SAILASA ASAELI v STATE (AAU0018 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP

17 September, 26 October 2012

[2012] FJCA 72

Criminal Law — sentencing — rape — leave to appeal against conviction — leave to appeal against sentence — unsafe and unsatisfactory conviction — whether any arguable grounds of appeal — whether excessively harsh sentence — Court of Appeal Act ss 23(1), 26, 35(2), 35(3); — Crimes Decree s 207(1)

The appellant was convicted of rape and sentenced to six years' imprisonment with a non-parole term of four years. The appellant sought leave to appeal against conviction and sentence.

Held –

(1) That a conviction is unsafe or unsatisfactory is not a basis upon which the Court of Appeal should allow an appeal against conviction under s 23(1) of the Court of Appeal Act. None of the grounds of appeal raise an arguable point.

(2) The judge correctly identified seven years' imprisonment as the appropriate starting point for the rape of an adult. The aggravating factors were identified by the learned judge, for which a year was added to the sentence. The mitigating factors, being his good character and young age, were considered and a deduction of two years was allowed. There was no error of law and the sentence was not wrong in principle.

Leave to appeal against conviction is refused. Appeal against conviction is dismissed.

A. Vakaloloma for the Appellant.

M. Korovou for the Respondent.

[1] Calanchini AP. On 9 February 2011 the Appellant was convicted on one count of rape contrary to s 207(1) of the Crimes Decree 2009. The Appellant had pleaded not guilty. On 10 February 2011 the Appellant was sentenced to a term of imprisonment of 6 years with a non-parole term of 4 years. The sentence took effect from 10 February 2011.

[2] The Appellant filed his notice of appeal on 4 March 2011. The appeal was filed within the time prescribed by s 26 of the Court of Appeal Act Cap 12. An amended notice of appeal was filed on 9 May 2011. The amended notice sets out six grounds of appeal, all of which relate to the application for leave to appeal against conviction. However the amended notice also states that the appeal is against both conviction and sentence. In the initial notice the Appellant referred to the sentence as being *'excessively harsh sentence.'* The application for leave to appeal against sentence will be considered on that basis.

[3] A brief summary of the relevant facts was set out in the Sentencing decision of the learned trial judge. On 17 July 2010 the victim joined the company of the offenders (the Appellant being one of two) and a girl for a drinking party after a wedding ceremony in the village. The victim was 19 years old. The victim and the offenders all lived on Kioa Island. After consuming a substantial amount of liquor the victim passed out. The Appellant undressed the victim and raped her while she lay unconscious. This was witnessed by the girl who was in their

company. She was threatened by the Appellant when she caught him having sexual intercourse with the victim who was still passed out.

[4] Both parties filed written submissions. Counsel for the Appellant filed on 14 September 2012 submissions that addressed the grounds of appeal set out in the amended notice of appeal. Counsel for the Respondent on 31 August 2012 filed submissions that addressed the grounds of appeal set out in the Appellant's initial notice of appeal. Counsel presented further oral submissions on 17 September 2012. The written and oral submissions by both parties will be considered in the context of the amended grounds of appeal.

[5] The amended grounds of appeal relied upon by the Appellant are:

> *"1 **THAT** the learned trial judge failed to give a balanced summing up that resulted in the convicted to be unsafe and unsatisfactory; and*
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> *2 **THAT** the learned trial judge failed to properly direct himself and direct assessors according to law when the assessors gave inconsistent verdict concerning a case largely built on the states of mind and that under all the circumstances of the case, the finding of guilt was unsafe and unsatisfactory; and*
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> *3 **THAT** the learned trial judge failed to direct assessors on the absence of professional and forensic material/ evidence on the effect alcohol consumption such as in this case, the real and practical effect of a 40oz bottle of Rum to the mind and body of people who consumed it.*
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> *4 **THAT** the learned trial judge failed to direct assessors to consider the timing of consumption of alcohol without a mix but dry, and the lighting effect in a close learn-to house in the afternoon by witness against the Appellant and that such non direction placed the Appellant to disadvantage and that the verdict was therefore unsafe; and*
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> *5 **THAT** the learned judge placed undue emphasis and weight in summing up to the evidence by complainant who said she could not remember anything and evidence of Elenoa Damudamu who was drunk and gave evidence of what she saw against the Appellant and failed to draw any evidential reference of how that exercise would have impacted the prosecution's case; and*
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> *6 **THAT** the learned judge failed to properly direct himself and the assessors in law and in fact on the issue of 'black out' and 'unconscious' after or during the consumption of alcohol that would have impact evidence against the Appellant."*

[6] The first ground is a claim that the learned Judge did not give a balanced Summing Up thus resulting in an unsafe and unsatisfactory conviction. It is only necessary to make two comments on this ground. First, the ground of appeal is not sufficiently particularised to enable a proper examination of the claim. Secondly, that a conviction is unsafe or unsatisfactory is not a basis upon which the Court of Appeal should allow an appeal against conviction under section 23 (1) of the Court of Appeal Act. So far as relevant s 23 (1) state:

> *"The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."*

[7] This ground of appeal does not raise an arguable point and leave is refused.

[8] The second ground of appeal appears to relate to an assertion that the assessors gave inconsistent verdicts and that the finding of guilt was unsafe and unsatisfactory. This ground is not addressed in the Appellant's submissions. There is no indication as to what the assessors inconsistent verdicts were and the ground is not supported by any material that appears in the file. Leave is refused.

[9] The third ground in effect relates to the issue of intoxication. There is no suggestion in the material that the Appellant had raised a defence of intoxication that prevented him from either forming the necessary intention or performing the act of intercourse. His defence was simply that he did not have intercourse not that he could not remember having intercourse with the complainant. This ground does not raise an arguable point and leave is refused.

[10] The fourth, fifth and sixth grounds seeks to challenge the evidence upon which the prosecution relied and which the assessors must have accepted in order to reach a guilty opinion. In my judgment the Summing Up reasonably and fairly discussed the evidence given by the Appellant and adduced by the Respondent. The fact that the assessors preferred the sworn testimony of the witness who saw the offence being committed in preference to the evidence given by the Appellant is, under those circumstances, not a basis for claiming that the verdict should be regarded as unreasonable. It was a trial where the Appellant was represented by Counsel and where the evidence of the witness was tested under cross-examination. In my judgment all three grounds fail to raise an arguable point and leave is refused.

[11] The application for leave to appeal against sentence is on even less secure ground. The maximum penalty for rape is life imprisonment. The learned judge correctly identified seven years imprisonment as the appropriate starting point for the rape of an adult. The aggravating factors were identified by the learned judge for which a further year was added to the sentence. The mitigating factors being his good character and young age were considered and a deduction of two years was allowed. There is no error of law and the sentence is not wrong in principle. Leave to appeal against sentence is dismissed under s 35(2) of the Act.

[12] In summary, leave to appeal against conviction is refused under s 35(3) of the Act and the appeal against conviction is dismissed under s 35(2) of the Act.

Leave to appeal refused. Appeal dismissed.