

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

CRIMINAL APPEAL NO. AAU 144 of 2017
(High Court Action No. HAC 124 of 2014)

BETWEEN : KENI BURENIVALU
Appellant

AND : THE STATE
Respondent

Coram : Chandra, RJA

Counsel : Mr G O'Driscoll for the Appellant
Mr L Burney for the Respondent

Date of Hearing : 24 July, 2019

Date of Ruling : 21 November, 2019

RULING

- [1] The Appellant was charged with Rape contrary to Section 207(1) and (2) of the Crimes Act, 2009 and was convicted before the High Court at Lautoka with the learned Trial Judge overturning the unanimous opinion of not guilty brought in by the Assessors.
- [2] He was sentenced to 13 years and 11 months with a non-parole term of 11 years on 27th September 2017.
- [3] The Appellant in his timely Notice of Appeal has set out the following grounds of appeal:
1. *That the Learned Trial Judge misdirected himself and contradicted himself in accordance with the directions given in his summing up when assessing the testimony of a witness.*
 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. 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 holding the complainant as a credible witness and not giving reasons for rejecting the Appellants evidence together with the defence witness and as such there has been a substantial miscarriage of justice.*
 4. *That the Learned Trial Judge erred in law and in fact in not accepting the evidence given by the Appellant without any cogent reasoning.*
 5. *That the Learned trial Judge erred in law and fact in overturning the unanimous decisions of the Assessors of Not Guilty and failing to consider that the facts of the case and the evidence given by each of the witnesses clearly indicated that the complaint by the Complainant was highly likely to be falsely made.*
 6. *That the Learned trial Judge erred in law and in fact in misdirecting himself when he stated that 'I have observed the demeanor of all the witnesses in Court. I accept the evidence of complainant and prosecution witnesses as truthful and reliable' relying only on the demeanor of the complainant and*

not whole evidence as a whole cause a substantial miscarriage of justice.

7. *That the Learned trial Judge did not consider /analyze the Defence case adequate / or in detail and in the circumstances there was a substantial miscarriage of justice.*
8. *That the Learned Trial Judge erred in law and in fact in overruling the unanimous verdict of the Assessors of Not Guilty did not give cogent reasons as to why he overruled the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.*
9. *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 doubts that there were serious doubts in the Prosecution case and as such the benefit of a doubt ought to have been given to the Appellant and in particular paragraph 58 of the learned Trial Judge's ruling that the complainant admitted that his anus was penetrated by some boys in the village in 2014 ... and hence a substantial miscarriage of justice.*
10. *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.*
11. *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.*
12. *That the learned Trial Judge erred in law and in fact in not directing himself adequately and / or taking into consideration that the rape complaint was not lodged on the date of the alleged incident but sometimes later when questioned by the Village Nurse and this would have raised serious doubts as to the credibility of the complainant. The failure to make a recent complaint would have definitely affected the credibility of the complainant which was not taken into consideration by the learned Trial Judge and hence caused a substantial miscarriage of justice.*
13. *That the Appellant reserves the right to appeal such further and other rounds as the Appellant may be advised upon the receipt of the Court Record.*

Appeal Against Sentence

14. *That the Appellant relies on Grounds 1 to 13 states hereinabove.*
15. *That the Appellant's appeal against the sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.*
16. *That the learned Trial Judge erred in law and in fact in not taking into consideration when sentencing the Appellant and not taking into relevant consideration.*
17. *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.*
18. *That the Appellant reserves his right to add /argue to the above grounds of appeal upon receipt of the Court records in this matter."*

[4] Between the 1st of June 2014 and 30th June 2014 at about 10 a.m. the victim, 16 years of age walked to the Octopus Resort from Nalauwaki Village taking with him lunch for his uncle Kafoa. After 2 pm he had left the Resort and on his way back to the village he had been called by his uncle, the Appellant. The Appellant had given his phone to the victim to watch a pornographic movie and both of them had watched the movie for 10 minutes. After watching the movie the Appellant had taken off the shorts of the victim and inserted his penis into the anus of the victim. The victim did not consent and had shouted but the Appellant had told him not to shout. The Appellant had told the victim not to tell anyone in the village and then left. The victim had informed his aunt about what the Appellant had done to him. A few days later the Village Nurse had come to see the victim and he had showed the injuries to her. Thereafter the victim had been taken by the Nurse to the Police Station and then to Lautoka Hospital for medical examination.

[5] The Assessors opined that the Appellant was not guilty but the learned trial Judge overturned their opinion and found the Appellant guilty.

- [6] The Appellant has filed 12 grounds of appeal against conviction and 5 grounds of appeal against sentence.
- [7] Of the said 12 grounds of appeal against conviction, ground 1 is vague as no particulars of alleged misdirections and contradictions have been provided. Ground 2 refers to a female victim and does not make sense. Ground 9 refers to the fact that the prosecution evidence proved beyond reasonable doubt that there were serious doubts in the prosecution case and again does not make sense. Grounds 10 and 11 are vague and do not have any merit.
- [8] Grounds 3 and 4 refer to the same matter that the Learned Judge erred in finding the complainant credible and in not giving reasons for rejecting the appellant's evidence and the evidence of defence witness.
- [9] The learned trial Judge in his judgment overturning the opinion of the Assessors dealt with the evidence of the Appellant and the Defence witness and had given reasons for rejecting such evidence in paragraph 55 to 57 of the judgment. These two grounds are not arguable.
- [10] The 5th and 8th grounds of appeal are on the basis that the learned Judge erred in not concurring with the Assessors' opinion. The learned trial Judge gave cogent reasons for overturning the opinion of the Assessors. The learned Judge had accepted the evidence of the complainant as being credible and that goes against the argument on behalf of the Appellant that the evidence of the complainant was highly likely to be false when considered with the evidence of the other witnesses. This ground is not arguable.
- [11] In the 6th ground of appeal the submission has been made that the learned Judge had relied only on the demeanour of the complainant and not the whole evidence as a whole. This ground is not arguable as a consideration of the judgment of the learned Judge shows that he has taken into consideration the entirety of the evidence in the case.
- [12] The 7th ground is to the effect that the learned trial Judge had failed to consider the defence case. This is not so as the learned Judge had considered the defence case in arriving at his conclusion. This ground is not arguable.

- [13] Ground 12 is as regards the absence of a recent complaint and that the learned Judge had not adequately directed the Assessors regarding same.
- [14] The learned trial Judge addressed this issue adequately in his summing up at paragraphs 136 and 137. This ground is not arguable.
- [15] Regarding the grounds of appeal against sentence, the sentence is within the tariff and the Appellant has failed to show any error in the sentencing exercise of the learned Judge as set out in the decision in **Kim Nam Bae v State** 1999 FJCA 21. AAU0015u.98S (26 February 1999). There is no merit in the grounds of appeal against sentence.

Orders of Court

- (a) Leave to appeal against conviction is refused.*
- (b) Leave to appeal against sentence is refused.*




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL