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

CRIMINAL APPEAL NO:AAU0033 of 2015
[High Court Case No: HAC21 of 2015]

BETWEEN : DAVENDRA NARAYAN CHAND
Appellant

AND : THE STATE
Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr I Khan for the Appellant
Ms P Madanavosa for the Respondent

Date of Hearing : 8 February 2017

Date of Ruling : 13 February 2017

RULING

[1] This is a timely application for leave to appeal against both conviction and sentence. The appellant was charged with three counts of rape contrary to sections 149 and 150 of the Penal Code, Cap. 17. The offences were allegedly committed between 2005 and 2007. At his election, the appellant was tried in the Magistrates' Court. Following a trial, the learned Magistrate found the appellant guilty on all three counts and transferred the case to the High Court for sentence pursuant to section 190(1) (b) of the Criminal Procedure Decree 2009. On 20 February 2015, the High Court sentenced the appellant to a total term of 13 years 11 months and 10 days imprisonment with a non-parole period of 11 years.

[2] The appellant's right of appeal is governed by section 21(1) of the Court of Appeal Act, Cap. 12. Section 190(4) of the Criminal Procedure Decree 2009 provides that a person transferred to the High Court for sentence under section 190 has the same right of appeal to the Court of Appeal as if the person had been convicted and sentenced by the High Court. Under section 21(1) of the Court of Appeal Act, Cap. 12, the appellant can appeal as of right on any question of law alone. On questions of mixed law and fact, or fact alone, the appellant is required to obtain leave. The test is whether there is an arguable ground of appeal (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013). Leave is also required to appeal against sentence. The test is whether there is an arguable error in the exercise of the sentencing discretion (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

[3] On 23 January 2017, the appellant filed a Notice of Amended Grounds of Appeal. The grounds of appeal are:

1. (1) **THAT** the Learned Trial Magistrate erred in law and in fact in not directing himself to the evidence of the complainant / witness who was a juvenile and as such proper ought to have been given regarding taking oath. The failure to do so caused a substantial miscarriage of justice.

1. (2) **THAT** the Learned Trial Magistrate **erred in law** in not taking into consideration the Appellant's submission on **NO CASE TO ANSWER** at the end of the Prosecution case. Furthermore, the Learned Trial Magistrate did not apply the relevant laws to the facts that were presented by the State.

1. (3) **THAT** the Learned Trial Magistrate erred in law and in fact in not taking into consideration that apart from the evidence of the Complainant, there was no other independent evidence against the Appellant to prove the case against appellant beyond all reasonable doubt.

1. (4) **THAT** the Learned Trial Magistrate erred in law and in fact in not adequately directing/misdirecting the previous inconsistent statements/evidence made by the Prosecution witnesses and as such there has been a substantial miscarriage of justice.

1. (5) **THAT** the Learned Trial Magistrate erred in law and in fact in not adequately/sufficiently/referring/directing himself on the evidence presented by the Appellant during the trial.

1. (6) **THAT** the Learned Trial Magistrate erred in law and in fact in not directing himself the possible defence on evidence presented in Court and as such by his failure there was a substantial miscarriage of justice.

1. (7) **THAT** the learned trial Magistrate erred in law and in fact in not directing himself on evidence against each count 1, 2 and 3 separately and as such there has been a substantial miscarriage of justice.

1. (8) **THAT** the learned trial Magistrate erred in law and in fact in not directing / inquiring himself as to why no medical report was tendered by the State as the Medical Report would have showed whether the complainant was telling the truth. The failure to do so caused a substantial miscarriage of justice.

1. (9) **THAT** the learned trial Magistrate erred in law and in fact in not directing himself and / or in taking into consideration that the rape complaint was lodged almost two (2) years after the alleged incident and this would have raised serious doubts as to the credibility of the complainant. The failure to consider the two (2) years delay caused a substantial miscarriage of justice.

1. (10) **THAT** the learned trial Magistrate erred in law when he stated that Section 129 of the Criminal Procedure Decree states that there is no need for corroboration of sexual related offences when in fact in not taking into consideration that the appellant was charged under the **Penal Code when the common law on corroboration of sexual offence was applicable**. The failure to do so caused a substantial miscarriage of justice.

1. (11) **THAT** the learned trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant when he stated that **"I have difficulty in accepting Accused's version of events"** and thus a substantial miscarriage of justice had occurred.

APPEAL AGAINST SENTENCE

1. (12) **THAT** the learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

1. (13) **THAT** the learned trial Magistrate erred in law and in fact in not taking into consideration the provision of the **Sentencing and Penalties Decree 2009** when he passed the sentence against the Appellant.

[4] At trial, the complainant, her two brothers and her mother gave evidence. The appellant also gave evidence and called one witness. He was a builder and owned a construction business. The complainant and the appellant were related. She was his niece. The abuse started when she was 12 years old and in Year 6. Her evidence was that in 2005, she accompanied the appellant at his request to clean a house in Sabeto that was under construction with the permission of her grandmother. While she was doing the house chores, the appellant grabbed her into a bedroom and prevented her from leaving the room by closing the door. He had sexual intercourse with her after putting on a condom. She bled during the sexual intercourse. After having sexual intercourse, the appellant threatened the complainant that he would kill her mother if she complained. The complainant said she did not complain to anyone when she returned home because of the threat the appellant had made to harm her family.

[5] The second incident occurred in 2006. The circumstances were similar to the first incident. The complainant said she did not complain to anyone when she returned home because she feared the appellant.

[6] On 17 January 2007, the appellant came to her home. She was home with her two brothers. Her mother was not at home. The appellant offered $5.00 to the boys and told them to get snacks from the shop. After the boys had left home, the appellant lured the complainant by offering candies and then had sexual intercourse with her in one of the bedrooms. The brothers told the court that they were told to go to the shop when the appellant came home on 17 January 2007. The complainant's mother gave evidence that she found it strange that the appellant told the boys to go to the shop to buy candies when she knew that the appellant had come to her home from town and he could have bought the candies while he was in town. Upon prodding, the complainant told her about the sexual abuse. She reported the matter.

[7] In his evidence, the appellant denied the allegations. He told the court that the allegations were fabricated by the complainant's mother after their relationship went sour in 2006 following an affair they had since 2004. The appellant's witness was one of his employees. His evidence was of no significance.

[8] At the hearing, counsel for the appellant relied upon his written submissions. Unfortunately, apart from reciting unnecessary case law, the submissions hardly identify the particulars of the alleged errors. The first ground was not

addressed in the submissions. The complainant was 18 years old when she gave evidence. The Juveniles Act did not apply to her.

[9] The second ground raises a question of law alone. Leave is not required. However, there is no basis to argue that the learned trial Magistrate had embellished the no case to answer test in the Magistrates' Court. The evidence led by the prosecution was not inherently vague or incredible to meet the test for no case to answer. Ground 2 is frivolous in the sense that it cannot possibly succeed.

[10] Grounds 3 and 10 are frivolous. By the time the complainant gave evidence, section 129 of the Criminal Procedure Decree 2009 abolished the common law corroboration rule in sexual cases. The law did not require the complainant's evidence to be corroborated even though the charges were laid under the Penal Code.

[11] In his judgment, the learned Magistrate expressly considered the inconsistencies in the complainant's evidence and found them as peripheral and not going to the root of the matter. Ground 4 is unarguable.

[12] The appellant's evidence and his defence were considered at length by the learned trial Magistrate. Grounds 5 and 6 are unarguable.

[13] Although the learned trial Magistrate did not consider the evidence on each count separately, the complainant gave evidence on all three counts and that evidence was fairly considered in the judgment. Ground 7 is unarguable.

[14] The relevance of any medical report was a trial issue. There was no requirement for the prosecution to tender a medical report to prove the charges of rape. This Court cannot speculate the reasons why any medical evidence was not led. The Court can only consider the evidence that was led at the trial. It is clear that the appellant was convicted because the learned trial Magistrate found the complainant was telling the truth when she said the appellant forced her to have sexual intercourse with him. Ground 8 is unarguable.

[15] The complainant explained the reasons for not reporting the abuse for two years. She was a child. The appellant was an adult male and a relative. He was an authority figure. She feared the threats he made to harm her family if she complained. The learned trial Magistrate accepted the complainant's explanation for not complaining. Ground 9 is unarguable.

[16] Counsel for the appellant has not cited any authority to support his argument that the phrase 'I have difficulty in accepting Accused's version of events' is objectionable. The learned Magistrate was entitled to consider the appellant's evidence and assess his credibility as a witness. When the judgment is read as a whole, the learned trial Magistrate clearly directed himself that the burden of proof was on the prosecution and that the appellant was not required to prove his innocence or anything at all. Ground 11 is unarguable.

[17] The written submissions have not addressed the grounds of appeal against sentence. The sentence of 13 years 11 months and 10 days imprisonment for rape of a 12-year old girl in a contested case is within the tariff for child rape (*Raj v State* unreported Cr App No AAU0038 of 2010; 5 March 2014). The rape was repeated over a period of two years. The appellant was a relative (uncle) and 53 years old. The breach of trust was gross. The only mitigating factor was the appellant's previous good character. Twenty days remand period was considered. Deterrence and denunciation were the primary objectives of the punishment. The sentence reflects these objectives. There is no arguable error in the exercise of the learned Judge's sentencing discretion.

Result

[18] Leave refused.

.....
Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Iqbal Khan & Associates for the Appellant
Office of the Director of Public Prosecutions for the State