KALIOVA VUKI BALEMAIRA v STATE (AAU0098 of 10)

COURT OF APPEAL — CRIMINAL JURISDICTION

MARSHALL JA

18 March 2011, 10 May 2012

Criminal Law — appeals — Rape — leave to appeal against conviction — whether arguable that verdict was unreasonable or could not be supported having regard to evidence — issue of fact — conflict of evidence between complainant and appellant — leave to appeal against sentence — no errors of principle — application for bail pending appeal — low chances of success — Court of Appeal Act ss 21(b), 35(2).

The appellant was convicted of rape and sentenced to six years' imprisonment. The appellant had admitted to sexual intercourse with the victim but claimed it was with consent. The appellant applied for leave to appeal against the conviction, leave to appeal against the sentence, and bail pending appeal.

Held –

(1) What the appellant has to do is satisfy the Court of Appeal that the verdict is unreasonable or cannot be supported having regard to the evidence. Where, as in the present case, a conflict of evidence between the complainant and the appellant is the principal issue of fact, the Court is prepared to grant leave to appeal on this ground if it is merely arguable. In the Court's view, it reaches the threshold to grant leave to appeal against conviction. However the chances of success are low and it is not a case where bail should be granted pending appeal.

(2) The test for leave to appeal against sentence is that it is wrong in principle. There were no errors of principle by the sentencing judge. The sentencing judge considered all the matters he should have and was correct in identifying the abuse of trust by the appellant as an aggravating factor. The sentence was correct.

Leave to appeal against conviction granted, limited to the ground that the verdict is unreasonable or cannot be supported having regard to the evidence. Leave to appeal against sentence refused and appeal against sentence dismissed. Application for bail pending appeal refused.

Cases referred to

Ilaisa Sousou Cava v The State Crim App No CAV 0007 of 2010, 14 November 2011, applied.

Drotini v The State [2006] FJCA 26; *Kasim v State* [1994] FJCA 25, considered.

R v Hancox [1913] 8 Cr App Rep 193, followed.

J Rabaku instructed by *Law Solutions* for the Appellant.

S Puamau instructed by *Office of the Director of Public Prosecutions* for the Respondent.

Marshall JA.

RULING

[1] Kaliova Vuki Balemaira was accused of two counts of rape and one of larceny in an information that was heard by Justice Priyantha Fernando and three assessors between 5th and 28th October 2010. There was no case to answer on the count of larceny. The incident had taken place at a late night drinks party at a villa in Pacific Harbour. The party had started on 19th November 2007 but the incidents charged in the information took place in the early hours of 20th November 2007.

[2] On two counts of rape the assessors were given a comprehensive summing up by Justice Priyantha Fernando on 28th March 2010. They then retired and considered their opinions. After three hours they returned a *"not guilty"*opinion on the First Count of rape by a majority of 2 – 1. On the 2nd count of rape there was a unanimous opinion of *"guilty"*.

[3] On 4th November 2010 Justice Priyantha Fernando in acquitting Vuki on the 1st Count and convicting him on the 2nd Count, said:

"I have reviewed the evidence called at the Trial, and I have directed myself in accordance with the Summing Up. I concur with the unanimous opinion of the Assessors in relation to Count No 2. Therefore I find the accused guilty of Count No 2 and convict him of the same.

In relation to Count No 1, I consider the evidence to see whether the majority opinion of not guilty is consistent with the evidence in the case.

The accused admits, having sexual intercourse with the complainant Majorie Parr. The complainant says that she did not consent to intercourse. Therefore the issue for this court is to see whether the prosecution has proved its case beyond reasonable doubt on the element of consent. Whether the act of sexual intercourse mentioned in Count No 1 was without the consent of the complainant and whether the accused knew or believed that she was not consenting or didn't care if she was not consenting.

It is evident that the four men including the accused and the 4 women including the complainant were having a party and had drinks together. The version of the complainant is that while she was sleeping in the room, she was woken up by somebody pulling her legs. She felt someone grabbing her breasts. She realized that she had no bottoms on, no pants on. She heard a voice, telling her to keep still and keep quiet. She realized what was happening. Accused was with no clothes on. She felt his hands going up. She tried to put his hand down and said 'No'. She was on the bed facing up and she felt her leg pinned up. It was his torso, upper part of his legs, his groin, pinned her up she said. She could feel his penis going inside her. She had told him that she had her period, she was married and that she had a son. Accused had said I don't care, I don't mind. She said that, he kept going and stopped and she felt that he finished. That was her evidence on the 1st Count.

Then on the 2nd Count of Rape her evidence was, that thereafter he pulled up her shoulders and turned her over, then she was face down and he tried to insert the penis from behind. He separated her knees and legs, and he managed to put his penis inside her vagina. She then pushed him off and escaped. Then she left the room for the living room and told her friends Tale and Taraima. Then she called her husband and called the Police. This indicates that there had been no consent for the act of intercourse in the 2nd instance.

On this evidence, on the 1st Count, accused had sexual intercourse until he ejaculated keeping her face up position. She said that she said No Thereafter on the 2nd Count of Rape her evidence was when the accused inserted his penis in to her vagina, when she was turned face down, she managed to push the accused and escape.

When you analyse the evidence of the complainant herself, on the issue of consent at the time of the 1st intercourse, where the accused continued until he ejaculated, a reasonable doubt exists as to whether she consented to the 1st act of intercourse. Whereas at the time of the 2nd intercourse where she pushed him and escaped.

Therefore I find when considering the evidence of the complainant, the Assessors majority verdict of not guilty on Count No 1 is consistent with the evidence placed in Court.

In my opinion Assessors were therefore entitled to reach their majority opinions of not guilty in relation to Count No 1. This conclusion of Assessors is based on a highly contested question of fact. Therefore I am not inclined to interfered with that conclusion for the above reasons.

Hence I accept the majority verdict of the Assessors that the assessors is not guilty of Count No 1.

In the above premise I acquit the accused on Count No 1 and convict him on Count No 2."

[4] I would not like it to be thought that a woman who wakes up to being raped by a man on top of her and who indicates by words and actions that she does not consent, must also succeed in pushing the man off and escaping before she can prove non consent. However I believe the learned judge meant no more than that the majority of the assessors who gave an opinion of *"not guilty"*believed the complainant's evidence rather than that of Kaliova Vuki Balemaira. But they also found something in the evidence that caused a reasonable doubt on the issue of consent. In a trial with assessors it is for the learned judge to respect and give effect to a verdict of the assessors unless he emphatically disagrees with it. The law is clear that it is trial by the judge alone. Here the learned judge in making his decision on Count 1 made a decision in favour of the appellant Kaliova Vuki Balemaira. Kaliova Vuki Balemaira cannot complain of what seems a generous acquittal by the judge on Count 1.

[5] I heard an application for leave to appeal by Kaliova Vuki Balemaira on 18th March 2011. It is clear that there is no point of law alone raised in this application. I reach that conclusion by applying the recent Supreme Court judgment in *Ilaisa Sousou Cava v The State* Criminal Appeal No CAV 0007 of 2010 with judgment on 14th November 2011.

[6] I have looked carefully at the summing up and other materials. This was a case where most of the eight people at the party gave evidence. Very little of it was more than marginally probative of anything. But the assessors had to be reminded what evidence was admissible and what evidence was inadmissible. They had to assess it all although the only really important evidence was that of the complainant Mrs Parr and the defendant Kaliova Vuki Balemaira. There had been no one else present in the bedroom. Mrs Parr made an immediate complaint and was medically examined which confirmed sexual intercourse had taken place. This was a case where neither the complainant nor the accused had met prior to 19th November 2008.

[7] I am quite sure that the summing up was correct in law. To be fair it was a case where the judge was correct to review the evidence in detail. There are no arguable points of mixed fact and law. Since the statutory abolition in Fiji of the need for corroboration, there is no arguable point on that matter.

[8] When it comes to miscarriage of justice the assessment has to be on the grounds of fairness. In my opinion the summing up was extremely fair. There is no arguable point raised that could establish *"any other ground which appears to the Court to be a sufficient ground of appeal"* (s 21(b) of the Court of Appeal Act).

[9] Nor is this a case where on the counts of rape it could be argued that there was no case to answer.

[10] So it all comes to issues of fact. In this case it depends on which of the principal witnesses is believed. The assessors in their opinion and the judge in his decision clearly believed Mrs Marjorie Parr and disbelieved Kaliova Vuki Balemaira. The judge believed Mrs Parr's evidence on the first count. He was also of the opinion that the assessors had believed Mrs Parr's evidence on the first count.

[11] On fact what the appellant, in accordance with the Court of Appeal Act, has to do, is to satisfy the Court of Appeal *"that the verdict is reasonable or cannot be supported having regard the evidence"*. In *R v Hancox* (1913) 8 Cr

App Rep 193 it was said that in the view of the Court it has to be persuaded that *"the verdict was obviously and palpably wrong"* before it finds unreasonable verdict.

[12] Where there is a conflict of evidence between complainant and appellant as the principal issue of fact, I am prepared to grant leave to appeal on this ground if it is merely arguable. In my view it reaches the threshold for leave to appeal against conviction to be granted. But the chances of success are low. It is not a case where bail should be granted pending appeal. I refuse leave on all other grounds.

[13] I turn now to the application for leave to appeal against sentence. Justice Priyantha Fernando sentenced Kaliova Vuki Balemaira to imprisonment for 6 years on 26th November 2010.

[14] Justice Priyantha Fernando said in his sentence judgment:

> *"[2] The brief facts of the case were, after arrival form World Netball Championship Tournament, the victim Marjorie Parr and her friends had a party at a villa at Pacific Harbour, which was owned by one of her friend's father. The accused too joined the party with his friends. At the party, all had drinks and enjoyed. After the victim went to sleep, the accused went inside the room where the victim was sleeping and raped her. At the trial the accused admitted sexual intercourse with the victim, but with consent.*
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> *[3] Rape is considered a very serious crime. The maximum punishment prescribed in Law for Rape is life imprisonment.*
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> *[4] In the case of Kasim v State* [1994] FJCA 25; AAU 0021j.93S (27 May 1994) it was decided that the starting point for sentencing an adult in any rape case without aggravating or mitigating features, should be a term of imprisonment of seven years.
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> *[5] In Kasim's case the court said:*
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> *'While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.'*
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> *[6] While endorsing the trend in Mohammed Kasim's case, the court said in the case of Drotini v The State* [2006] FJCA 26; AAU0001.2005S (24 March 2006):
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> *'The continuing frequency of such cases has resulted in a general increase in the levels of sentences ordered in rape cases by the courts of Fiji. We endorse that trend. We do not suggest that the starting point described in Mohammed Kasim's case should be altered in rape cases in general but the sentencing court should not hesitate to increase the sentence substantially where there are further aggravating factors.'*

[15] Justice Priyantha Fernando considered all the matters he should have. Kaliova Vuki Balemaira called witnesses as to his good character. He has not been previously convicted. But I agree with the judge when he said:

> *"In this case it is evident, that the accused requested to join the party and later the victim and the other ladies agreed to let the accused and his friends join them. The trust reposed on accused by allowing him to be present at the party was misused or abused by him, which I consider as an aggravating factor."*

[16] At the time of the offence Mrs Parr was 31 years old. The appellant was 27 years of age. Mrs Parr gave evidence on which the trial judge commented:

"In her evidence at the trial the victim said, that she walked away from sports. She never let her son leave her side. Her relationship with her husband was disturbed, she didn't want to be in company with any Fijian man, she had to undergo counseling and she couldn't stay alone at home when husband was away."

[17] The test for leave to appeal against sentence is that it is *"wrong in principle"*. There are no errors of principle. There was no order that Kaliova Vuki Balemaira should serve a minimum term before being eligible for parole. In my view the sentence was correct and I refuse leave to appeal against sentence. I will dismiss the appeal against sentence under section 35(2) of the Court of Appeal Act.

ORDERS

[18] I order as follows:

(1) That Kaliova Vuki Balemaira be granted leave to appeal against conviction limited to the ground that the verdict is unreasonable or cannot be supported having regard to the evidence.
(2) That bail pending appeal be refused.
(3) That leave to appeal against sentence be refused.
(4) That Kaliova Vuki Balemaira's appeal against sentence be dismissed under section 35(2) of the Court of Appeal Act.

Leave to appeal against conviction granted.