

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 107 OF 2016
(High Court HAC 143 of 2013)

BETWEEN : JOSEPH SHYAM NARAYAN

Appellant

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Ms. V. Ravono for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing : 18 May 2017

Date of Ruling : 16 June 2017

RULING

- [1] This is an application for leave to appeal by the Appellant against his conviction and sentence.
- [2] The Appellant was charged with one count of Sexual Assault contrary to section 210 (1)(a) of the Crimes Act and one count of the offence of Rape contrary to section 2017 (1)(2)(b) of the Crimes Act, 2009.

[3] The Appellant was found guilty on both counts after trial in the High Court of Suva and was sentenced on the 25th of July to 10 years 10 months and 18 days imprisonment with a non-parole period of 8 years 10 months and 18 days.

[4] In his notice of appeal the Appellant has set out the following grounds of appeal:

"1. That the learned Trial Judge erred in law and in fact when he accepted in the judgment that the complainant was subjected to various sexual assaults by the Appellant being the touching of her vagina and the kissing of her lips and vagina when in fact the Appellant faced one count of sexual assault. In so doing the evidence was misleading and prejudicial to the Appellant as it was unclear as to which particular incident of sexual assault he was defending himself in and which incident led to the conviction as the separate incidents were capable of constituting separate offences.

2. That the learned Trial Judge erred in law and in fact when he found in his judgment that the offence of rape allegedly committed by the Appellant took place on or about the 11th of March 2013 when evidence clearly shows that that was the time the Appellant allegedly kissed her lips and her vagina which acts do not constitute rape.

3. That the learned Trial Judge erred in law and in fact that when the complainant could not remember the actual date the Appellant is alleged to have licked her vagina and the date, he allegedly kissed her vagina in the bathroom thereby suggesting that she was giving inconsistent dates, the complainant was allowed to correct her inconsistency by being shown a certain part of her statement which was greatly prejudicial to the Appellant.

4. That the learned Trial Judge erred in law and in fact when he directed the assessors that they may either decide that the entire evidence of a particular witness can be believed or they may believe only a part of the evidence and reject the other part as the direction is prejudicial to the Appellant. It is either the evidence is credible or not as credibility is not divisible.

5. That the learned trial Judge erred in law and in fact when he failed to specifically include the word complainant but made specific mention of the word accused when directing the assessors to put aside all feeling of sympathy for or prejudice and that no emotion shall influence their decision.

6. That the learned Trial Judge erred in law and in fact when he misdirected the assessors that the complainant did not tell anyone of the alleged incident because she did not know who to approach when

in fact the evidence had shows that she had told her own mother thereby contradicting her own claim which is prejudicial to the Appellant.

7. That the learned Trial Judge erred in law and in fact when he failed to direct the assessors as to the inconsistency in the victim's evidence.

8. That the learned Trial Judge erred in law and in fact when he directed the assessors that the Complainant did not inform anyone about the incidence because she was scared that the father in NZ would come to know about her smoking when evidence shows that her father was already aware of the complainants wayward ways and had sent her away from Nadi.

9. That the learned Trial Judge erred in law and in fact when he accepted that the evidence of the 2nd prosecution witness made some two days after the alleged incident as a prompt complaint thereby strengthening the complainants evidence when evidence hat that her own mother who was the closest to her was readily available and yet she found it more comfortable to share the incidents with a school teacher who was a male some days later.

10. That the learned Trial Judge erred in law and in fact when he directed the assessors that where there are inconsistencies they have to decide whether the inconsistency is material and relevant and if so whether there is any explanation for the inconsistency. The directive Is of grave injustice to the Appellant.

11. That the sentence is harsh and excessive."

Consideration of the Grounds of Appeal

Ground 1

[5] The learned trial Judge after the Assessors had returned a verdict of guilt on both counts proceeded to give his judgment on 18th July 2016. In his judgment the learned trial Judge has referred to the first count and stated that he believed the complainant's evidence regarding the said count, that he cannot accept the defence evidence that the accused could not have committed the crime due to his daily routine as a taxi driver and then went on to state that he was satisfied that the prosecution has proved the elements of the first count beyond reasonable doubt.

- [6] Although the ground of appeal states that the learned Judge had in his judgment had accepted that the complainant was subject to various sexual assaults by the Appellant being the touching of her vagina and the kissing of her lips and vagina when in fact the Appellant only faced one count of sexual assault. There was no reference to several incidents regarding the first count. The only reference by the learned Judge in the judgment regarding the first count is that the accused caught her smoking inside the bathroom when he forcefully opened the door while she was naked and about to have a bath and then he touched her vagina.
- [7] There is no misleading of evidence as alleged in the first ground of appeal and no prejudice has been caused to the Appellant as it is quite clear in the said judgment that the learned Judge was referring to only one act regarding the first count.
- [8] This ground has been formulated on an erroneous basis and is therefore devoid of any merit. The authorities cited in the submissions of the Appellant have no relevance.

Ground 2

- [9] Having set out the ground, in the written submissions filed on behalf of the Appellant it is stated that full particulars will be provided upon receipt of the Full Court Record.
- [10] Time and again Appellants have been discouraged from setting out grounds of appeal which do not point out any errors to be considered for the purpose of granting leave to appeal by a single Judge of the Court of Appeal. Anthony v State Crim. App. No. AAU0027 of 2012; 27 May 2016 Setting out a ground in vague terms, hoping it would become helpful at a hearing of the full court is not a good practice and has to be discouraged.
- [11] Leave is refused on the said ground of appeal.

Ground 3

- [12] In this ground the Appellant is stating that as a result of the statement being shown to the complainant by the prosecution while she was giving evidence in order to refresh her memory regarding the date (11th March 2013) on which the offence was committed as the dates played a vital role in deciding whether the Appellant was present at the scene or not.
- [13] In her complaint to the Police she had given the date of the commission of the offence as 11th March 2013. It would appear from the written submission filed on behalf of the Respondent, that the complainant was shown that part of her statement setting out the date when she could not remember the date and when the statement was shown she was able to confirm the date on which the offence was committed.
- [14] The defence run by the Appellant was an alibi which was to the effect that he had no opportunity to commit the offence with his schedule of work as a taxi driver. The witness who gave evidence on his behalf was not specific of any dates and there was no proper record produced referring to any dates.
- [15] In those circumstances, it cannot be said that any prejudice was caused to the Appellant as a result of showing the statement to the complainant when giving evidence which was to refresh her memory regarding the date that the offence was committed, and therefore this ground fails.

Ground 4

- [16] This ground is in relation to the directions of the learned trial Judge in his summing up to the Assessors. It is being submitted that the directions of the learned trial Judge were

prejudicial to the Appellant in that his direction regarding a consideration of the evidence should be on the basis of the evidence being either credible or not and that credibility is not divisible.

[17] The case of Armogan, Ranjit Singha and Harendra Prasad v State [2003] AAU32/02 cited in support of this ground has no relevance as that decision related to the treatment of a witness as a hostile witness.

[18] In the present case the learned trial Judge in his directions to the Assessors stated"

"You may decide that the entire evidence of a particular witness can be believed; or you may decide to believe only a part of the evidence and reject the other part or you may reject the entire evidence of a witness if you decide that the entire evidence of that particular is not capable of being believed".

[19] I do not see any prejudice being caused to the Appellant by the above direction of the learned trial Judge. It has been a fair direction as to how the Assessors should consider the evidence of the witnesses. This ground is not arguable.

Ground 5

[20] This ground is to the effect that prejudice was caused to the Appellant when the learned Trial Judge in his summing up to the Assessors stated:

"You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else."

[21] This sentence in paragraph 4 of the summing up has been taken out of context by the Appellant to formulate this ground of appeal. It must be read along with the entirety of the paragraph where it was included. The entire paragraph was:

"4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision."

- [22] The learned trial Judge in this passage has directed the Assessors as to how they should consider the witnesses which includes the complainant, and the accused in dealing with their evidence. The absence of any reference to the complainant would not cause any prejudice to the Appellant as what has been stated has been in a general sense. This ground is not arguable.

Ground 6

- [23] This ground of appeal is in relation to the manner in which the learned trial Judge directed the Assessors in his summing up regarding the evidence of the complainant, specially regarding her complaint to her mother.
- [24] The learned trial Judge referred to the fact that the complainant having taken some time to find courage to tell someone. She had stated in her evidence that she had told her mother but her mother had not wanted her to take any legal action. There was no contradiction as far as the evidence of the complainant was concerned, when she had stated that she had not told anyone. It has to be considered together with the evidence she gave stating that she had taken time to find courage to complain. The learned trial Judge had in his direction referred to this aspect.
- [25] No prejudice would have been caused to the Appellant by the direction of the learned trial Judge regarding the evidence of the complainant. This ground is not arguable.

'Grounds 7 and 10

- [26] These grounds will be considered together as they relate to the submission that the learned trial Judge had failed to direct the assessors regarding the inconsistencies in the victim's evidence.
- [27] The learned trial Judge in his directions to the Assessors in his summing up having summarized the evidence led on behalf of the prosecution and the defence directed them at paragraph 48 as follows:

"48. You may consider whether there any inconsistencies in the evidence led in this case. In dealing with inconsistencies, first you have to be satisfied that in fact there are inconsistencies. If you are satisfied that there are inconsistencies, then you should consider those inconsistencies are material and relevant or insignificant and irrelevant. If you find and inconsistency to be material and relevant, then you must consider whether there is any explanation for that inconsistency. If there is no such explanation or if you are not satisfied with the explanation, again you have two options. You may either conclude that that particular witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.

49. On the other hand, if you consider the inconsistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witness as a reliable witness notwithstanding the inconsistency."

- [28] The complaint of the Appellant is that the learned Trial Judge did not direct the assessors as to the inconsistency in the victim's evidence. However, the Appellant has not elaborated on this ground to indicate what the inconsistencies were.
- [29] The directions given regarding inconsistencies by the learned trial Judge as cited above is a fair direction which is not prejudicial to the Appellant . Therefore these two grounds fail.

Ground 8

- [30] The Appellant has stated in relation to this ground in the submissions that full particulars will be given when the full record is available. This ground is therefore vague and has no merit and therefore not arguable.

Ground 9

- [31] This ground relates to the learned trial Judge accepting the evidence of the 2nd prosecution witness as a prompt complaint whereas the incident had occurred two days earlier and that she had not complained to her mother who was available soon after the incident.
- [32] The learned Judge's judgment relates to the evidence of the 2nd prosecution witness as a reliable witness and the evidence of the victim who had stated that when the Appellant dropped her at school that day, that the Appellant had told her that he wanted to have sex with her when she returned from school. This was therefore a sufficient reason for her to complain to her teacher specially when her mother was the de facto partner of the Appellant.
- [33] In those circumstances the conclusion reached by the learned trial Judge regarding the recent complaint cannot be faulted. Therefore this ground of appeal is also not arguable.

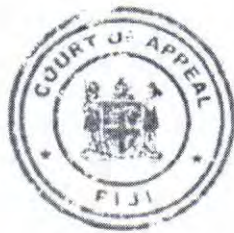
Ground 11

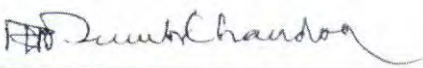
- [34] This ground relates to the sentence imposed on the Appellant on the basis that it is harsh and excessive.
- [35] The sentence imposed on the Appellant is almost 11 years with a non parole period of almost 9 years.
- [36] The second count against the Appellant was committing rape by penetrating with the tongue. No evidence was available regarding any injuries to the victim.

- [37] The learned trial Judge considered the tariff of 10 to 16 years for rape and picked 10 years as the starting point and after considering the aggravating features and mitigating features arrived at the head sentence of 10 years 8 months.
- [38] In view of the nature of the rape committed by the Appellant in the present case it may be arguable that the sentence imposed is harsh and excessive and therefore leave is granted on that ground.

Orders of Court:

- (1) *Leave is refused against conviction.*
- (2) *Leave is granted regarding sentence.*




Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL