

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

CRIMINAL APPEAL NO. AAU 0070 of 2020
[In the High Court at Lautoka Case No. HAC 107 of 2016]

BETWEEN : **SEMESA SACERE**

AND : **THE STATE** *Appellant*
Respondent

Coram : **Prematilaka, RJA**
Mataitoga, RJA
Morgan, JA

Counsel : **Appellant in person**
Mr. A. Singh for the Respondent

Date of Hearing : **03 July 2024**

Date of Judgment : **26 July 2024**

JUDGMENT

Prematilaka, RJA

1. I agree with the reasons and proposed orders of Mataitoga, RJA.

Mataitoga, RJA

2. The appellant had been indicted in the High Court at Lautoka on one representative count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed between 01 January 2012 and 31 December 2012 and one count of indecent assault contrary to section 212 (1) of the Crimes Act No. 44 of 2009 on 08 March 2015 at Sigatoka in the Western Division.

3. The information read as follows:

'COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

SEMESA SACERE, between the 1st day of January, 2012 and 31 say of December 2012 at Sigatoka in the Western Division, penetrated the vagina of "MN" with his penis without her consent.

COUNT TWO

Statement of Offence

INDECENT ASSAULT: *Contrary to Section 212 (1) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

SEMESA SACERE, on the 8 March 2015 at Sigatoka in the Western Division, unlawfully and indecently assaulted "MN" by kissing her stomach.

4. At the end of the summing-up, the assessors had opined that the appellant was guilty of the first count, but not guilty of the second count. The trial judge agreed with the assessors' opinion, convicted the appellant and sentenced him on 22 August 2019 to a sentence of 14 years and 8 months imprisonment with a non-parole period of 11 years.
5. The appellant submitted one ground each against conviction and sentence in person belatedly (13 August 2020). This appeal was untimely. The Legal Aid Commission [LAC] had then filed an application for enlargement of time for leave to appeal against conviction and sentence. An affidavit and written submissions were filed on 9 November 2021. The state had tendered its written submissions on 3 December 2021.

Leave to Appeal Hearing

6. Application for enlargement of time to appeal. The appellant submitted one ground of appeal against conviction and one ground of appeal against sentence. For the ground against conviction, he alleges:

“The trial judge erred in fact and law when he did not independently assess all the evidence adduced during the trial and in so doing resulted in the conviction being unsafe, causing a grave miscarriage of justice.”

7. The appellant’s ground of appeal against sentence at the leave hearing was:

“That the sentence imposed on the appellant is harsh and excessive”

8. The grounds of appeal against conviction and sentence were carefully considered by the judge alone and his ruling is clear and detail in referencing his decisions to relevant passages of the summing up and with extracts from the judgement of the high court The result of the appeals against conviction and sentence were both dismissed as having no reasonable prospect of success on appeal to the Full Court. The appellant has only renewed his sentence appeal to the Full Court. However, this Court on its own decided to consider his conviction appeal too.

Conviction appeal

9. In the Full Court the approach taken, given the specific circumstance of the appellant, was to treat the appeal grounds as if it was timely and proceeded to deal with issues raised normally.
10. The appellant, like he did in the High Court trial, is not denying the acts of sexual intercourse with MN, for which he was charged and found guilty. He claims that all of the sexual intercourse he was charged, was with the consent of the complainant. He stated that the complainant was running after him at times when these acts of rape took place.
11. In the leave hearing for this appeal, he submitted the following ground against his conviction:

“The trial judge erred in fact and law when he did not independently assess all the evidence adduced during trial and in not doing so resulted in the conviction being unsafe and causing grave miscarriage of justice.”

12. When dealing with the claim of the appellant that the sexual intercourse was consensual, it was pointed to him that the trial judge's assessment was fair and in accordance with the relevant legal principles. For example, in dealing with the prosecution evidence and the applicable legal principles, the trial judge covered this at paragraph 45 to 79 of the summing up.
13. When dealing with the defence case at paragraphs 8 to 89 and 92 to 93, showed that the trial judge had independently assessed the evidence from both the prosecution and appellant.
14. In directing the assessors regarding who to believe, the trial judge was again fair and proper in his directions thus:
 97. *You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.*
 98. *It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.*
 99. *If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.*
 100. *The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.*¹
15. The approach and manner of the trial judge in dealing with evidence of both parties, was fair and just. He took time to evaluate separately the evidence of the prosecution and defence.
16. This ground was not renewed in the appellant's appeal to the Full Court. It is covered in this judgement because it had been raised at the leave hearing and in interest of fairness, in that it was indeed raised at the interlocutory stage in the process before the

¹ *State v Sacere* (Summing-Up) [2019] FJHC 829.

single judge of the Court of Appeal. This ground would not have succeeded, if it was renewed. The claim of consent has no basis on the evidence adduced at his trial and which was subjected to intense cross-examination by counsel of the appellant.

17. By a letter dated 1 January 2022, the appellant submitted what purports to be grounds of appeal to the Full Court of Appeal. It is just his plea for the Court of Appeal to hear his appeal because of his age and physical condition. The appellant is 84 years old, weak and blind in one eye.

Against Sentence

18. The appellant was convicted of a representative count of Rape. In fact, it is for 3 separate acts of rape of a 16-year-old girl. There are no new factors advanced by the appellant to support his appeal against sentence. He states in his letter asking the court may consider his old age and physical condition and that he represented Fiji in rugby union. He submits that the sentence in his case is harsh and excessive. Underlying this claim is the submission that his advanced age should have been considered by the sentencing judge when composing the sentence.
19. The court have reviewed the sentencing ruling and it finds that the sentencing judge was careful to follow the relevant case law, especially being guidelines in the decision of the Supreme Court in *Aitcheson v State*². It should be noted that the personal circumstances and family background were considered and the fact that he was a first offender. The sentencing judge also took care to follow the Supreme Court's decision in *Felix Ram v State*³, which referred to factors a court should consider when sentencing offenders of child rape case. The sentencing judge also considered the advanced age of the appellant but was not convinced that it should be used to lighten the sentence.
20. In all the above it is clear that the sentence was within the tariff for offences of rape against children.

² [2019] FJSC 29 (CAV 0012 of 2018)

³ [2015] FJSC 26, (CAV 0012 of 2015)

21. But for the Grace of God, and considering the current age of the appellant at 84 years, this court will reduce the sentence by 1 year and the non-parole period by 1 year as well.

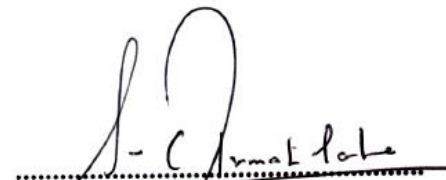
Morgan, JA

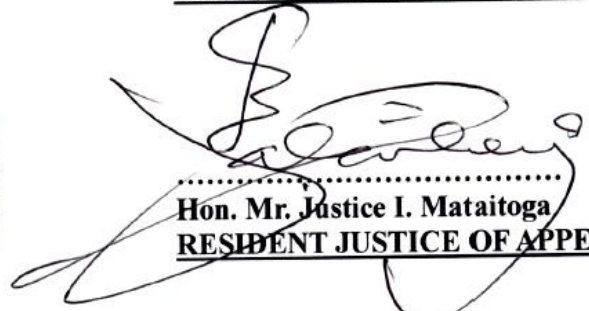
22. I have read and concur with the judgment of Mataitoga, RJA.

ORDERS OF THE COURT:

1. Appeal against sentence is allowed.
2. The sentence of 14 years 8 months of imprisonment non-parole period of 11 years is set aside
3. A new sentence for the appellant is 13 years 8 months imprisonment with a non-parole period of 10 years imprisonment with effect from 22 August 2019.




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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL


.....
Hon. Mr. Justice I. Mataitoga
RESIDENT JUSTICE OF APPEAL


.....
Hon. Mr. Justice W. Morgan
JUSTICE OF APPEAL

Solicitors:

Appellant in person

Office of the Director of Public Prosecution for the Respondent