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

CRIMINAL APPEAL NO. AAU 0083 of 2017
(High Court Action No: HAC 61 of 2016)

BETWEEN : **THE STATE**

Appellant

AND : **MAIKELI DAWAI**

Respondent

Coram : **Chandra, RJA**

Counsel : **Ms. J Fatiaki for the Appellant**
Ms. S Nasedra for the Respondent

Date of Hearing : **29 January, 2019**

Date of Ruling : **24 May, 2019**

RULING

[1] The Appellant by notice of appeal filed on the 7th of June 2017 has made an application to appeal the Ruling made by the learned High Court Judge on 11 May 2017 whereby the Respondent was acquitted.

[2] The Respondent was charged in the High Court at Labasa with one count of Rape contrary to Section 207(1) and (2) (a) of the Crimes Act 2009 which was alleged to have occurred on 16th April 2010.

[3] The Respondent had denied the charge when the case was taken up for trial in 2017. Subsequently, a No Case to Answer submission had been made by Respondent's counsel and the learned High Court Judge had agreed with the submission and acquitted the Respondent on 11th May 2017.

[4] In the Notice of Appeal, the Appellant has advanced the following grounds of appeal:

a) That the Honourable Judge erred in law by failing to exercise properly or at all, his discretionary powers of committal against an uncooperative rape complainant pursuant to Section 118 of the Criminal Procedure Act, 2009.

b) That the Honourable Judge erred in principle by failing to consider that his powers of committal included a power to commit for a much shorter, if any period.

c) That the Honourable Judge erred in finding a sufficient excuse not to testify included the claim that there had been an earlier traditional and cultural settlement and forgiveness rites, notwithstanding the defendants blatant breach of bail condition to keep away from the complainant implied by such action.

d) That the Honourable Judge erred in not taking into account fully or at all the serious nature of the offence, Rape and that the defendant was thereby being allowed to go entirely unpunished.

e) That the Honourable Judge erred in not taking into account at all the fact that the complainant did not claim that her complaint was in any way untrue or inaccurate.

f) That the Honourable Judge erred in principle by finding a sufficient excuse included as relevant the complainant's wish that the defendant should not be punished, thereby confusing the issue of public policy of prosecution and victim's impact statement for the purposes of sentence.

[5] In his Ruling the learned High Court Judge had stated that the complainant was the first prosecution witness at the trial. That she had earlier written to both the D.P.P. and the Court saying that she wanted to withdraw her complaint ad did not want to give evidence about it. That the reasons that she had given and which were known to the D.P.P. included factors of the age of the complainant and that she had moved on. She was now happily married with young children and wanted to forgive and forget. She had participated in traditional cultural settlement and forgiveness rites and had no wish to punish the accused who now had a young family of his own.

[6] The prosecution had submitted that they had been instructed by the D.P.P. to insist that she give evidence in accordance with her original complaint. Thereupon the Court had proceeded. The Court had observed that she was obdurate and insisting that she would not give evidence.

[7] The Prosecution had at that stage relied on s.118 of the Criminal Procedure Act, 2009 and wanted the Court to act in terms of that Section.

[8] S.118 of the Criminal Procedure Act, 2009 provides:

> *"s.118(1) Whenever any person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence –*
>
> *(a) Refused to be sworn; or*
>
> *(b) Having been sworn, refuses to answer any question put to him or her; or*
>
> *(c) Refuses or neglects to produce any document or thing which the person is required to produce; or*
>
> *(d) Refuses to sign his or her deposition –*
>
> *Without in any such case offering any sufficient excuse for such refusal or neglect, the court may adjourn the case for any period not exceeding 8 days, and may in the meantime commit the person to prison unless he or she sooner consents to do what is required.*
>
> *(2) If such person, upon being brought before the court at or before the adjourned hearing again refuses to do what is required, the court may again adjourn the case and commit the person for the same period, and so again from time to time until the person consents to do what is required."*

[9] The learned High Court Judge in his Ruling stated that the stance of the witness came under the situation provided for in s.118 (b) and that it was in the discretion of the court whether to apply the sanction of imprisonment, and further stated that the section provides for sufficient excuse which the Court found had been given by her before the trial and after she had answered her summons.

[10] Having considered the submissions of the prosecution, the learned High Court Judge stated:

> *"12. It is a basic principle of prosecution protocol that they do not strive for conviction at all costs. A fortiori to compel a witness to give evidence under pain of imprisonment is unconscionable in an effort to secure a conviction, they would imprison the victim of a rape.*
>
> *13. Sometimes witnesses do not come up to proof and whether they be declared hostile or not, their evidence is virtually worthless. To refuse to give evidence at all after answering the summons is a similar circumstance. She has "sufficient reason". She is a happily married woman with 2 young children, she has forgiven the accused in both the cultural and her faith based ethic, and she does not wish to relieve the trauma of events occurring seven years ago."*

[11] The Court thereafter dismissed and released the witness without sanction and concluded that there being no other evidence, there was no case to answer against the accused, and that he was not guilty and was acquitted therein.

[12] In appeal grounds 1 and 2 the Appellant has urged that the learned High Court Judge has failed to exercise his discretionary powers of committal against the complainant in terms of section118 of the criminal Procedure Act.

[13] Section 118 confers on the Judge a discretion in dealing with an uncooperative witness whether to commit such a witness or not. It is not a mandatory provision where the Judge is expected to commit such a witness in terms of the provisions of that section.

[14] The learned trial Judge had observed the behavior of the witness up to the date of the trial and in Court when she was sworn in to give evidence and had been satisfied with her explanation in exercising his discretion not to commit the witness in terms of section 118.

[15] In his ruling the learned High Court Judge has set out the basis of the exercise of his discretion and the reasoning set out therein is clear as to why he was not proceeding to commit the witness in terms of section 118.

[16] In those circumstances I would consider that the grounds 1 and 2 are not arguable.

[17] In ground 3 the Appellant has urged that the learned trial Judge erred in finding a sufficient excuse not to testify included the claim that there had been an earlier traditional and cultural settlement and forgiveness rites, notwithstanding the defendant's blatant breach of bail condition to keep away from the complainant implied by such action.

[18] In the present case, the complainant who was called to give evidence had refused to answer any questions relating to the allegation of rape. The prosecution therefore could not proceed any further. The only evidence that was available before Court was not sufficient to bring about a situation where there was a case for the defendant to answer. It was in that situation that the leaned Judge proceeded to give his Ruling.

[19] The fact that the learned trial Judge had mentioned about the traditional settlement in his ruling would therefore not affect the manner in which the learned Judge proceeded to conclude that there was no case to answer, as what he had to consider at that stage was to see whether there was sufficient evidence to proceed on the charge against the defendant. Therefore ground 3 is not arguable.

[20] In ground 4 the Appellant has urged that the learned Judge has erred in not taking into account the seriousness of the offence that the Respondent was charged with.

[21] Proof of a charge against any defendant whether serious or not would depend on the evidence that is placed before Court against such defendant. In the present case there was no evidence before Court at the stage that the prosecution had dealt with its main witness, which brought about a situation where the learned Judge had to consider whether there was a case made out for the Respondent to answer.

[22] It is in that situation that the learned Judge had ruled that that there was no case to answer and therefore this ground too is not arguable.

[23] In ground 5 the Appellant urged that the learned Judge erred in not taking into account that the complainant did not claim that her complaint was in any way untrue or inaccurate.

[24] As stated earlier there was no evidence before court to consider whether the complainant's claim was untrue or inaccurate. Therefore this ground too is not arguable.

[25] In ground 6 the Appellant has urged that the learned judge by finding a sufficient excuse to show that the complainant's wish was that the defendant should go unpunished, had thereby confused the issue of public policy of prosecution and victim's impact statement for the purpose of sentence.

[26] The learned Judge had considered the issue of public policy when he dealt with the position of the complainant being forced to give evidence against her wish and the consequent possibility of being threatened with imprisonment and committal and stated so in his ruling. Further, there was nothing to indicate the availability of the victim's impact statement.

[27] In considering the manner in which the learned Judge had dealt with the complainant's position when called upon to do so by the prosecution in terms of s.118 of the Criminal Procedure Act it cannot be said that he had gone against the issue of public policy and therefore this ground is not arguable.

Orders of Court:

Leave to appeal is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL