

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0014 OF 2016
(High Court Case No: HAC 257 of 2015)

BETWEEN : **ILAITIA NALAWA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Basnayake, JA**

Counsel : **Mr. T. Lee for the Appellant**
Mr. Y. Prasad for the Respondent

Date of Hearing : **21 May 2018**

Date of Ruling : **1 June 2018**

RULING

Basnayake JA

- [1] This is a leave application filed by the appellant against the judgment of the learned High Court Judge delivered on 5 February 2016 and the sentence on 8 February 2016. The learned High Court Judge after accepting a decision by the majority of the Assessors (2

against 1) found the appellant guilty on four counts of burglary, theft, assault with intent to commit rape. The appellant was sentenced to 18 years imprisonment with a non-parole period of 17 years imprisonment. The appellant appealed against the conviction and the sentence.

Grounds of Appeal

The appellant in an amended petition urged to allow the appeal on the following grounds.

Appeal against conviction

- [2] *"i. That the learned Judge erred in law by relying on the confession made by the Appellant in the caution interview statement yet not adequately and properly directing the assessors on any other evidence apart from the confession.*
- ii. That the learned trial Judge erred in law in not properly and adequately directing the assessors on the principle of Turnbull since the identification of the perpetrator was disputed.*
- iii. The learned Judge caused the trial to miscarry when the summing-up lacked fairness and balance."*

Appeal against sentence

- [3] *"i. That the learned Judge erred in law to sentence the appellant on duplicity charges for assault with intent to commit rape and rape.*
- ii. That the learned Judge erred in law in considering 15 years as the appropriate starting point.*
- iii. That the learned Judge erred in law to consider the injuries to the complainant's vagina as an aggravating feature and labelling it as the "level of violence appellant did on the complainant.*
- iv. The learned Judge erred in law in considering the appellant's non-remorsefulness during the proceedings as an aggravating feature.*
- v. The learned sentencing Judge erred in law in choosing a non-parole period that is close to the head sentence."*

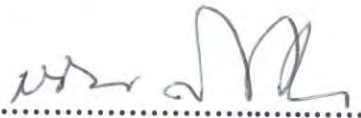
Submissions of the learned counsel for the appellant

- [4] The learned counsel for the appellant submitted that one item of evidence against the appellant was the alleged confession produced in court. The learned counsel submitted that he is challenging the directions given to the assessors by the learned Judge. Apart from that fact, the learned counsel submitted that the learned Judge was unfair by the appellant in not putting all the defences available to the appellant. In particular, the learned counsel submitted that the complainant did not identify her assailant as the assailant was covering his face. However the complainant had noted a tattoo the assailant had in his right leg in her evidence and the appellant had shown his right leg in court to prove that the appellant did not have a tattoo on the right leg. The learned counsel complained that the learned Judge had failed to direct the assessors on this important matter which would have decided the fate of the appellant.
- [5] The learned counsel for the respondent was gracious enough to concede this point which he admitted as a matter that could be considered in favour of the appellant in granting leave.
- [6] The entire proceedings are not before me to peruse all these matters the learned counsel for the appellant adverted to. However, on the admission on this point by the learned counsel for the respondent, I am of the view that leave should be granted to canvass these matters before a full court. Hence I grant leave on the conviction and the sentence on the grounds urged by the appellant in his amended petition.

Result

- [7] Leave granted on the conviction and the sentence on the grounds urged in the amended petition of appeal.




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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL