

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 63 OF 2012
(High Court HAC 228 of 2011)

BETWEEN : LUKE MAYA

Appellant

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Mr. J Savou for the Appellant
Ms. P Madanavosa for the Respondent

Date of Hearing : 1 October 2014

Date of Ruling : 26 November 2014

RULING

- [1] This is an application for leave to appeal against sentence.
- [2] The Appellant was charged with one count of Rape contrary to section 207(2) (a) of the Crimes Decree No.44 of 2009.
- [3] The Appellant was found guilty after trial and was convicted. He was sentenced on 28th March 2013 to a term of 11 years imprisonment with a non-parole period of 10 years.
- [4] The Appellant filed an application for leave to appeal on 20th April 2013 and complied with the time limit prescribed by section 26 of the Court of Appeal Act (Cap.12) and filed amended grounds of appeal on 30th July 2014.

[5] The grounds set out in his amended petition of appeal appealing against his sentence are:

- i. *The learned sentencing judge erred in fact when he failed to discount the term of one (1) year and five (5) months from the final sentence of the Appellant;*
- ii. *The learned trial Judge erred in fact and law when he failed to justify the imposition of a non-parole period considering the circumstances of the Appellant;*
- iii. *The learned trial Judge erred in fact when he considered matters at paragraph 4(ii) of his sentence that were never apparent from the learned trial Judge's summing up.*

[6] The prosecution case was that the Appellant and the complainant had been living in a de-facto relationship for 11 years prior to 8 October 2011. They were not staying together and in the morning of the 8th of October the complainant was outside the house hanging her clothes to dry while her children were in the sitting room of the house. The Appellant had come there drunk and had forcefully got hold of the complainant and taken her into the house. He had dragged her into the complainant's bedroom and had forcefully pushed her onto her bed, assaulted and overpowered her and without her consent had sex with her forcefully. After that he had slept for about an hour and left. The complainant had complained to the police five days after the incident and consequently he was charged.

[7] An application for leave to appeal against sentence comes under Section 21(1)(c) of the Court of Appeal Act (Cap.12). As set out in **Felix Ram v. The State** AAU 108 of 2011 the test for leave to appeal against sentence is whether the sentencing judge arguably fell into one of the following errors:

- (i) Acted upon a wrong principle
- (ii) Allowed extraneous matters
- (iii) Mistook the facts
- (iv) Failed to take into account some relevant considerations.

Ground 1

- [8] The learned trial Judge had not taken into account the period that the Appellant had spent in remand when imposing the sentence. Section 24 of the Sentencing and Penalties Decree No.45 of 2009 provides:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters, shall, unless a court otherwise, be regarded by the Court as a period of imprisonment already served by the offender."

- [9] In **Simeli Bili Naisua v. State** AAU 0014 of 2011 it was held that there must be a clear indication that the learned Judge has deducted from any term of imprisonment that is to be imposed the period served in remand.

- [10] Since the learned trial Judge has failed to discount the period that the Appellant was in remand, this ground is arguable and leave to appeal is granted.

Ground 2

- [11] The learned trial Judge in imposing the sentence on the Appellant imposed a sentence of 11 years with a non-parole period of 10 years.
- [12] According to Section 18(1) of the sentencing and Penalties Decree it is mandatory to impose a non-parole period if the sentence is more than two years. Section 18(1) is subject to section 18(2) which confers on the sentencing judge a discretion not to grant a non-parole where he considers it inappropriate considering the circumstances of the offender and the nature of the offence.

- [13] Since it is mandatory to grant a non-parole period where the sentence is over two years, there is no necessity to give a reason when imposing a non-parole period. Section 18(1) is a stand alone provision.
- [14] Since there is necessity to give reasons for setting a non-parole period where the sentence is over two years, ground 2 is not arguable and leave is refused on that ground.


Ground 3

- [15] This relates to the fact that the learned trial Judge had taken into account matters at paragraph 4(ii) of his sentence that were never apparent from the summing up.
- [16] It was a matter that was in evidence at the trial though not included in the summing up. The matter in evidence before Court was that a son of the complainant who gave evidence in Court, had tried to commit suicide when the Appellant had forcefully dragged his mother into the bedroom. Such a situation is different from the situation that arose in Chirk King Yam v. State [2013] FJCA 81; AAU0095.2011 where there was no evidence regarding the matters taken into account by the trial Judge which he had taken into account when sentencing.
- [17] This is a ground which should be considered by the Full Court as it is arguable and leave to appeal is granted.

Orders of Court:

- (1) Leave to appeal is granted on grounds 1 and 3.
- (2) Leave to appeal is refused on ground 2.




Hon. Mr Justice Chandra
RESIDENT JUSTICE OF APPEAL