

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

CRIMINAL APPEAL N0.AAU0005 OF 2004S
(High Court Criminal Appeal N0.HAC0017 of 2002)

BETWEEN:

PENIASI SENIKARAWA

Appellant

AND:

T H E S T A T E

Respondent

Coram: Ward, President
Smellie, JA
Penlington, JA

Counsel: Appellant in person
D Goundar for respondent

Date of Hearing: 15 November, 2005

Date of Judgment: 25 November 2005

J U D G M E N T O F T H E C O U R T

- [1] The appellant was tried in the High Court on one count of rape, three of indecent assault and one of indecently annoying a female. He was convicted by the judge; agreeing with the unanimous opinions of the assessors and sentenced on 20 May

2003. The sentences were ordered to be served concurrently making a total effective term of eleven years imprisonment.

- [2] He has appealed against conviction and sentence but applies to the Court for counsel to be assigned under section 30 of the Court of Appeal Act:

“30. The Court of Appeal may at any time assign counsel to an appellant in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.”

- [3] The charges all relate to his step daughter who was 14 years old at the time and they were alleged to have occurred in November 2001 with the exception of the third charge of indecent assault which was charged as having been between the 1st November 2001 and 17 February 2002.

- [4] At the first appearance in the High Court on 25 October 2002, the applicant told the court he had applied for legal aid and the case was adjourned to 22 November 2002 when he was advised his application had been refused. It was then listed for hearing on 13 May 2003 and, on that date despite the time he had been allowed and the fact he was on bail, he applied for time to instruct a lawyer. Counsel for the prosecution pointed out to the court that he had obtained an adjournment in the magistrates' court for the same reason but had not been represented. The application was refused by the learned judge who ruled:

“The accused asks for time to find a lawyer. This matter has been pending in the High Court since October last year. The charges relate to events in and after November 2001. The accused was unrepresented in the lower court because he did not take time to instruct his lawyer, who then withdrew. There was a full PI and the accused cross examined at length.

In all the circumstances, any further adjournment will push this case into 2004. I consider that the accused has had ample time to find a lawyer and he was aware that his legal aid application was unsuccessful in November 2002. He is on bail.

His application is refused. I will ensure during trial that he understands the proceedings to minimise the risk of prejudice.”

[5] He pleaded not guilty and subjected the complainant and some other prosecution witnesses to careful and lengthy cross examination

[6] He has filed 12 grounds of appeal of which the first is simply an, apparently justified, complaint that he had not heard anything since he first sought to appeal. The second complains in general terms that the evidence was insufficient and the sentence too harsh and extremely excessive. Eight challenge the findings of fact and relate mainly to the evidence of his stepdaughter and the time of her complaint.

[7] Grounds 3 and 4 are:

“3. That the learned trial Judge failed to consider my illiteracy which is the most aggravating factor in such circumstances, having no knowledge of the Nation’s Court of law and the Constitution of the Republic of the Fiji Is, but continued with the said trial and thus executing the judgment.

4. That the learned trial Judgement failed to consider my legal rights for an access to a fair trial. I was truly denied a fair trial as stipulated in the 1997 Constitution Sect 22(3) and also in the Criminal Procedure Code.”

[8] Shortly before the hearing of this application, he submitted lengthy submissions which effectively repeat and re-emphasise his earlier grounds and his need for counsel. Mr Goundar for the respondent points out that the appeal was filed well after the time for appealing had expired and no application for leave has yet been made. However, he agrees that this application may still proceed because, if counsel is assigned, he should also deal with the application for leave to appeal out of time.

[9] The manner in which the Court should consider applications under section 30 was dealt with at some length in the case of *Peceli Masidole and others v The State*; AAU 21/02 S, 14 November 2003, and more recently in the appeal of *Yidali Yaba v The State*; AAU 44/02S, 29 July 2005. In *Peceli's case* the Court explained:

“Section 30 ... empowers the Court to assign counsel to an indigent appellant in a criminal appeal when it appears desirable in the interests of justice that the appellant should have legal representation.

The section confers this power so as to ensure that the Court of Appeal will never be precluded by an appellant's lack of funds from ensuring that justice is done in a criminal appeal. ...

[It] is not a substitute for Legal Aid. The discretion is one to be exercised sparingly and applicants will have to show that the interests of justice require the appointment of counsel. Simply because applicants have been convicted of serious crimes and advised to appeal will not be sufficient. In the normal run of cases, lack of means coupled with a reasonable prospect of success, (judged objectively and responsibly), will be prerequisites.”

[10] It was stated in *Yaba's case* that:

“The issue is whether it is desirable in the interests of justice that counsel be assigned. ... The appellant's case is likely to be presented more competently with counsel and the Court will be better able to

focus on and decide the issues. However, as pointed out in *Peceli*, those matters are not the only considerations. A conviction [of a serious offence] is not necessarily something that the Court cannot deal with fairly and properly in the absence of representation for the appellant.”

[11] The test, as set out in *Yaba's case*, is whether the points to be raised are “run of the mill issues involving familiar principles”. The Court will generally prefer to have the assistance of counsel but it must consider whether it can fairly and properly consider the appeal without that help. It is only if that is answered in the negative that it should assign counsel.

[12] As the court stated in *Peceli's case*, a reasonable chance of success is a prerequisite. To proceed without that would be an exercise in futility. On the grounds filed by the applicant in this case, we do not consider there is a reasonable chance of success.

[13] However, there are aspects of the case which cause us concern relating to the evidence which was admitted in the trial and the manner in which the learned trial judge dealt with those matters in the trial and in the summing up to the assessors. These are matters which, had the applicant been represented at the trial in the High Court, may have been the subject of objection by his counsel.

[14] However, the test for this Court in an application under section 30 is not whether the applicant should have been represented at the lower court but whether the possible grounds of appeal raise issues which are of such complexity or obscurity or which raise issues of such public importance that the Court considers it is necessary to have the assistance of counsel in order to ensure a fair and just appeal hearing. Mr Goundar accepts that is the test and suggests that must mean that, if the matters on appeal are well settled matters of law which the Court can determine fairly and justly without the assistance of counsel, it should not assign counsel.

- [15] There are two possible aspects of appeal which concern us. First is the evidence of previous violence by the applicant to the members of his family and the reference to suggested offences against others which were not the subject of charges before the court but which were presumably allowed as part of the res gestae.
- [16] These incidents were described by the complainant and her mother. The former described violence since the applicant first moved into her family home in 1993. It included references to violence both against the complainant and against her mother. Evidence was led from the mother about an incident which would amount to indecent assault against the complainant in 2000, violence and indecent assault against the mother and indecent assault on his daughter by his first marriage. The sufficiency of the direction to the assessors as to the relevance and the manner in which they should consider these matters also gives rise to a possible ground of appeal.
- [17] The second matter is recent complaint. Evidence was led that there had been recent complaint to the mother two days after one of the incidents in November 2001. However, the court also heard evidence of complaints by the victim to her aunt, the doctor and a police officer in 20 February 2002 the details of which were admitted in evidence. The manner in which the learned judge advised the assessors on the relevance and probative value of such complaints may also be questionable.
- [18] The applicant was not represented at the trial in the High Court or for this application and the significance of such points is unlikely to be apparent to a layman. In such circumstances, the Court should raise them in the interests of justice. Having done so, we consider that they may give a reasonable chance of success on appeal.

[19] Mr Goundar does not challenge that conclusion but repeats his suggestion that there is no need to assign counsel. We agree. These matters do not raise any novel, difficult or unique points of law. On the contrary, they require consideration of well established principles and we have no doubt that the Court will be able to deal with the issues without the need for assistance by counsel.

[20] As Mr Goundar has demonstrated in this application, the respondent can be expected to assist the Court in a fair and responsible manner including, we have no doubt, the provision of any authorities which may be relevant.

[21] The application for counsel to be assigned is refused but the appellant is given leave to appeal out of time limited to the two issues identified in this judgment, namely:

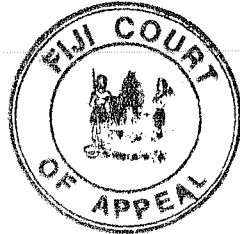
1. The evidence led and the direction to the assessors on acts of violence or sexual abuse by the appellant which were not the subject of charges in the trial.
2. The admissibility of complaints by the victim and the direction of the learned judge on the effect of recent complaint on the assessment of the complainant's evidence.

Orders

1. Application under section 30 for assignment of counsel refused.
2. Leave granted to appeal out of time limited to the issues set out in this judgment.
3. Respondent to file submissions on or before 20 January 2006.
4. Appellant to file any submissions in reply on or before 17 February 2006.
5. No further submissions to be accepted without leave of the Court.
6. Appeal to be heard in the March 2006 session of the Court.

W Ward

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WARD, PRESIDENT



Robert Smellie

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SMELLIE, JA

Paul Penlington

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PENLINGTON, JA

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions, Suva for the Respondent