

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

CRIMINAL APPEAL NO.AAU 132 of 2015
High Court Criminal Case No. HAC 260 of 2014]

BETWEEN : SHIU BALAK

Appellant

AND : THE STATE

Respondent

Coram : Chandra, RJA

Counsel : Mr. T Lee for the Appellant
Ms. P Madanavosa for the Respondent

Date of Hearing : 8 November, 2018

Date of Ruling : 6 December, 2018

RULING

- [1] The Appellant was charged and convicted after trial with one count of Rape contrary to section 207(1)(2)(a) and two counts of Defilement contrary to section 215(1) of the Crimes Act,2009.

- [2] On 1st October 2015 the Appellant was sentenced to 13 years imprisonment with a non-parole period of 11 years, 4 years imprisonment on each count of defilement, the sentences to run concurrently.
- [3] The Appellant filed a timely appeal and set out the following grounds:
- (i) The learned Judge erred in law by failing to adequately and properly direct the assessors on the defence available to an accused person charged with the offence of Defilement.
 - (ii) That the learned trial Judge caused the trial to miscarry when the summing up lacked fairness and balance.
 - (iii) That the conviction entered against the Appellant is unsafe and unsatisfactory giving rise to a grave miscarriage of justice.
 - (iv) That the learned Sentencing Judge was not consistent and uniformed in sentencing the Appellant thus erring in law.
- [4] Counsel appearing for the Appellant at the hearing of the petition for leave to appeal stated that the Appellant would not proceed with the ground of appeal against sentence and reliance would be placed only on the three grounds of appeal against conviction.
- [5] The charges against the Appellant were filed as a result of the complainant revealing the instances that the Appellant had sexually abused her on being asked how she came to have \$50 with her which she had dropped in the school compound. She had divulged three occasions on which the Appellant had sexually abused her and having given her money on those occasion, where she had been called by him to clean his vehicle and the house. The Appellant had given evidence and completely denied the charges.
- [6] The Assessors opined unanimously that the Appellant was guilty on all three counts with which the learned Judge concurred and the Appellant was convicted.

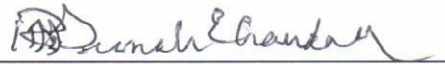
- [7] The first ground of appeal is on the basis that the summing up in relation to the offence of defilement was inadequate. Counsel for the Appellant cited the decision in **Reddy v. State** [2018] FJCA 10; AAU06.2014 (8 March 2018) in support of this ground. Counsel for the Respondent also cited the same decision to submit that the learned Judge had adequately summed up regarding the offence of defilement as the Appellant had taken up the position the incidents complained of never occurred and therefore there was no need to direct the Assessors on the other defences that would be available to the Appellant.
- [8] In my view, it would have been better if the learned Judge had directed the Assessors on the other defences available to the Appellant and thereafter directed to the effect that such defences would not be beneficial to him as he had denied the occurrence of the events.
- [9] In such a situation it would be arguable that the summing up would be inadequate and therefore leave is granted on the first ground.
- [10] The second ground of appeal is that learned trial Judge caused the trial to miscarry as the summing up lacked fairness and balance.
- [11] Counsel for the Appellant cited the decision in **Balelala v. State** [2004] FJCA 49; AAU0003.2004S (11 November 2004) to the effect of what should be included in a summing up where there has been belated complaint and the complainant by reason of age was questionable about the veracity and where such evidence has been inconsistent.
- [12] As this stage it is not possible to comment on the inconsistency of the complainant's evidence as there is no record of the evidence available. Further there has been a great deal of evidence in this case coming from the complainant, her father, her school teachers and the Appellant.

- [13] In such a situation it is best left to the Full Court to ascertain the nature of the evidence before Court and consider whether the summing up was adequate and whether the trial was miscarried as alleged by the Appellant.
- [14] In those circumstances I would leave it to the Full Court to determine whether there is any merit in this ground of appeal.
- [15] In the third ground of appeal the Appellant complains of a grave miscarriage of justice on the conviction of the Appellant.
- [16] In his judgment the learned trial Judge commented on the medical evidence which was what was revealed in the medical evidence and he has not made any personal observations on same.
- [17] The learned trial Judge has further commented on the evidence of the Appellant and had spoken out his mind regarding the Appellant by stating that he did not believe him.
- [18] Although the Assessors opined that the Appellant was guilty, the final arbiter was the trial Judge. He also expressed his view regarding the complainant's evidence that he believed her evidence. While concurring with the opinion of the Assessors he was himself satisfied that the Appellant was guilty of the three charges and it is on that basis that the Appellant was convicted.
- [19] I do not see any merit in this ground of appeal.

Orders of Court:

Leave to appeal is granted on the first two grounds of appeal against conviction.





Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL