

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL AAU 88 of 2010**  
**(High Court HAC 32 & 33 of 2010)**

**BETWEEN** : 1. **TEVITA DRAUNIDALO**  
2. **LAISENIA SAISAI**

***Appellants***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Chandra RJA**

**Counsel** : **Mr A. Vakaloloma for the Appellants**  
**Ms M. Fong for the Respondent**

**Date of Hearing** : **18 June 2013**

**Date of Ruling** : **5 August 2013**

**RULING**

1. The 1<sup>st</sup> Appellant was charged with One Count of Rape contrary to section 207(1)(3) of the Crimes Decree No.44 of 2009 and the 2<sup>nd</sup> Appellant was charged with two counts of rape contrary to section 207(1)(3) of the Crimes Decree No.44 of 2009.
2. The Appellants pleaded guilty before the Magistrate's Court of Labasa and the Magistrate transferred the case to the High Court for sentencing.
3. Before the High Court a fresh plea was taken and the Appellants pleaded guilty to the charges and the 1<sup>st</sup> Appellant was sentenced to 10 years imprisonment and the 2<sup>nd</sup> Appellant was sentenced to 11 years imprisonment.

4. The Appellants have sought leave to appeal against their conviction and sentence on the following grounds:
  - (a) That the guilty plea was unequivocal because of the Legal Aid Commission Lawyer's advice that they need to plead guilty and receive 2-3years sentence from the court or face the maximum sentence;
  - (b) That the girl victim they are alleged to have raped had been previously involved in random sexual intercourse from an early age and before she approached them she was casually involved in sexual activities and therefore the trial Magistrate/Judge was wrong in law when they were convicted on their own plea of guilty and ordering severe sentences.
  - (c) That from the victim's physical feature they had wrongly assumed that she was of the age of consent and the Magistrate/Judge was wrong in law when he failed to judicially investigate the assumption they had made as it was only human error.
  - (d) That the summary of facts presented in court did not contain evidence in support of the offence charged;
  - (e) That there has been a great miscarriage of justice that has been occasioned.
  - (f) That the sentence ordered by the High Court is too harsh.
  
5. The Appellants were not represented when they appeared before the Magistrate's Court and have stated that they were advised by a Legal Aid Commission's Lawyer to plead guilty. They were however not sentenced by the Magistrate and were referred to the High Court. In the High Court they were represented and a fresh plea had been taken and they had pleaded guilty and admitted the facts as presented by the prosecution.

6. In the above circumstances their ground of appeal that their plea of guilt was unequivocal is not of much substance as they were represented by Counsel in the High Court who would have advised them. The first ground of appeal has no merit.
7. The second ground of appeal is on the basis that the victim had sexual experience previously. The victim was 12 years and 8 months old and hence under 13 years of age. According to section 207(3) of the Crimes Decree a child under the age of 13 is incapable of giving consent. Therefore the fact that the victim had consented and had previous sexual experience as asserted by the Appellants does not enure to their benefit. Therefore the second ground lacks merit.
8. Ground (c) is to the effect that the girls physique made them assume that she was of a consenting age. The girl was under 13 years and according to section 224 of the Crimes Decree No.44 of 2009 it is immaterial in the case of any of the offences committed with respect to a person under a specified age that the accused person did not know that the person was under that age, or believed she was not under that age. Therefore their belief that the girl was over 13 years was immaterial. This ground too lacks merit.
9. The next ground urged as ground (d) is that the summary of facts presented in court did not contain evidence in support of the offence charge. The charge that was made out against the Appellants set out the facts of the offence clearly and further it appears from the record that the Appellants had admitted the facts which has been recorded by the learned trial judge before convicting the Appellants. It is the record of the court that can be relied upon regarding the proceedings that took place in court and not any other assertions made by the Appellants. This ground too therefore lacks merit.

10. The next ground of appeal (e) is that the sentences imposed on the Appellant were too harsh. When imposing the sentences on the two Appellants, each Appellant's position was considered separately by the learned trial judge. As regards the 1<sup>st</sup> Appellant the learned trial judge commenced the sentencing after considering the tariff for such offences which was considered as being 11 to 16 years. The commencing point of 12 years was at the lower end of the scale and considering the victim's age as an aggravating factor increased the sentence by 2 years and taking into account the mitigating factors reduced 4 years and arrived at the sentence of 10 years.
11. As regards the 2<sup>nd</sup> Appellant, the starting point was taken as 12 years and considering the victim's age, the fact that the victim was a niece of the Appellant and that he had raped the victim on more than one occasion increased the sentence by 2 years, reduced 3 years for the mitigating factors and arrived at the sentence of 11 years imprisonment.
12. The manner in which the learned trial judge had sentenced the Appellants cannot be faulted in the above circumstances and therefore the ground of appeal against sentence has no merit.
13. Therefore the applications of the Appellants for leave to appeal against conviction and sentence are refused.

### **Order of Court**

Applications for leave to appeal against conviction and sentence are refused.

Suresh Chandra  
**Resident Justice of Appeal**