

IN THE COURT OF APPEAL, FIJI
APPELLATE JURISDICTION

Criminal Appeal No: AAU0043 of 2011

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

BETWEEN : **JOSATEKI LULU**
Applicant

AND : **THE STATE**
Respondent

Counsel : Mr. S. Waqainabete (L.A.C.) for applicant
Mr. M. Korovou for the State

Dates of Hearing : 25 March, 3 May 2013
Date of Judgment : 13th May 2013

JUDGMENT

[1] The applicant seeks leave to appeal both conviction and sentence having been convicted after trial before the High Court of one count of rape and sentenced to a term of imprisonment of 9 years and 10 months.

[2] The facts of the case were that on the 12 March 2010 the complainant ("C") met her boyfriend Pritesh after work for a drink. They had an argument and Pritesh left. C then called a friend of hers to join her and they drank together until midnight when the friend dropped her at her

home gate at about 12.30am. She then called Pritesh and walked along the road while talking to him. When she reached the Ratu Dovi junction and still talking, somebody came and held her and dragged her into a grassy area. He forcefully pushed her to the ground and removed her clothing and penetrated her for about 5 to 10 minutes. Police came and took her to Valelevu.

- [3] The boyfriend (Pritesh) said that at about 12 midnight or 1am they were talking when the phone was suddenly diverted.
- [4] C's mother said that the Police had come at around 1am and told her that C was at the Police Station.
- [5] A taxi driver on the way to Nausori saw a girl talking on the phone. He then saw a Fijian man grab her and take her into the bushes. He went to Police (8 miles Mobile) and reported it.
- [6] A police witness from the Command Centre received a report asking for assistance "after 1am." He directed a mobile patrol to the area and he arrived at the scene at 1.40am. When he was there searching, a bystander called saying a man was running across the ground. The officer chased him into a house. The man (the applicant) was arrested. He was sure that the arrestee was the man seen running from the scene. He denied that anybody else was seen in the vicinity.
- [7] I have been purposely selective of the facts in order to explain the applicant's ground of appeal on inferences and circumstantial evidence.
- [8] The applicant submits that all evidence of time points to the rape as having been committed between 12.40am and 1.00am or at the very latest by 1.15am. The Police arrived at the scene at 1.40am at which

time they saw the accused and chased him to a house where they apprehended him. The applicant claims that it is not believable that the rapist would wait until the Police arrived before fleeing the scene, or would not wait for at least 25 minutes or more. His presence at the scene at 1.40am must have some other explanation other than being the rapist.

- [9] The applicant's second ground of appeal relates to the admissibility of the cautioned interview which they say was unfairly made in a language the applicant is not familiar with.
- [10] The unreliability of the cautioned interview they say, coupled with the unexplained presence of the applicant at the rape scene 40 minutes after the rape would have been committed, leads to the inescapable presumption that the applicant cannot be guilty of the crime.

Analysis

- [11] The admissibility of the cautioned interview was addressed by the trial Judge in a voir dire before the trial proper commenced. The Judge in his discretion having heard all of the evidence surrounding its production, ruled that it was not obtained unfairly or by oppression and it was therefore admissible.
- [12] All of the complaints of the applicant with regard to assaults and improprieties in the creation of the record of the caution interview were left to the assessors. They were certainly made aware that the applicant complained that the interview was written in English, a language he did not understand, having only a limited education in the Lomaiviti Group. There was evidence of the interviewing officer contradicting himself as to the language of the interview.

- [13] Although these matters were left properly to the assessors to evaluate, it is quite clear from the Summing Up that the assessors were not assisted in any way in how they should approach the interview should they find that the applicant had been assaulted and that he had been prejudiced in the medium of language used. They should have been told that if they were to find such improprieties, then they were to discard the interview and ignore it. It appears that they were not.
- [14] I find that it is at least arguable that the assessors were misdirected on their approach to the caution interview and leave is granted to the applicant to argue this ground of appeal.
- [15] The circumstantial evidence ground (revolving around the time of rape and apprehension of the applicant) has been conceded as arguable by the State. Whilst I would not be so quick to concede the ground, given that the times given by the complainant and her friends and family were all very approximate, I accept that the ground is at least arguable and leave should also be granted on this ground.

Sentence

- [16] The sentence passed on the applicant (ten years less time spent on remand) is well within tariff for rape of an adult. ***Kasim*** [1994] FJCA 25 says that it must be at least seven years; the Judge added five years to this for the aggravating features of violence occasioned to the victim. He allowed a discount of two years for his family circumstances and for being a first offender.
- [17] The sentence is perfectly appropriate and leave to appeal it is refused.

Conclusion

[18] Leave is granted to appeal conviction on two grounds –

- (i) circumstantial evidence re; time.
- (ii) caution interview improprieties not left adequately to the assessors.

[19] Leave to appeal sentence is not granted.

Paul K. Madigan
Judge of Appeal

At Suva
Thursday 9th May 2013