

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

Criminal Appeal No: AAU47 of 2012
(HC Crim. Case No. HAC 87 of 2011)

BETWEEN : AKUILA VAKANITOGA

Appellant

AND : THE STATE

Respondent

Coram : Hon. Mr. Justice Goundar

Counsel : Mr. K. Tunidau for Appellant
Mr. M. Delaney for Respondent

Date of Hearing : 12 June 2014

Date of Ruling : 24 July 2014

RULING

- [1] Following a trial in the High Court at Lautoka, the appellant was convicted of 3 counts of indecent assault and 2 counts of rape, and sentenced to 18 years' imprisonment with a non-parole of 15 years. The complainant was the appellant's biological daughter. When the first incident of sexual assault arose, the complainant was 7 years old. The offences were committed over a period of four years.
- [2] There are two applications before this Court. The first is an application to adduce fresh evidence on appeal. The second is an application for leave to appeal against conviction on the following grounds:

Ground 1 – The material non-disclosure by the Respondent before and during the trial of a letter dated 9th November, 2011 by AN was miscarriage of justice.

Ground 2 – The Appellant was denied a fair hearing by the material non-disclosure by the Respondent before and during the trial of a letter dated 9th November, 2011 by AN the complainant.

- [3] The proposed fresh evidence is a letter purported to be written by the complainant, withdrawing her police complaint against the appellant.
- [4] The appellant contends that the prosecution had a duty to disclose this letter to him during the trial and the non-disclosure has caused the trial to miscarry. Mr. Delaney for the State submits that the letter was a product of a crime allegedly committed by the appellant and that he knew about the existence of the letter and he could have applied to the trial court for disclosures if he intended to rely on it for his defence.
- [5] There is some force in the State's submissions. If the withdrawal of complaint was indeed made by the complainant after the appellant was charged, then the evidence of withdrawal was not necessarily exculpatory. If the defence had introduced the evidence of withdrawal of complaint in cross examination of the complainant, the prosecution would have been entitled to lead evidence explaining the circumstances under which the child complainant made the decision to withdraw her complaint against the appellant who was an authority figure over the family. The defence would have run the risk of introducing prejudicial evidence against the appellant if the withdrawal of complaint evidence was introduced at trial.
- [6] Counsel for the appellant submits that the application for leave to appeal is depended upon the application to adduce fresh evidence on appeal.
- [7] The powers of a single judge are provided by section 35(1) of the Court of Appeal Act. A single judge has power to grant leave. But a single judge has no power to grant leave to adduce fresh evidence on appeal. The power to grant leave to adduce fresh evidence on appeal lies with the Full Court. The State contends that the proposed fresh evidence does not satisfy the test for admitting fresh evidence on appeal. Whether the proposed evidence satisfies the test for fresh evidence is a matter for the Full Court.

- [8] As far as the application for leave to appeal is concerned, the grounds advanced by the appellant can be considered independently and without the proposed fresh evidence, because the issue is whether there was a non-disclosure of material evidence to the defence by the prosecution, causing a miscarriage of justice. For the reasons that I have given at paragraph 5 above, I am not satisfied the grounds of appeal on non-disclosure of the letter of withdrawal of police complaint by a minor child witness are arguable before the Full Court.
- [9] Leave to appeal is refused.
- [10] The application for fresh evidence is to be listed for call-over before the President.
- [11] The appellant may renew his application for leave before the Full Court.



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Hon. Justice Daniel Goundar
JUDGE OF APPEAL

At Suva
24 July 2014

Solicitors:

Kevueli Tunidau Lawyers for Appellant
Office of the Director of Public Prosecutions for State