

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

CRIMINAL APPEAL NO:AAU0102 of 2015
[High Court Case No: HAC304 of 2014]

BETWEEN : **RICHARD KASHMIR KUMAR** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr J Bale for the Appellant
Mr Y Prasad for the Respondent

Date of Hearing : 16 March 2017

Date of Ruling : 22 March 2017

RULING

[1] This is a timely application for leave to appeal against conviction only. The appellant was charged with one representative count of rape, an alternative representative count of defilement and a representative count of indecent assault. The charges were brought under the Penal Code, Cap. 17. At his election, the appellant was tried in the Magistrates' Court. Following a trial, the learned Magistrate found the appellant guilty on the charge of rape and transferred the case to the High Court for sentence pursuant to section 190(1) (b) of the Criminal Procedure Decree 2009. On 30 January 2015, the High Court sentenced the appellant to 14 years' imprisonment with a non-parole period of 12 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).

[3] The grounds of appeal are:

Ground one

That the Learned Magistrate erred in fact and law when he failed to give proper weight and/or consideration to the following evidence adduced at the trial of this matter which tended to cast reasonable doubt as to the veracity and/or truthfulness of the allegations against the Appellant, and therefore render the decision of the Learned Magistrate demonstrably perverse, unsafe and unsatisfactory:

- (a) That the complainant had reported the rape some 12 months after the alleged incident had occurred;
- (b) That the allegation of rape by the complainant arose amidst a bitter dispute between the complainant's family and the Appellant's wife;
- (c) That the complainant's mother gave evidence in chief that when the issue of rape was first raised with the Police, the complainant denied that any rape had occurred;
- (d) That the complainant's mother gave evidence in chief that complainant appeared "normal" only one day after alleged rape occurred;
- (e) That the complainant gave evidence in chief that she was raped in her bedroom whilst her elder sister was sleeping next to her in the same room, yet the elder sister did not give any evidence at the trial to support the alleged fact of rape;
- (f) That the doctor who examined the complainant on 02 February 2010 could not give evidence at the trial and medical evidence to support the allegation of rape was given by another doctor who was merely interpreting the examining doctor's report;
- (g) That the complainant's evidence was inconsistent in that she had informed the examining doctor when she was examined on 02 February 2010 that she was raped 7 times, however she gave evidence in court during the trial that she was raped 3 times;
- (h) That the medical report was inconclusive in respect of evidence of rape and only confirmed that the complainant's hymen had been broken at some point prior to her examination on 02 February 2010;
- (i) That the Appellant gave evidence at the trial that suggested that he had been framed because his wife was in a bitter dispute with the

complainant's family and offered this as a motive as to why the complainant and he family would make false allegations against him.

Ground two

That the Learned Magistrate erred in fact and law in his analysis of the evidence adduced at the trial when he:

- (a) Concluded that on the night in question, the Appellant had taken the complainant to the privacy of another room and allegedly raped her there when the complainant's own evidence in chief alleged that she was raped in the bedroom that she was sleeping in with her elder sister;
- (b) Concluded that the failure of the complainant's mother to recognize any form of emotion or physical distress in the complainant, one day after the alleged incident, could be explained by the mother's lack of empathy towards the complainant;
- (c) Failed to conclude that even if the complainant's mother lacked sufficient empathy to recognize the complainant's distress, one day after the alleged rape, if the complainant had indeed been raped, she would have been emotionally traumatized and he distress should and ought to have been recognized by the other members of the complainant's family including the complainant's father and elder sister;
- (d) Failed to conclude that evidence given at the trial confirming the existence of a dispute between the complainant's family and the Appellant's wife at the time the complaint was lodged with the Police case reasonable doubt as to the truthfulness of the complainant's allegation of rape against the Appellant.

Ground three

The Learned Magistrate erred in fact and law when he failed to take account of the fact that the complainant was a juvenile witness and proceeded to accept her uncorroborated evidence without making a prior enquiry of her understanding of the nature of an oath and/or the necessity to speak the truth.

Ground four

The learned Magistrate's decision to convict the Appellant is against the weight of evidence adduced at the trial and is demonstrably perverse, unsafe and unsatisfactory in that he failed to give due consideration to the inconsistencies in the prosecution's evidence adduced at the trial vis a vis the unreliability of the complainant's uncorroborated evidence and the existence of reasonable doubt as to whether the Appellant committed the offence of rape against the complainant.

- [4] At the hearing, counsel for the appellant abandoned grounds one (e) and (f) and ground three of the appeal. Both parties relied upon their respective written submissions.

- [5] The victim in this case was a 12-year old girl. She lived with her family next door to the appellant who lived with his family in a crowded estate. On a day in June 2009, the victim's brother fell ill and her mother and the appellant's wife took him to the hospital leaving the victim and her sister under the care of the appellant because the victim's father was away. The victim was asleep in one of the bedrooms when she was awoken by the appellant touching her and telling her that he wanted to have sex with her. She refused and went back to sleep. She was woken again by the appellant who dragged her into the sitting room, asking her again for sex. She refused and when she went back to the bedroom to sleep, she was awoken finding the appellant on top of her and undressing her. He then had sexual intercourse for about 10 to 15 minutes while holding his hands over her mouth. He told her not to say anything if his wife returned unexpectedly. When the victim returned home the next morning, she did not complain.
- [6] On another occasion, the mother of the victim sent her to the appellant to get their radio fixed. When she arrived at his home, she remained at the doorway. The appellant came and pulled her inside. He had sexual intercourse with her. The victim did not complain when she returned home because she was threatened.
- [7] It is clear that the appellant was convicted solely on the victim's evidence. The learned trial magistrate believed the victim when she said that the appellant had sexual intercourse with her, without her consent. The gist of the various complaints made in ground one is that the learned trial magistrate failed to give due weight to evidence which casted doubt on the truth of the sexual allegations made by the victim. I am not convinced the complaints are arguable.
- [8] The victim was a child. She did not complain because she was threatened by the appellant. The learned trial magistrate accepted the victim's explanation for not reporting the matter to anyone. The learned trial magistrate also accepted that initially the victim was reluctant to implicate the appellant to the police.

[9] The medical examination was done one year after the sexual assault. The medical examination revealed that the victim's hymen was torn, which supported the victim's evidence of sexual intercourse. But the medical evidence did not implicate the appellant. The history related to the doctor was hearsay and inadmissible. The learned trial magistrate quite correctly did not refer to that evidence in his judgment.

[10] The learned trial magistrate did not find any of these matters affected the veracity of the victim's evidence implicating the appellant. It was open on the evidence for the learned trial magistrate to believe the victim when she said the appellant raped her. Ground 1 is unarguable.

[11] Ground two is merely an extension of ground one. The learned trial magistrate was not required by law to analyze every fact of the story presented at the trial. The central issue at the trial was whether the victim was telling the truth when she said the appellant had sexual intercourse with her, without her consent. The learned trial magistrate believed the victim after analyzing the evidence. Ground two is unarguable.

[12] Ground three was abandoned.

[13] The appellant's contention in ground four is that the appellant was convicted on the victim's uncorroborated evidence, and therefore, the guilty verdict is perverse, unsafe and unsatisfactory. The learned trial magistrate was not required by law to look for corroboration. A conviction for rape can be based solely upon the victim's evidence. That is what occurred in this case. Ground four is unarguable.

[14] Leave refused.



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

Solicitors:
Faktaufon & Bale Lawyers for the Appellant
Office of the Director of Public Prosecutions for the State