IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV 0001 OF 2023
[Court of Appeal No: AAU 158/16]
[High Court No: HAC 120/2015]

BETWEEN : **JAMES ANTHONY NAIDU**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

Counsel: Petitioner in Person
Ms R. Uce for the Respondent

Date of Hearing: 7 August, 2024

Date of Judgment: 29 August 2024

JUDGMENT

Temo, AP

[1] I agree entirely with the judgment of his Lordship Mr Justice William Calanchini.

Calanchini, J

Introduction

[2] At a trial in the High Court at Lautoka before a Judge sitting with three assessors, James Anthony Naidu (the Petitioner) was convicted of two counts of rape and sentenced to 11 years 11 months imprisonment with a non-parole period of 9 years. He appealed to the Court of Appeal against both conviction and sentence. His application for leave to appeal was refused by a single Judge of the Court. The Petitioner subsequently renewed his application for leave to appeal against conviction before the Court of Appeal. That application was refused.

[3] The Court of Appeal gave thorough and detailed consideration to the seven grounds of appeal that were raised by the Petitioner. They were different from the grounds raised before the single Judge of the Court at the initial leave application. The Court of Appeal concluded that none of the grounds satisfied the threshold test of reasonable prospect of success in order to grant leave to appeal against conviction.

[4] The Petitioner now applies for leave to appeal to the Supreme Court. He filed a timely Petition relying on the same seven grounds of appeal against conviction that he had argued before the Court of Appeal. The reason for doing so was the claim that the Court of Appeal had not properly considered and/or evaluated the effect of alleged failures on the part of the learned trial Judge.

The relevant facts

[5] The findings of fact were set out in the judgment of the trial Judge at paragraphs 7 to 10 as follows:

> *"7. On 1st May, 2015 at around 7pm the complainant who was 16 years of age, a Form 5 student and a friend Sara were picked by the accused from Ram Asre Road in his car. The complainant knew the accused who was a family friend. She accompanied Sara since it was her school holidays and Sara had an employment opportunity at the Motel owned by the accused.*

8. *In the car the complainant saw Meli Tauvoli a worker of the accused. The accused drove to the City gave Meli some money to buy liquor, after buying liquor all went to the seawall at Marine Drive. At the seawall all except the accused drank liquor. After a while Sara and the accused went somewhere in the car of the accused, when they returned Sara informed the complainant that the accused wanted to talk to her in private about her wages.*

9. *The complainant went with the accused in his car she sat in the front seat of the car, the accused drove to Navutu to a vacant land. After stopping the car the accused locked the door of the car pulled down his three quarter pants and told the complainant to suck his penis. The complainant was scared and shocked she had nowhere to go she could not escape because the door was locked. The accused took her head and pushed it towards his penis.*

10. *As the complainant was sucking the penis of the accused, the accused pulled down the skirt of the complainant and started to play around with her vagina and then inserted his finger into her vagina. This continued for five minutes. At this time the accused received a phone call hence he pushed her head up."*

Court of Appeal

[6] In his application for leave to appeal against conviction and sentence before Goundar J, sitting as a single Judge of the Court of Appeal, the Petitioner advanced three grounds of appeal. They were:

i) Whether the trial miscarried when an assessor allegedly did not disclose that she resided in the same neighbourhood as the complainant;

ii) Whether the trial Judge erred in declaring Janet a hostile witness;

iii) Whether there is an error in the exercise of the sentencing discretion.

[7] Goundar J concluded that the two grounds of appeal against conviction were unarguable and that there was no error in the exercise of the sentencing discretion. Leave to appeal against conviction and sentence was refused. In arriving at that conclusion Goundar J applied the test for leave to appeal against conviction on a ground of mixed law and fact as whether the ground is arguable. The test for leave to appeal against sentence was whether there was an error in the exercise of the sentencing discretion. These tests had

been confirmed as the appropriate tests for the Court when considering an application for leave to appeal to the Court of Appeal: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013).

[8] The Petitioner renewed his application for leave to appeal against conviction (only) pursuant to section 35(3) of the Court of Appeal Act on the following seven grounds:

> *"Ground 1*
> *THAT the Learned Judge erred in law when he shifts the burden of proof to the appellant by requiring the appellant to prove his innocence in the Judgment through his credibility.*
>
> *Ground 2*
> *THAT the Trial Judge failed to give a proper direction on the credibility and/or the inconsistencies of the Complainant surrounding her evidence.*
>
> *Ground 3*
> *THAT the Learned Judge erred in law when he failed to adequately consider the evidence elicited by both parties during the trial.*
>
> *Ground 4*
> *THAT the Learned Judge erred in law when misdirected the assessors on what weight is to be given to Meli Tauvoli's evidence and furthermore misdirected himself that Meli Tauvoli's evidence cannot be relied upon.*
>
> *Ground 5*
> *THAT the Learned Trial Judge erred in law and in fact when he failed to adequately address the issue of recent complaint.*
>
> *Ground 6*
> *THAT the Learned Trial Judge erred in law when he allowed the Prosecution to serve the statement of one of the crucial witness on the day of the trial, thus violating section 290 (1) of the Criminal Procedure Act and Section 14 (2) of the Constitution.*
>
> *Ground 7*
> *THAT the Trial Judge miscarried when the evidence of the complainant was re-taken in the absence of any reminder as to her cross-examination, any reminder of the evidence of appellant, or any warning as to misuse."*

[9] It must be recalled that none of the seven grounds before the Court of Appeal had been considered by Goundar J in the Petitioner's initial application for leave to appeal. The

Court of Appeal refused the renewed application for leave to appeal against conviction. Although the Court of Appeal proceeded to order that the appeal against conviction be dismissed, that order was not strictly necessary as there was no appeal on foot since the appellant had not been granted leave. That order would only have been necessary had the Court of Appeal granted leave to appeal, and had then determined that the appeal should be dismissed.

[10] The test applied by the Court of Appeal in its judgment on the renewed application for leave to appeal against conviction was *"reasonable prospects of success."* The decision upon which this test was adopted by the Court of Appeal was a decision of a single Judge of the Court considering an initial application for leave to appeal. The rationale for adopting this test was that it would assist in distinguishing arguable grounds from non-arguable grounds. However, it is arguable that the test of reasonable prospects of success is more stringent than the test of arguable ground(s) stated by the Supreme Court in **Naisua –v- The State** (supra). In that decision the Supreme Court observed at paragraph 18:

> *"It is settled that the test for leave to appeal against conviction on mixed grounds of law and fact in the Court of Appeal is whether an arguable point is being raised for the Full Court's consideration. . . . .*
> *We must add that it is not appropriate to reach any conclusion on the merits of the proposed grounds when considering leave. That conclusion should be left to the Full Court."*

[11] My concern about the current test for leave to appeal to the Court of Appeal against conviction is that a similar test is generally applied by the State when deciding to proceed to trial against an accused person. The problem is that the prosecution's reasonable prospects of success test is reasonable prospects of success of proving the case beyond reasonable doubt. This is a matter that should be resolved by the Court of Appeal. There are issues relating to the prospects of success test. There also are issues relating to resources available to the judiciary to ensure that appeals are determined in a timely and fair manner. In Archbold (2020 edition) at para. 7 – 237 it is stated that:

"The prima facie test to be applied in deciding whether to grant leave to appeal is whether the ground of appeal is arguable or merits consideration by the Full Court."

The Supreme Court

[12] There are two requirements that a Petitioner must satisfy before an appeal may be brought to the Supreme Court under section 98(4) of the Constitution. The first is that the Petitioner must obtain leave to appeal. The second is that, the judgment of the Court of Appeal must be a final judgment of that Court. Under section 7(2) of the Supreme Court Act leave must not be granted, in relation to a criminal matter, 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) a substantial and grave injustice may otherwise occur.

[13] As for the requirement that the decision from which it is sought to appeal must be a final judgment of the Court of Appeal, it is well established by this Court that any decision of the Court of Appeal that brings an end to the proceedings is a final judgment of the Court of Appeal. In **Ralumu v Commander, Republic of Fiji Military Forces** [2006] FJSC 11; CBV 8 of 2003S (10 September 2004) at paragraph 51 this Court observed:

"In our opinion the better view is that a final judgment of the Court of Appeal, for the purposes of section [98(4)] of the Constitution, is any judgment of the Court of Appeal which finally disposes of a proceeding in that Court……"

The grounds of appeal in the Petition

[14] This Court has frequently stressed that leave is not granted automatically. The Court is not a court of criminal appeal and the grounds upon which the Petitioner relies must be considered in the context of the criteria set out in section 7(2) of the Act. The Petitioner's seven grounds have been listed in full earlier in this judgment. On 30 May 2024 the Petitioner filed a document submitting an "*additional or new ground*" of appeal.

Although the Petitioner has included his submission on this ground as part of the ground of appeal, the paragraph that states his appeal ground reads:

> *"The Petitioner respectfully submits that the Court of Judicature had failed to exercise jurisprudence to conclude and acknowledge that the conduct of both the Prosecution and the Defence Counsel were compatibly unfair to the Defendant's case."*

The gist of this ground and his submissions relate to the competency of his trial Counsel and Counsel for the State.

[15] In the concluding two paragraphs of this second notice the Petitioner refers to the original grounds of appeal in the following terms:

> *"At the backdrop of the case there is a reasonable doubt on the Prosecution's case and that doubt or the benefit thereof must be given to the Petitioner.*
>
> *In conclusion, the Petitioner would be acknowledging the other Grounds of Appeal to support his submission on this new ground the authenticity of the Prosecution unfair conduct and the incompetence of the Defence Counsel."*

[16] It is clear that the Petitioner is relying on the seven grounds that were considered by the Court of Appeal and what he describes as his "*additional or new ground."* Since this additional ground was not before the Court of Appeal it raises an issue that has not been considered in the final judgment of the Court of Appeal.

Submissions

[17] Apart from the material filed on 30 May 2024 the Petitioner has not filed submissions in this Court on the grounds of appeal set out in his Petition. As noted they are the same grounds upon which the Petitioner relied in the Court of Appeal. The Petitioner has not indicated how the Court of Appeal has erred. More importantly, he has not provided sufficient particulars to demonstrate how his Petition satisfies the criteria in section 7(2) of the Act. It is not for this Court to attempt to identify an error of law that would come within section 7(2).

[18] Counsel for the Petitioner and the State had filed submissions in the Court of Appeal. To the extent necessary reference will be made to those submissions on the same grounds raised by the Petitioner in the Court of Appeal. The Court of Appeal has considered in detail each of the seven grounds raised by the Petitioner. To the extent that any of the grounds relate to inadequate directions, misdirections or wrong directions to the assessors, the first question to consider is whether trial counsel requested the trial Judge to re-direct the assessors on the matter in issue. The second question to consider is whether any defect in the directions in the summing up was rectified by the trial Judge in his substantive judgment setting out the evidence upon which he relied to convict the petitioner.

Burden of Proof

[19] The Court of Appeal concluded that the trial Judge had not shifted the burden of proof on to the Petitioner. Any ambiguity that had resulted from the directions in the summing up were clarified by the trial Judge in his Judgment. Trial Counsel did not seek a re-direction on this issue. The burden of proof was clearly explained by the Judge in his summing up in paragraphs 8 and 127. The crucial directions to the assessors and to himself are set out in paras. 127 – 129:

> *"127. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also decided to call witnesses in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.*
>
> *128. However the accused decided to give evidence and also to call witnesses on his behalf. You must then take into account what the accused and his witnesses adduced in evidence when considering the issues of fact which you are determining.*
>
> *129. It is for you to decide whether you believe the evidence of the accused and his witnesses. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty of either or both counts."*

[20] To the extent that the last sentence may have given rise to some ambiguity in the minds of the assessors, had not occurred to trial counsel who had not sought a re-direction. It is apparent from the judgment that the trial judge was not in any doubt as to on whom the burden of proof fell. At paragraph 13 the Judge concluded:

> *"I accept the evidence of the complainant as truthful and reliable. She was forthright in her evidence and was able to withstand cross-examination and recall whatever the accused did to her clearly. I have no doubt in my mind that the complainant told the truth in Court."*

In paragraph 45 the Judge concluded:

> *"I find that the accused has not been a reliable and credible witness and therefore I reject his evidence that he did not go with the complainant alone anywhere from the seawall. I accept that it was the accused who had on 1 May 2015 penetrated the mouth of the complainant with his penis without her consent and also on the same might he had penetrated the vagina of the complainant with his finger without her consent."*

[21] The trial Judge concluded that:

"a) *The accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.*

b) *The complainant and her friend (Sara) did not ask the Petitioner for money for "clubbing" that night nor did they ask the petitioner for money for shopping.*

(c) *The complainant and/or her family had not approached the Petitioner for money.*

(d) *That the Petitioner's son had made an attempt to offer the complainant money.*

(e) *That Janet had been untruthful when she claimed in evidence that the complainant had subsequently told her that her "recent complaint" to Janet was not true."*

[22] Both the summing up and his judgment indicate that having considered the totality of the evidence the judge concluded that the State had proved beyond reasonable doubt that the Petitioner was guilty. In arriving at that conclusion the trial Judge had explained his reasons for accepting the evidence of the prosecution witnesses and rejecting the evidence of the defence witnesses. He has confirmed that the evidence of the prosecution witnesses satisfied the standard of proof necessary for a finding of guilt, thereby confirming the unanimous opinion of the assessors.

Inconsistencies

[23] Complaints about inconsistencies in the evidence given by the complainant at the trial and a failure by the trial Judge to consider the evidence in its totality are essentially matters to be analysed in the Court of Appeal and only rarely would meet the threshold for granting leave to appeal to the Supreme Court. The Court of Appeal analysed the evidence and the summing up. The alleged inconsistencies raised by the Petitioner in his Court of Appeal submissions (para.8.5 of the submissions) were not put to the complainant in cross-examination. If the Petitioner gave evidence that was inconsistent with the complainant's evidence, those inconsistencies should first have been put to the complainant in cross-examination.

Totality of the Evidence

[24] The trial Judge has extensively discussed and analysed the evidence called by both parties and has reminded the assessors of their obligations in relation to that evidence at paragraph 136 – 139. In his judgment the trial Judge had given cogent reasons for his findings and his conclusions. The Petitioner has not identified any error in the judgment on this point that would meet the threshold prescribed by section 7(2) of the Supreme Court Act. This ground represents an attempt by the Petitioner to persuade this Court that it should substitute its view of these evidentiary complaints in place of those of the Court of Appeal, without given any reason for doing so.

Credibility of the Witness Meli

[25] Complaints about the trial Judge's findings as to the credibility of any witness are very rarely successful in the Court of Appeal and are even less likely to be considered by this Court.

The Judge gave a clear explanation at paragraph 48 of his judgment for his conclusion that Meli was an untruthful witness. Any ground that raises this issue has even less merit when it can be assumed that both the assessors and the trial Judge have formed the same view as to the credibility of the witness Meli.

Recent Complaint

[26] Having read the transcript of the evidence, the summing up, the request for a re-direction, the trial Judge's judgment and the Court of Appeal judgment, it is clear that this ground lacks merit. At all times in these proceedings it has been clearly stated that recent complaint evidence goes to the consistency of the complainant's conduct following the alleged incidents. It is not evidence that goes to proof of the allegations against the Petitioner. At page 485 of Volume 2 of the Record, the trial Judge and Counsel for the Petitioner discuss the request, for a re-direction to the assessors on the issue of recent complaint. The transcript at page 486 indicates that counsel agreed that the direction was sufficient. The direction on recent complaint is at paragraphs 107 to 114:

> *"107. According to the complainant it was the next day she informed her best friend Janet Cathy of what the accused had done to her. Janet told the court that when the complainant was telling her what happened to her the complainant looked said, however, the complainant had asked Janet to keep it a secret.*
>
> *108. This is commonly known as recent complaint. The evidence given by Janet is not evidence as to what actually happened between the complainant and the accused since Janet was not present and did not see what happened between them.*

109. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says that the complainant's complaint to her best friend shortly after the alleged incident is consistent with her account of both the alleged incidents and therefore she is more likely to be truthful.

110. On the other hand the Defence says that the evidence of Janet Cathy after she was recalled as a witness shows that the complainant was not truthful. Janet informed the court that after she had given her police statement about what the complainant had told her 3 or 4 days later the complainant came to her home with her sister Salome.

111. During conversation the complainant told her that everything she had told Janet about the allegation against the accused was a lie. Thereafter Janet and her mother went to Lautoka Police Station and gave a statement to W.D.C.Irene Singh. W.D.C Singh had written a police statement which was read back to Janet signed by her and counter signed by the Police officer.

112. You will recall that W.D.C. Irene Singh was called by the court to give evidence in view of the new information brought to the attention of the court.

113. W.D.C. Singh informed the court that Janet and her mother had approached her with the view to withdrawing her statement, however, she had no authority to do so since the matter was pending in court. Furthermore, W.D.C Singh in her evidence informed the court that no police statement was recorded from Janet in regards to her intention to withdraw.

114. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it."

There is no basis for concluding that the directions on recent complaint could be regarded as ambiguous thereby constituting a misdirection such as to give rise to a miscarriage of justice.

Late service of a witness statement

[27] Any objection concerning the late introduction of evidence should have been raised with the trial Judge at the time. There was no objection raised by Counsel for the Petitioner when the State sought leave to serve a written statement of a witness and before which a copy had been provided to defence Counsel. It is too late to protest in the Court of Appeal. The State submitted that there was no prejudice since the statement was favourable to the Petitioner.

Recalling a witness

[28] For the reasons stated by both the State in its submissions and the judgment of the Court of Appeal, the challenge to the decision of the trial Judge to recall one of the witnesses was not convincing. In any event, the evidence given by the witness on her being recalled was favourable to the Petitioner. The trial Judge has set out clearly his reasons for recalling the witness Janet and his reasons for subsequently rejecting her evidence when recalled concerning the complainant's alleged retraction of the allegations made against the Petitioner. This Court will not disturb the trial Judge's findings or credibility nor is there any reason to disagree with any of the subsequent inferences.

Competency of Counsel

[29] In the material filed in May 2024 the Petitioner submits that his new ground of appeal against conviction relates to a question of general legal importance or it raises a substantive question of principle affecting the administration of criminal justice. This new ground contends that the "*Court of Judicature*" failed to conclude that the conduct of both the Prosecution and Defence Counsel was unfair to the Defendant's case. It is not clear which Court is the "*Court of Judicature*." It is probably a reference to the Court of Appeal. As previously noted, this ground was not raised in the Court of Appeal. This ground is not referenced in any of the seven grounds of appeal pleaded in the Notice of

Appeal. There was no complaint made by the Petitioner to the trial Judge at any time concerning his representation by Counsel.

[30] Even if the Court was so minded to accept that this ground raised an issue that came within section 7(2), there is a further obstacle for the Petitioner. In **Chand –v- The State** [2022] FJSC 28; CAV 0001 of 2020 (27 October 2022), this Court adopted the English procedure, set out in **R v Doberty and McGregor** [1997] EWCA Crim. 556; [1997] 2 Cr. App. R. 218 that was to be followed where allegations are being levelled at counsel as a ground of appeal. The guidance in that decision provides for a formal procedure. However as this Court noted, it is perfectly proper for Counsel newly instructed to speak to former counsel, as a matter of courtesy, before grounds are lodged, to inform former counsel of the position.

[31] The Petitioner did not, of course, follow either the formal procedure or approach his former counsel to discuss the allegation. This was understandable to some extent as he may not have been aware of the procedure. However, had the Petitioner been genuinely concerned about the conduct of his counsel, it is reasonable to assume that it would have been raised as a ground of appeal in the Court of Appeal.

[32] To some extent this additional or new ground of appeal has the appearance of an afterthought. As Keith J observed in **Chand –v- The State** (supra) at paragraph 45:

> *"It is very easy when all else fails to blame the lawyer."*

As a general observation, it is incumbent on legal practitioners to, at least, make enquiries, when such a complaint is made about a legal practitioner's conduct at trial, in order to obtain an objective and independent basis, rather than rely on complaints by the unhappy convicted appellant, as to what had happened.

[33] Apart from the above observations, I cannot accept that the issue raised by the additional or new ground of appeal satisfies the criteria in section 7(2) of the Act. I cannot find any reason for granting leave to appeal to this Court as none of the grounds satisfy section 7(2) of the Court of Appeal Act. Furthermore, I can see no reason for disturbing the

judgment of the Court of Appeal. As a result all of the above, the petition for leave to appeal conviction is refused.

Goddard, J

[34] I agree entirely with the learned Judge's reasoning and conclusions.

Orders:

Petition for leave to appeal conviction is refused.

The Hon Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT

The Hon Justice Lowell Goddard
JUDGE OF THE SUPREME COURT