IN THE COURT OF APPEAL, FIJI
APPELLATE JURISDICTION

Criminal Appeal No: Misc. 28 of 2011

BEFORE THE JUSTICE OF APPEAL, HON. JUSTICE PAUL K. MADIGAN

BETWEEN	**:**	**MAHENDRA KUMAR**
		Applicant/Appellant
AND	**:**	**THE STATE**
		Respondent
Counsel	:	Mr. J. Singh for the Applicant Mr. M. Korovou for the State
Dates of Hearing	:	25 March 2013
Date of Judgment	:	5 April 2013

JUDGMENT

[1] The applicant applies for leave out of time to appeal a conviction for rape in the Labasa High Court and his sentence of thirteen years consequent to that conviction.

[2] The sentence was passed on the 16th May 2011 and the applicant filed his appeal on 14th August 2011, some 56 days out of time. I have the powers under section 35(1)(a) of the Court of Appeal Act to extend time within which to appeal and in following ***Opeti Delana Koro*** *AAU0028.2008* which recommends flexibility of allowing time up to 3 months, and with no objection from the State, I do grant leave for this application for leave to appeal to be heard out of time.

[3] The appellant was tried in the High Court at Labasa from 2-5 May 2011 and he was convicted after a unanimous finding of guilty by three assessors and the Court. He was then sentenced to thirteen years' imprisonment with a minimum term to be served of 9 years.

[4] The brief facts of the case were that the appellant had offered himself to the parents of a sickly 18 year old, Form 7 student to pray for and heal her. With the leave of her mother, he took the girl to his home and he persuaded her that he was going to heal her and pray for her. In that isolated environment he raped her on 4 consecutive days in September 2010 and continued to do so until 11 October 2010 when her parents removed her from his charge and took her to the Police Station.

[5] The accused seeks leave to appeal his conviction on three grounds; and leave to appeal sentence on two.

[6] His grounds of appeal against conviction are:

> (i) That in his summing up, the learned trial Judge appeared to be reversing the burden of proof, by stating that "there were no eye witnesses to confirm or deny the parties' version of events.
>
> (ii) That the trial Judge erred in law in not directing the assessors on the definition of "defilement."
>
> (iii) That the trial Judge erred in law in failing to adequately direct the assessors on the law of corroboration.

[7] Although the grounds (ii) and (iii) claim to be failings "in law" which would give an automatic right to the Full Court, they are in fact mixed

law and fact and require leave before they can be advanced before the Full Court.

[8] The 2 grounds of appeal against sentence are:

(i) That 13 years is harsh and excessive in the circumstances.

(ii) That the trial Judge took the elements of the offence to be aggravating features when enhancing the sentence.

First Ground of Appeal against Conviction

[9] Counsel for the applicant takes issue with a sentence in paragraph 24 of the Summing Up, namely: "there was no eye witnesses from either sides to confirm or deny the parties' version of events." Counsel says that without further qualification this sentence prejudices the applicant because it implies that the accused bears the burden of proving his innocence. To remedy this, Counsel submits, the Judge should have gone on to remind the assessors immediately thereafter that there was no burden on the accused.

[10] It is difficult to see how those words in isolation might be regarded as prejudicial to the accused, even though a balance of "confirm or deny" is presented. As Mr. Korovou points out the phrase cannot be taken in isolation. The Judge has been at pains throughout the summing up to tell the assessors (paras 4, 25 and 29) that the accused does not have to prove anything: that the burden of proof remains on the State.

[11] This ground of appeal is not made out and leave to advance it before the Full Court is refused.

Second Ground of Appeal against Conviction

> *"….. that the Honourable trial Judge erred in failing and/or adequately directing the assessors at paragraph 26 of the Summing Up on the definition of the term "defilement"."*

[12] The crime of defilement, although an alternative to rape when the victim is under the age of 16 could never be an alternative in this case, the victim being 18. The learned trial Judge had no intention of directing the assessors on the crime of defilement nor should he have. He is merely defining the word to them because it is a word that was mistakenly used by the examining Doctor in his medical report.

[13] This ground of appeal fails and leave is refused to advance it.

Third Ground of Appeal against Conviction

> *"that the trial Judge erred in law when failing to direct the assessors at paras 26 and 27 of the Summing Up regarding the law on corroboration when stating that the "medical evidence appears to confirm the complainant's version of events."*

[14] Counsel for the accused correctly submits that in terms of section 129 of the Criminal Procedure Decree corroboration is no longer necessary for a sexual offence, but submits that if corroborative evidence is called then the direction still becomes necessary.

[15] This ground of appeal is misconceived. Corroboration warnings might well be given to a jury or a panel of assessors in (rare) suitable cases; but what the Judge has told the assessors here is not inviting them to regard the Doctor's evidence as corroboration for the allegations of the complainant; but merely offering his opinion that the evidence of the Doctor's report is consistent with the allegations made by the complainant.

[16] It is doubtful if it could be said that the Doctor's report assists either the prosecution or the defence. The Doctor's professional findings were that the hymen was not intact, but that there was no sign of abuse or violence. No doctor can say from a gynecological examination that a patient has been raped yet he can say if she be a virgin or not. All the doctor says here that, allowing for masturbation or the use of a blunt object, the patient had been "defiled" – that is that she had had sexual intercourse.

[17] The learned Judge was not relying on the report to corroborate the evidence of the complainant, but said merely that the report "appears to confirm the complainant's version of events."

[18] This ground of appeal is not made out and leave is not granted to advance it.

A new Ground of Appeal against Conviction

[19] Before leaving the appeal against conviction in which none of the applicant's grounds can be made out, there is a matter raised by counsel for the applicant which does cause me some concern. In making submissions on the last ground of appeal, counsel referred me to paragraph 22 of the learned Judge's summing up in which he states:

> "In this case, all the elements of the offence of "rape" discussed in paragraphs 9, 10, 11 and 12 are disputed. The parties' version of events are completely at odds with one another. On the one hand, the complainant said, the accused on 24th September 2010, **forcefully** took off her clothes, **forcefully** held her hands, **forcefully** kissed her and sucked her breasts, **forcefully** separated her legs, **forcefully** inserted his penis into her vagina and **forcefully** had sex with her for 5 minutes without her consent and well knew she was not consenting to sex, at the time. According to the

> complainant, the accused repeated the above on 25th, 26th, 27th September 2010 and in the daytime until 11th October 2010."(emphasis added)

[20] In this paragraph the Judge has used the word "forcefully" six times in describing the evidence of the rape when in the actual record of the complainant's evidence the word "forcefully" was not used once. The judge's version of the evidence is unfortunately weighted to the prejudice of the accused. He is emphasizing the exercise of power over the victim in all his deeds when this degree of power was not reflected in the complainant's *viva voce* evidence.

[21] This unfortunate repetition of the word forcefully may perhaps be seen to be unnecessary and prejudicial. The Court could find that the summing up is unbalanced and weighted in favour of the State. It certainly raises an issue that is arguable on appeal in front of the Court of Appeal and although it was not a ground of appeal, in all fairness I do give leave to the applicant to advance it before the Full Court.

The Appeal against Sentence

> *"that the honourable trial Judge erred in law when taking into account the elements of the offence as an aggravating factor when sentencing the appellant.*
>
> and
>
> *"that the sentence is harsh and excessive in all the circumstances of the case."*

[22] The elements of the offence of rape are penetration and lack of consent. The sentencing remarks of the trial Judge do not emphasise any one of these two elements to establish the ground of appeal against sentence relied upon by the applicant. Although the evidence disclosed multiple acts of rape on consecutive days, the applicant was charged with one

charge and must be sentenced for only one charge, although it is quite justifiable for the sentencing Judge to find aggravating features such as repeated abuse against the child, as well as sapping her will by trickery and isolation.

[23] The first part of the applicant's ground of appeal against sentence can not be made out and leave is refused to advance it before the Full Court.

[24] However it could well be argued that the final sentence imposed was harsh and excessive. To add seven years to a seven year sentence for what the learned Judge found to be aggravating features could be seen to be extreme. Leave is given to the applicant to appeal his sentence only on the ground that it was harsh and excessive and on no other ground.

Conclusion

[25] The applicant is given leave to argue one ground of appeal against conviction: that is, that the summing up is unbalanced and therefore unduly prejudicial.

[26] The applicant is given leave to appeal sentence only on the ground that it was harsh and excessive.

Paul K. Madigan
Judge of Appeal

At Suva
5 April 2013