

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

**Criminal Appeal No: AAU0097 of 2014**  
**[High Court Case No. HAC 78/13]**

**BETWEEN** : **SAMISONI RABAKA** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : Hon. Mr. Justice Daniel Goundar

**Counsel** : Mr. J. Savou for Appellant  
Mr. L. J. Burney for State

**Date of Hearing** : 28 April 2016

**Date of Ruling** : 5 May 2016

**RULING**

[1] Following a trial in the High Court at Suva, the appellant was convicted of rape and sentenced to 16 years' imprisonment with a non-parole period of 15 years. The appellant seeks leave to appeal both his conviction and sentence. The appeal is governed by section 21 (1) of the Court of Appeal Act, Cap. 12. Leave is not required if a ground of appeal involves a question of law only. Leave is required on any ground of appeal that involves a question of mixed law and fact, or fact only. Leave is also required to appeal against sentence. The test for leave to appeal a question of mixed law and fact, or fact only is whether the ground is arguable. The test for leave to appeal against sentence is whether there is an arguable error in the sentencing discretion.

[2] The facts of the case were that the appellant who at the time of the offending was in his thirties, was residing in the same house as the complainant and her family. The female

complainant was 3 years old at the time of the offending. One evening the appellant made a sexual proposition to the complainant's mother when she was in her bedroom with her children. She rejected the proposition and walked out of the bedroom, leaving her children behind with the appellant. The next day, the complainant's mother noticed her child's genital area was dark in colour (could have been bruising or blood stains according to medical evidence) and experiencing pain while bathing her. The following day when the complainant's mother noticed bleeding in the complainant's vagina, the complainant told her mother that the appellant had caused the pain in her genital area. The matter was reported and the complainant was medically examined. Medical examination revealed a tear in the complainant's vagina that according to the examining doctor could only have been caused by penetration.

[3] Under caution the appellant denied the allegation. At trial, the prosecution led evidence from the complainant, her mother and the medical doctor. The appellant represented himself. He elected to remain silent.

[4] The grounds of appeal in summary are:

1. The trial judge gave an impression to the assessors that the complainant's evidence was capable of proof of penetration.
2. The trial judge failed to treat the complainant's mother with suspicion.
3. The trial judge contravened the Constitution by shifting the burden of proof on the appellant.
4. The sentence is excessive based on erroneous aggravating factors.

[5] The appellant contends in his Summing-Up (para. 11) that the trial judge gave an impression to the assessors that the complainant's evidence was capable of proof of penetration when her evidence was that the appellant had touched her genitals. In his Summing-Up, the trial judge directed the assessors that the child complainant was a reluctant and withdrawn witness but she was able to demonstrate how the appellant had

touched her genital region with his hand. The trial judge highlighted that although there was no direct evidence of penetration from the complainant, there was circumstantial evidence (bleeding and injury in the vagina) from which the assessors could deduce that the appellant penetrated the complainant's vagina with his hand/finger. In my judgment, there is no arguable error in the manner in which the trial judge left the issue of penetration for the assessors to decide.

[6] Ground 2 is unarguable because there was no basis to treat the complainant's mother with suspicion.

[7] When the Summing-Up is read as a whole, there is no suggestion that the trial judge had shifted the burden of proof on the appellant. The trial judge apart from giving the standard direction on the burden of proof, in paragraph 18 of the Summing-Up reminded the assessors that the appellant was entitled to remain silent and to require the prosecution to make sure of his guilt. The assessors were also directed that they must not assume the accused is guilty just because he has not given evidence. In my judgment, the directions on the burden of proof did not contravene the Constitution and therefore ground 3 is not arguable.

[8] There is some basis to suggest that the trial judge punished the appellant for exercising his right to a trial. In his sentencing remarks, the trial judge said:

"It is aggravating that he (the appellant) would put a four year old vulnerable witness, through the ordeal of giving evidence to the Court..."

[9] The right to a trial is a constitutional right of every person who is accused of a crime. When an accused is convicted after trial, he or she cannot be punished for exercising his constitutional right. Counsel for the State concedes that it is arguable that the trial judge erred in adding two years for the aggravating factor that the young victim had to give evidence. In my judgment, this is an arguable ground.

[10] The second alleged sentencing error is that the trial judge wrongly considered breach of trust as an aggravating factor. The appellant resided in the same house as the victim when he committed the offence. Being an adult member of the same household, there was some degree of trust placed on the appellant by the complainant's parents. That trust was breached when the appellant sexually violated a vulnerable member of the household. This ground is not arguable.

**Result**

Leave to appeal against conviction is refused.

Leave to appeal against sentence is granted on one ground only.



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Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

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