

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

CRIMINAL APPEAL NO. AAU 0016 OF 2016
(High Court HAC 29 of 2014)

BETWEEN : HIND MUNISHWAR LAL

Appellant

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Appellant appeared in person
Mr M D Korovou for the Respondent

Date of Hearing : 8 November, 2018

Date of Ruling : 5 February, 2019

R U L I N G

1. The Appellant was charged with four counts of rape contrary to sections 207(1) and 207(2) (a) of the Crimes Act.
2. After trial the Assessors opined unanimously that the Appellant was guilty on all counts and the learned High Court Judge concurring with the opinion of the assessors convicted the Appellant.

3. The Appellant was sentenced on 27th August 2015 to 14 years imprisonment with a non-parole period of 12 years.
4. The Appellant filed an application for enlargement of time to appeal against his conviction and sentence. The delay being about 5 months.
5. Subsequently the Appellant has filed amendments to the grounds of appeal and sentence which he filed originally along with his application seeking enlargement of time.
6. The Respondent has not taken up any objection regarding the delay in filing the Appellant's appeal.
7. Considering the reasons set out in his affidavit explaining his delay in making the application, it appears that he was not getting assistance from Legal Aid although he had expected Counsel who appeared for him at the trial to have filed his appeal.
8. There is merit in the grounds of appeal filed by the Appellant and enlargement of time can be granted.
9. In all, the Appellant has set out 26 grounds of appeal against conviction and 6 grounds of appeal against sentence which are as follows:

- "1. That the learned trial judge erred in law and in fact when he explained the assessors about the elements of the offence of rape which were similar to the facts of the case against the appellant resulting in substantial prejudice of the appellant. (ii) The arguments of the defence case was not fairly put to the assessors.*
- 2. That the learned trial judge erred in law and in fact in misdirecting himself and the assessors to consider relevant matters / chain of events which took place between complainant and accused was of loving, romantic nature and not linking regards to books 18Feb 2014 [complainant conduct / characteristic justifies she was a willing partner before voluntarily pursued to the flat]. Failure to instruct the assessors to assess the evidence regards to books amounted to miscarriage of justice.*

3. *The learned trial judge lacked directions to the assessors on how to approach and assess the complainant evidence to get FNU papers, text books from appellants flat but not exercising FNU library and what weight to be given while analyzing evidence resulting in substantial miscarriage of justice.*
4. *That the learned trial judge erred in law and in fact when he made a wrong assessment in summing up regarding the photo posed of complainant was threatened act material evidence issue, by doing so, the nature of pictures were assessed and wrongly admitted.*
5. *That the learned trial judge erred in law and in fact when he failed to properly guide the assessors and how to approach and weigh the fresh evidence of uncharged acts, the admission of evidence of recent complaints and judge direction to be used/made as the evidence.*
6. *That the learned trial judge erred in law and in fact when he did not properly direct the assessors on the essential element of the charge of rape contrary to section 207 (1)(2)(a) of the Crimes Decree no. 44 of 2009 resulting in a substantial miscarriage of justice.*
7. *That the learned trial judge erred in law and in fact in misdirecting or not properly or sufficiently on the defence evidence and the exhibits and in not identifying what evidence could corroborate the defence.*
8. *That the learned trial judge erred in law and in fact in not adequately directing or misdirecting that the prosecution evidence before the Court proved reasonable doubt that there were serious doubt in prosecution case and as such the benefit of doubt to have been given to appellant.*
9. *That the learned trial judge erred in law and in fact in misdirecting/or not properly or sufficiently on his judgment the matter of consent and the crucial issue in determining nature of sexual intercourse resulting in substantial miscarriage of justice.*
10. *That the learned trial judge erred in law and in fact when he failed to consider on his judgment the inconsistent evidence of the complainant and the significant material hearsay evidence in determining any forced/threatened sexual intercourse resulting in a substantial miscarriage of justice.*
11. *That the learned trial judge erred in law and in fact when he unfairly dismissed /refused the appellant counsel application to*

examine/refer the exhibits that the prosecution decided not to produce exhibits on the day of the trial. These exhibits 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.

12. *That the learned trial judge erred in law and in fact in misdirecting himself and the assessors that the prosecution had the burden of proving the unlawfulness of the defendants actions, therefore has failed to prove the ingredient of the offence.*
13. *That the appellant did not adequately received a proper representation on trial, the counsel for the appellant did not seek re-direction to correct the error of the trial judge.*
14. *That the learned trial judge erred in law and in fact in not sufficiently putting the investigating officers evidence to the assessors but expressed comment on prosecution case, where the comments can lead the assessors to think that he was directing them they must find the facts in a way he indicated.*
15. *That the learned trial judge erred in law and in fact in misdirecting or not properly or sufficiently himself that expert evidence/a person with special knowledge to act as assessor was required for proper determination of the case.*
16. *That the learned trial judge erred in law and in fact in misdirecting/or not properly and/or sufficiently himself on recent complain medical certificate and complainants under garments not tendered as exhibited.*
17. *That the learned trial judge erred in law and in fact in misdirecting or not properly and/or sufficiently on his judgment to consider intimate relationship activity evidence to guide and direct the assessors about the livelihood lifestyle accused and complainant were engaged as loving/sexual partners. (boyfriend and girlfriend)*
18. *That the learned trial judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial where by the defence has had no opportunity of commenting upon it.*
19. *That the learned trial judge erred in law and in fact in misdirecting himself and the assessors that evidence was insufficient and not capable of supporting to constitute sufficient proof in regards to alleged threats made by calls was not established/confirmed but assigned guilt without exercising*

discretion and truth. Facts were insufficient, assumed and failed to disclose each element of the offence. Accordingly evidence was poor unreliable to stand/ support conviction.

20. *That the learned trial judge erred in law and in fact in misdirecting himself and the assessors that complainant also took accused nude pictures and was in possession of photos. Failure to determine the case in a way that is fair has resulted improper trial and miscarriage of justice.*
21. *That the trial judge erred in law and in fact in failing to allow the counsel for the accused to cross examine the complainant on the circumstances surrounding the commission of the purported offence that was integral to the defence of the appellant.*
22. *That the learned trial judge made misdirection/non direction in accepting all contradicting and/or inconsistency and belatedness statement of the complainant.*
23. *That the learned trial judge erred in law by failing to make an independent assessment of the evidence, before affirming a verdict of guilt was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.*
24. *That the learned trial judge erred in law and in principle by not exercising his discretion to the extent to assure that justice being granted or maintained for the case of prosecution and the case for defence party which amounted to miscarriage of justice.*
 - I. *Prejudicing accused right by not determining the case fairly, in particular the judge did not apply correct principal by not treating and not taking into consideration to refer exhibits; sim card, phone and memory card to confirm/declare what the truth was. The judge announced guilt by assuming his own opinion without truth and sufficient evidence from phone record/network registry.*
 - II. *The judge judiciously failed to investigate the truth or refer Vodafone verification call analysis report of complainant and appellant to find the fact/truth based on the evidence. Accordingly, whether accused called complainant on alleged occasion was a doubt and not fairly determined. (Trace phone contacts to view the nature between the parties on phone during time of communication).*

25. *That the learned trial judge erred in law and in fact when he only considered the prosecution case (favoured one party) totally ignored to bother defence case. Failure to determine the case from both sides in a balanced manner led to miscarriage of justice.*
26. *That the learned trial judge erred in law and in fact when he failed to properly guide the assessors on how to approach and weigh the evidence given by the complainant (which was part of prosecution evidence) against appellant and to give cogent reason on judgment to reflect the credibility of witness amounted to miscarriage of justice."*

10. In terms of section 21(1) an appeal is available against conviction on any ground of appeal which involves a question of law alone or with the leave of the Court of Appeal on any ground of appeal which involves a question of fact alone or question of mixed law and fact or any other ground which appears to be a sufficient ground of appeal. It is well settled that the test adopted for leave to appeal is to see whether the grounds of appeal are arguable.
11. In the grounds of appeal filed against conviction, ground 6 sets out a question of law which is conceded by the Respondent as well. Since that ground involves a question of law no leave is required.
12. Since no leave is required regarding ground 6, the question arises as to the other grounds of appeal whether they are arguable grounds.
13. The Appellant appeared in person at the hearing and he had prepared the grounds of appeal and the submissions himself.
14. The Respondent has stated in the written submissions regarding some of the grounds of appeal that it would be necessary to consider the entire proceedings which are not available at this stage and would be available before the Full Court.
15. In these circumstances, since ground 6 does not require leave, and to consider granting leave on some of the grounds of appeal it is necessary to have the entire proceedings, I

would not endeavour to select the grounds on which leave should be granted and would leave it to the Full Court to deal with same.

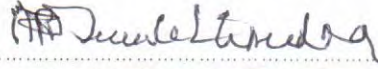
16. As regards the grounds of appeal against sentence, in grounds 1 and 3 the Appellant argues that the starting point of 12 years chosen by the learned Trial Judge was too high.
17. It appears that the learned Trial Judge had considered the aggravating factors when fixing the starting point and therefore this ground is arguable.
18. Ground 2 is to the effect that the sentence was harsh and excessive. This ground would go along with ground 1.
19. Ground 4 relates to the fact that the learned Trial Judge had taken irrelevant matters into consideration and not taken relevant matters into consideration when sentencing.
20. The Appellant has not set out the relevant or irrelevant matters and therefore this ground is not arguable.
21. The 5th ground of appeal is on the basis that the mitigating factors have not been taken into account. The learned trial Judge refers only to the period in remand. It would be necessary to see the record of proceedings as to whether there were other mitigating factors and would leave it to the Full Court.
22. The 6th ground of appeal is that the learned Trial Judge erred in law and in fact in imposing sentence based on wrong factual basis. This ground is vague.

Orders of Court:

- (1) *Since ground of appeal No.6 involves a question of law no leave is required.*
- (2) *The Full Court to consider the other grounds of appeal against conviction the consideration of which would be facilitated with the availability of the entire proceedings.*

- (3) *Leave to appeal is granted on grounds 1, 2, 3 and 5 of the grounds of appeal against sentence.*




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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL