

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

CRIMINAL APPEAL NO. AAU0036 of 2013  
[High Court Case No. HAC 302 of 2011]

BETWEEN : ILAITIA MATASAVUI  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Goundar JA

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

Date of Hearing : 13 October 2014

Date of Ruling : 14 January 2015

RULING

- [1] This is an application for leave to appeal against conviction and sentence. The application is timely.
- [2] Following a trial in the High Court at Suva, the appellant was convicted on three counts of rape. On each count, he was sentenced to a term of 12 years' imprisonment. Since the offences were committed in the course of one single transaction, all three terms were made concurrent.
- [3] The grounds of appeal are as follows:

Appeal against Conviction

1. That the learned trial judge erred in law and principle when he acted unfairly against the appellant in his summing up when he made the following adverse analysis:

- (i) At paragraph 24 lines 3 to 8, when he commented that the Appellant's answers in court were inconsistent to the answers the Appellant had given during his caution interview.
  - (ii) At paragraph 27 line 6 when he made the observation that if the victim were not telling the truth, she would not have gone through the trouble to have her private part medically examined by a doctor.
  - (iii) At paragraph 27 line 5 when he made the observation that the doctor's evidence appeared to support the complainant's evidence.
2. That the learned trial judge erred in law and principle when he told the Appellant in full view of the Assessors that the Appellant was not credible.
  3. That the learned trial judge erred in law and in fact when he failed to consider in his judgment that the complainant and supporting witnesses had been inconsistent and that significant material evidence being the alleged torn t-shirt of the complainant and knife were not tendered.
  4. That the learned trial judge erred in fact when he failed to consider the Doctor's opinion of there being a possibility that another person could have had sexual intercourse with the complainant prior to the complainant being medically examined.

#### **Appeal against Sentence**

1. The learned sentencing judge erred in law and fact when he chose as an aggravating feature matters which had already been accounted for when the court had convicted the appellant.
- [4] The facts were that the complainant and the appellant were neighbours. The complainant was a married woman. On 4 September 2011, the appellant approached the complainant when she was collecting firewood. He told her that he liked her. He placed a knife in the complainant's neck, forced her to undress and raped her. When the complainant returned home, she reported the incident to her husband. The matter was reported to police. On 15 September 2011, the complainant was medically examined.
- [5] At trial the appellant gave evidence. His defence was that the complainant fabricated the allegation because he had earlier witnessed her having sex with her father.

- [6] The first contention is that the summing up was unfair to the appellant. The appellant cites passages which he says were unfair remarks by the trial judge.
- [7] Paragraph 24 of the summing up is the direction on the appellant's evidence. The trial judge reminded the assessors that the appellant's evidence was that the complainant had fabricated the allegation against him because he had witnessed her having sex with her father. This direction was followed by a reminder that in his caution interview (which was not disputed by the defence at trial) the appellant said he did not know why the complainant had fabricated the allegation against him. By giving this direction, the trial judge merely pointed out the inconsistency in the appellant's evidence. A material inconsistency affects the veracity of the evidence. There is nothing unfair about such direction.
- [8] Paragraph 27 of the summing up deals with the medical evidence. After summarizing the medical findings the learned trial judge posed the following question to the assessors:
- “You may ask yourselves, if the complainant was not telling the truth, why would she take all the trouble to have her private part been medically examined by a professional.”
- [9] The above question is arguably unfair to the appellant. Such question has a tendency to diminish the burden of proof. In **Joseph Ben Vasu v. The State** (unreported Criminal Appeal No. AAU0011 of 2006S; 24 November 2006) the trial Magistrate posed the question “Why the complainant was crying and complaining of being raped” before convicting the accused. The Court of Appeal held the question why would a complainant make up a story of being raped is a forbidden question because it assumes that the absence of a persuasive reason for the complainant behaving in a particular way enhances the prosecution case. Ground one is arguable.
- [10] Ground two makes a serious allegation against the trial judge. Counsel for the appellant who also appeared in the trial submits when the appellant was giving evidence, the trial

judge made a statement that he was not credible in the presence of the assessors. Without the court record it is not possible to confirm whether the trial judge did make a statement to that effect in the presence of the assessors. If such a statement is supported by the court record, then arguably the appellant did not receive a fair trial.

[11] Ground three deals with exhibits that were not tendered at trial by the prosecution. At this stage of the proceedings, I cannot speculate why certain exhibits were not tendered by the prosecution. It could be that the exhibits did not exist because they were not seized by the police during the investigation stage. If the prosecution had lost exhibits which were seized by the police and the exhibits were relevant to the defence case, then counsel for the appellant could have applied for a stay of proceedings. No such application was made to the trial judge and any complaint regarding untendered exhibits cannot be an arguable issue on appeal.

[12] Ground four is speculative and does not allege an arguable error.

### Sentence appeal

[13] The appellant's contention is that the learned trial judge took into account irrelevant considerations as aggravating factors to enhance his sentence. His further contention is that the learned trial judge did not give sufficient weight to his remand period. The aggravating factors identified by the trial judge were:

- (i) The complainant and her husband were your neighbours, and were friendly to you. They often invited you to their house, to share a meal with them. Prior to the incident, you were on friendly terms with them. However, by committing the offence of rape on the complainant, you betrayed the trust they had in you.
- (ii) When committing the offence, you put a knife on the complainant's neck, and threatened to kill her if she resisted. This behavior seriously aggravates the offence. Those who threaten women with a knife, and then rape them, must always expect a severe sentence. In other words, the more serious the threat, the higher the sentence will be.

- (iii) When cautioned interviewed by the police on 21<sup>st</sup> September, 2011 you told the police that you don't know the reasons why the complainant reported the rape to police on 14<sup>th</sup> September 2011. During the trial on 3<sup>rd</sup> April 2013, you saw fit to defame the character of the complainant by saying that, the reason she reported the matter to police, was because you saw her having sex with her father. The assessors and the court rejected this view. Nevertheless, your utterance abovementioned revealed your depraved character, and a message ought to be given to you to stop belittling people.
- (iv) Your offendings showed your utter disregard to the complainant's right to a peaceful life.

Arguably factors (iii) and (iv) were not aggravating factors.

[14] The learned trial judge took the appellant's remand period as part of his mitigating factors and gave a total discount of 3 years. Sufficient weight was given to the appellant's remand period. This is not arguable issue.

### Result

[15] Leave to appeal against conviction is allowed on grounds one and two only. Leave refused on grounds three and four. Leave to appeal against sentence is allowed.



  
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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