

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 63 OF 2013
(High Court HAA 26 of 2012)

BETWEEN : PENISONI TILAU

Appellant

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Ms. N Nawasaitoga for the Appellant
Mr. M D Korovou for the Respondent

Date of Hearing : 30 September 2014

Date of Ruling : 4 December 2014

RULING

1. This is an application for leave to appeal.
2. The Appellant was charged with one count of Rape contrary to Section 207(10 and (2) (a) of the Crimes Decree No.44 of 2009.
3. The Appellant was convicted and sentenced on 22nd March 2013 to 8 years imprisonment with a non-parole period of 6 years imprisonment.

4. The application of the Appellant which was filed by him was delayed by 75 days. Thereafter the Legal Aid Commission appearing on his behalf filed an amended notice of appeal against conviction on 1st July 2014 and submissions were filed on the grounds in the amended notice of appeal which are as follows:
 - i. *The learned Trial Judge erred in law and in fact when he did not direct the assessors in respect of the element of recklessness for the offence of rape resulting in a substantial miscarriage of justice.*
 - ii. *The learned Trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the answers contained in the caution interview and the weight to be attached to the disputed confession considering that he denied the allegation in his evidence in Court resulting in a substantial miscarriage of justice.*
 - iii. *The learned Trial Judge erred in law and in fact when he did not direct and/or guide the assessors on the cross-examination of the victim resulting in a substantial miscarriage of justice.*
5. The prosecution case was that the complainant who was dumb had been fishing when the Appellant had come and requested whether he also could fish. The complainant had agreed and thereafter she complained that the Appellant had started kissing her and thereafter raped her forcefully. The Appellant's case was that she had consented to have sex with him as she had invited him.
6. Although the leave to appeal application had been filed late, the Respondent did not object to the application for leave to appeal being taken up on the grounds urged on behalf of the Appellant. In criminal appeals, usually a delay up to three months has been excused where the Appellant has been in prison since conviction. **Isimeli Seresere v. State** [2005] AAU 92/08 (5 November 2008). The application is therefore taken up to consider whether there are merits in the grounds of appeal.
7. The first ground deals with the summing up of the learned trial Judge regarding the elements of the offence of rape and submits that the trial Judge failed to direct the

Assessors in respect of the element of recklessness for the offence of rape. The Appellant's submission do not elaborate as to what is meant by stating that recklessness is an element of the offence of rape. In his summing up the learned trial Judge has adequately dealt with the elements of the offence of rape and there is no misdirection and there is no substantial miscarriage of justice as submitted by the Appellant. Therefore there is no arguable ground and leave is refused on this ground.

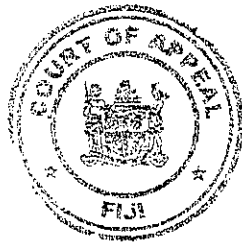
8. The second ground is in relation to the learned trial Judge's directions to the Assessors on how to approach the answers contained in the caution interview and the weight to be attached to the disputed confession as the Appellant had denied the allegation against him. The Appellant had given evidence at the trial and his evidence was consistent with what he had stated in his caution interview which was to the effect that the complainant had consented to have sex with him. The Appellant had stated in Court that the complainant had removed her clothes whereas in the statement to the Police he had stated that he removed the complainant's clothes. Apart from that, the statement to the Police and the evidence given in Court were consistent. The learned trial Judge in his summing up referred to the statement made by the Appellant to the Police and stated in his summing up that the Assessors should consider the entirety of the evidence and that it was up to the Assessors to accept or reject the explanation given by the Appellant. In view of such a direction there is no misdirection in the summing up and therefore this ground is not arguable.
9. The third ground is on the basis that the learned trial Judge did not direct and/or guide the assessors on the cross-examination of the victim resulting in a substantial miscarriage of justice.
10. The learned trial Judge had in his summing up narrated the evidence of the complainant in a summary manner and had not separately dealt with the examination-in-chief and cross-examination. The cross-examination of the victim was in fact disadvantageous to the Appellant and the Appellant benefitted from the manner in which the learned trial Judge had narrated the victim's evidence. The complainant being deaf and mute had

responded angrily when it was suggested to her that she had consented when she was cross-examined.

11. The defence taken up by the Appellant was that the complainant had consented. The Learned trial Judge had in his summing up, put the defence of the Appellant before the Assessors in clear and precise terms. It was a summing up which was fair, objective and balanced as referred to in **Wilisoni Dakunaivei Tamaibeka and Another v. The State**, Criminal Appeal No.AAU0015 of 1997S. There has been no misdirection in the summing up of the learned trial Judge and therefore the third ground has no merit.
12. Since none of the grounds of appeal are arguable as they have no merit the application for leave to appeal is refused.

Order of Court:

Application for leave to appeal is refused.





Hon. Mr Justice Chandra
RESIDENT JUSTICE OF APPEAL