

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 104 of 2018
[In the High Court at Suva Case No. HAC 42 of 2017]

BETWEEN : **TEVITA RASUAKI**

AND : **STATE**

Appellant

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **09 March 2021**

Date of Ruling : **10 March 2021**

RULING

[1] The appellant had been indicted in the High Court of Suva on one count of criminal intimidation contrary to Section 375(1) (a) (i) and (iv) of the Crimes Act 2009 and one count of rape contrary to section 207(1) & (2) (b) of the Crimes Act, 2009 committed at Kanakana Village, Tunuloa in the Northern Division on 20 April 2017.

[2] The information read as follows.

'FIRST COUNT
Statement of Offence

CRIMINAL INTIMIDATION: *Contrary to Section 375(1) (a) (i) and (iv) of the Crimes Act 2009.*

Particulars of Offence

TEVITA RASUAKI, on 20 April 2017, at Kanakana Village, Tunuloa in the Northern Division, without lawful excuse, threatened **UM** with injury to her person, with intent to cause alarm to **UM**.

SECOND COUNT ***Statement of Offence***

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

TEVITA RASUAKI, on 20 April 2017, at Kanakana Village, Tunuloa in the Northern Division, penetrated the vagina of **UM**, with his finger, without her consent.

- [3] The facts of the case had been summarized by the trial judge in the judgment as follows.

'3. The facts of the case as elicited at trial were that on the 20th April 2017, the accused approached the village house of his cousin UM. UM was at home alone looking after a toddler.

4. He was brandishing a knife and entering the house he took all of his clothes off and fondled UM's breasts. All the time holding the knife, he made her lie down and he raped her with his fingers. She was dressed only in a towel as she had been on her way to bath when he arrived. He threatened to stab her or the toddler if she shouted. UM was able to take up the child and run to where her mother was working and tell her of the incident.

5. A medical examination the following day revealed recent injury to her genitals.

- [4] The complainant's mother had testified that the complainant was crying and angry when she informed her that the appellant had touched her breast and put his fingers into her vagina. The doctor had confirmed that the aberration on the labia minora could have been caused by penetration of the vagina within 24-48 hours. The appellant had given evidence and called another witness to give evidence on his behalf. His defense had been that he was never at the complainant's house.
- [5] At the end of the summing-up on 22 August 2018 the assessors had unanimously opined that the appellant was guilty of both counts. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on the same

day, convicted the appellant on both counts and sentenced him on 23 August 2018 to 11 years and 06 months of imprisonment on the first count and 03 years of imprisonment on the second count (both to run concurrently) with a non-parole period of 10 years.

- [6] The appellant had signed a timely notice of leave to appeal on 17 September 2018 against conviction and sentence. The Legal Aid Commission had filed an amended notice of appeal for leave to appeal against conviction and sentence and written submissions on 05 November 2020. The state had tendered its written submissions on 03 December 2020.
- [7] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal is ‘**reasonable prospect of success**’ (see Caucu v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and Waqasaqa v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.
- [8] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; House v The King [1936] HCA 40; (1936) 55 CLR 499, Kim Nam Bae v The State Criminal Appeal No.AAU0015 and Chirk King Yam v The State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (i) Acted upon a wrong principle;*
- (ii) Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) Mistook the facts;*
- (iv) Failed to take into account some relevant consideration.*

[9] Grounds of appeal urged on behalf of the appellant are as follows.

Conviction

Ground 1

The Learned Trial Judge erred in law and in fact having not adequately directed the assessors on how to approach previous inconsistent statements.

Ground 2

The Learned Trial Judge erred in law and in fact by not fairly and objectively summed up the evidence of the Appellant's defense witness.

Ground 3

The verdict on the charge of criminal intimidation is unreasonable as the charged itself is defective.

Sentence

Ground 1

The Learned Trial Judge erred in principle by accounting for aggravating factor that formed part of the offending thereby enhancing the sentence.

Conviction

01st ground of appeal

[10] The appellant submits that the trial judge had not adequately directed the assessors on how to approach previous inconsistent statements at paragraph 17 of the summing-up in keeping with the guidelines given in **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012).

[11] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal sets down the law on inconsistencies as follows:

'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses

(see **R. v O'Neill** [1969] Crim. L. R. 260). *But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance* (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).

- [12] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

'[35].....Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;'

- [13] The Court of Appeal followed the above decisions in **Chand v State** [2019] FJCA 192; AAU0033.2015 (3 October 2019). It is, of course, a paramount duty of the trial judge to direct and guide the assessors on how to act on the inconsistencies or contradictions or omissions (*vide* **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017)).

- [14] Paragraphs in the summing-up relating to the appellant's complaint are as follows.

'15. When Defence Counsel cross-examined the witness it was pointed out that there were a few discrepancies between the evidence she gave in Court and the things she told the Police the day after the incident.

16. These assessors, brings into effect the law relating to previous inconsistent statements. Let me explain it to you.

17. The law says that whatever a witness says in Court is the definitive evidence. In some cases you might think that the differences are unimportant and you must decide whether the previous statement is in fact inconsistent. For example when you are deciding on the question of whether Te raped Usenia or not, does it matter whether the little child was a boy or a girl? Does it matter how old the child is? Does it matter whether he threatened to stab

her or stab the baby? In either case it is criminal intimidation. You might think that some differences are important. If so, while accepting the evidence in Court as the proper evidence you might think that the very different version given to Police before would make the evidence of the witness unreliable and you might not give it much weight. It is all a matter for you.'

[15] It appears from the summing-up that there had been a few discrepancies between the complainant's evidence and her police statement. They appear to relate to whether her child was a boy or a girl, what the child's age was, whether the appellant threatened to stab her, the child etc. It is obvious that these discrepancies are on peripheral matters and they do not go to the root of the matter and shake the basic version of the complainant and therefore cannot be annexed with undue importance. **Ram** directions would be strictly applicable when the inconsistency in evidence given under oath compared with a previous statement also given on oath directly affects the offender. The conflicts should be between a previous sworn statement and current sworn evidence.

[16] In the instant case the few discrepancies found in the complainant's evidence do not seem to fall into the type of inconsistencies or conflicts discussed in **Ram**. Therefore, no reasonable assessors would have disbelieved the complainant's evidence on the basis of those discrepancies.

[17] Therefore, there is no reasonable prospect of success in appeal for this ground of appeal.

02nd ground of appeal

[18] The appellant joins issue with the trial judge's statement '*you might think that his evidence was not very helpful*' regarding the evidence of the appellants' witness. To put that statement into context one has to consider both paragraphs 27 and 28 of the summing-up.

'27. The accused called as his witness Jamesa Tuvu. He told us that the accused came to the village that day to look for a horse. He came for breakfast and then went out looking. He came back and said he could not find the horse he wanted and asked the witness to go with him to look again. They went together but then the bus came and the accused took the bus home.'

28. Well ladies and Sir, you might think that his evidence is not very helpful. First, there was a period that the accused was away and that he cannot account for. Secondly, the accused said he was with Paula that day but Jamesa said that the accused was alone.

[19] From the above paragraphs it is clear that Jamesa Tuvu's evidence in any way does not rule out the appellant having been at the complainant's house at some point of time on that day although the purpose of the appellant calling him as a witness was to buttress his position that he never was at her house. In that context I do not see anything wrong in the trial judge telling the assessors that '*you might think that his evidence was not very helpful*'. It is appropriate for a trial judge to put to the assessors clearly and defects in the prosecution or defense cases as long as it is done in a way that is fair, objective and balanced (vide Tamaibeka v State [1999] FJCA 1; AAU0015u.97s (8 January 1999). I do not think the trial judge in this instance has exceeded the boundaries set in Tamaibeka. Nor do I think that the trial judge had usurped the function of the assessors (vide Base v State [2015] FJCA 21; AAU0067 of 2011 (27 February 2015).

[20] Therefore, there is no reasonable prospect of success in appeal for this ground of appeal.

03rd ground of appeal

[21] The appellant argues that the evidence led in the case does not establish the charge under criminal intimidation in that it had been framed under section 375(1)(a)(i) and (iv) of the Crimes Act, 2009 where particulars allege that the appellant had threatened the complainant with injury to her person with intent to cause alarm to her. The contention of the appellant is that the evidence as summarized at paragraph 14 of the summing-up shows that the appellant had allegedly threatened to harm the child if the complainant were to shout and therefore charge should have mentioned section 375(1)(a)(iii) and (iv).

[22] However, according to paragraph 4 of the judgment the appellant had threatened to stab the complainant or the toddler if she shouted. Therefore, the appellant had directed the threat not only against the child but also against the complainant as well. Thus, the charge as framed could be sustained by the evidence.

[23] In any event, given the appellant's evidence that he never visited the complainant's house nor did he threaten to harm the complainant or the child, it is clear he had not been misled in his defense at all by the mention of section 375(1)(a)(i) and (iv) .

[24] In **Vakatalai v State** [2017] FJHC 228; HAA035.2016 (17 March 2017) it was held

'[6] It has been said in many cases that that while the particulars of offence should be reasonably informative, it is not necessary slavishly to follow the section in the Act that creates the offence (Shekar v State [2005] FJCA 18; AAU0056.2004 (15 July 2005); Mudaliar v State [2007] FJCA 16; AAU0032.2006 (23 March 2007)). Even if the particulars lack an essential element of the offence, the charge may be defective but not bad. In such a case, the question is whether the accused was prejudiced by the defect (McVitie (1960) 44 Cr App R 201; Skipper v R [1979] FJCA 6; Tavurunaqiwa v State (2009) FJHC 198; HAA0221.2009 (10 September 2009)).'

[25] I think the principles relating to an allegation of a defective charge set out in **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) by the Supreme Court as to how to assess the weight of it by the appellate court, could be safely applied to the appellant's complaint as well.

*'[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.'*

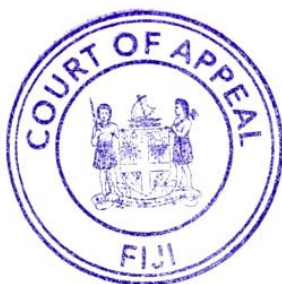
[26] Therefore, there is no reasonable prospect of success in appeal for this ground of appeal.


Sentence

- [27] The appellant argues that the trial judge had wrongly considered at paragraph 10 of the sentencing order the use of the knife in intimidating the complainant as an aggravating factor when there was already a separate charge of intimidation. It appears from paragraphs 9 and 10 that this is just one of 06 factors considered by the trial judge as aggravating features. It should also be remembered that the offence of criminal intimidation as framed had not involved the use of a knife. In any event for criminal intimidation to take place the use of a weapon is not necessary. Therefore, consideration of the knife in this instance is justified as the trial judge was considering aggravating factors in the case in relation to both charges.
- [28] In any event, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).
- [29] The learned trial judge had identified the starting point of the sentence in adult rape as 07 years as established in **Kasim v State** [1994] FJCA 25; AAU0021j of 1993s (27 May 1994). Supreme Court in **Rokolaba v State** [2018] FJSC 12; CAV0011.2017 (26 April 2018) had taken the tariff for adult rape to be between 07 and 15 years of imprisonment following **State v. Marawa** [2004] FJHC 338.
- [30] The ultimate sentence imposed on the appellant is 11 years and 06 months and within the tariff. Given the facts of the case it is neither harsh nor excessive.
- [31] No sentencing error has been demonstrated by the appellant and therefore, there is no reasonable prospect of success in appeal for this ground of appeal.

Order

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL