

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

Criminal Appeal No. AAU0082 of 2013
[High Court Case No. HAC 21/2013Lab]

BETWEEN : SEMI RAINIMA
Appellant

AND : THE STATE
Respondent

Coram : Goundar JA

Counsel : Mr. S. Sharma for the Appellant
Mr. L. Fotofili for the Respondent

Date of Hearing : 11 August 2014

Date of Ruling : 19 September 2014

RULING

- [1] The appellant was tried on two counts of rape in the Magistrates' Court at Labasa. He was convicted on the first count but acquitted on the second count. After entering conviction, the learned Magistrate transferred the case to the High Court for sentence. On 15 April 2013, the High Court sentenced the appellant to 16 years' imprisonment with a non-parole period of 14 years. On 18 June 2013, the appellant filed an application for an enlargement of time to seek leave to appeal against conviction and sentence. Section 26 of the Court of Appeal prescribes a 30-day appeal period. The application for leave is out of time by about one month.

- [2] On 26 May 2014, I granted the appellant an extension of time to seek leave to appeal because the length of the delay was not significant, and the State took no objection to an extension of time.

Conviction appeal

- [3] The ground of appeal against conviction is:

“The Learned Trial Magistrate erred in law and in fact when she convicted the Appellant in view of the following:

(a) The conviction was unreasonable and cannot be supported having regard to the evidence resulting in a miscarriage of justice”.

- [4] The two incidents of rape involved the same complainant. When the incidents arose she was 15 years old while the appellant was 21 years old. The first incident was allegedly committed in December 2009. The second incident allegedly occurred in February 2010. At trial, the appellant did not dispute sexual intercourse. He said he had sex with the complainant in December 2009 once, and that was consensual. He denied having sex with the complainant on any other occasions. The victim gave evidence that in December 2009 she accompanied the appellant to a coconut plantation upon his request. While they were in the plantation, he made sexual advances to her and when she refused his advances, he forcefully removed her clothes and raped her. After raping her, the appellant went away, leaving the victim behind in the plantation. The victim said she was afraid to tell her parents about what the appellant had done to her when she returned home.
- [5] The victim said on the second occasion, she went to her farm to get some vegetables when the appellant approached her. She said she was afraid of him because of what he did to her earlier. She said he forcefully removed her clothes and raped her. In March 2010, the victim discovered she was pregnant. When her parents came to know about the pregnancy, she told them what the appellant had done to her. The village headman reported the matter to the police. The appellant was arrested and interviewed under

caution. He admitted having forceful sex with the complainant but the learned trial Magistrate gave no weight to his admission because she found the caution interview to be unreliable. On 30 August 2010, the victim gave birth to a child.

[6] Counsel for the appellant has filed detailed submissions in support of the ground that the conviction is unreasonable and not supported by evidence. The gist of the appellant's submissions is that the victim was not a credible witness because she only cried out rape when her parents discovered that she was pregnant. Counsel for appellant further points out that the learned trial Magistrate believed the victim on the first count and convicted the appellant, but she disbelieved the victim on the second count and acquitted the appellant. Counsel submits that the guilty verdict on count 1 is inconsistent with the not guilty verdict on count 2.

[7] When inconsistency in verdicts is raised as a ground of appeal, the appellate court reviews the entire evidence to see if the verdicts are reasonable or logical (*Balemaira v State unreported Criminal Appeal No. CAV0008 of 2013 (6December 2013)*). In convicting the appellant on count 1, the learned Magistrate accepted the complainant's evidence as credible. She found the inconsistencies in the complainant's evidence on count 1 were of peripheral importance and the timing of complaint after discovery of pregnancy did not affect the veracity of the complainant's evidence. The reason the learned Magistrate did not accept the complainant's evidence on count 2 is contained at paragraph 58 of the judgment:

"In analyzing the evidence for this count, I found the prosecution falling short of the required standard and had a reasonable doubt as to whether this alleged incident occurred at all. Whilst the victim did say that there was sexual intercourse and that she had told the accused to stop, she did not reply when asked in re-examination as to why she had told the Police that she had had sex with the accused in February 2010. Her demeanour in her evidence in support of this count was one of uncertainty and unwillingness and I was left with a reasonable doubt as to whether the incident alleged in count 2 had occurred at all. She seemed most uncertain when asked for the reason she made the allegation in this count to the Police. The doubt in my mind is given to the accused and, finding that the prosecution has not

discharged its burden in respect of this count, I acquit the accused accordingly."

- [8] The learned trial Magistrate quite properly considered the evidence on each count separately. She based her finding of credibility on the demeanour of the complainant when she gave evidence. She accepted the complainant's evidence on count 1 but rejected her evidence on count 2 because the complainant did not offer any explanation for not telling the police about the second incident of rape. The lack of explanation left a reasonable doubt in the learned Magistrate's mind and she resolved that doubt by acquitting the appellant on count 2. Thus there is logic in the two different verdicts based on the complainant's evidence. There cannot be an arguable ground that the conviction is unreasonable and not supported by evidence.

Sentence appeal

- [9] The ground of appeal against sentence is:

"The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent of:

- (a) Taking a high starting point at 12 years imprisonment and then adding separately the aggravating factors which were already part of the starting point thereby punishing the Appellant twice;*
- (b) Failing to take into account the period in remand as a separate factor which would have reduced the sentence;*
- (c) Failing to take into account the following relevant factors as part of mitigation which was available on the facts of the matter.*
 - i) Victim was not physically harmed or threatened;*
 - ii) Young offender;*
 - iii) Cooperation with Police during investigations."*

- [10] The process used by the learned High Court judge to arrive at the sentence of 16 years' imprisonment is contained at paragraph (8) of the sentencing remarks:

"I take as a starting point a term of imprisonment of twelve years. For the breach of trust of a fellow villager and of the pastor's son, I add a further term of three years bringing the total sentence to fifteen years. For the aggravation of the pregnancy I add two more years, bringing the sentence to seventeen years. There is very little that the accused can bring (nor did bring) before the Court by way of mitigation apart from his previous clear record and for that I deduct one year meaning the total term of imprisonment the accused will serve will be a term of sixteen years. He will serve a minimum term of fourteen years before being eligible for parole."

- [11] It could be argued that the fact that the appellant was a fellow villager and a pastor's son did not aggravate the offence. Further, there was no allowance made for the appellant's remand period and for the fact that the appellant was 21 years old and a young offender when he committed the offence. The appeal against sentence is arguable.

Result

- [12] Leave to appeal against conviction is refused.
Leave to appeal against sentence is allowed.



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Hon. Justice D. Goundar
JUSTICE OF APPEAL

At Suva
19 September 2014

Solicitors:

Office of the Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State