

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

Criminal Appeal No. AAU0035 of 2013
[High Court Case No. HAC 050/2012S]

BETWEEN : APOROSA TUICOLO

Appellant

AND : THE STATE

Respondent

Coram : Goundar JA

Counsel : Mr. S. Waqainabete & Mr. J. Savou for the Appellant
Mr. V. Perera for the Respondent

Date of Hearing : 28 August 2014

Date of Ruling : 15 September 2014

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted and sentenced to 10 years' imprisonment for rape of a young girl. He now seeks leave to appeal against his conviction and sentence on the following grounds:

Conviction

1. The Learned Trial Judge erred in law and fact when the identity of the complainant was never verified prior to the amendment of the complainant's name on the information.
2. The Learned Trial Judge erred in law and in fact when he unfairly directed the assessors to make a finding that there was a possibility of the appellant committing the offence at paragraph 21 of his summing up.

3. The Learned Trial Judge erred in fact when he agreed with the unanimous opinions of assessors without robustly considering the inconsistent statements of the witnesses.
4. The Learned Trial Judge erred in law and in fact when he agreed with the unanimous opinions of the assessors without robustly considering the absence of any injury in the medical evidence as a result of anal penetration.

Sentence

1. The learned sentencing Judge erred in law and in fact when sentencing the Appellant on the tariff for child rape when the complainant's age was never verified.

[2] At trial, the date and place of the offence were not in dispute. The incident arose on 26 July 2011 in a village in Naitasiri. At the time the appellant was 20 years old. The appellant and the complainant were neighbours and they knew each other well. The prosecution case was that on the date of the offence, the appellant invited the complainant to his sister's house and raped her. No one else was in the house when the offence was committed. At trial, the complainant told the court that she did not know her actual date of birth. She said that she resided with her grandmother in the village and had never been to a school. The defence case was a complete denial of the charge. The appellant elected to remain silent, which was his right.

Conviction appeal

[3] Before commencement of the trial, the prosecution applied to amend the Information. The amendment was to correct the spelling of the last name of the complainant. The existing name read 'LIKU'. The correct name was 'LUTU'. Counsel for the appellant objected saying the defence was going to be embarrassed by the last minute amendment. The nature of the embarrassment was not disclosed. The trial judge allowed the amendment and corrected the complainant's name in the Information. Mr. Savou who was also the trial counsel submits that the amendment had the effect of embarrassing the defence because the court was not sure whether the person who appeared at trial as the complainant was in fact the complainant.

- [4] According to the trial judge's notes, the complainant told the court that her last name was Lutu and not Liku. When she was cross examined by Mr. Savou, it was not suggested to her that she was not the complainant who had made the initial police complaint. The manner in which the cross examination was conducted shows the defence accepted that the complainant's name was Lutu and not Liku. For the appellant to now suggest that the complainant who made the initial police complaint was not the person who gave the evidence at the trial is devoid of any merit. The amendment to correct the spelling of the complainant's name was within the discretion of the trial judge. The amendment was not significant. The amendment did not alter the nature of the allegation. The nature of the allegation remained the same. In my judgment, there is no arguable error in the discretion exercised by the trial judge to amend the Information.
- [5] Ground 2 alleges a misdirection at paragraph 21 of the summing up. Paragraph 21 reads:
- “Defence took up the position that accused was at Talica Bativesi's house at the time of the alleged incident. According to Talica Bativesi accused had come for lunch on day of incident and went home. But according to the victim incident had taken place before lunch. On that day victim had her lunch at Litiana's house after the incident. When Loraini called the victim from accused's house only accused answered. As Assessors and Judges of facts you have to consider this evidence very carefully.”
- [6] According to the complainant's evidence, the rape occurred before lunch on 26 July 2011. The defence case was that the appellant was at Talica Bativesi's house for lunch on 26 July 2011. The assessors had to consider whether the complainant was telling the truth when she said the rape occurred before lunch time. The trial judge left this question to the assessors by giving fair and balanced directions on the evidence that was led at the trial. This ground is not arguable.
- [7] Grounds 3 and 4 deals with the paucity of evidence led at the trial by the prosecution. The appellant contends that the trial judge failed to robustly consider the inconsistency in the evidence and the inadequacy of the medical evidence to confirm rape.

- [8] The trial judge was not obliged to take a robust approach to the evidence. His obligation was to consider the entire evidence fairly and in a balanced manner. Reading of the entire summing up shows the trial judge complied with this obligation. The entire evidence was fairly summarized in the summing up. The medical report of the complainant was not in dispute. The complainant was medically examined three weeks after the alleged rape. The examining doctor found no visible injuries on the complainant. The delay in reporting rape was explained by the complainant. The complainant told the court that she was scared to tell her sister and her grandmother about the incident.
- [9] All these matters were fairly considered by the trial judge in his summing up. Grounds 3 and 4 are not arguable.

Sentence appeal

- [10] The error alleged in the sentencing discretion is that the trial judge took into account that the complainant was a child when her age was not established by evidence. Under the Juveniles Act, a child is a person who has not attained the age of eighteen years. There is no dispute that the prosecution was unable to establish the correct age of the complainant. Counsel for the State submits that although the complainant's correct age could not be established, by her physical stature when she gave evidence, it could have been inferred that she was a child and not an adult. Furthermore, when the complainant gave evidence the appellant did not suggest to her in cross examination that she was not a child but an adult. Counsel for the State submits that at trial both the prosecution and the defence had accepted that the complainant was a child, that is, under the age of 18 years.
- [11] In sentencing the appellant, the trial judge took 10 years as his starting point after identifying the tariff for child rape to be from 10 to 15 years imprisonment. After adjusting for the mitigating and aggravating factors the trial judge arrived at a final sentence of 10 years imprisonment. A term of 10 years imprisonment is on the lower end of 10 to 16 years tariff for rape that was recently endorsed by the Supreme Court in *Anand Abhay Raj v The State*, unreported Criminal Appeal No. CAV0003 of 2014 (20 August 2014). In my judgment, the sentence appeal is not arguable.

State, unreported Criminal Appeal No. CAV0003 of 2014 (20 August 2014). In my judgment, the sentence appeal is not arguable.

Result

[12] For the reasons given, I make the following orders:

Leave to appeal against conviction is refused.

Leave to appeal against sentence is refused.



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

Hon. Justice D. Goundar
JUSTICE OF APPEAL

At Suva
15 September 2014

Solicitors:

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