IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0022 OF 2023
[On Appeal from the Court of Appeal No: AAU0024 of 2016]

BETWEEN : **AVITESH RAM**

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. Mr. Justice Alipate Qetaki, Judge of the Supreme Court

Counsel: Petitioner In - Person
Mr. Seruvatu, S, for the Respondent

Date of Hearing: 16th October, 2024

Date of Judgment: 29th October, 2024

JUDGMENT

Temo, AP

[1] I have read His Lordship Justice Qetaki's judgment and I agree entirely with it.

Calanchini, J

[2] I have had the advantage of reading the draft judgment of Qetaki J and agree that the Petition should be dismissed.

Qetaki, J

Introduction

[3] The petitioner had been indicted in the High Court at Suva with one count of indecent assault contrary to section 212(1) of the Crimes Act, 2009, and one count of rape contrary to section 207(1) and (2) (b) of the Crimes Act 2009. He is petitioning the Court for the grant of enlargement of time to apply for special leave to appeal against the judgment of the Court of Appeal which was delivered on 2 July 2021.

[4] The Information states, with respect to, the 1st count, that the accused, on 15th day of March 2013 at Suva in the Central Division, unlawfully and indecently assaulted a girl namely '*JAC*'; and on the 2nd count, the accused, on 15th day of March 2013 at Suva in the Central Division, penetrated the vagina of '*JAC'* with his fingers, without her consent.

[5] At the end of the summing – up, the assessors had unanimously opined that the petitioner was guilty of the 1st count and not guilty on the 2nd count. The learned trial judge agreed with the opinion of the assessors on the 1st count, and disagreed with them on the 2nd count. He convicted the petitioner on both counts as charged and sentenced him to imprisonment of 18 months for the 1st count, and 10 years and 1 month for the 2nd count, the sentences to run concurrently, with a non-parole period of 7 years.

[6] The petitioner filed a timely appeal against conviction and sentence in the Court of Appeal urging six grounds of appeal, five against conviction and one against sentence. The learned single judge had refused leave to appeal on 24 January 2017, following which, the petitioner appealed to the Full Court of Appeal, which dismissed the appeal against both conviction and sentence.

Enlargement of Time

[7] A notice of motion for enlargement of time and special leave to appeal was filed on 16th January 2023. The delay in the filing of the Petition is substantial, as approximately 1 year and 6 months has passed from the delivery of the judgment in the Court of Appeal to the day of filing of the petition. While the petitioner acknowledges the considerable delay in the filing the petition, he explained that he had been diagnosed as suffering from mental depression, and was unable to pursue his appeal after judgment of the Court of Appeal. He submits that he is a lay person and cannot formulate his grounds of appeal on his own. However, after coming to terms with himself, he sought advice from inmates who helped him formulate his grounds of appeal. He submits that the ground of appeal must be granted as it raises, a question of general legal importance; a substantial question of principle affecting the administration of criminal justice, or substantial and grave injustice may otherwise occur.

[8] In **Kumar v State**, FJSC 17, CAV001 of 2009, it was held that, in an application for enlargement of time, the appellate courts would by way of a principled approach examine five factors, as follows:

(i) the reason for the failure to file within time;

(ii) the length of the delay;

(iii) whether there is a ground of merit justifying the appellate court's consideration;

(iv) where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed? , and

(v) if time is enlarged, will the respondent be unfairly prejudiced.

The above factors may be considered as convenient yardsticks to assess the merit of the application for enlargement of time under the circumstances of this appeal. Due consideration will be given to whether the petitioner has met the test for grant of enlargement of time.

Discussion

Ground of Appeal

[9] The following ground was filed by the petitioner:

> *"That, the learned trial judge and the judges of the Court of Appeal erred in law and in facts by inadequately assessing and evaluating the complainant's evidence regarding the critical factual issues on recent complaint; discrepancies; material omissions; non-direction and misdirection regarding credibility and reliability of all summoned witnesses, causing a substantial miscarriage of justice to the petitioner."*

[10] The ground as formulated challenges the decisions of both the learned trial judge (High Court) and the Court of Appeal, but this Court is essentially concerned in this petition with the judgment of the Court of Appeal. The ground and the issues arising from it were not raised in the Court of Appeal, and is outside the scope of section 98(3)(b) of the Constitution which confers exclusive jurisdiction on the Supreme Court *"to hear and determine appeals from all final judgments of the Court of Appeal"*. This point will be revisited later in this judgment as, although the ground is new, the question of whether or not this Court can still consider the new grounds and the issues arising from it, in the exercises of its discretion on whether to grant special leave or not under section7(2) of the Supreme Court Act.

The Factual situation (In the High Court)

[11] There were three prosecution witnesses, namely, the complainant, her mother Sushil Kumar and the brother-in-law of the accused Vinay Kamal Singh. Giving evidence for the defence were the accused, his sister Kusbhu Lata and the mother Shabnam Lata. The facts as established by the learned trial judge and set out in summing–up and in his judgment are set out below.

[12] The complainant's evidence is that on 15th March 2013, the accused came home late in the night drunk. She was sleeping in the bedroom, and the accused come and touched her breasts, chest, and private part and also had poked his fingers into her vagina. She had not agreed to that and shouted. No one had come for help. At one time the accused's mother Shabnam had come and pushed the accused on to her again and had sworn at her. The following day the complainant had informed her grandmother who was residing the next door the same building and also informed her mother. The complainant's mother also gave evidence and confirmed that the complainant informed her of what the accused did to her.

[13] Although the complainant's mother was informed the following day, the unchallenged evidence was that she could not immediately attend to the complaint as she had a Domestic Violence Restraining Order (DVRO) against her on a complaint made by the complainant in this case. After getting the DVRO cancelled, she had accompanied the complainant to report the matter to the police station. The learned trial judge, found the complainant to be consistent in her evidence. He was satisfied that the complainant correctly identified the accused when he committed the sexual acts on her inside the bedroom. It had happened for about 20minutes and there had been sufficient light to identify the accused who had been living in the same house. The accused in his evidence said that the complainant was not at their home, which contradicts the agreed fact that the complainant was living in that house.

[14] The mother of the accused clearly said in her evidence that the complainant was living in her house with her, his 6 year old son Ashant and the accused. The complainant had been there for 2 weeks. It was also an agreed fact that the complainant was living in that house. The learned trial judge found that the accused lied in court when he said that the complainant was not living in that house and the accused did that to get out of the charge. The learned trial judge found that the witnesses for the accused were not truthful.

[15] The learned trial judge found the complainant was consistent with her evidence. That clearly, she was truthful when she said the accused touched her breasts, chest and private part and also poked his finger into her vagina for which she did not agree. He also found that the evidence of the accused and his witnesses were far from the truth. He held that the assessors were correct in returning a unanimous guilty verdict on the 1st count. He also found the assessors unanimous opinion of not guilty on 2nd count as perverse. He did not agree with it. He also found that the delay in complaining to the police was justified. He held that the prosecution had proven all the elements of the offences in the two counts, and had convicted the accused on both counts.

Before a single judge (Leave stage)

[16] The learned single judge (Gounder, JA) having considered the grounds of appeal, refused the appellant's leave application. On the ground based on previous inconsistent statements, it was held that trial judge's directions in paragraph 55 of the summing-up are adequate and correct. In any event, it was held that, in his judgment, the trial judge did not find the inconsistencies raised by the defence affected the credibility of the witnesses. On the sentence ground, the learned single judge held that the sentence is in fact at the lower end of the tariff for rape – see **Raj v State,** unreported CAV003.2014; 20 April 2014). He agreed with the trial judge's assessment of the aggravating factors, and found no error in the exercise of the sentencing discretion.

Full Court of Appeal

[17] The Court (per Prematilaka, ARJA) considered all the grounds against conviction, except ground 4, which was withdrawn, and concluded that none of grounds has a reasonable prospect of success. He dismissed the appeal against conviction. He also held that the ultimate sentence of 10 years and 1 month for the 2nd count is at the lower end of the tariff for juvenile rape applicable at the time of sentencing. The sentence is not harsh and excessive.

[18] On the argument that the learned judge's directions at paragraph 55 of the summing – up on how to approach previous inconsistent statements is inadequate in light of the guidelines given in cases including, **Ram v State** [2012 FJSC 12; CAV0001 of 2011(9 May 2012) , which support the proposition that, it is a paramount duty of a trial judge to direct and guide the assessors on how to act on the inconsistencies or contradictions , it was held that:

(a) Counsel had not shown what previous inconsistent statements of the prosecution witnesses the trial judge had failed to direct the assessors on;

(b) What is important is whether the inconsistency is such that it could shake the foundation of the complainant's evidence, and

(c) The counsel had not been able to substantiate the merits of the ground of appeal with reference to the evidence of the complainant. He has not pointed to any material discrepancies', inconsistencies or omissions in the complainant's evidence in his written or oral submissions which the learned judge could have directed the assessors to.

[19] On counsel for the appellant's contention that the trial judge had not given cogent reasons in overturning the assessor's opinion on the second count of rape, it was held:

> *"[48] Therefore, the trial judge having traversed all relevant issues affecting the credibility had concluded that he would not believe defence witnesses but believe the complainant and accept her to be truthful when she said that the appellant poked her fingers in her vagina. In short, in my view, the trial judge's reasons are cogent and they are founded on the weight of the evidence reflecting his views as to the credibility of witnesses for differing from the opinion of the assessors on count 02 And those reasons are capable of withstanding critical examination in the light of the whole of the evidence."*

The ground cannot succeed.

[20] On Sentence, the Court held that the sentence is not harsh and excessive as it is within the range.

Petitioner's Case

[21] The Petitioner was not legally represented at the hearing. He indicated with the assistance of an interpreter, that he relies on his written submissions filed on 16th January 2023, and the subsequent submissions filed on 12 September 2024. The first submissions is in fact the notice of motion for enlargement of time and special leave to appeal, where the petitioner had requested enlargement of time, and submitted the petition ground. The petitioner did submit in effect that the ground urged by him meets the statutory requirement for grant of special leave in section 7(2) of the Supreme Court Act.

[22] In the latter submissions, of 12 September 2024, the petitioner complained, *"I did not have fair justice at the High Court and also at Court of Appeal."* He raised other points that do not amount to submissions in support of the ground he is pursuing , issues which essentially relate to how he was told to take his oath which he objected to, the way he was treated by the police, and his distaste of the fact that the learned trial judge held he had lied, and believing in the complainant's version of the events on that fateful night. There is nothing much that were in the submissions to advance or support his ground.

[23] The petitioner's oral submissions revolve around the points he had raised in his written submissions dated 12 September 2024. I reiterate that there is nothing of substance in the submissions to support his ground of appeal. I had taken the liberty to read and consider the petitioner's submissions that was filed in the Court of Appeal also, but they are of limited value, as his grounds of appeal in that court were all dismissed, and further, the ground raised in this petition is a new ground, except for the inconsistency issue.

Analysis of Ground and Issues

[24] The respondent submits that the ground of appeal contains allegations that may conveniently be broken down into four aspects of the judgment of the Court of Appeal The ground raises new issues that were not subject of discussions or part of the judgment of the Court of Appeal. The respondent submits that the petitioner's application for special leave to appeal should be refused as the arguments raised does not fulfil the criteria set out in section 7(2) of the Supreme Court Act, especially in light of the fact that the ground is fresh ground.

[25] **First aspect:** *Inadequate Assessment of Complainant's Evidence***:** The respondent states that the petitioner alleges that the Court of Appeal erred in law and in fact in not adequately assessing and evaluating the complainant's evidence regarding several key issues, such as, discrepancies and material omissions. The respondent submits that the petitioner has failed to fully articulate how this inadequate assessment caused a substantial miscarriage of justice. It submits that the petitioner's generalised claims of inadequate assessment lack the detailed reasoning or evidence necessary to substantiate a miscarriage of justice. I agree with the respondent. Also, contrary to the allegations, the learned trial judge had summarised and analysed the complainant's evidence comprehensively in paragraphs [17] to [29] of the summing – up. This issue was not raised as a ground in the Court of Appeal, and in any event, the petitioner has not been specific in particularising, which of the evidence of the complainant that the Court of Appeal did not adequately assess, and how that meets the requirement of section 7(2) of the Supreme Court Act.

[26] **Second aspect:** *Recent Complaint***:** The respondent submits that the petitioner has not fully expanded on what specific discrepancies or omissions were overlooked by the Court of Appeal, leaving, resulted in miscarriage of justice. That this argument on this point is unsubstantiated. I am in agreement with the respondent. The Court of Appeal had adequately assessed the issue of recent complaint, in connection with ground 5

(Overturning the assessors' verdict in relation to 2nd count without giving cogent reasons), in paragraphs [47] and [48] of its judgment.

[27] **Third aspect:** *Discrepancies and Material Omissions***:** The respondent submits that discrepancies and omissions in witnesses statements are common in trials and do not necessarily amount to grounds of appeal unless they are so significant that they affect the credibility of the witnesses or the integrity of the trial. I agree with the respondent. However, the Court of appeal had adequately addressed inconsistencies, discrepancies and material omissions that occur and are relevant to the grounds before it. To illustrate, the Court of appeal stated:

> *"[26] I find that under the first and fifth ground of appeal, the counsel had highlighted the fact that the complainant had stated in evidence that the appellant poked his finger as well as fingers into her vagina. It does not really matter as far as the act of penetration is concerned whether it was done with one finger or fingers. This is not an inconsistency that could shake the foundation of the complainant's evidence."*

The appellant has not been able to substantiate the merits of this allegation with reference to the evidence of the prosecution witnesses, especially that of the complainant.

[28] **Fourth aspect:** *Non-direction and Misdirection on Credibility and Reliability***:** The respondent submits that the petitioner has not pointed to any clear instances of misdirection or non-direction, nor has he explained how such errors, if they existed resulted in miscarriage of justice. I agree with the respondent's contention. At paragraph [50] of the Court of Appeal's judgment, it was noted that the appellant's trial counsel had not sought redirection in respect of the complaints now being made on the summing- up as strongly commented upon in **Tuwai v State** (supra) and **Alfaz v State** [2018] FJCA 35 (26 August 2016) and **Alfaz v State** [2018] FJSC 17; CAV0009 of 2018 (30 August 2018). Any deliberate failure to seek redirection would disentitle the appellant even to raise them in appeal with any credibility.

[29] The respondent submits that the petitioner's arguments, while invoking significant legal principles, remain underdeveloped and unsupported by specific evidence or reasoning.

This view is valid given the above observations on the inadequacy of substance in the petitioner's case to support the ground of appeal and the issues arising from it.

[30] Section 98(4) of the Constitution provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal. In this instance, the ground of appeal was not raised in the Court of Appeal and is not from a final judgment of that Court. This Court has no jurisdiction to deal with the petition.

[31] Even if it was a final judgment of the Court of Appeal, leave has to be granted, which means that the legal issues raised have to be measured against the criteria set out in section 7(2) of the Supreme Court Act, and meet/satisfy the '*test'*, as established by legal authorities. The threshold for granting special leave by this Court is very high as set out in **Livai Mala Matalulu and Another v The Director of Public Prosecutions** [2003] FJSC 2; (17 April 2003):

> *"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 his 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."*

[32] As previously stated, the petitioner seeks to raise a new ground that was not addressed in the Court of Appeal. In a similar situation, in **Eroni Vaqewa v The State** [2016] FJSC 12; CAV0016.2015 (22 April 2016), it was stated :

> *"[28] ……..This ground was not raised in the High Court or in the Court of Appeal. In such circumstances this court would not entertain a fresh ground unless its significance upon the special leave criteria was compelling…."*

[33] It is evident therefore that the Supreme Court holds the discretionary power to entertain fresh grounds of appeal, and it is not an automatic right. A new/fresh ground will only be considered if it is compelling within the framework of the special leave criteria. The

petitioner, apart from submitting that the ground urged by him meets the requirement of section 7(2) of the Supreme Court Act, has not provided evidence or demonstrated that it is compelling, and within the framework of the statutory criteria.

[34] The question of whether new issues should be allowed to be argued in the appellate court when it was not raised in the trial court, is also relevant in this appeal. In **R v Brown** [1993] 2 SCR 918; 1993 CanLii 114 (SCC), Justice L' Heureux – Dube in his dissent said:

> *"Courts have long frowned on the practice of raising new arguments on appeal, Only those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on question of law alone are likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of new a new issue…… for the first time on appeal: first there must be sufficient evidentiary record to resolve the issue; second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result…."*

[35] The threshold for raising new issues is notably high and requires that the new argument or evidence must be so significant that it directly impacts the courts assessment of whether special leave should be granted. The Petitioner has not shown evidence or demonstrated that the new issues/arguments is so significant that it directly impact the court's assessment of whether special leave should be granted. I hold that the petitioner's ground of appeal fails to meet the criteria set under section 7(2) of the Supreme Court Act.

Conclusion

[36] I have considered the factors relevant to the grant of enlargement of time, and I hold that the application for enlargement of time is refused. The petitioner's application for special leave does not meet the statutory requirements in section 7(2) of the Supreme Court Act, nor meet the threshold set by case law. The special leave application is dismissed .I have also considered the merits of the appeal. The appeal is dismissed.

Orders of Court:

1. *Application for enlargement of time is refused.*

2. *Application for Special Leave to appeal is dismissed.*

3. *Appeal is dismissed.*

The Hon Mr Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon Mr Justice William Calanchini
JUDGE OF THE SUPREME COURT

Hon Mr Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT