

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

CRIMINAL APPEAL NO. AAU 95 of 2015
(High Court HAC 125 of 2011)

BETWEEN : **SEREMAIA SUVEINAIKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Mr A. Liverpool for the Appellant**
Mr Y. Prasad for the Respondent

Date of Hearing : **18 April 2018**

Date of Ruling : **11 June 2018**

RULING

[1] The Appellant was charged with six counts of incest by male contrary to section 178(1) & (2) of the Penal Code, Cap. 17 and one count of incest by a relative contrary to section 223(1)(2) of the Crimes Act, 2009.

- [2] The trial was conducted in the Magistrate's Court, Nausori and the Appellant was found guilty of the charges and the learned Magistrate transferred the proceedings to the High Court for sentencing.
- [3] The High Court in the sentencing Judgment held that the Magistrate's Court had jurisdiction only regarding the first six counts, and since the 7th Count was an indictable offence triable only by the High Court, unless an extended jurisdiction was granted to the Magistrate's Court under Section 4(2) of the Criminal Procedure Act 2009. As no such extended jurisdiction was given in this instance, the Magistrate had no jurisdiction to deal with Count No. 7 and therefore the Magistrate's decision on Count 7 was declared null and void.
- [4] The High Court sentenced the Appellant on 9 July 2015, to 17 years imprisonment for all six counts to be served concurrently with a non-parole period of 16 years.
- [5] The Appellant filed a timely notice of appeal seeking leave to appeal against his conviction and sentence. The grounds of appeal were subsequently amended as follows:
1. *Convicting the Appellant on Count 1 without considering that the Appellant had an alibi.*
 2. *Failing to consider that the witnesses who were to testify in favour of the Appellant were not called as witnesses on the basis that the Legal Aid Lawyer had said that it was the Appellants duty to call witnesses.*
 3. *Failing to give appropriate weight to the inconsistencies in the complainant's testimony being that her father was sleeping in another room when the house had an open living area and did not have divided rooms.*
 4. *Allowing the confession evidence to be admitted.*
 5. *Not having a paternity test carried out to prove beyond reasonable doubt that the Appellant was in fact the father of the Complainant's child as alleged.*

6. *Failing to consider the medical expert evidence that after a rape a child would need complete rest and the complainant testified that she had gone to a school trip the following day.*
7. *Finding that the Appellant made the complainant have an abortion when no medical evidence had been adduced to verify an abortion.*
8. *That the sentencing Judge failed in law and in fact in sentencing the Appellant without having the opportunity to examine the demeanour of the complainant and the Appellant and hearing the evidence first hand."*

[6] The appellant was the biological father of the complainant. From about 2005 the appellant had sexual intercourse with the complainant from the time that she was 12 years old, under threat. She had made her complaint in 2011 when she could not bear it any more. In the meantime she had given birth to a child and later there had been an abortion as well.

[7] Ground 1 is on the basis that the learned Magistrate did not consider the alibi of the accused. The Appellant, who was represented by Counsel, had given evidence on his behalf. In terms of section 125 (1)(b)(3)(a) of the Criminal Procedure Act of 2009, alibi notices have to be filed 21 days before the trial. No such steps had been taken on behalf of the Appellant. Although the Appellant gave evidence stating that he was away most of the time from home, that by itself would not be suggestive of the defence of alibi. His evidence had been considered by the learned Magistrate when convicting him of the charges. There is no merit in this ground.

[8] The 2nd ground is on the basis that Counsel representing him had said that it was the duty of the Appellant to call the witnesses. The Appellant was represented by Counsel and it was he who would have decided what evidence to lead and rely on in the case. No fault can be attributed to the learned Magistrate for failing to consider as to why any witnesses whom the Appellant was relying on were not called to give evidence. Therefore this ground has no merit.


- [9] The 3rd ground of appeal is that the learned Magistrate had failed to consider the inconsistencies in the evidence of the Complainant. As to what the inconsistencies were have not been pointed out. At this stage as the record is not available, it is best for the full court to consider whether there is any merit in this ground of appeal in order to see whether, the inconsistencies if any, would affect the credibility of the complainant. Leave to appeal is granted on this ground.
- [10] The 4th ground of appeal is that no paternity test was carried out to prove that the Appellant had fathered the child that was born. The charge against the Appellant was incest. There was no requirement of proving paternity. Further in sexual offences in terms of section 129 of the Criminal Procedure Act, corroboration is not a requirement. This ground has no merit.
- [11] The 5th ground of appeal is that the learned Magistrate had failed to consider medical expert evidence. The record is not available at this stage to consider the nature of the medical evidence and whether the learned Magistrate had considered such evidence when convicting the Appellant. As stated in ground 4 above, there is no requirement of corroboration in proving sexual offences. Apart from considering the consistency of the complainant's evidence, medical evidence is not required to corroborate the evidence of the complainant. This ground lacks merit.
- [12] The 6th ground of appeal is that no medical evidence was led regarding abortion and therefore it was unfair and unjust for the sentencing judge to consider that as an aggravating factor. Here again, the record is not available at this stage to deal with this ground. If there was no evidence to support the allegation of abortion, whether it was justifiable to consider it as an aggravating factor is arguable.
- [13] The 7th ground of appeal is regarding the failure to examine the demeanor of the complainant. The trial court is the best judge of the demeanour of a witness. An appellate court will not interfere with the decision, unless it is shown that the evidence

before Court was not supportive of the decision of the Magistrate. The Appellant has failed to point out the errors, if any, in the decision of the Magistrate which would justify the consideration of this ground of appeal. This ground of appeal fails.

Orders of Court

- (1) Leave to appeal against conviction is granted on ground 3 of the grounds of appeal.*
- (2) Leave to appeal is granted against sentence on ground 6 of the grounds of appeal.*




Hon. Justice S. Chandra
JUSTICE OF APPEAL