IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0060 of 2015

[High Court Case No: HAC211 of 2013]

BETWEEN	:	**KINIVUWAI DELAILAGI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Hon. Mr Justice Daniel Goundar**
Counsel	:	**Mr S Waqanaibete for the Appellant** **Mr M Korovou for the Respondent**
Date of Hearing	:	**27 June 2017**
Date of Ruling	:	**3 July 2017**

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of one count of rape and sentenced to 10 years, 6 months imprisonment with a non-parole period of 9 years. The appellant seeks leave to appeal against conviction only pursuant to section 21 of the Court of Appeal Act, Cap. 12. The test for leave is whether the appeal is arguable.

[2] The complainant was the appellant's step-daughter. She was 18 years old at the time of the incident and was living with her grandfather. On the date of the incident, she came to the appellant's house to collect her clothes. Her mother was not at home. Upon the appellant's request she massaged his back. He told her that he was going to leave for

Cunningham soon. While she was asleep after doing the house chores, the appellant entered the room and raped her. At the trial, the appellant ran the defence of alibi. He said he was in Cunningham at the time of the alleged offence. The assessors' unanimous opinion was that the appellant was guilty of the charge. The learned trial judge agreed with that opinion. He found the appellant guilty of rape in a written judgment pronounced in open court.

[3] The grounds of appeal are:

(1) The learned Trial Judge erred in law and in fact when he did not direct the assessors to disregard the hearsay evidence of the history that was relayed to the doctor which caused prejudice to the Appellant.

(2) The learned Trial Judge erred in law and in fact when he failed to give adequate directions to the assessors on how to approach PW's 2 evidence that the complainant had told her that the Appellant had forced her on the bed and had sex with her.

(3) That the learned Trial Judge erred in law and fact when he misdirected himself and the assessors on (sic) paragraph 39 of the summing up in implying that the witness Torika had said that the Appellant was at home when she had returned home from work at 5-6pm on the day of the incident.

Hearsay evidence

[4] The alleged rape was committed on 4 March 2013. The complainant was medically examined on 30 April 2013. The medical report of the complainant was tendered by consent of the appellant and his trial counsel. The report contained the history related by the complainant to the examining doctor. It stated that the complainant had told the examining doctor that her stepfather forcefully had sexual intercourse with her on 04/03/13. The assessors were invited to consider the history as contained in the medical report when the learned trial judge summarized the medical evidence in paragraph 27 of the summing up. Counsel for the appellant submits that the medical history was hearsay and should have been excluded from consideration. Counsel for the State submits that any objection to the hearsay evidence should have been taken at the trial since the appellant was represented by counsel and no issue was taken by counsel even after the

summing up was delivered. While I accept that there is some force in the State counsel's submission, I am satisfied that it is reasonably arguable that the medical history was hearsay evidence and that the learned trial judge should not have invited the assessors to consider it in the summing up.

Recent complaint

[5] The complainant reported the alleged rape to her mother almost one month after the incident. There was evidence that the complaint was not voluntarily made but was prodded out of the complainant by her mother. The prosecution led the evidence of the complaint from the complainant and her mother. However, in the summing up, the learned trial judge gave no direction to the assessors on what use they could make of the complaint evidence. This ground is arguable.

Alibi date

[6] The complainant's mother gave evidence that when she returned home between 5-6 pm she found that her daughter, the complainant was missing from home. She saw the appellant was at home. She made enquiries with him but he told her that he did not know where the complainant was. Later that night the witness found the complainant at her sister's residence. The appellant's evidence was that on the day of the alleged incident he was at Cunningham. Counsel for the appellant submits that since the witness did not refer to the specific date when the complainant went missing from her home, the learned trial judge mistook the facts by assuming that the witness was referring to the date of the alleged rape when she came home from work and saw the appellant at home but not the complainant. The complainant's evidence was that the incident occurred on 3 March 2013. She left her mother's house on that date and never returned to that house. The mother's evidence was that that was the date she saw the appellant home but the complainant was missing. There was evidence from which the learned trial judge was entitled to infer that the complainant's mother was referring to the date of the alleged incident. This ground is unarguable.

[7] **Result**

Leave granted on grounds one and two only.

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The Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent