

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 063 of 2018
[In the High Court at Suva Case No. HAC 290 of 2017]

BETWEEN : **APENISA RAILEQE** - *Appellant*

AND : **STATE** *Respondent*

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **30 June 2022**

Date of Ruling : **01 July 2022**

RULING

- [1] The appellant had been charged in the High Court at Suva with a single count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009 committed on LG (name withheld), a female child of 08 years, between 12 August and 27 August 2017 at Nadro Village in the Central Division.
- [2] At the end of the trial, the assessors had expressed a unanimous opinion that the appellant was guilty of rape. The learned High Court judge had agreed with the assessors and convicted the appellant as charged. The appellant had been sentenced on 29 March 2018 to 14 years and 05 months of imprisonment with a non-parole period of 12 years and 05 months.
- [3] The appellant's appeal against conviction in person is late by about two months (28 June 2018) and the delay could be excused. I shall consider it as a timely appeal. Both he and the state had tendered written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success' [see Caucu v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Waqasaqa v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and Naisua v State [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see Nasila v State [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The grounds of appeal urged on behalf of the appellant against conviction are as follows.

'Ground 1

That the facts of the case do not corroborate (sic) with the charge of rape.

Ground 2

That the prosecution has failed to prove its case beyond reasonable doubt.'

[6] The prosecution evidence has revealed that the appellant was the victim's father's elder brother. On the day in question he had visited the house where LG, her younger brother, her grandparents and parents live. Both parents had been away but the rest were at home. The appellant had come inside the toilet and tried to kiss LG. After LG came out of the toilet the appellant had asked her to come to the room where he had removed her cloths, unzipped his trousers and pulled out his penis. He had wanted LG to kiss each other but when she told him not to kiss and the police would arrest him, he had threatened to smack her if she were to tell anyone. Thereafter, the appellant had oiled his penis and put it inside LG's vagina. Due to pain, she had started crying and the appellant had placed a pillow covering her mouth. He had also wiped the blood off her vagina.

- [7] According to LG's mother on a day between 12 and 27 August 2017 the appellant had visited their house and when she left for Suva market the appellant, LG, her brother and grandparents were at home. Even before 27 August 2017 LG had complained of pain in her vagina while urinating. On 27 August LG was sick and upon examination the mother had seen blood and pus in her vagina and taken her to hospital on the following day. When questioned LG had told the mother that on the day she took cassava to the market 'ta leva' namely the elder brother of her father, who was the appellant, had done something bad to her. When the mother probed further slowly, LG had said what the appellant had done. The mother had observed that LG was scared and frightened when she narrated the story to her.
- [8] When LG was examined on 28 August 2017 the doctor had seen abrasions and tenderness on both sides of labia minora and at the introitus, pus discharge, and found that the hymen was not present. The doctor had said that the hymen was a thin membrane at the entrance to the vagina and its absence suggested that penetration had taken place. She had said that the abrasions noted could be caused by an erected penis. In her opinion the injuries would have occurred within a period of less than one month.
- [9] The appellant had remained silent at the trial and not called any witnesses.

01st ground of Appeal

- [10] The appellant's complaint, incoherent as it is, appears to be that had a 'big' penis of a 42 year old man (like him) entered the 'small' vagina of a 07 year old girl (like LG) she should have screamed at the top of her voice, gone unconscious, and flow of blood would have been excessive and unstoppable and dripping down her legs with blood marks all over her cloths and she would have walked with an abnormality with her back popped out and raised backwards and legs spread apart. She would have been on the sickbed for weeks. He argues that the absence of these noticeable after-effects suggest that there was no act of rape as complained by LG.
- [11] The appellant's stereotyped aftermath of a penetration by a grown-up penis of not so grown-up vagina appears to be based on an unsubstantiated incident of rape of a class 5 girl in Nakasi. None of these propositions advocated by the appellant had been put to

the doctor by the appellant's counsel at the trial to be tested for their accuracy. Nor had they been put to LG or her mother. These are essentially trial issues and trial arguments.

[12] On the other hand, the appellant had oiled his penis before inserting into LG's vagina and that had been done exactly to minimize the impact that he was expecting otherwise. He had covered her mouth with a pillow precisely to prevent her cries being heard by other inmates of the house. He had wiped blood off her vagina to prevent blood being seen by others.

[13] Therefore, I see no prospect of success in this ground of appeal. On the totality evidence available it was perfectly open to the assessors to bring home the charge against the appellant.

02nd ground of appeal

[14] While arguing that the prosecution had failed to prove the case beyond reasonable doubt, the appellant has stated that the complaint to the mother should not have been treated as recent complaint evidence. He also joins issue with the delay in LG complaining to her mother. He also has a complaint on the absence of a specific date of the incident in the narrative of the prosecution witnesses. At the same time he admits that the main issue in the case was the element of penetration, for identity and lack of consent were not arguable issues at all.

[15] The trial judge had referred to the fact that the prosecution had relied on recent complaint evidence but not indicated to the assessors that they should treat it as such. In any event the trial judge had correctly directed the assessors as to how they should evaluate a recent complaint. Even if what LG had told the mother is not considered as recent complaint evidence, the rest of evidence was quite sufficient to prove the case beyond reasonable doubt.

[16] The delay in reporting could easily be understood given the age of the victim and the hierarchical position the appellant held *vis-à-vis* her and also his threat issued at the time of the incident. The mother had seen LG's demeanor of being scared and frightened even after nearly a month since the incident in telling her what had happened.

- [17] Lack of a specific date is immaterial in as much the count of rape is a representative count. It is clear that the incident had happened on the day when the LG's mother had left for Suva leaving the appellant, LG, her brother and grandparents at home which was within the period specified in the information.
- [18] As the appellant had admitted the most crucial issue was whether there had been penetration. The evidence of LG, her mother and medical evidence amply prove the case against the appellant beyond reasonable doubt.
- [19] If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred (vide Aziz v State [2015] FJCA 91; AAU112.2011 (13 July 2015))
- [20] The Court of Appeal in Sahib v State [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere but should base its decision on the reading of the whole record.
- [21] In considering whether a verdict is unreasonable or cannot be supported having regard to the evidence, the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable doubt of the commission of the offence [Kumar v State [2021] FJCA 101; AAU 102 of 2015 (29 April 2021); Naduva v State [2021] FJCA 98; AAU0125.2015 (27 May 2021)].
- [22] In my view, in this case it was quite open to the assessors and the trial judge on the material available to find the appellant guilty of rape (see Pell v The Queen [2020] HCA 12 and M v The Queen (1994) 181 CLR 487, 494)
- [23] This ground of appeal also has no prospect of success.

Order

1. Leave to appeal against conviction is refused.



C. Prematilaka

Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL