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

CRIMINAL APPEAL NO: AAU0092 of 2015
[High Court Case No: HAC274 of 2014)

BETWEEN	:	**ESEKAIA DAULAKO**
		Appellant
AND	:	**THE STATE**
		Respondent
Before	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Mr. E. Koroi for the Appellant Mr. L. J. Burney for the Respondent
Date of Hearing	:	8 December 2016
Date of Ruling	:	13 December 2016

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of two counts of rape and sentenced to 15 years' imprisonment with a non-parole period of 12 years. The first count was a representative count. It alleged penile rape. The second count alleged a single incident of digital rape. This is a timely application for leave to appeal against both conviction and sentence. The appeal is governed by section 21(1) of the Court of Appeal Act, Cap. 12. Leave is required on any ground of appeal that involves a question of mixed law and fact, or fact alone. Leave is not required on any ground that involves a question of law alone. Section 35(1) of the Court of Appeal Act Cap. 12 gives a single judge power to grant leave. The test for leave is whether the ground of appeal is arguable.

[2] At trial, the appellant was represented by legal aid counsel. The trial commenced on 20 July 2015 and was concluded on 22 July 2015. When the charges arose in 2014, the victim was 13 years old. The appellant was a relative of her father and had lived in the same house as them. The victim's evidence was that between February and March 2014, the appellant entered her bedroom at night and penetrated her with his finger and penis. The appellant did this about 4 to 5 times in the two month period. She did not consent to the sexual acts. She said she was too scared of the appellant to tell anyone.

[3] Eventually, in July 2014, she told her mother when her mother overheard a conversation between her and another sibling. The mother was called to give complaint evidence. The victim was medically examined in July 2014. The medical doctor gave evidence that the victim's hymen was not intact, consistent with penetration.

[4] The appellant's evidence was that he had been suffering from a hernia which prevented him from having sexual intercourse because he could not sustain an erection. He denied the sexual allegations made against him by the victim. The appellant called a medical doctor who had examined him in the remand centre. The doctor's opinion was that the appellant's condition would have affected his ability to have sexual intercourse, but an erection was still possible.

[5] I now consider whether the grounds of appeal are arguable? Ground 1 of the appeal reads:

> THAT the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting/considering himself or the Assessors the Medical Report of the Doctor that had examined the Complainant (Prosecution Exhibit) in particular where the Doctor sad that **"there was no injuries on her genitals, however the hymen was not intact and he could not rule out the possibility that there has been penetration of the vagina."**
> That such failure by the Learned Trial Judge caused a substantial miscarriage of justice.

[6] The medical evidence was fairly summarized in paragraph 17 of the summing-up. The medical evidence neither implicated nor exonerated the appellant. The weight of evidence was for the assessors and the trial judge. Ground 1 is unarguable.

[7] Ground 2 of the appeal reads:

> THAT the Learned Trial Judge erred in law and in fact in not adequately/referring /directing/putting/considering himself or the Assessors:
>
> (a) The opinion of the Doctor that had examined the Complainant as in paragraph 16 of the Judge's Summing Up in particular where the said Doctor opined that "a hernia doesn't affect erection or ejaculation."
> (b) The subsequent report of the Doctor that had examined the Accused at Korovou Prison in October 2014 in particular where he (Doctor) had said that "he (Accused) was suffering from linguinal hernia which need surgery: and then went to opined that **"in his condition it would not likely affect his ability to have sexual intercourse**" and he later said that although **"an erection was still possible but it would be uncomfortable".**
>
> That such failure by the learned Trial Judge not adequately/referring /directing/putting/considering himself or the Assessors the two different Doctors' Medical Reports had caused a substantial miscarriage of justice.

[8] This ground is an extension of ground one. The medical doctor who gave evidence on behalf of the appellant confirmed the appellant's medical condition, but he did not say that the appellant was incapable of having sexual intercourse due to the condition. The learned trial judge fairly summarized the defence's medical evidence in paragraph 21 of the summing-up. Ground two is unarguable.

[9] Ground 3 of appeal reads:

> THAT the Learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of RAPE. That after the Assessors had found the Appellant guilty of Rape just before adjournment for lunch, the Learned Trial Judge convened Court after lunch to pronounce his Judgment finding the Accused guilty of the charge of Rape. There was substantial miscarriage of justice by the Learned Trial Judge when he came to a decision over lunch of the guilty verdict of the Assessors where he failed to analyze all the facts before him.

[10] The learned trial judge accepted the unanimous guilty opinions of the assessors to convict the appellant on both charges. The facts were analyzed in the summing-up. There is no legal requirement for a trial judge to independently analyze evidence when convicting an accused based on unanimous guilty opinions of the assessors. Ground three is unarguable.

[11] Ground 4 of the appeal reads:

> THAT the learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged of Rape. Such error of the Learned Trial Judge in law by failing to make an independent assessment of the evidence before affirming a verdict was unsafe, unsatisfactory and unsupported by evidence giving rise to a grave miscarriage of justice.

[12] Ground 4 is a mere repetition of ground 3. This ground is unarguable.

[13] Ground 5 of the appeal reads:

> THAT the Learned Trial Judge's failure to evaluate the evidence prior to returning a verdict of guilty as charged and in the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict have given rise to a grave and substantial miscarriage of justice.

[14] Ground 5 is also a repetition of grounds 3 and 4. The ground is unarguable.

[15] Ground 6 of the appeal reads:

> THAT the Learned Trial Judge erred in law and in fact in totally omitting to direct the Assessors or himself that the Complainant did not make a recent complaint either to her family members or to her peers. It follows therefore that her credibility could be in doubt for the delay in reporting to the Police over two months after the purported incidents.

[16] The circumstances in which the victim complained to her mother was clearly highlighted by the learned trial judge in paragraph 15 of the summing-up. The victim's evidence was that she was too scared to report the incidents until her mother overheard a conversation and prodded, when the victim complained. The question of credibility was for the assessors and the trial judge. They believed the victim's account despite the delayed reporting of the incidents. This ground is unarguable.

[17] Ground 7 of the appeal reads:

THAT the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors or refer to any summing up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.

PARTICULARS

(a) That there was uncontested evidence that the Doctor who had examined the Accused had incited that the Accused will need surgery for the hernia he was suffering which had prevented him from having sexual intercourse because he cannot sustain an erection. Although later on the Doctor admitted that an erection was possible but would be uncomfortable. Having an erection and having sexual intercourse are two different issues.
(b) That the delay in reporting by the Complainant to the Police was over two months. There was no recent complaint by the complainant to anyone for at least two months which would render her credibility doubtful.
(c) That the Medical Report which was uncontested stated that the Doctor who had examined the Complainant gave an opinion that it was inconclusive that the victim was raped in accordance with the history that was given by the Complainant.
(d) That there was uncontested evidence of Defence Witness who stated in Court that he had treated the Complainant like a sister's daughter.
(e) That there was uncontested evidence of the Accused who said that he used to discipline the Complainant about the housework and that she didn't like it.
(f) That the uncontested evidence of taking revenge against the Appellant demonstrated that the allegation against the Appellant was fabricated.

[18] Both the case for the prosecution and the case for the defence were fairly put to the assessors in the summing-up. This ground is unarguable.

[19] Ground 8 of the appeal reads:

THAT the Learned Trial Judge erred in law and in fact in not adequately directing/misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubt that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.

(a) That there was uncontested evidence that the Doctor who had examined the Accused had indicated that the Accused will need surgery for the hernia he was suffering which had prevented him from having sexual intercourse because he cannot sustain an erection. Although later on the Doctor admitted that an erection was possible but would be uncomfortable.

(b) The delay in reporting by the Complainant to the Police was about one month. There was no recent complaint by the complainant to anyone.

(c) The Medical Report which was contested stated that the Doctor who had examined the Complainant gave an opinion that was inconclusive that the victim was raped in accordance with the history that was given by the Complainant.

(d) That there was uncontested evidence of the Defence Witness who stated in Court that he had treated the Complainant like a sister's daughter.

(e) That there was uncontested evidence of the Accused who said that he used to discipline the Complainant about the housework and that she didn't like it.

(f) That the uncontested evidence of taking revenge against the Appellant demonstrated that the allegation against the Appellant was fabricated.

[20] As I have said earlier, the learned trial fairly summarized the evidence and the issues for consideration in the summing-up. This ground is unarguable.

[21] Ground 9 of the appeal reads:

> THAT the Learned Trial Judge erred in law and in fact in directing the Assessors to use their common sense without directing them that they have to first find the facts they rely upon as proved and then to draw the necessary inference using their "common sense". The direction could be well misinterpreted by the Assessors that they have the option to speculate.

[22] Counsel for the appellant does not cite any authority to support his argument that the phrase 'common sense' is an objectionable phrase to use when directing the assessors to use common sense when deciding on the facts. This ground is unarguable.

[23] The appellant advances two grounds of appeal against sentence. The test for leave is whether there is an arguable error in exercising of the sentencing discretion by the trial judge. The grounds of appeal are:

1. THAT the Appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all circumstances of the case.

2. THAT the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

[24] In his sentencing remarks, the learned trial judge referred to the case of *Raj v State* unreported Case No. CAV003 of 2014 that confirmed the tariff for child rape to be between 10 to 16 years imprisonment. The victim was 13 years old when she was raped twice by the appellant who at the time was 36 years old. Clearly, there was a gross breach of trust because the appellant was a relative and had been living with the victim's family. The learned trial judge took the breach of trust as a serious aggravating factor to enhance the sentence. The sentence was reduced to reflect the appellant's remand period and previous clear record. It is not arguable that the total term of 15 years imprisonment for two incidents of rape of a 13 year old child is manifestly excessive. There is no arguable error in the exercise of the sentencing discretion by the learned trial judge.

[25] **Result**

Leave refused.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Koroi Law for the Appellant.
Office of the Director of Public Prosecutions for the State.