

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

CRIMINAL APPEAL NO. AAU0106 OF 2013
CRIMINAL APPEAL NO. AAU0117 OF 2013
[High Court Case No. HAC 135/11]

BETWEEN : VILIAME NAICORI

Appellant

AND : THE STATE

Respondent

Coram : Goundar JA

Counsel : Mr. S. Waiqainabete for the Appellant
Mr. L. Fotofili for the Respondent

Date of Hearing : 21 July 2014

Date of Ruling : 15 January 2015

RULING

- [1] There are two applications before this Court. The first is an application for leave to appeal against conviction by the appellant. The second is an application for leave to appeal against sentence by the State. Both applications were filed within time.
- [2] The appellant was tried on a charge of rape in the High Court at Suva. After conclusion of the summing up, the majority opinion of the assessors was that the appellant was not guilty, while the minority opinion was that the appellant was guilty of the charge. The trial judge accepted the minority opinion and in a judgment delivered on 11 October 2013, convicted the appellant.

- [3] At the time of the offence the appellant was 21 years old. He worked as a caretaker at the “gun site” located in Veisari, Lami. The “gun site” is a tourist attraction. The complainant at the time was a student. On 5 May 2011 (date of the offence), she came to visit her aunt at Bilo Settlement. The appellant lived in the same settlement. He invited the complainant for a tour of the “gun site”. The complainant agreed and accompanied him to the “gun site”. When they entered a cave, the appellant pushed the complainant to the ground and had sexual intercourse without her consent. When the complainant was medically examined on 17 May 2011, a healed abrasion was found behind her left shoulder. On 18 May 2011, the appellant was interviewed by the police under caution. The appellant confessed to rape.
- [4] At trial, the appellant disputed the voluntariness of his confession. The trial judge held a voir dire and admitted the confession in evidence. The appellant gave evidence at trial. He admitted having sexual intercourse with the complainant but said she consented to sex. He denied using force to obtain the complainant’s consent.
- [5] The appellant appeals against his conviction on the following grounds:

Ground One

The Learned Judge erred in law when he shifts the burden of proof to the Appellant by requiring the Appellant to prove his innocent in the Judgment through his credibility and forthrightness in responding to questions in cross examination.

Ground Two

The Learned Judge erred in law when he failed to include in his summing up and also properly consider the evidence under cross examination of PW2 namely Mereani who was the aunty of the complainant and are as follows:

- 1) She agreed that the complainant was shocked to see her.
- 2) She agreed that when the complainant came down to the foot of the hill near the cave to where she stood, the complainant had a guilty look.

- 3) She agreed that she only beat the complainant after she was asking the complainant and the complainant was not saying anything.

Ground Three

The Learned Trial Judge erred in law and in fact when he did not direct the Assessors on the complainant's evidence which was given on oath where she agreed that only after she was wacked by the aunty she then began to talk a bit.

Ground 1

- [6] The alleged shifting of burden of proof is contained at paragraph 12 of the judgment. Paragraph 12 reads:

“Coupled with the above, the way the accused reacted to being cross-examined by the prosecutor after giving sworn evidence, did not put him in a good light. I observed him to be a very evasive witness. He evaded most of the questions thrown by the prosecution. He was not forthright, leading me to the conclusion that he was not a credible witness. Had he been forthright with his answers, I would possibly have reached a different conclusion.”

- [7] Counsel for the appellant submits that the trial judge's remarks “Had he been forthright with his answers, I would possibly have reached a different conclusion” suggest that the appellant carried the burden to prove his credibility. This submission cannot arguably succeed for two reasons. Firstly, the appellant cites no authority to support his submission that such remark is objectionable because it has tendency to shift the burden of proof. In his summing up the trial judge gave clear directions that the burden of proof was on the State and the Accused carried no burden to prove anything (see, paragraphs 4, 5 and 30 of the summing up). When the appellant decided to give evidence, which was his right, he chose to put his credibility as an issue. The manner in which he answered the questions made the trial judge conclude that he was not a truthful witness. The trial judge having observed the appellant when he gave evidence was entitled to make this finding and therefore this ground is not arguable.

Ground 2

[8] The contention on ground two is that the learned trial judge failed to direct the assessors on evidence elicited under cross examination from PW2, Mereani. Mereani was the complainant's aunt. It is argued that Mereani admitted -

- the complainant was shocked to see her
- the complainant had a guilty look
- the complainant did not say anything until she was beaten up.

[9] The assessors and the trial judge had heard this evidence. Out of court perception of the complainant by another witness is of little probative value. What mattered was the view that the assessors and the trial judge took of the complainant when she gave evidence. Two women assessors did not believe the complainant's account of lack of consent and force being used by the appellant. A male assessor and the trial judge (who was also male) believed the complainant's account of lack of consent and force being used by the appellant. In our criminal justice system, the trial judge was entitled to make that finding of credibility provided his reasons are cogent. In my judgment, the trial judge's reasons for believing the complainant's account of lack of consent and force being used are cogent. This ground is not arguable.

State's appeal against sentence

[10] The State advances its appeal against sentence on the following grounds:

- i. That the sentence is manifestly lenient having regards to the sentencing guidelines and applicable tariff for the rape of a child.
- ii. That the period spent in remand is not a mitigating factor.

[11] I deal with the issue of the remand period first. I accept remand period is not a mitigating factor. However, under section 24 of the Sentencing and Penalties Decree the remand period has the mitigating effect of reducing the sentence. Remand period is a relevant consideration in the exercise of the sentencing discretion. The manner in which the

remand period is taken into account does not matter. The appellant's remand period was about 7 weeks. Since the length of the remand period was not long, the learned trial judge subsumed it with the mitigating factors and gave a total reduction of 3 years in sentence. There is no arguable error in the sentencing direction in the manner which the remand period was considered by the learned trial judge.

[12] The second alleged error relates to the severity of sentence. Seven years' imprisonment for rape of a juvenile girl (under the age of 17 years) is no doubt below the accepted range of 10 to 16 years' imprisonment for rape.

[13] However, the trial judge gave reasoned justification for below the tariff sentence. The appellant was a young (21 years old) and a first time offender. The youth and previous good character of the appellant were compelling mitigating factors. Furthermore, he did not dispute sexual intercourse. He took some responsibility for his conduct. The term of 7 years imprisonment, in my judgment, reflects the criminality involved for a first time young offender. I find the State's appeal against sentence is not arguable.

Result

[14] The appellant's application for leave to appeal against conviction is refused. The State's application for leave to appeal against sentence is refused.



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Hon. Mr. Justice D. Goundar
JUSTICE OF APPEAL

Solicitors:

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