

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

CRIMINAL APPEAL NO. AAU 0128 of 2018
(High Court Action No. HAC 87 of 2016)

BETWEEN : SAIYAD KHAN
Appellant

AND : THE STATE
Respondent

Coram : Chandra, RJA

Counsel : Mr S Nand for the Appellant
Ms S Tivao for the Respondent

Date of Hearing : 15 October, 2019

CRIMINAL APPEAL NO. AAU 0125 of 2018
(High Court Action No. HAC 87 of 2016)

BETWEEN : THE STATE
Appellant

AND : SAIYAD KHAN
Respondent

Coram : Chandra, RJA

Counsel : Ms S Tivao for the Appellant
Mr S Nand for the Respondent

Date of Hearing : 15 October, 2019

Date of Ruling : 21 November, 2019

RULING

- [1] The Appellant was charged with one count of rape contrary to section 207(1) and (2)(a) and (3) of the Crimes Act 2009.
- [2] He was convicted after trial and was sentenced on 3rd December 2018 to 14 years imprisonment with a non-parole term of 10 years.
- [3] He filed a timely appeal setting out the following grounds of appeal:

Against Conviction

1. *That the Learned Judge erred in law in misdirecting himself that there was evidence of distress and disturbed condition on the part of the complainant soon after the alleged incident against the overwhelming testimony that the incident did come to light until April 2016.*
2. *That the Learned Judge erred in law and in misdirecting himself when he held that there was an abortion on the complainant in the face of evidence to the contrary namely that the complainant had miscarried.*
3. *The Learned Judge erred in law and in fact in holding that the delay in reporting was due to the allegation of a threat from the Appellant and the delay in reporting by the complainants mother due to the interference by one Ahmed Khan when such allegations were bare and unsupported and absolute absence of evidence from the police to show that the alleged Ahmed Khan was ever questioned or confronted with the said allegations.*
4. *The Learned Judge erred in law and in fact in holding that the Appellant and his family members “had taken every effort to prevent the matter being reported to police” and further misdirected himself in holding “they had tried to influence the witnesses for the prosecution in various forms even after trial had commenced” in face of complete absence of the said allegations being tested by a rigorous police investigation. The above has caused a substantial miscarriage of justice.*

5. *The Learned Judge erred in law and in fact in holding that the Appellant had inserted his penis forcefully into the vagina of the complainant when there was no evidence to support the same and more so when the medical report categorically stated that there was no evidence of forced penetration.*
6. *The Learned Judge erred in law and in fact in failing to direct the assessors that the Appellant's version of sexual intercourse was not consistent with statutory rape if the assessors believed that the Appellant did not know the age of the complainant and no evidence was led to show that Appellant's lack of knowledge of the complainant's age was misconceived or unreasonable.*
7. *The learned Judge erred in law and in fact by failing to direct the assessors that notwithstanding the age of the complainant at the time of the alleged offence it was open to the assessors to consider the make and build of the complainant to indicate her advanced sexual maturity which would reflect the appellant's disinterestedness in her age.*
8. *The learned Judge erred in law and in fact by failing to put the Defence case fairly to the assessors thereby causing a substantial miscarriage of justice.*

Appeal Against Sentence

9. *The sentence is manifestly harsh and excessive in all the circumstances of the case.*
10. *The Appellant reserve the right to argue further and/or revised grounds of appeal upon receipt of the Court Record.*

[4] The facts in brief were that between 1st December 2014 and 21st March 2015, the 12 year old victim had been sent to the Respondent's house to charge her mother's mobile phone. Later when the victim left the Respondent's house, he had grabbed her from the back, taken her to his room, where he had raped her. A month later it had been discovered that

the victim was pregnant and the incident came to light. The victim had to abort the baby. Later the Respondent's family had prevented the victim from reporting the matter to police until the 1st of April 2016.

- [5] The State in their written submission takes up the position that the grounds of appeal are based on issues of law and fact and that the written submission filed on behalf of the Appellant are vague and lack sufficient details for the State to respond to same. The Ruling of Goundar J in **Rokodreu v State** [2016] FJCA 102; AAU0139.2014 (5 August 2016) has been cited to the effect that without reasonable details of the alleged errors in the summing up, that the Court cannot assess whether this appeal is arguable.
- [6] I find that in the present instance too, all the grounds of appeal against conviction deal with the summing up, of the learned trial Judge. The written submissions which have been filed are vague and they do not relate to the decisions which have been attached to the written submission as a bundle of authorities.
- [7] As a result of there being no coherence between the written submissions and the authorities handed up the Court cannot assess whether the grounds of appeal against conviction are arguable.
- [8] The 9th ground of appeal against sentence, is that it is harsh and excessive and no submissions have been made regarding same. However, the page following the page (which are not numbered) where ground 9 is set out three decisions have been cited which deal with directions in the summing up and have no relevance to the ground of appeal on sentence. Therefore the ground of appeal against sentence is also not arguable.
- [9] The State has appealed against the sentence by filing a notice of appeal ((AAU125 of 2018) setting out the following grounds of appeal:

- A) That the learned trial Judge erred in principle by imposing a sentence of 14 years imprisonment with a non-parole period of 10 years which does not reflect the totality of the respondent's culpability and the seriousness of the crimes. The sentence imposed is unduly lenient;
- B) That the learned trial Judge erred in the exercise of his sentencing discretion by failing to provide a meaningful upwards adjustment of the sentence for the aggravating factors that were present in the circumstances of the case;
- C) That the learned trial Judge erred in principle in failing to give any or any sufficient consideration to deterrence and denunciation given the prevalent of serious child sexual assault cases in Fiji.

[10] The Respondent to the appeal of the State has opposed the application for leave to appeal against sentence filed by the State.

[11] The State has cited the decision in Aicheson v State [2018] FJSC 29; CAV0012.2018 (2 December 2018) which increased the tariff for child rape from 11 to 20 years, and several other decisions showing the upward trend of the tariff.

[12] The Respondent has cited the decision in Prasad v State [2019] FJSC 3; CAV 0024.2018 (25 April 2019) where Keith J stated that the new tariff should only apply to offenders whose offences took place after the promulgation of the judgment in Aitcheson.

[13] In view of this position I would consider the grounds of appeal against sentence filed by the State to be arguable.

Orders of Court:

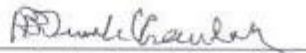
1. AAU00128/2018 - Saiyad Khan v State

The application for leave to appeal against conviction and sentence is refused.

2. AAU00125/2018 - State v Saiyad Khan

The application for leave to appeal against sentence is allowed.




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL