

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

**CRIMINAL APPEAL NO. AAU 0079 OF 2016**  
(High Court Action No: HAC 112 of 2013 Ltk)

**BETWEEN** : PECELI TAUBULA SENIBUA  
*Appellant*

**AND** : THE STATE  
*Respondent*

**Coram** : Chandra, RJA

**Counsel** : Mr O'Driscoll for the Appellant  
Mr S Babitu for the Respondent

**Date of Hearing** : 5 June, 2019

**Date of Ruling** : 9 July, 2019

**RULING**

- [1] The Appellant was charged with one count of rape contrary to Section 207(1)(2)(a) of the Crimes Act, 2009.
- [2] The Appellant was convicted after trial with the Assessors opining that he was guilty and the learned Trial Judge concurring with that opinion.

- [3] The Appellant was sentenced on 7<sup>th</sup> June 2016 to 12 years 9 months imprisonment with a non-parole period of 10 years imprisonment.
- [4] The Appellant filed a timely application seeking leave to appeal against conviction and sentence setting out the following grounds:

Against Conviction:

1. That the Learned Trial Judge erred in law and in fact in not directing himself and the assessors that the prosecution has to prove the Appellant's alibi evidence. Such failure to do so caused a substantial miscarriage of justice.
2. That the Learned Trial Judge erred in law and in fact in not directing himself when finding that the evidence of the complainant was credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave to police and that she gave to the medical doctor. Failure to direct himself on previous inconsistent statement in law of the complainant caused substantial miscarriage of justice.
3. That the Learned Trial Judge erred in law and in fact in not accepting the evidence given by the Appellant without any cogent reasoning.
4. That the learned Trial Judge did not consider/analyze the defence case adequately/or in detail in particular the evidence of the alibi witness Mr. Alipate whose evidence proved accused alibi. In the circumstances there was a substantial miscarriage of justice.
5. That the Learned Trial Judge erred in law and in fact in not adequately directing himself that the Prosecution evidence before the Court proved beyond reasonable doubt that there were serious doubts in the prosecution case and as such the benefit of doubt to have been given to the Appellant.
6. That the Learned Trial Judge erred in law and in fact in not directing himself or the assessors that by finding there was no case to answer on Count 2 demonstrated a doubt when assessing the credibility of the complainant in the prosecution case in

respect of count 1 and hence there was a inconsistent verdict and as such there was a substantial miscarriage of justice.

7. That the Learned Trial Judge erred in law and in fact in not directing himself to refer any summing up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.
8. That the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/referring/directing/putting/considering the Appellant's case to the Prosecution and Defence evidence.

Against Sentence:

1. That the Learned Trial Judge erred in law and fact in ordering a sentence of 12 years 9 months with parole of 10 years which is manifestly excessive.
  2. That the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.
  3. That the Learned Trial Judge erred in law and in fact in not taking into consideration the provisions of the sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.
- [5] The victim had been weeding in their cassava plantation in the morning when the Appellant had come and punched her on her face and squeezed her hand. He had grabbed the cane knife that the victim was holding in her hand. He had then punched her on her thighs and when she fell on the ground, he had threatened her that he would chop off her head, if she shouted. He had then torn her skirt, removed her undergarment, and raped her. She had gone home and told her mother about the incident and thereafter her grandfather had telephoned the police and reported the matter. She had been medically examined on the same day at the Sigatoka hospital.
- [6] At the trial the victim, her mother and the doctor who had examined her had given evidence while the Appellant had given evidence on his behalf and led the evidence of another witness.

- [7] The first ground of appeal is to the effect that the learned Trial Judge had failed to direct himself and the assessors that the prosecution had to disprove the Appellant's alibi evidence.
- [8] The learned trial Judge had in his summing up at paragraphs 44 to 47 very clearly directed the assessors as to how they should consider the defence of alibi and that the prosecution must prove that they should be sure that the accused person was correctly identified by the victim and therefore that his alibi is untrue.
- [9] There is no error in the direction of the learned Trial Judge and therefore this ground is not arguable.
- [10] The 2<sup>nd</sup> ground of appeal is urged on the basis that the learned Trial Judge had failed to consider previous inconsistent statements of the victim regarding the information that she had given to the police and to the doctor who examined her.
- [11] The Appellant has not set out the nature of the inconsistent statements that is being referred to in this ground of appeal and has when formulating the ground stated that details would be given when the case record is available.
- [12] In the summing up of the learned Trial Judge there is very little reference to inconsistent statements of the victim and therefore I would leave it to the Full Court to consider this ground when the entirety of the evidence is available and I would grant leave on this ground.
- [13] The 3<sup>rd</sup> ground is that the learned Trial Judge had erred in not accepting the evidence of the Appellant without any cogent reasoning.
- [14] In his judgment the learned Trial Judge at paragraph 14 had stated that he finds the evidence of alibi as credible and reliable, that he did not find that the defence had created any reasonable doubt on the prosecution case. He stated further, that he does not find any cogent reasons to disagree with the unanimous opinion of guilt of the Assessors.


- [15] It is submitted on behalf of the Appellant that the Assessors had given an opinion of not guilty and that the learned Trial Judge had overturned that opinion. This is a misconception as the Assessors had brought in an opinion of guilt.
- [16] This ground is not arguable.
- [17] The fourth ground is almost on the same lines as ground 3 as it relates to the evidence of alibi of the Appellant which the learned Trial Judge had not accepted as being credible and reliable.
- [18] This ground is not arguable.
- [19] The fifth ground of appeal is vague as it refers to the fact that the learned Trial Judge should have considered the totality of the evidence given at the trial.
- [20] The learned Trial Judge summed up the entire evidence in the case in his directions to the Assessors and referred to that evidence in his judgment as well.
- [21] This ground is not arguable.
- [22] In the sixth ground of appeal, it is stated that the Appellant had been acquitted of the second count and therefore there was an inconsistency in the verdict.
- [23] When the Appellant was charged there had been two counts set out in the information. The second count being the same charge which the learned Trial Judge had set out in his judgment. There is no inconsistency as the learned trial Judge has stated at paragraph 2 in his judgment that at the conclusion of the prosecution case, there was no evidence regarding the second count and that the Court found the accused not guilty of the second count and thereafter proceeded to deal with the first count.
- [24] This ground is not arguable.
- [25] The seventh ground of appeal has no basis as the sole defence taken up by the Appellant at the trial was the alibi defence and therefore there was no other defence that was necessary to be considered. This ground is not arguable.

- [26] The Eighth ground is vague. It is sought to be submitted that the learned Trial Judge had failed to put the Appellant's case to the case of the prosecution without stating in what ways that the learned Trial Judge had failed to consider the case of the defence.
- [27] The learned Trial Judge has very clearly considered the defence case both in the summing up and in his judgment. This ground is not arguable.
- [28] The three grounds of appeal against sentence fail to point out any error in the sentencing as required in considering whether they are arguable. The sentence handed down to the Appellant is within the tariff. The grounds of appeal against sentence are not arguable.

***Orders of Court:***

- [1] *Leave to appeal against conviction is granted on ground 2 of the grounds of appeal against conviction.*
- [2] *Leave to appeal against sentence is refused.*



  
**Hon. Justice Suresh Chandra**  
**RESIDENT JUSTICE OF APPEAL**