IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV 0033 OF 2022
[Court of Appeal No: AAU 85/2016]
[High Court No: HAC 75/2014L]

BETWEEN : **SUDESH ANAND KISHORE**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court
The Hon. Mr Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: Mr K.R Prasad for the Petitioner
Mr A. Singh for the Respondent

Date of Hearing: 16 August, 2024

Date of Judgment: 29 August 2024

JUDGMENT

Calanchini, J

Introduction

[1] At a trial in the High Court at Lautoka before a Judge sitting with three assessors, Sudesh Anand Kishore (the Petitioner) was convicted of two representative counts of raping SL who was 9 years old at the time. He was sentenced to 13 years imprisonment on each count to be served concurrently with a non-parole term of 12 years. He was subsequently granted leave to appeal out of time on two of the grounds pleaded in his appeal notice.

The grounds of appeal alleged various errors and other defects in the Judge's summing up to the assessors, whose unanimous opinion, with which the trial Judge agreed, was that the Petitioner was guilty on both counts of rape.

The Facts

[2] It was agreed that the complainant was 9 years old at the time of the offences. The complainant was adopted by B.W. soon after her mother had given birth at the Sigatoka Hospital. B.W. was the sister of the complainant's natural mother and hence the complainant's aunt. At the time of the offences, B.W. and the Petitioner were living at Olosara, Sigatoka. The complainant returned to live with her natural mother some 10 years later. Shortly afterwards the complainant informed her natural mother that the Petitioner had taken out "*his private part and put it in her private part."* She said this happened many times. She shouted when this happened and she did not like it. Her natural mother took her to the Womens Crisis Centre in Suva and from there to the Central Police Station (now Totogo Police Station) in Joske Street, Suva.

The Law

[3] The Petitioner was charged on two representative counts of rape pursuant to section 70(3) of the Criminal Procedure Act 2009. Section 70(3) provides that when a person is charged with a sexual offence and when the evidence points to more than one separate, but similar act of sexual misconduct, it is sufficient that the charge specifies the dates between which the acts occurred in one count. The prosecution must prove that between the specified dates at least one act of that nature occurred.

The Trial

[4] The Petitioner was charged on two representative counts of rape. The first was under sections 149 and 150 of the Penal Code alleging that between 1 January 2010 and 31 January 2010 at Sigatoka the Petitioner had unlawful carnal knowledge of the

complainant without her consent. The second count was under 207(1) and (2)(a)(3) of the Crimes Act 2009 alleging that the Petitioner between 1 February 2010 and 31 December 2011 at Sigatoka had carnal knowledge of the complainant, a girl below the age of 13. The Crimes Act 2009 came into effect on 1 February 2010.

[5] The evidence against the Petitioner included the admissions in his caution interview. The interview was conducted at the Sigatoka Police Station Crimes Office on 4 June 2014 commencing at 10.45am and concluding at 4.52pm. From questions and answers 66 to 89 the Petitioner admitted to one specific incident of sexual intercourse with the complainant without her consent. Then from Q and A 97 to 114 the Petitioner admitted to a further act of sexual intercourse in November 2011 with the complainant without her consent. There was an admission to a third act of sexual intercourse with the complainant on Q and A 118 to 133. There was an admission to an act of sexual intercourse in the Petitioner's charge statement dated 4 June 2014.

[6] At the *voir dire* hearing the Petitioner challenged the admissibility of those admissions on the basis that they were not voluntarily made. The Petitioner alleged physical assaults by the Police and also claimed that the admissions were made under unfair circumstances. For the reasons stated in the Ruling, the trial Judge concluded that the admissions had been made voluntarily, under circumstances that were not unfair and that the Petitioner had not been deprived of his rights.

[7] At the trial the witnesses called by the prosecution included the complainant and the complainant's mother. Police witnesses were called as to the admissions made in the caution interview. They were cross-examined as to the claims of Police violence and the unfairness of the circumstances surrounding the caution interview. The medical evidence was given by Dr Evelyn Tuivaga who had examined the complainant in September 2012. She described the findings in these terms:

> *". . . . .the vagina ____was gaping open and noted that there was no injuries, no bruises, no cuts. I couldn't see the hymen. My conclusion was consistent with penetration with a blunt object."*

Under cross-examination the doctor conceded that this condition could be caused by a blunt object other than a penis.

[8] The Petitioner gave evidence in his own defence but called no other witnesses. The Petitioner explained the nature of the assaults and the circumstances of the caution interview. He denied making the admissions in the statement. He was told to sign without the contents being read to him. He denied the incidents of rape. Under cross-examination he admitted that he had not complained about these issues prior to the trial. He stated that he did not know that he could complain because it was his first time in court.

[9] The Trial Judge delivered his summing up on 4 May 2015. The transcript at page 217 of the Record indicates that State and Defence Counsel informed the Judge that no further directions were required. The assessors subsequently returned unanimous opinions of guilty on both counts. The trial Judge agreed with the unanimous opinions and proceeded to convict the Petitioner on both counts. The Judge gave brief reasons for proceeding to convict the Petitioner. He rejected the evidence of the Petitioner and accepted the evidence of the complainant as "*forthright and consistent*."

Court of Appeal

[10] The Court of Appeal gave thorough and detailed consideration to the two grounds of appeal against conviction for which an enlargement of time had been granted. They were:

> *"1. The learned Trial Judge's direction to the assessors on prior inconsistent statements has caused a substantial miscarriage of justice in that:*
>
> *i) The direction is a misdirection as it is not inconsistencies (sic) with the police statements but that of an omission on the police statements; and*
>
> *ii) The directions, if taken in its entirety is inaccurate and inadequate relating to the weight to be attached.*
>
> *2. The learned trial Judge erred in law and in fact by inadequately directing the assessors on the alibi defence taken up by the Appellant that he was*

elsewhere at the alleged time of the offence is said to have been committed causing substantial miscarriage of justice."

[11] The Court of Appeal dismissed the appeal rejecting both grounds for which leave had been given. The first complaint related to the evidence given by the complainant that included two matters that were not in her statement to the police. The petitioner's complaint appears to be that the trial Judge had not sufficiently explained to the assessors how they should consider her evidence in the light of that inconsistency. On this ground, the Court concluded that, on the whole of the evidence, the omissions, the subject of the Petitioner's complaint, were not sufficiently significant to change the outcome of the trial nor sufficient to have affected the assessors' and the trial Judge's conclusions on the truthfulness, reliability and credibility of the complainant and of her mother. The direction to the assessors on prior inconsistent statements, even if incomplete when read in isolation, did not cause a miscarriage of justice.

On the alibi issue, it was noted that there was no alibi notice served and as a result the credibility and weight of the alibi defence was diminished. It was sufficient for the trial Judge to direct the assessors that it was not for the Petitioner to prove that he was elsewhere. The Judge reminded that assessors (and himself) that it was for the prosecution to prove guilt beyond reasonable doubt.

Petition for leave to appeal

[12] The Petitioner filed a petition seeking leave to appeal. Although filed late, the dates on which the Petitioner had signed his two petitions were within time. In keeping with the usual practice of the appellate courts in Fiji, the Petition is regarded as being timely. This is on the basis that an unrepresented and incarcerated petitioner has no control over his petition once the document has been handed to Corrections Service staff for typing and subsequent filing.

[13] To obtain leave to appeal, the Petition must convince the Court that his case (a) involves a question of general legal importance or (b) involves a substantial question of principle

affecting the administration of criminal justice, or (c) may result in a grave and substantial miscarriage of justice if leave is not granted. (Section 7(2) of the Supreme Court Act). The granting of leave is a mandatory requirement in order for this Court to consider and determine the appeal. The requirement to obtain leave pre-supposes that the Court of Appeal judgment was wrong. However, that conclusion alone will not be sufficient to attract a grant of leave. Furthermore, leave will not be granted when this Court is being asked to substitute a different view of the evidence from that taken by the Court of Appeal.

Grounds of Appeal in the Petition

[14] In his initial Petition the Petitioner's only ground was to the effect that "I desire that the dismissal of appeal be considered and determined by the Supreme Court of Fiji." In a subsequent notice filed on 15 August 2024, the Petitioner relied on 5 grounds that were headed as (1) Inconsistency, (2) Police Brutality, (3) alibi, (4) Timeline and (5) Inconsistent Judgment. The same five grounds were repeated in the Petitioner's submissions filed by the Legal Aid Commission on 20 August 2024.

Ground One – Inconsistency

[15] This ground is stated as "*inconsistency of the statement*" provided by the witness to the Police and the Court. The Petitioner has amended the basis of this ground by indicating that the issue relates to inconsistencies rather than omissions that were the issue raised in the Court of Appeal.

[16] It is of some significance that the procedure that is usually followed when a witness is alleged to have made a prior out of court statement that is inconsistent with subsequent testimony given under oath in court was not followed at the trial. Neither the complainant nor her mother were given the opportunity to read their out of court statements when the issue of prior inconsistent statements was raised under cross-examination. It is customary to give the witness an opportunity to agree or disagree that the witness had made the prior statement and that there was an inconsistency. The witness should be given an opportunity to explain the inconsistency. The complainant was 13 years old at the time

of the trial. She was 9 years old at the time the offences were committed in 2010 and then 2011. She was interviewed on 9 October 2012 which was over 18 months after the offences had occurred. She was cross-examined towards the end of April in 2015. That is a gap of about two and half years between the date of her police statement and her evidence in Court. It would have been appropriate for Counsel to have allowed the complainant an opportunity to read her statement before being questioned on any alleged inconsistency. There were some 42 questions and answers relating to an experience that, according to the complainant's evidence, was painful at the time and which had left her physically and emotionally scarred.

[17] To the extent that there are inconsistencies between the statement and her evidence, they are not significant and certainly do not go to the elements of rape under the relevant provisions of the Penal Code and the Crimes Act. In answer to question 26 in her statement, the complainant recounted that *"He was putting the boys thing inside my pattu"* (private part), he used to put it in and out of my vagina. She stated that he would do this for about 3 to 5 minutes. In response to question 35 the complainant answered "I told him not to touch my body and not to put *"boy thing into my pattu."* On the elements of rape her testimony was consistent with her prior statement to the Police. The inconsistencies do not diminish her credibility as a 13 year old recounting what had happened to her as a 9 year old.

[18] The direction on prior inconsistent statements was set out in paragraph 53:

> *"You may have observed that when some witnesses gave evidence, there were some inconsistencies between the evidence before this Court and the statement given to the police. What you should take into consideration is only the evidence given by the witness and not any other previous statement given by the witness. However you should also take into consideration the fact that such inconsistencies between the evidence before court and statement of police, can affect the credibility of the witness . . . . . It is for you to decide which witnesses you are going to accept as reliable and which are not."*

[19] The trial Judge has correctly stated that prior inconsistent statements are not evidence but may affect the credibility of the witnesses. What he did not say was that depending on the explanation for the inconsistency (if any), the weight that is attached to the evidence

of the witness may be diminished. At paragraph 25 the trial Judge identified the two inconsistencies. The first was that there was no reference to the Petitioner putting his hand over the complainant's mouth and secondly that there was no reference in the police statement to the Petitioner putting "the milky thing" on her face. The complainant's explanation was that the lady at the Police Station did not listen to the full story.

[20] In his Judgment the trial Judge has considered the evidence of the complainant and found her evidence to be forthright and consistent. It is clear that her evidence as to the elements of rape was consistent with her statement to the Police. The inconsistencies between her evidence and her statement to the police were not such as to affect her credibility. The manner in which the complainant had been interviewed by the police may have resulted in the complainant simply forgetting at the time some of the details sought by the Police.

Ground 2 Police Brutality

[21] The Petitioner claimed to have been subjected to police brutality and torture during the caution interview process and submitted that the Judge should have dismissed the caution interview as it incriminated the appellant. The problem for the Petitioner is that this was not a ground of appeal in the Court of Appeal. In the light of the detailed complaints raised in his evidence at the trial and the subsequent rejection of his evidence by the assessors and the trial Judge, it is reasonable to infer that in the Court of Appeal the Petitioner had accepted that his version of events had been rejected. There was no further material that would justify this Court substituting a different conclusion from the trial Judge at the *voir dire* stage or the trial Judge and assessors at the trial.

Ground 3 – Alibi

[22] It need only be noted that there was no alibi notice given under the Criminal Procedure Act. There was no reference to a possible alibi defence in either of his interviews. There was no material that would have required the investigating police to verify a possible alibi defence. It would not be sufficient for the Petitioner simply to claim that he was somewhere else. That is not an alibi that can be investigated or verified.

Ground 4 – Timeline

[23] This ground is connected with the issue of an alibi defence. There were inconsistencies in the caution interview that was admitted into evidence. The Petitioner at various times referred to being in one place when some of the offences occurred elsewhere and then he admitted that on other occasions he was present in the same place where other offences occurred. There is insufficient detail in the submission to enable this Court to conclude that the issue may cause a grave and substantial miscarriage of justice if it were not explored further.

Ground 5 – Inconsistent Judgment

[24] This ground is considered in the Petitioner's submissions as "*suggestive of development of ground one and inconsistencies."* The submission adds nothing further to the Petitioner's case and does not attempt to explain what exactly is the issue raised by the Petition.

CONCLUSION

[25] For all of the above reasons I would conclude that the Petitioner's petition for leave to appeal the final judgment of the Court of Appeal should be refused.

Young, J

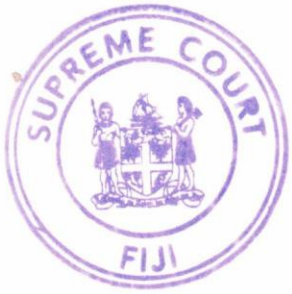
[26] I concur with the Judgment of Calanchini J.

Qetaki, J

[27] I have read in draft the judgment of Honourable Judge Calanchini J. I agree with it, the reasoning and orders.

Order:

Petition for leave to appeal conviction is refused.



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