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

CRIMINAL APPEAL NO. AAU 107 OF 2015
(High Court Action No: HAC 20 of 2014)

BETWEEN : **LATCHMAN PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Mr M Fesaitu with Mr K Chang for the Appellant**

Mr S Babitu for the Respondent

Date of Hearing : **24 April, 2019**

Date of Ruling : **14 June, 2019**

RULING

[1] The Applicant was charged with one count of the offence of Rape contrary to section 207(1)(2)(a) of the Crimes Act No.44 of 2009 and one count of the offence of Indecent Assault contrary to section 212 of the Crimes Act, 2009.

[2] After trial, the Assessors returned a unanimous opinion of guilty on the first count and for the second count the majority opinion was that he was guilty as charged whereas the minority opinion was that he was guilty of the alternative count of sexual assault.

[3] The learned trial Judge agreed with the opinion of the assessors for the first count and for the second count agreed with the minority opinion and convicted the Appellant for indecent assault and sexual assault respectively.

[4] On 12 December 2014 the Applicant was sentenced to 12 months imprisonment for the first count of indecent assault and 6 years for the alternative count of sexual assault, both sentences to run concurrently and with a non-parole period of 4 years imprisonment.

[5] The Applicant made an application for enlargement of time to appeal the conviction and sentence with an affidavit explaining the delay of 8 months.

[6] In his application he has set out the following grounds of appeal:

Against Conviction:

1. The Learned Trial Judge erred in law when he failed to direct the Assessors that in respect of the first count of Rape, if they are still dissatisfied with an alternative count of sexual assault, they may convict the Applicant for a lesser charge of indecent assault.
2. That the learned trial Judge erred in law and in fact when he failed to direct the Assessors to consider the defence case theory in the absence of recent complaint evidence.

Against Sentence:

3. The learned Trial Judge erred in law when he failed to give separate deduction for pre-trial detention.
4. The Learned Trial Judge erred in law when he stated that there was no tariff for the offence of sexual assault, when the tariff for the said offence ranged between 2 years to 8 years depending on the category of the offending. (**State v Laca** – Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012).
5. Sentence was harsh and excessive in all circumstances of the matter.

[7] It was alleged that the Applicant had got the virtual complainant (12 years of age) to remove her pants and underwear. When the clothes were removed he had measured the complainant's thigh from waist down using a mobile charger. It was also alleged that he had licked the complainant's vagina.

[8] In considering the application seeking extension of time, it is observed that the delay is about 8 months. In his affidavit he has stated that he had handed over his notice of appeal to the Correction Centre in Labasa in December 2014, but when he checked at the registry he had been informed that his notice had not been received. Thereupon he had sent another notice in April, 2015 that too had not been sent to the Registry whereupon he had sent a further notice in August 2015 which had been received on 1st September 2015.

[9] Although his explanation seems plausible he has no material to support such an explanation. However, I would consider granting him an extension of time.

[10] Considering the grounds of appeal, in Ground 1 it is urged that the learned Trial Judge had failed to direct the Assessors adequately on the appropriate charge, when he was directing them on the charge of rape. It is submitted that the learned Judge had directed them only on the lesser charge of rape and not on the other likely lesser charge of indecent assault.

[11] Although the majority of the assessors opined that the Applicant was guilty of rape, the learned trial Judge disagreed with that opinion and concurred with the minority opinion of his being guilty of the alternative count of sexual assault.

[12] The evidence of the complainant regarding the second count was beyond a situation contemplated in the definition of indecent assault in section 212(1) of the Crimes Act, 2009 and was more in line with the definition of sexual assault as defined in section 210(1)(a) of the Crimes Act.

[13] In such a situation the direction given by the learned Judge to the Assessors cannot be considered as being inadequate. Therefore there is no merit in this ground.

[14] The second ground of appeal is as regards recent complaint. It has been submitted that the learned trial Judge had failed to direct the Assessors on recent complaint.

[15] There was no evidence of recent complaint at the trial and the case rested on the evidence of the virtual complainant which was believed by the Assessors as well as the learned trial Judge.

[16] In such a situation there was no necessity to direct the Assessors on recent complaint. This ground too has no merit.

[17] As regards the grounds of appeal against sentence, it has to be shown that there has been an error in the sentencing judgment.

[18] In ground 1 it is urged that the learned Trial Judge failed to take into account the period of 11 months that the Applicant had been in detention prior to the trial.

[19] The learned trial Judge had in his sentencing judgment specifically referred to the period of 11 months in remand at paragraph 7 of the sentencing judgment. Therefore there is no merit in this ground.

[20] The second ground is to the effect that the learned trial Judge erred when he stated that there is no tariff for the offence of sexual assault.

[21] The learned trial Judge had stated that there was no tariff for sexual assault whereas the tariff that was considered was between 2 to 8 years.

[22] The sentence imposed was 6 years and was well within the tariff and therefore there was no prejudice caused to the applicant. There is no merit in this ground.

[23] The next ground is that the sentence was harsh and excessive.

[24] The sentence of 1 year on count 1 was to run concurrently with the sentence for the alternative count of sexual assault which was 6 years and a non-parole period of 4 years was imposed.

[25] Since the sentences imposed were within the tariff the sentence is not harsh and excessive. There is no merit in this ground.

Orders of Court:

Application for extension of time is allowed.

Leave to appeal against conviction and sentence is refused.

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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL