IN THE COURT OF APPEAL, FIJI

ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0035 of 2017
(High Court Action No. HAC 208 of 2013)

BETWEEN : **ATUNAISA GAUNAVOU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Mr S Waqainabete for the Appellant**
Ms S Kiran for the Respondent

Date of Hearing : **24 July, 2019**
Date of Ruling : **8 November, 2019**

RULING

[1] The Appellant was convicted after trial of 2 representative counts of rape contrary to section 2017(1) and 207(2)(a) Crimes Act 2009 and 2 representative counts of sexual assault contrary to section 210(1)(a) of the Crimes Act, 2009.

[2] The Appellant was sentenced on 27 March 2015 to 13 years' imprisonment on the counts of rape and 2 years on the counts of sexual assault. The sentences to run concurrently and imposed a non-parole term of 12 years.

[3] The Appellant filed a timely notice of appeal setting out the following grounds of appeal:

1. *The learned Judge erred in law and in fact when he informed the assessors that a prima facie case was found at the end of the prosecution's case against the appellant thereby causing prejudice to the appellant.*

2. *The learned Judge erred in law and in fact when he did not properly consider the denial of the appellant in the trial which was consistent and credible.*

3. *The learned trial Judge erred in law and in fact when he did give directions to the assessors relating to the consequences of a complaint that was not recent which goes to the consistency of the evidence of the complainant and nothing else.*

4. *The learned Judge erred in law and in fact when he did not consider that there was more than reasonable doubts in the State's case given the absence of any DNA test results given that the alleged child of the appellant was already born at the time of the trial which could have been very consistent with the evidence of the complainant.*

[4] The Appellant was a neighbor of the complainant's family and had been in friendly terms with them. In September 2012 he had invited the complainant, who was under14 years, to his bedroom to fold his clothes. While she was folding the clothes in the bedroom, the Appellant had raped and sexually assaulted her.

[5] The above episode had been repeated in his bedroom in January 2013. He had called her to his bedroom to get some clothing. He had then closed the bedroom door, forcefully taken off the clothes of the complainant and raped her. While he was having sex with her, he had assaulted her by fondling her breast and kissing her.

[6] At the trial, the complainant and her mother had given evidence while the Appellant had given evidence on his behalf and led the evidence of another witness.

[7] In the first ground of appeal the Appellant has taken up the position that the learned High Court Judge had at the end of the prosecution case informed the Assessors that a prima facie case had been made out against the Appellant which was prejudicial to the Appellant.

[8] Paragraph 21 of the summing up is as follows:

> *"21. On23 March 2015, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to all the counts. In other words, he denied the rape and sexual assault allegations against him. When a prima facie case was found against him at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to give sworn evidence, in his defence. He also called one witness. That was his right."*

[9] Counsel for the Appellant relied on the judgment in **Namni Raqio v The State** AAU 0061A of 2015 where Justice Goundar had given his ruling in a similar situation where the learned trial Judge had informed the Assessors that a prima facie case was found against the appellant. In that decision Goundar J cited the English case of **R v Smith and Doe** 85 CR App R 197 CA where Watkins LJ had said:

> *"The question as to whether or not here is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they convict because they think the judge's view is sufficient indication that the evidence is strong enough for that purpose."*

[10] Justice Goundar in his Ruling stated that the ground was reasonably arguable.

[11] Counsel for the Respondent also cited **Raqio** but sought to distinguish the decision in **R v Smith** on the basis that it was a case of Jury trial whereas in the present case the trial was with Assessors where the final arbiter is the trial Judge. On that basis it was argued that there was no prejudice caused to the Appellant.

[12] Having considered the arguments of both Counsel I would prefer to follow Goundar J's view that this ground is reasonably arguable.

[13] The second ground is based on the fact that the Appellant's denial in the trial which was consistent and credible was not properly considered by the learned trial Judge.

[14] Counsel referred to paragraph 30 of the summing up which read:

> *"30. On oath, the accused denied the complainant's rape and sexual assault allegations. He said, he did not have sexual intercourse with the complainant in September 2012, nor in January 2013. He said, he also did not sexually assault her, at all. He said, he is not the father of the complainant's child."*

[15] The case rested on the evidence of the complainant as against the Appellant. The learned trial Judge in his judgment at paragraph 5 stated:

> *"5. I agree with the three assessor's opinion. I find the complainant was a credible witness and I accept her evidence on the four counts in the information. I reject the accused's denials. He was not a credible witness. In my view, he* was evasive at times."

[16] Since the learned trial Judge had not considered the Appellant to be a credible witness, the fact that his denial had been consistent would not have much effect. Therefore this ground is not arguable.

[17] The third ground of appeal is in relation to directions given by the learned trial Judge to the Assessors relating to the consequences of a complaint that was not recent.

[18] Referring to paragraph 28 of the summing up, it was argued that there should have been a direction to the Assessors regarding the fact that there was no recent complaint and it only goes to the consistency of the evidence of the complainant.

[19] In the said paragraph the learned trial Judge summarized the evidence given by the complainant's mother. At paragraph 31 the learned trial Judge in his analysis of the evidence had stated that the evidence of the mother was not to be taken as evidence of the facts complained of, but as evidence of the consistency of her conduct with the story she said in the witness box.

[20] The learned trial Judge had not made any reference to recent complaint and had stated that the complainant's mother's evidence should be taken only to consider consistency of the evidence of the complainant. This ground is not arguable.

[21] The fourth ground of appeal is on the basis that in the absence of any DNA test as the alleged child of the Appellant was already born at the time of the trial, the learned Judge erred in law and in fact when there was more than reasonable doubts in the State's case.

[22] What can be taken up in appeal is regarding what had transpired at the trial. There was no issue raised regarding a DNA test. What was before Court was the evidence of the prosecution and the evidence of the defence. The Assessors as well as the learned trial Judge had accepted the complainant's evidence as credible. In the absence of any requirement for corroboration in sexual offences cases, a conviction can be based on the sole evidence of a complainant and that has occurred in this case.

[23] There is no merit in the fourth ground of appeal.

Orders of Court:

Leave to appeal against conviction is granted on ground 1 of the grounds of appeal.

COURT OF APPEAL

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL