] HCA 66; (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792 (HCA) the High Court of Australia held, it not being a court of criminal appeal, will not grant special leave to appeal in criminal cases unless some point of general importance is involved which, if wrongly decided, might seriously interfere with the administration of criminal justice. It would not accord with that practice to grant special leave to appeal in a case where no question of law is involved and the court is merely asked to substitute for the view taken by an appellate court below a different view of the evidence and the summing up. This position of the law was adopted by the Supreme Court in **Isei Korodrau v State** [2023] FJSC 6 (CAV 002/2019).

[13] In the case of **Livia Lila Matalulu and Anor v The Director of Public Prosecutions** [2003] FJSC 2, their Lordships articulated the role of the

Supreme Court in applications for special leave to appeal matters in the following way:

The court has considered the application of the criteria for the grant “of special leave in this case with some particularity. Petitioners for special leave should ensure that when they frame their petitions, they do so with care. 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. Such leave will not be granted lightly. Too low a standard for its grant would undermine the authority of the Court of Appeal and distract the Supreme Court from its role as the final appellate body, by burdening it with appeals that do not raise matters of general importance or a principle or, in the criminal jurisdiction, ‘substantial and grave injustice’ (see p 731, below)

- [19] The special leave procedure is critical because it requires the petitioner to carefully frame their petitions addressing the specific requirements of section 7(2) of the Supreme Court. In that way it assists the court, by focusing the appeal grounds to the real issue needing attention of the court at the leave to appeal stage and also for the appeal hearing.
- [20] This procedure is in place for two reasons, first, to allow appeals that would engage the law- making powers (either subjective or procedural) of the Supreme Court to address a gap in jurisprudence which if left unattended may compromise the administration of criminal justice in Fiji. Second, to weed out unnecessary appeal that do not raise any special issues requiring the attention of the Supreme Court.
- [21] In **Isei Korodrau v. State** [2023] FJSC 6; CAV0022/2019(27/4/2023), the Supreme Court stated the following, which is worth repeating here about section 7(2) of the Supreme Court Act:

*[17] The above are the threshold criteria which **MUST** be satisfied by the petitioner before leave may be granted. Section 7(2) requires that one or more of the criteria set out therein is made out before special leave is granted.*

[18] Special leave applications act as a filtering mechanism to ensure that the Supreme Court expends its limited judicial resources determining only the most significant legal questions,

[19] Section 7(2)(a) of the Supreme Court Act 2016 is directed to the court’s law-making function. The grant of special leave in relation to such questions of law enables the court to clarify the law by formulating the correct legal principle. The formulation of the correct principle to clarify the law is the decisive consideration in the grant of special leave. In this

way, a question of general legal importance requires this Court to be satisfied that there is a gap in its jurisprudence that requires filling. It is not sufficient that mere error be demonstrated or that a contestable point is raised. It must be established that if the error is left to stand, a state of unsatisfactory incoherence in law will exist.

[22] In this petition there is no submission made by the petitioner, to address the requirements for special leave to appeal under section 7(1)(2) of the Supreme Court Act 1998. The submissions provided by the petitioner are grounds he requests the Supreme Court to consider in the appeal hearing against his conviction and sentence, once leave to appeal is granted. In the absence of any specific submission from the petitioner as regards whether special leave should be given or not, I do not support the approach adopted by some in the past, for the court to review the grounds of appeal submitted and try to work out if it satisfies section 7(2) of the Supreme Court Act 1998. This is not the role of the court. That approach has no basis in law and procedure applicable in Fiji.

[23] Special Leave to Appeal is refused.

ORDERS:

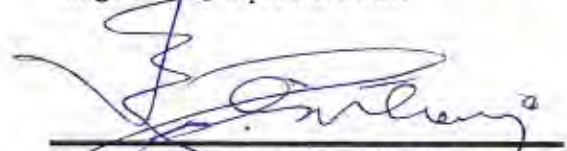
1. Special leave to appeal is refused.
2. Appeal is refused.
3. Judgement of the High Court as regards conviction and sentence confirmed.



The Hon. Justice William Calanchini
Judge of the Supreme Court



The Hon. Justice Lowell Goddard
Judge of the Supreme Court



The Hon. Justice Isikeli Mataitoga
Judge of the Supreme Court