

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

Criminal Appeal No. AAU0089 of 2013
[High Court Case No. 311 of 2011S]

BETWEEN : **DHARMENDRA BAL RAM**
Appellant

AND : **THE STATE**
Respondent

Coram : Hon. Mr. Justice Goundar

Counsel : Mr. J. Savou for Appellant
Mr. L. Fotofili for Respondent

Date of Hearing : 10 June 2014

Date of Ruling : 24 July 2014

RULING

- [1] The appellant was charged and tried in the High Court at Suva on one count of rape and two counts of sexual assault. On the charge of rape, the appellant was acquitted of rape, but convicted of attempted rape. He was acquitted of the sexual assault on both counts. For attempted rape, the appellant was sentenced to 5 years' imprisonment with a non-parole period of 3 years.
- [2] This is an application for leave to appeal against conviction and sentence. The grounds of appeal are as follows:-
- i) The learned Trial Judge erred in law and in fact when he overturned the majority not guilty opinion of the assessors when he unfairly adjudged that the Defence case was not credible at paragraphs 10 and 11 of the Judgment.
 - ii) The appellant was prejudiced in his defence when the learned trial Judge introduced the offence of attempted rape to the assessors as an alternative charge at summing up stage which the appellant was unable to challenge during trial stage.

- iii) The learned trial Judge erred in law and in fact when he convicted the appellant for the offence of attempted rape as an alternative charge when the evidence of the complainant did not identify the same.
- iv) The learned trial Judge erred in law and in fact when he misdirected himself on the elements for the offence of attempted rape.
- v) The learned trial Judge erred in law in the following manner:
 - a) Failing to highlight the contravened section of the Crimes Decree which the appellant was convicted with; and
 - b) Failing to put the election to the accused the offence of attempted rape when the said offence is an indictable offence tried summarily.
- vi) The learned trial Judge erred in law and fact in failing to give proper consideration to the appellant's first offender status and the principles of sentencing under the Sentencing and Penalties Decree 2009.
- vii) The learned trial Judge unfairly adjudged at paragraph 5 of the appellant's sentence that family tension caused by the appellant was an aggravating feature of the offending.

Conviction Appeal

Ground 1

[3] Ground 1 alleges that the learned trial judge unfairly rejected the defence case as being not credible. Whether the defence case was credible or not was a trial issue. At paragraphs 10 and 11 of his judgment, the trial judge rejected the version of facts presented by the defence. The appellant does not suggest that the trial judge's reasons for rejecting the defence evidence are not cogent. What the defence say is that those reasons are unfair. The particulars of the alleged unfairness have not been provided to this Court. The trial judge was presented with two different versions of facts. One was the prosecution version and the other was the defence version. The trial judge accepted the prosecution version as credible and rejected the defence version as not being credible. As far as the trial judge provided cogent reasons for his decision, and in this case the defence are not suggesting that the reasons are not cogent, no arguable error arises under this ground.

Ground 2

[4] This ground alleges that the appellant was prejudiced in his defence when the trial judge directed the assessors on attempted rape without any prior notice of the charge of attempted rape during the trial. The appellant gives no particulars of the prejudice that was caused to his defence by the trial judge's decision to put the attempted rape to the assessors. Section 161 of the Criminal Procedure Decree provides for a conviction for an attempt, even when an accused is not charged with an attempt. In this case, the appellant does not contend that he could not have been convicted for attempted rape. His contention is that he was prejudiced in his defence when he received no notice before the close of the evidence that attempted rape was going to be put to the assessors. Whether there should be a notice given to an accused that a charge of attempt is going to be put to the assessors as an alternative to the substantive charge is a question of law alone. The question of whether the appellant was prejudiced by the lack of notice is a question of mixed law and fact. In the present case, the offence of attempted rape was raised for the first time in the summing up and without any prior notice to the appellant. This ground is arguable.

Ground 3

[5] This ground contends that the complainant's evidence does not support an attempted rape charge because in her evidence she did not say the appellant was unsuccessful when he tried to penetrate her vagina with his fingers. The evidence of the complainant was that the appellant touched her vagina and she felt pain. The medical evidence was inconclusive of penetration because the victim's hymen was intact. For these reasons, the trial judge convicted the appellant for attempted rape because there was a reasonable doubt as to element of penetration required for rape. This ground is not arguable.

Ground 4

[6] This ground is misconceived and not arguable. The law clearly permits conviction for attempted rape when the charge is rape.

Sentence Appeal

Ground 1

[7] In his sentencing remarks, the trial judge clearly took into account the appellant's previous good character as a mitigating factor. The appellant's previous good character was the only compelling mitigating factor. The learned trial judge gave a discount of 2 years for the appellant's previous good character and his personal circumstances. Proper weight was given to the mitigating factors. This ground is not arguable.

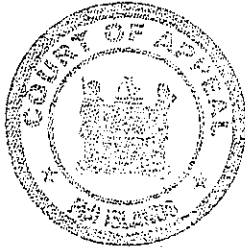
Ground 2

[8] Tension caused to a family from commission of an offence is arguably not an aggravating factor. Whether the alleged error prejudiced the appellant from receiving a lesser sentence is a matter for the Full Court to consider.

Result

[9] Leave to appeal against conviction is granted on ground 2 only.

[10] Leave to appeal against sentence is granted.



A handwritten signature in black ink, appearing to read 'D. Goundar'.

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Hon. Justice D. Goundar
JUDGE OF APPEAL

At Suva
24 July 2014

Solicitors:

Office of the Director of Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State