

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

CRIMINAL APPEAL NO. AAU 167 of 2017
(High Court Action No: HAC 425 of 2016)

BETWEEN : **MOHAMMED ZUBAIR**
Appellant

AND : **THE STATE**
Respondent

Coram : **Chandra, RJA**

Counsel : **Mr A K Singh for the Appellant**
Mr Y Prasad with Ms S Serukai for the Respondent

Date of Hearing : **23 January, 2019**

Date of Ruling : **24 May, 2019**

RULING

- [1] The Appellant was charged with one count of rape contrary to section 207(1) and 2(a), and one count of indecent assault contrary to section 212 of the Crimes Act, 2009.
- [2] The Appellant was convicted and sentenced on 24th November 2017 to a term of 12 years imprisonment with a non-parole term of 10 years.
- [3] The Appellant has filed a timely appeal against conviction and sentence and set out the following grounds of appeal:

1. *The Learned Trial Judge's direction in respect of paragraphs 8 and 9 of the summing up was unfair, putting assessors on emotional and or directed without any supporting evidence and thereby caused miscarriage of justice.*

2. *That the Learned Trial Judge erred in law when he failed to properly direct himself or the Assessors on effect of the contradictions in the Prosecution Witnesses' testimony and what weight to be given to it?*
3. *That the Learned Judge erred in law when he failed to direct himself and the assessors regarding the contradiction of Prosecution evidence and what weight to be placed on it.*
4. *That the Learned Trial Judge erred in law when he failed to direct the assessors to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive.*
5. *That the Learned Trial Judge erred in law when he failed to correctly explain the relevant law and rules of procedures to the assessors that resulted in the Appellant having lost a chance which was fairly open to him being acquitted resulted in a miscarriage of justice (para 57 of the summing up).*
6. *That the Learned Trial Judge erred in law and facts when he failed to properly direct himself and the Assessors regarding the delay of 8 months in making the complaint.*
7. *That there has been "serious misdirection" by the trial judge to invite the assessors to disregard doctor's expert evidence and or that he misdirected himself or the assessors that they are bound to accept the medical report of the victim (para. 59 of the summing up).*
8. *That the conviction was unsafe and unsatisfactory having regard to the entire sum of the evidence at trial, in particular to the following:*
 - a) *The complainant in her evidence alleges that appellant spread her legs and inserted his penis into her vagina. She could feel something hard going inside (para38© of the Summing Up).*
 - b) *Complainant told doctor that Appellant tried to insert his penis inside her vagina but was unsuccessful because she kept pushing him away (para 41(b) of the summing Up).*
 - c) *Doctor confirmed hymen was intact (para 41(a) of the summint up).*
 - d) *Welfare officer was informed that it was attempted rape.*

e) Complainant and her mother's statement were subject to omission and inconsistent to their Police statement (para 38(j) and 39(g) of the Summing Up).

f) Complainant told her teacher completely different facts that the first incident was in December 2015. That was first early complaint she made about the incident (para 40(a) of the summing Up). Although she first discussed with her friend who advised complainant to refer it to the Form Teacher.

g) Complainant told her friend N that the first incident happened on a wedding day (that should be 30th April 2016) and second one in a kitchen (para 43(a) of the Summing Up).

h) Complainant's admitted going to Appellant's house immediately after the incident and met her mother first.

i) Her mother said that she came home at 10.15 a.m. and saw complainant watching TV.

j) Photographs showed complainant as cheerful.

k) Date of the allegation is wrong as proved by the Appellant through documentary evidence.

l) Complainant's continued contact with the Appellant after the incident.

m) Medical report does not support that that was any penetration.

n) Complainant's evidence as stated by the trial Judge as "It was painful and she was crying and shouting when he did that" (para 38(c) of the Summing up).

o) Their tenants would have heard the shouting as on Sunday 14th February 2016 Tenants was at home.

9. *The Learned Trial Judge erred in law when he failed to direct the Assessors that in assessing the evidence before them, the totality of evidence should be taken into account as a whole to determine where the truth lies.*

10. *The Learned Judge erred in law when he failed to direct the assessors that it was mandatory on the assessors to examine evidence presented by the defence carefully to decide, not necessarily they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.*

11. *That the Learned Trial Judge erred in law when he failed to direct himself or the assessors to the significance of Prosecution witness' conflicting evidence during the trial especially:*
 - a) *The Complainant stated that after the incident, she had a bath and went to accused house and met her mother;*
 - b) *The mother said that she came home at 10.15 a.m. from accused's home and saw complainant watching TV.*
 - c) *Complainant she shouted when accused inserted his penis inside her vagina.*
 - d) *Complainant told welfare officer that there was an attempted rape.*
 - e) *Complainant's tenants were at home and did not hear any shouting.*
 - f) *Why tenants were not interviewed or called to give evidence.*
12. *The Learned Judge erred in law and facts when he directed to the Assessors that what is written in the Medical Report in A(4) and D(10) are not admissible when his Lordship failed to direct that the Doctor's finding is consistent with what complainant told her and that it directly affects the credibility of the complainant.*
13. *That the Learned Trial Judge erred in law when he without any valid reason disbelieved the Defendant and his witnesses.*
14. *That the Learned Trial Judge erred in law when he rejected evidence S/DC Angeline Kumar who confirmed that the complainant and her mother read the Police statement.*
15. *That the Learned Trial Judge erred in law regarding the sentencing principle when he sentenced the Appellant to 12 years without taking into consideration that the Appellant was in custody before taken to Court."*

[4] Having set out the above grounds of appeal, written submissions have been filed on behalf of the Appellant under the following heads incorporating the said grounds of appeal:

- (i) Judges Directions (dealing with grounds 1, 4, 5 and 6).
- (ii) Law as to Inconsistent/Omission and Contradiction (dealing with Grounds 2, 3 and 11).
- (iii) Expert Evidence (dealing with Grounds 7 and 12).

(iv) Totality of Evidence (Dealing with Grounds 8 and 9).

(v) Defence Case (dealing with Grounds 10, 13 and 14).

(vi) Error in sentencing (dealing with Ground 15).

- [5] Although the written submissions were formulated under the above heads as having incorporated the different grounds of appeal, it is difficult to comprehend the different grounds when the submissions are considered under the different heads in the written submissions. For instance, under the heading Judges Directions, though it is stated that grounds 1, 4, 5 and 6 are dealt with, there is no indication regarding the said grounds individually. In view of this, the different grounds of appeal are dealt with separately.
- [6] Regarding ground 1, in paragraphs 8 and 9 the learned trial Judge had directed the Assessors in general terms as to how they should consider the evidence of a child complainant and as to how they should consider such a witness recalling events. There was no reference to the facts of the case as such.
- [7] A trial Judge is entitled to give some assistance on questions of fact which the Assessors are called upon to consider. He is entitled to express extremely confident opinions. **R v Cohen and Bateman** 2 Cr. App. R. 197, 208.
- [8] In the said paragraphs the learned trial Judge was expressing his opinions in a generalised form and therefore there was no prejudice caused to the Appellant as alleged in ground 1 of the grounds of appeal.
- [9] In ground 4 it is urged that the learned Trial Judge erred in law when he failed to direct the assessors to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive.
- [10] It was suggested on behalf of the Appellant that the complainant had an improper motive in making accusations against the Appellant though there was no material evidence placed regarding same.
- [11] The learned Trial Judge had in his summing up at paragraph 52(d) dealt with the position regarding improper motive and had left it to the Assessors to decide on it. The complaint

on behalf of the Appellant is that the learned Judge should have directed the Assessors that they should proceed with caution when dealing with the evidence of the prosecution.

- [12] In view of the nature of the evidence placed before Court by the prosecution, where several contradictions were pointed out, it could be argued that there should have been more emphasis on the aspect of improper motive when the Assessors were directed by the learned trial Judge. I would consider this ground (4) to be arguable.
- [13] In ground 5 it is urged that the learned Trial Judge erred in law when he failed to correctly explain the relevant law and rules of procedures to the assessors that result in the Appellant having lost a chance which was fairly open to him being acquitted resulted in a miscarriage of justice.
- [14] This ground is vague and not precise as is expected when formulating grounds of appeal. It would appear that what is submitted is that the learned trial Judge instead of summarizing the evidence of the several witnesses at the trial had set out the evidence verbatim as a result of which the Assessors would have been confused and unclear as to what they had to decide.
- [15] The learned trial Judge in his summing had given a detailed account of the evidence of the several witnesses and invited them to consider the evidence in considering whether the prosecution had proved the charges against the Appellant.
- [16] The learned trial Judge also explained to the Assessors the relevant law and as to how they should apply same to the evidence that was before them. In view of this position I would not consider this ground to be arguable.
- [17] Ground six is to the effect that the learned Trial Judge erred in law and facts when he failed to properly direct himself and the Assessors regarding the delay of 8 months in making the complaint.
- [18] The learned trial Judge has dealt with the delay in making the complaint to the Police in his summing up in paragraphs 57 and 58 and how the Assessors should consider it adequately and therefore this ground is not arguable.

- [19] Grounds 2, 3 and 11 are in relation to the contradictions in the evidence of the prosecution witnesses specially the evidence of the complainant and of her mother.
- [20] The learned trial Judge in his summing up had dealt with the contradictions in the evidence of the complainant per se as well as with the evidence of the other prosecution witnesses and the first defence witness. There were contradictions in the complainant's evidence when considering her statement to the Police, her disclosing the matter to her friend, the School teacher and the Doctor who examined her, which were in relation the date of the incident, the nature and manner in which the incident occurred.
- [21] In view of the various contradictions that were there specially in the complainant's evidence it would be arguable that the learned trial Judge had not properly directed himself and the assessors in considering the weight to be attached to the complainant's evidence.
- [22] Grounds 7 and 12 deal with the Doctor's (Expert) evidence. Ground 7 is to the effect that there is serious misdirection by the trial judge to invite the assessors to disregard the doctor's expert evidence.
- [23] It had been pointed out in the trial that the complainant's evidence in Court was contradictory to what was recorded by the Doctor who examined her. The doctor had stated in her evidence that she recorded what the complainant had told her and that too in the presence of her mother and a Nurse who was in attendance. According to what was recorded in the doctor's report the complainant had stated that the Appellant had attempted to rape her and that she had pushed him away. The Doctor had also stated in her report that there were no injuries and stated that her hymen would have been intact.
- [24] The learned Judge had in his summing up dealt with the doctor's evidence and had stated that they are not bound to accept her evidence.
- [25] It would appear that the learned Judge was not convinced with the Doctor's evidence as in his Judgment he had been critical of the doctor and had stated that her evidence was not reliable. He had proceeded further and stated that what was stated in the medical report did not affect the credibility and reliability of the evidence of the complainant.
- [26] I would consider these two grounds, 7 and 12 to be arguable.

- [27] Grounds 8 and 9 are to the effect that the conviction was unsafe taking into consideration the entire sum of evidence.
- [28] The matter highlighted in ground 8 relates to the several contradictions and omissions that transpired during the course of the trial regarding the evidence of the witnesses, specially that of the complainant and her mother.
- [29] A consideration of the entirety of the evidence led at the trial by the prosecution as well as the defence would be necessary to reach a final conclusion on these two grounds which appear to be arguable.
- [30] Grounds 10, 13 and 14 relate to the defence evidence. The position taken upon behalf of the Appellant is that the learned Trial Judge had misdirected himself regarding the Defence evidence.
- [31] Regarding ground 10, it has been submitted that the learned Trial Judge had failed to direct the Assessors to consider whether the evidence adduced on behalf of the Appellant was capable of creating a reasonable doubt in their minds that no sexual intercourse took place between the Appellant and the Complainant as alleged by the complainant specially when the evidence of the complainant was that there was penetration which was not supported by the medical evidence.
- [32] The learned Trial Judge had in his summing up dealt with the defence evidence and directed the Assessors at paragraphs 62 and 63 to the effect that though an accused person gives evidence, he does not assume any burden of proving his case and that the burden remained throughout on the prosecution to prove the case beyond reasonable doubt. Further that the accused's evidence must be considered along with all the other evidence and that they could attach such weight to it as they thought appropriate.
- [33] The learned Trial Judge also stated that if they think that what the accused said might be true, it means that there is reasonable doubt in their mind and therefore their opinion must be not guilty.

- [34] In **Prasad v State** AAU 105 of 2013, 14th September 2017, the manner in which a trial judge should direct the Assessors regarding the evidence of an accused has been spelt out in fair detail and it is the submission of the Appellant that there should have been a direction by the learned Trial Judge in line with the directions suggested in Prasad's case.
- [35] I would consider this ground to be arguable specially in view of the fact that there were several contradictions that were highlighted in the evidence of the prosecution.
- [36] Grounds 13 and 14 are in relation to the disbelief of the evidence of the accused and his witnesses by the learned trial Judge based on demeanour only, when such evidence was not contradicted, or inconsistent when compared with the complainant's evidence.
- [37] The position taken up on behalf of the Appellant is that the same yardstick that was applicable when dealing with the evidence of prosecution was not utilized by the learned Trial Judge when considering the evidence of the defence.
- [38] I would consider these grounds to be arguable.
- [39] Ground 15 is in relation to sentencing on the basis that the learned Trial Judge had failed to take into account the time spent in remand when sentencing and that the starting point chosen was too high.
- [40] The Respondent submitted that the Appellant had been granted bail when he first appeared in the Magistrate's Court and that he did not spend time in remand. The Appellant has failed to give details regarding this matter.
- [41] The complaint that the starting point chosen was too high when there was no penetration and the hymen was still intact has to be viewed with the final outcome of the trial. The Appellant was found guilty of the charge of rape and therefore the starting point chosen by the learned Trial Judge was not high as it was within the tariff. This ground is therefore not arguable.
- [42] There has been an application for bail pending appeal and to adduce further evidence by the Appellant and an affidavit sworn on the 12th December 2018 had been filed in support of that application.

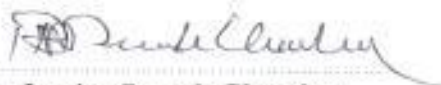
[43] No submissions were made regarding that application and therefore no order is made regarding same.

Orders of Court

(1) Leave to appeal is granted against conviction on grounds 2, 3, 4, 7, 8, 9, 10, 11, 12, 13 and 14 only.

(2) Leave to appeal against sentence (ground 15) is refused.




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL