

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0006.2018
(On Appeal From Court of Appeal No: AAU 086.2013)

BETWEEN : **TUIMATEO TUKAINIU**

Petitioner

AND : **THE STATE**

Respondent

Coram : Hon. Chief Justice, Mr. Anthony Gates, President of the Supreme Court
Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Mr. Justice Quentin Loh, Judge of the Supreme Court

Counsel : Petitioner in Person
Ms. J. Prasad for the Respondent

Date of Hearing: 15th August, 2018

Date of Judgment: 30th August, 2018

JUDGMENT

Gates, P

1. In the way this rape case had been litigated, the issue of recklessness never arose. A conviction was entered because the prosecution had proved its case on lack of consent, and had proved an intentional act on the part of the Petitioner against a woman whom the

Petitioner knew was not consenting. His case and evidence were far apart from that of the complainant. Accordingly, the directions were appropriate for the litigation issue and the facts of the case.

2. The Petitioner argued before us with fluency and articulation. His skills appeared to be adequate for the purpose of trial though he may have lacked wisdom. He dismissed his counsel before us also. That was his choice. The trial did not miscarry for lack of a defence counsel.
3. I agree with the judgment of Marsoof J that this petition must be dismissed in its entirety and for the reasons His Lordship provides.

Marsoof, J

4. When this application was taken up for hearing on 15th August 2018, Mr. M. Fesaitu, who was assigned to represent the Petitioner by the Legal Aid Commission, moved for permission to withdraw from the case on the ground that the Petitioner did not wish him to appear, and this fact being affirmed by the Petitioner who was present in Court, leave was granted for Mr. Fesaitu to withdraw from the proceedings, and the Petitioner made submissions in support of his application before Court.
5. The Petitioner brought to the notice of Court that he had by his notice of appeal dated 18th September 2017 (lodged in the Registry of this Court the following day) sought to appeal against the judgment of the Court of Appeal dated 14th September 2017 on the basis that he is “not satisfied” with the same and it also “seems biased”. No specific grounds other than the above for seeking leave of Court to appeal against the said judgment of the Court of Appeal were set out in the said notice.
6. However, in his subsequent notice lodged in the Registry of this Court on 24th April 2018, two specific grounds of appeal were included, which are also reiterated in the Written Submissions of the Petitioner lodged on 4th July 2018. These grounds are as follows:-

Ground 1

The learned trial judge erred in law and in fact when he did not properly direct the assessors on the essential elements of the charge of rape contrary to section 207(1) and (2)(a) of the Crimes Decree (now Act) of 2009 resulting in a substantial miscarriage of justice.

Ground 2

The Petitioner was prejudiced due to lack of legal representation resulting in a substantial miscarriage of justice.

7. These were the very same grounds taken up in and considered by the Court of Appeal in its impugned judgment.
8. Before considering these grounds in detail, it may be useful to set out the material facts of the case.

Material facts

9. What unfolded on 16th March 2012 at Jittu Estate within the Raiwaqa Police Division in Suva, Fiji was the central focus of the trial against the Petitioner on one count of rape contrary to section 207(1) and 207(2)(a) of the Crimes Act No. 44 of 2009.
10. The complainant was a 19 year old girl resident in Wailoku. According to her testimony at the trial, she had walked as she usually does, from Wailoku to Jittu for about 2 hours at mid-day in order to meet her boy-friend who is currently her husband.
11. When she got to Jittu and was on the way to her boyfriend's house, at a place nearby, the Petitioner, who was 42 years old at the time, had called her and she had felt obliged to walk towards him since she "knew his face" and him as a friend of her boyfriend.
12. The Petitioner told her that her boy-friend was not at home, and he would go and look for him, while she sat on the Petitioner's door step. The Petitioner returned and said he did not find her boy-friend, and what transpired thereafter is best explained in the complainant's own words in the course of her testimony at the trial in the High Court of Fiji at Suva:

"He [the Petitioner] dragged me into the house and *closed the door*. He told me he was an ex-prisoner. He tried to rape me. He made me lie down, took off my T-Shirt, kissed my breast, and tried 3 times to take off my pants. He managed to take them off on the third time. He stood up and took off his pants. His penis was erect. He forcefully inserted his penis into my vagina. *I was weak and did not do anything and he was threatening me. Told me he was an ex-prisoner. Can't remember much because I was weak. He told me not to shout.*"(emphasis added)

13. According to the complainant, the Petitioner had sexual intercourse with her for about 20 to 25 minutes. She stated in evidence that the sexual intercourse had taken place in the

sitting room of the Petitioner's house. Again, in the words of the complainant, "I was lying on floor and he on top of me". The complainant further stated in her evidence that-

"I stood up, got dressed and went to boy friend's house. I wasn't happy of what he did. At boy-friend's house I was crying and told him about what had happened."

14. Apart from the complainant, her boy-friend, who had subsequently married her, also gave evidence at the trial. He recalled the complainant coming to his house crying and told him what had happened. "She was afraid and scared" he stated in his testimony. Answering questions put to him in cross-examination, he said that "I saw in her face that she [was] afraid, scared and weak." After hearing her story, he had gone to the house of the Petitioner, and found it locked. He thereafter went with the complainant to the Raiwaqa Police Station.
15. Police officer, Pranil Chand, who caution interviewed the Petitioner and through whom the caution interview was marked in evidence, officer Joape Qio, who conducted investigations, and Dr. Boniface Dumutatau, who had examined the complainant on 16th March 2012 and provided a medical report, which too was marked in evidence, were the other witnesses for the prosecution at the trial.
16. It is common ground that the Petitioner had sexual intercourse with the complainant, but the Petitioner testified at the trial that he did so with the consent of the complainant. His evidence was that he was a Security Officer earning Fiji \$ 130 per week. He stayed alone in Jittu. He stated as follows in the course of his testimony at the trial:-

"At lunch time on 16th March I went to town. Hour for lunch and I lay down and slept. Woke up and felt someone had entered my house. When I looked, girl standing. Never saw her before. Told her to come in. She sat beside me and asked her questions and she didn't say she was my friend's girl-friend. She said she stayed as a neighbour."

17. In the course of his testimony, the Petitioner stated that he had rented the house for one year, and no one passes that way as they are scared of his landlord. He stated further that-

"It is totally away from boy-friend's house. *I did not tell her that I am an ex-convict.* I lay on floor, small room. I wanted to touch her. So, *I fixed her because I didn't trust her.* She said she enjoyed. Said she liked me using mouth. I had sex until her. We were kissing each other. Sex lasted ½ hour."*(emphasis added)*

18. The Petitioner further stated in his evidence that the complainant enjoyed having sex with him, and he showed her where the food was. He added-

“I told her how to use bathroom. I said *don't open door*. She said she wanted to stay. I found out she was friend's girl-friend”(emphasis added)

19. At the trial, where the Petitioner chose not to have assistance of Counsel, the Petitioner's defence simply was that the complainant had consented to have sexual intercourse with him.

20. After the addresses, the learned trial judge, summed up, and in the course of the summing up directed the assessors that rape required proof of sexual intercourse without the consent of the complainant.

21. The assessors returned a unanimous verdict of guilty, with which the learned trial judge agreed, and sentenced the Petitioner to 9 year's imprisonment with a non-parole period of 7 years.

22. By the Ruling of the Single Judge of the Court of Appeal dated 5th December 2014, the Petitioner was granted leave to appeal on the very same grounds relied upon by him for seeking leave to appeal to this Court (which are set out in paragraph 6 of this Judgment), and the Court of Appeal, after hearing submissions of learned Counsel for the Petitioner and the State, by its impugned judgment dated 14th September 2017, affirmed the conviction and dismissed the appeal of the Petitioner.

Invoking the Appellate Jurisdiction of the Supreme Court

23. The exclusive jurisdiction of the Supreme Court of Fiji to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji. Section 98(4) of the said 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.

24. It is to be noted at the outset that the Petitioner has failed to comply with the applicable provisions of the Constitution of the Republic of Fiji and the Supreme Court Rules 2016 in making his application to this Court.

25. The Petitioner has not formally sought the leave of this Court to pursue his appeal against the impugned judgment of the Court of Appeal in his notice of appeal dated 18th September 2017 or his subsequent notice lodged in the Registry of this Court on 24th

April 2018, nor has his application to this Court been made in the manner prescribed in Rule 4 of the said Supreme Court Rules by way of Petition supported by affidavit.

26. The Petitioner has filed his Written Submissions dated 4th July 2018, and even in these submissions, he has not moved for leave to appeal, which omission he has sought to rectify by his Written Submissions dated 8th July 2018 lodged in the Registry of this Court on 12th July 2018.
27. Furthermore, it is noteworthy that the Petitioner's notice of appeal dated 18th September 2017 did not set out any specific grounds of appeal as contemplated by Rule 4, except for the averment that the Petitioner is "not satisfied" with the impugned judgment of the Court of Appeal and it also "seems biased".
28. The subsequent notice of appeal lodged in the Registry of this Court on 24th April 2018 which raised the two grounds of appeal referred to in paragraph 6 of this judgment is belated and outside the time limit of 42 days specified in Rule 5 of the Supreme Court Rules, as pointed out by the learned Counsel for the Respondent in paragraph 17 of its Written Submissions dated 23rd July 2018.
29. The Petitioner has not formally sought enlargement of time to pursue his belated application for leave to appeal.
30. However, since the Petitioner is an incarcerated prisoner and does not appear to have had the assistance of Counsel in the matter of presenting his application for leave to appeal to this Court despite being represented by Counsel in the Court of Appeal, and for the additional reason that the grounds urged by the Petitioner are the same as those relied upon by him in the Court of Appeal, I am inclined to the view that the application of the Petitioner may be entertained as one seeking leave to appeal, and dealt with accordingly.
31. Before looking at the grounds urged by the Petitioner for being permitted leave to pursue his appeal, it may be useful to briefly summarise the material facts of this case insofar as it relates to the grounds urged.

Criteria to be satisfied by a Petitioner seeking leave to appeal in a criminal case

32. While the Supreme Court has been vested with an exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal by section 98(3)(b) of the Constitution of the Republic of Fiji, section 98(4) of the Constitution provides no appeal may brought to this Court from such a judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

33. The circumstances under which this Court is permitted to grant leave to appeal to a petitioner in a criminal petition are set out in section 7(2) of the Supreme Court Act 1998 which provides that:

“In relation to a criminal matter the Supreme Court must not grant leave to appeal 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) substantial and grave injustice may otherwise occur.”

34. The stringency of the said criteria is amply illustrated in the following *dictum* of Lord Sumner in *Ibrahim v Rex* [1914] A.C. 599 at page 614:-

“Leave to appeal is not granted “except where some clear departure from the requirements of justice” exists: *Riel v. Reg* (1885) 10 App. Case. 675; nor unless by “a disregard of the forms of legal process”, or by some “violation of the principles of natural justice or otherwise, substantial and grave injustice has been done”: *In re Abraham Mallory Dittet* (1887) 12 App. Case. 459.”

35. The aforesaid criteria for granting leave under section 7(2) have been the subject of frequent comment by this Court over many years. In *Katonivualiku v The State* (CAV 1 of 1999; 17 April 2003) the Court observed that:

“It is plain from this provision that the Supreme Court *is not a Court of Criminal Appeal or general review* nor is there an appeal to this Court as a matter of right and whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, *the Court is necessarily confined within the legal parameters set out above*, to an appeal against the judgment of the Court of Appeal.....”(emphasis added)

36. In *Livia Lila Matalulu and Anor v The Director of Public Prosecutions*, [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003), their Lordships expressed the role of the Supreme Court of Fiji in special leave to appeal matters in the following words:-

“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 this 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.*” (emphasis added)

37. The above quoted passage was cited with approval by this Court recently in *Sharma v State* [2017] FJSC 5; CAV0031.2016 (20 April 2017) wherein at paragraph 15 of its judgment this Court observed as follows:-

“Thus, it is clear that the Supreme Court, in exercising its powers vested under section 7 (2) of the Supreme Court Act, is *not required to act as a second court of criminal appeal*, but will only consider as to whether the question of law raised is one of general legal importance or a substantial question of principle affecting the administration of criminal justice is involved or whether substantial and grave injustice may occur in the event leave is not granted.” (emphasis added)

38. Bearing these principles in mind, I shall proceed to consider the two grounds relied upon by the Petitioner in this case for seeking leave to appeal in some depth.

Ground 1: Failure to direct the assessors on the essential elements of Rape

39. The first ground urged by the Petitioner for seeking leave to appeal is that the learned trial judge erred in law and in fact when he did not properly direct the assessors on the essential elements of the charge of rape contrary to section 207(1) and (2)(a) of the Crimes Act of 2009, resulting in a substantial miscarriage of justice.
40. The main gravamen of the Petitioner’s submission before this Court as adverted to in paragraph 11.4 of his Written Submissions, is that the Court of Appeal, which had properly analysed the essential elements of the offence of rape and having concluded that the fault or mental element of rape (*mens rea*) may consist of intention, knowledge or recklessness with respect to which the learned trial judge had omitted to properly direct the assessors, failed to quash the conviction or at least order a retrial.
41. This submission must be examined in the context of the material facts relating to the case summarised in paragraphs 9 to 18 of this judgment and the summing up of the learned trial judge.
42. In the course of his summing up, the learned trial judge adverted to the testimony of the complainant in paragraph [11] thereof and that of her husband who was her boy-friend at the time of the incident on 16th March 2012 in paragraph [12] of the said summing up.

The material facts set out in the testimony of the complainant and her husband have been summarised in paragraphs 12 to 16 of this judgment.

43. The learned trial judge then went on to deal with the Petitioner's caution interview in paragraph [13] of the summing up in the following words:-

"The Police Officer from Raiwaqa told us about the interview of Tui after his arrest. The record of interview was produced and you read it along with the officer. Now what the accused says in his interview is all a matter for you to consider in the normal way. You understand that is a complete denial of the offence and *in the interview Tui says that he did have sex with the complainant* [name of the complainant deleted for reasons of privacy] *but it was all with her consent and enjoyment.* You will give the evidence in the interview whatever weight you wish." (*emphasis added*)

44. It is necessary for the purposes of this application to examine how the learned trial judge had directed the assessors in the instant case on the essential elements of the offence of rape. Before doing so it is necessary to add that the Petitioner, who did not have the assistance of Counsel, had not raised any non-direction or misdirection when the learned trial judge called for the same at the conclusion of his summing up, nor had the Counsel for the Respondent availed of the opportunity to do so.
45. It is evident that the learned trial judge had adequately directed the assessors on the physical elements (*actus reus*) of the offence of rape as defined in section 207(1) and (2)(a) in paragraph 8 and 9 of his summing up in the following words:-

"8. In our law, rape is committed when someone invades the body of another without that other's consent, and for the purpose of this case rape is normal penile sexual intercourse without consent. *Consent must have been freely given and not given in fear of authority or by threat.*

9. In this case, it is not in dispute that there was an act of sexual intercourse in the afternoon of 16th March 2012. What is in dispute is the issue of consent. If you believe the complainant [the name of the complainant has been removed for reasons of privacy] that the Accused pulled her into his house and raped her, then you will find him guilty of rape. The accused however says that the sex was by mutual agreement and that the complainant enjoyed it and agreed to it all along. It is a matter for you." (*emphasis added*)

46. As outlined in section 13 of the Crimes Act, all offences consists of physical elements and fault (or mental) elements, unless the law that creates the offence provides that there is no fault element for one or more physical elements of the offence or that different fault elements apply for different physical elements.

47. Rape is not an offence that attracts strict or absolute liability as contemplated by sections 24 or 25 of the Crimes Act, and hence section 23 of the Act, which is quoted below is applicable:-

“(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, *intention* is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, *recklessness* is the fault element for that physical element.”(*emphasis added*)

48. Section 207 of the Crimes Decree deals with the offence of rape in the following manner:-

“(1) Any person who rapes another person commits an indictable offence.

Penalty — Imprisonment for life.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person’s consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or

(c) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.

(3) for this section, a child under the age of 13 years is incapable of giving consent.”

49. The Court of Appeal has analysed the applicable provisions of the Crimes Act relating to the fault or mental element (*mens rea*) of the offence of rape and has observed as follows in paragraphs [31], [32] and [34] of its impugned judgment –

“[31] Therefore, since section 207 (2) (a) (i.e. the law creating the offence of rape) does not specify a fault element for the physical element i.e. the act of penetration without the victim’s consent (amounting to a circumstance), section 23(2) would become applicable and recklessness becomes the fault element for the physical element of rape. This is the same with section 207(2)(b) and 207(2)(c) as well, though not applicable in this case.

[32] Section 14 states *inter alia* that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) recklessness on the part of the accused as defined in section 21 (1).

[33].....

[34] If *recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element* [vide section 21(4)]. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. *The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape.*”(emphasis added)

50. Though the fault or mental element (*mens rea*) of rape was never in issue in the High Court, the Court of Appeal found that the learned trial judge had omitted to address the fault element of rape in the course of his summing up and had failed to draw the attention of the assessors to the burden on the prosecution to establish that the Petitioner was in the least reckless in regard to the consent of the complainant.

51. It is evident from paragraph [55] of the impugned judgment of the Court of Appeal that having decided to hold in favour of the Petitioner on the first ground of appeal taken up by the Petitioner in the Court of Appeal, which is identical with Ground 1 urged by him

before this Court, the Court of Appeal went on to dismiss the Petitioner's appeal in terms of the proviso to section 23(1) of the Court of Appeal Act, Cap. 12, on the basis that "no substantial miscarriage of justice has occurred as a result of the omission."

52. The Petitioner has submitted that the only dispute in this case in the lower courts as well as before the Supreme Court related to the element of consent. He contended that the learned trial judge had explained the meaning of rape but failed to outline in his summing up each element of rape, and in particular, the fault element, that the prosecution had to prove beyond reasonable doubt. He submitted that in the circumstances, the Court of Appeal erred in refusing to grant him relief by way of acquittal or at least an order for re-trial.
53. Responding to these submissions, learned Counsel for the Respondent has argued that in all the circumstances of this case, the Court of Appeal had properly acted in terms of the proviso to section 23 of the Court of Appeal Act, and was justified in dismissing this ground of appeal.
54. In view of the contention of the Petitioner that the Court of Appeal had misapplied the proviso to Section 23 (1) of the Court of Appeal Act, it is necessary to look at that provision as well at the reasoning of the Court of Appeal in deciding as it has, that despite the non-direction and its finding that this ground of appeal must be allowed, whether it had acted properly in terms of the proviso to section 23 of the Court of Appeal Act.
55. Section 23 of the Court of Appeal Act, Cap. 12, provides as follows:-

"The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.
(emphasis added)

56. This was a simple case with a very short trial that turns on the question of consent, and the prosecution case was that the complainant did not consent to sexual intercourse with the Petitioner, and the Petitioner's case is that he had her consent.

57. I am satisfied that in this case there was ample cogent evidence before the High Court and the Court of Appeal that clearly points to the Petitioner's guilt beyond a semblance of doubt.
58. The testimony of the complainant has been adverted to in paragraphs 10 to 13 of this judgment, and according to her evidence she had been forced into the Petitioner's room at the end of what must have been a tiring 2 hour walk from Wailoku to Jittu and subjected to intimidation by the Petitioner who had raped her. According to the testimony of her husband, who was at the time of the incident, her boy-friend, when she finally got to his house, he saw her crying and in a terrified state.
59. According to the Petitioner's testimony at the trial which has been referred to in paragraphs 16, 17 and 18 of this judgment, after returning from the town to his home, the Petitioner lay down and slept, and woke up when he felt someone had entered his house, and it was the complainant standing at his door. He had never seen her before. He asked her to come in, and she sat beside him and answered his questions. He wanted to touch her, *so he fixed her because he didn't trust her.*
60. In the course of his caution interview as well, the Petitioner had used the expression that he "*started to fix her*" when answering question 43, and his answers that followed to questions 44 to 51 are quoted below as they are most revealing:

"Q 44 What happened after that?

A I asked her if we could have sex.

Q45 What did she say?

A She said that she was afraid that the other tenants would hear us.

Q46 What did you do?

A I started to persuade her.

Q47 What did you do to persuade her?

A I made some conversation to persuade her.

Q48 What happened after that?

A My landlord called me from outside.

Q49 What happened when the landlord called you?

A The girl quickly jumped onto my bed.

Q50 Why did the landlord call you?

A He was just walking by and called my name as a greeting.

Q51 What happened after that?

A *The girl told me to close the door* and put down the curtains because somebody might see her.

Q52 What did you do after that?

A *I closed the door* and sat down beside her on the floor.

Q53 Where was she?

A She was lying on my bed.

Q54 What happened after that?

A I started talk to her and touched her.

Q55 Where did you touch?

A I touched her breast.

(emphasis added)

61. Although in his answer to questions 51 and 52 the Petitioner has stated that he *closed the door at the request of the complainant*, it is significant that in the entirety of his testimony as well as in the course of his cross examination of the complainant and the other witnesses including the police officer who had investigated at the scene of the crime, the Petitioner had not provided any information as to *whether he had closed the door* before he went to sleep, and if it was closed, how the complainant came to where he was sleeping.
62. Despite this omission, in his Written submissions dated 8th July 2018 and lodged in the Registry of this Court on 12th July 2018, under the heading “8.0 Clarification of Facts and the Circumstances Surrounding it”, the Petitioner has sought to clarify that the Petitioner’s flat was in the middle of two other flats, all of which were occupied and “*their doors were all open during this alleged incident* and the Landlord and his family were also there.” It is trite law that none can supplement evidence led in court through written submissions.
63. Prematilaka JA, with whom Gamalath JA and Temo JA concurred, has at paragraph 46 of the impugned judgment of the Court of Appeal, concluded that the Petitioner “ought

to have been aware of the risk he was taking with the victim *who according to him was a stranger.*” He has stated in paragraph 51 of his judgment that-

“Analysing the evidence of the prosecution carefully, I find that the victim’s testimony has stood the test of probability, consistency, lack of contradictions, promptness and been enhanced by the corroboration in the form of her subsequent demeanour, recent complaint and the observations of her boyfriend. Her testimony had remained unshaken and emerged unscathed. To me, the victim comes across as a very credible witness. I would not expect to see injuries in her consistent with and corroborative of an act of forcible sexual intercourse as she had admittedly not resisted out of fear coming from a self-proclaimed ex-prisoner. Law does not require the woman to have resisted physically [see *Olugboja* [1982] QB 320 & (1981) 73 Cr App Rep 344]. *Submission without physical resistance by the victim to an act of the accused shall not alone constitute consent* (vide section 206 (1) of the Crimes Act, 2009).”(emphasis added)

64. In the circumstances, I do not see any justification for granting leave to appeal on the basis of Ground 1 advanced by him in support of his present application before this Court. As this Court observed recently in paragraph 18 of its judgment in *Sharma v State* [2017] FJSC 5; CAV0031.2016 (20 April 2017)-

“It is to be observed that the injustice that is said to have occurred must *not only be one that is substantial but also one that is grave.* As such, even if the party succeeds in establishing that some injustice had been caused, that by itself may not be sufficient to obtain relief unless the party is capable of establishing that the injustice referred to is one that meets the threshold laid down in section 7 (2) paragraph (c) of the Supreme Court Act.”

65. The Petitioner has failed to satisfy the threshold criteria required to obtain leave of this Court to pursue his appeal on the basis of Ground 1, and his application for leave to appeal insofar as it relates to this ground is dismissed.

Ground 2 - Lack of Legal Representation

66. The next matter for consideration is Ground 2 raised by the Petitioner, which was that he was prejudiced due to lack of legal representation resulting in a substantial miscarriage of justice.

67. The same ground was urged before the Court of Appeal albeit as Ground 3, which the Court of Appeal has dealt with in paragraphs 59 to 61 of its well considered judgment in the following manner:-

“[59] The Appellant had been present for the first time in the High Court on 23 March 2012. He had informed court on 20 April 2012 that he would retain a private lawyer and the court had advised him to do it as soon as possible and warned that delay in getting a lawyer could not be an excuse to delay the trial. As the Appellant had not retained a lawyer the court had asked him to apply for legal aid on 18 May 2012. On 16 July 2012 the court proceedings read as follows.

“Court - Apply to Legal Aid Commission?

Accused – I have applied but no response. I want to appear in person. Legal Aid Commission very late with result. Been 2 months now and I want to make plea today.”

[60] After a few more call days the trial judge had explained to the Appellant the legal process of the trial on 28.03.2013. The trial had finally commenced on 02 April 2013. Thus, it is clear that the trial had commenced more than a year after the Appellant’s first appearance and he had not retained a lawyer of his choice. Neither had he obtained legal aid. In the meantime he had specifically indicated that he would appear in person.

[61] I have perused carefully the Appellant’s cross-examination of the victim and I would say that it had been very thorough and complete in the sense that *he had unequivocally put to the witness his position that he had engaged in sexual intercourse with her consent though she had vehemently denied it*. The trial judge had put his case to the victim at the end of the cross-examination and the victim had completely denied it. He had given evidence also on the same lines consistent with his cross-examination of the victim and his caution interview. I cannot see what more could have been done on behalf of the Appellant even if he had been represented by a lawyer. No miscarriage of justice had ensued by lack of legal representation on behalf of the Appellant.”(*emphasis added*)

68. It is manifest that, as the Court of Appeal has observed, the Petitioner had ample opportunity to seek the assistance of the Legal Aid Commission or private Counsel during his trial before the Fiji High Court in Suva, but he chose to appear on his own. In the Court of Appeal, the Petitioner was represented by Counsel. In the circumstances, Ground 2 cannot be maintained.

Conclusions

69. Both grounds urged by the Petitioner for seeking leave to appeal were against his conviction, and no ground was urged against his sentence.
70. In the circumstances, for the reasons set out above, I am of the opinion that the Petitioner has failed to satisfy the threshold criteria set out in section 7(2) of the Court of Appeal for the grant of leave to appeal, and would refuse his application for leave on the basis of this ground.
71. In the result, the Petitioner's application for leave to appeal is dismissed, and his conviction and sentence will stand.

Loh, J

72. I have read the judgment of Marsoof, J. in draft. I concur with his judgment and the proposed orders of Court and have nothing to add.

Orders of Court:

- (1) Application for leave to appeal is refused and the application of the Petitioner is dismissed.*
- (2) The Petitioner's conviction and sentence will stand.*

.....
Hon. Chief Justice, Mr. Anthony Gates
President of the Supreme Court

.....
Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court



A handwritten signature in blue ink, which appears to read "Quentin Loh", is written above a dotted line.

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Hon. Mr. Justice Quentin Loh
Judge of the Supreme Court

Solicitors:

Petitioner in Person.

Office of the Director of Public Prosecutions for the Respondent.