

IN THE COURT OF APPEAL
AT SUVA

CRIMINAL APPEAL NO. AAU 55 OF 2013
(High Court HAC 134 of 2012)

BETWEEN : JOSUA WALILI
ILIANI SUKALOA
SAILOSI LAWALIGANA

Appellants

AND : THE STATE

Respondent

Coram : Hon. Justice Suresh Chandra

Counsel : Mr. J. Savou for the Appellants
Mr. L. Fotofili for the Respondent

Date of Hearing : 22 January 2015

Date of Ruling : 2 March 2016

RULING

[1] This is an application for leave to appeal against conviction and sentence by the Appellants who were charged as follows:

The 1st Appellant on a representative count of Rape contrary to section 207(1) and section 2(a) of the Crimes Decree, 2009.

The 2nd Appellant on a count of Rape contrary to section 207(1) and section 2(a) of the Crimes Decree, 2009.

The 3rd Appellant on a count of Rape contrary to section 207(1) and section 2(a) of the Crimes Decree, 2009.

- [2] They pleaded not guilty and were found guilty after trial. They were convicted and sentenced by the High Court at Suva as follows:

The 1st Appellant to 12 years imprisonment with a minimum term of nine years.

The 2nd and 3rd Appellants to 11 years imprisonment with a minimum term of 8 years.

- [3] The Appellants in their notice of appeal have set out the following grounds of appeal against their conviction and sentence:

- "i. The learned trial judge erred in law when he unfairly dismissed the Appellant's counsel's application to summon the witnesses that the Prosecution decided not to call on the day of the trial. These witnesses were crucial in determining the credibility of the complainant. In doing so, it was prejudicial to the defence resulting in a substantial miscarriage of justice.*
- ii. The learned trial judge erred in law and in fact when he failed to consider in his judgment the inconsistent evidence of the complainant and the significant material medical evidence in determining any forced sexual intercourse resulting in a substantial miscarriage of justice.*
- iii. The learned sentencing Judge erred in principle and also erred in exercising his sentencing discretion to the extent:*
 - (a) That he took a starting point of 11 years imprisonment;*
 - (b) Adding 4 years as aggravating factors to the already high starting point.*
- iv. The learned trial judge erred in law and in fact when he speculated that there was public outrage and bewilderment*

at the number of cases coming before the Court in the sentencing when there was no evidence to support this contention resulting in a substantial miscarriage of justice.

- v. *The learned trial judge erred in law when he did not justify the imposition of a non-parole period resulting in a substantial miscarriage."*

[4] In terms of section 21(1) of the Court of Appeal Act (Cap.12) the Appellant has to establish an arguable point which warrants the consideration of the Court of Appeal. **Simeli Bili Naisua v. The State** Crim. Appeal No. AAU 0014 of 2011.

[5] In terms of section 21(1) (c) of the Court of Appeal Act the Appellant appealing the sentence has to establish that there are arguable points as set out in **Simeli Bili Naisua v The State** (supra) being that if the trial Judge had :

- (i) acted upon a wrong principle;
- (ii) allowed extraneous or irrelevant matters to guide or affect him;
- (iii) mistook the facts;
- (iv) failed to take into account some relevant considerations.

[6] The Appellant's first ground of appeal is that the learned trial Judge had unfairly dismissed the Appellant's Counsel's application to summon the witnesses that the prosecution decided not to call on the day of the trial. That these witnesses were crucial in determining the credibility of the complainant and that it was prejudicial to the defence resulting in a miscarriage of justice. The question that arises then is whether the accused had a fair trial. This attracts the basic principle that every accused has a right to a fair trial.

[7] The complainant's evidence was that the Appellants had sex with her forcibly and that she was afraid of telling anyone about it. In her Police statement she had stated that she had told the Pastor after the Pastor had stated at the congregation that youth in the village

had been misbehaving. But in her evidence in Court she stated that she had told her Aunt and that was how the matter was complained to the Police. The Accused took up the position that they had consensual sex with the complainant. The accused had stated so in their caution interview statements. The first two accused who gave evidence maintained the same position and denied using force.

[8] The medical evidence led in the case which was regarding the examination of the complainant after she had complained to the Police did not reveal any evidence regarding the use of any physical force except the fact that that she was not a virgin.

[9] It was therefore a case of the complainant's word against the word of the accused who maintained that they had consensual sex. It was thus based on questions of fact regarding which the Assessors brought in an unanimous verdict of guilt, with which the learned High Court Judge concurred. It is in the light of these facts that the ground regarding the refusal of the learned trial Judge to allow the defence application to summon witnesses who were to be summoned by the prosecution but were not, has to be considered. It is on record that the learned trial Judge refused the application of the defence Counsel to summon witnesses. The nature of the application and the circumstances relating to same as regards the witnesses that the defence wanted to summon would have to be considered in determining this question of whether the accused had a fair trial. It is a matter that is arguable as the credibility of the complainant was the most important factor in determining the guilt of the accused. In view of this position leave is granted on this ground.

[10] The second ground of appeal is that the learned trial Judge had failed to consider the inconsistent evidence of the complainant in relation to the medical evidence. In his summing up the learned trial Judge adverted to the inconsistencies in the evidence of the complainant. He also referred to the medical evidence that was given in the case. The

summing up regarding these matters had been fair and adequate and would not have caused any prejudice to the accused. This ground is not arguable.

[11] The third ground which relates to sentence is on the basis that there has been in a sense double counting in that a higher starting point has been taken by the learned trial Judge and 4 years were added on for aggravating circumstances in addition to the higher starting point. The range to be considered when sentencing for rape of a minor has been 10 to 15 years and the learned trial Judge by starting at 11 years had taken a starting point within the range which was not very high. In such a situation the addition of 4 years for aggravating circumstances is not an error that comes within the grounds set out in Simeli Bili Naisua v State (Supra). Therefore this ground is not arguable.

[12] The Appellants have also submitted that the learned trial Judge has made certain comments regarding which there was no evidence and that there was a miscarriage of justice. After the Appellants were found guilty, in the mitigation submissions Counsel had stated that since the Appellants were young without any previous criminal record, that they should be given non-custodial sentences. The learned trial Judge has made the comments in response to this submission of Counsel and was in the nature of a general comment and therefore it cannot be said that there was a miscarriage of justice.


[13] The Appellants have also taken up the position that the learned trial Judge did not justify the imposition of the non-parole period when imposing the sentences. The setting of a non-parole period in consequence of Section 18(1) of the Sentencing and Penalties Decree 2009 is within the discretion of the trial Judge. There is no requirement of justifying the setting of the non-parole period. Therefore this ground is not arguable.

[14] The Appellants are granted leave only on ground one regarding their conviction.

Orders of Court:

- (1) Leave to appeal against conviction is granted on ground one.*
- (2) Leave to appeal against sentence is refused.*




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL