

**SIMELI BILI NAISUA v STATE (AAU0014 of 2011)**

COURT OF APPEAL — CRIMINAL JURISDICTION

5 TEMO JA

12 October, 2 November 2012

10 **Criminal Law — appeals — rape — appeal against conviction and sentence — whether question of law alone — whether sentence wrong in law — no right of appeal — vexatious and frivolous — Court of Appeal Act ss 21(1), 35(2).**

The appellant was convicted of rape. He was sentenced to 15 years' imprisonment with a non-parole period of 11 years. He appealed against the conviction and the sentence.

15 **Held —**

The appellant's ground of appeal does not involve a question of law alone, and the appellant did not show that the sentence was wrong in law. Pursuant to s 35(2) of the Court of Appeal Act, Chap 12, the appellant's appeal against conviction is bound to fail because there is no right of appeal, and his application for leave to appeal against sentence is vexatious and frivolous.

20 Appeal against sentence and conviction dismissed.

*Appellant in Person*

*P. Madanavosa* instructed by *Office of the Director of Public Prosecution*, Suva for the Respondent

25 [1] **Temo JA.** On 14th December, 2010, the appellant went to trial in the Suva High Court, on the following information:**FIRST COUNT****Statement of Offence**30 **RAPE:** Contrary to s 207(1)(2)(c) of the Crimes Decree, No 44 of 2009.**Particulars of Offence**

**SIMELI BILI NAISUA** on the 5th day of April 2010, at Lami, in the Central Division, penetrated the mouth of **S.M** with his penis without her consent.

35 [2] The accused pleaded not guilty, and the matter was heard. On 16th December, 2010, His Lordship Mr Justice S. Thurairaja delivered his summing up. The assessors then retired to deliberate. They returned with a unanimous verdict that the accused was guilty as charged. His Lordship agreed with the assessors, found the accused guilty as charged and convicted him accordingly. On 8th February, 2011, the accused was sentenced to 15 years imprisonment, with a non-parole period of 11 years imprisonment.

40 [3] The accused was aggrieved by the above decision, and he lodged his appeal against conviction and sentence on 1st March 2011. His ground of appeal on conviction were as follows:

- 45 (i) That he was convicted of a defective charge, which should be under s 207(2), instead of subsection 1 of the Crimes Decree 2009;
- (ii) The Learned Trial Judge failed to call the arresting officer at the voir dire to determine the admissibility of the confession. I feel the time of arrest and the time of my being taken to court is accountable to the time of interview. The same was not considered by the court;
- 50 (iii) The complainant's allegation of rape is not true;
- (iv) The allegation by the complainant was sexual assault, not rape.

[4] On sentence, the appellant complained the sentence was harsh and excessive.

[5] The appellant's right to appeal to the Court of Appeal is governed by s 21(1) of the of the Court of Appeal Act, Chap 12, which reads as follows:

5       **"...21(1) A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal –**

- (a) **against his conviction on any ground of appeal which involves a question of law alone;**
- 10       **(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and**
- 15       **(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law..."**

[6] Both parties have submitted written submission, and I have carefully considered the same. I have also listened to their verbal submissions.

[7] The appellant was convicted on 16th December 2010. He submitted his appeal within time. However, he must satisfy the requirements of s 21(1) of the Court of Appeal Act, Chap 12, to proceed with his appeal on conviction. He must satisfy the court that his ground of appeal on conviction "involves a question of law alone". According to the State, the appellant's ground of appeal against conviction does not involve question of law alone, and as such, ask that his appeal against conviction be dismissed. I have carefully looked at the grounds submitted by the appellant, and I must say, I agree with the State. The appellant was correctly charged. It is not the role of the trial judge to call for witnesses in a voir dire. The assessors and the court have properly made their decision on the charge. The grounds submitted by the appellant does not involve questions of law.

30 [8] As to the sentence, the appellant had not shown that the sentence was wrong in law.

[9] Pursuant to s 35(2) of the Court of Appeal Act, Chap 12, I find the appellant's appeal against conviction is bound to fail because there is no right of appeal, and his application for leave to appeal against sentence is nothing but vexations and frivolous. I therefore dismiss his appeal against conviction and sentence.

*Appeal dismissed.*

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