

IN THE COURT OF APPEAL
[On Appeal From The High Court]

CRIMINAL APPEAL NO: AAU0021 OF 2012
(High Court Case No: HAC081 of 2011)

BETWEEN : **LAISENIA KATO VIBOTE**
Appellant

AND : **THE STATE**
Respondent

Coram : Goundar JA

Counsel : Mr. S. Waqainabete for the Appellant
Mr. M. Delaney for the Respondent

Date of Hearing : 17 April 2014

Date of Ruling : 2 June 2014

RULING

[1] The appellant was convicted of digital rape after a trial in the High Court at Lautoka. He seeks leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act. Leave is required on any ground which involves a mixed question of law and fact, or fact alone [subsection (b)]. The test for leave is whether the ground is arguable before the Full Court.

[2] The grounds of appeal are as follows:

Ground One

The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence and also the two statements made to the two different doctors upon examination to assess the credibility of the complainant.

Ground Two

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.

- [3] In his written submissions, counsel for the State summarized the evidence contained in the summing up as follows:

“PW1 paragraph 29. Applicant’s step mother gave evidence that the applicant was home in the morning in question acting in a drunken and sexually aggressive manner.

PW2 Victim – paragraph 31-40. She was attacked and raped by a person while at home between 11am and 12pm. That person had a cloth around his head 4 and 5. She recognised that person as the Applicant (paragraph 76 deals with the recognition of the Applicant and how it is made. The Judge refers to identification but with respect this is not an identification case.) The V immediately reported assault (not rape) to her returning husband by “Kato” (Applicant) no later than an hour afterwards. This led to a Report Assault (not rape) made to the police that day. The Applicant was arrested for assault that day. The V was examined for assault only that day by PW8 - Dr. Salman Hanifa (paragraph 1).

The following day the V made a complaint of rape against the Applicant. It seems that she had previously been too ashamed to make the complaint but subsequently considered it her responsibility. (Paragraph 37). Having confided in her husband in the interim period after the assault complaint, she returned to the police to make a second complaint. (See paragraph 45). She was then examined by a second doctor.

PW9 Dr. Karalaini Saumiramira - paragraph 52. The medical finding was a laceration of the inner labia minora (inner vulva). There was no age evidence of the injury but it was consistent with penetration of penis, finger or blunt instrument. The reference is a record of the Dr. which was relating to an old lady in a rape incident and nothing more.

PW3 (paragraph 39) gave similar evidence as given by PW1. The Applicant was nearby to her home and the V’s home and was behaving in an overtly sexual manner by masturbating.

PW10 paragraph 54 - was the arresting and investigating officer. What was originally an assault investigation became additionally a rape investigation. A cautioned statement was taken without any reason to challenge its voluntariness and confessions were elicited.

The same officer accepted that a more prudent investigation would have included an ID parade. Both the cautioned statement and the subsequently obtained charging statement taken by PW11 – paragraph 59 – were produced as a prosecution documentary exhibits.

The Applicant gave evidence. His testimony was that at the material time he was in his nearby home – shared with PW2 – asleep from about 9am until 2pm whereupon the police arrived to arrest him for assault. When he arrived at the police station he saw the V and when she made an accusation he replied immediately that she was mad. See paragraph 66.

He complained in detail about the assaults made by the police prior to and in order to obtain his co-operation in respect of the confessional material.

Additionally the Applicant said that parts of the statement were factually correct but other parts not so. Paragraph 70.”

Ground 1 – History related to the doctor

- [4] The victim was attacked around midday on 9 March 2011. She was medically examined on 10 March 2011 at 2.05pm. The history related to the doctor was:

“Assaulted by 1 Fijian male (30 yrs). Was forcefully thrown on a bed and clothes (undergarments) taken off. She does not recall any penetration but felt that her vagina was painful and she had some bleeding per vagina”.

- [5] At trial it was not in dispute that the victim had not reported rape promptly after the assault on her. The learned judge dealt with the delay in reporting rape at paragraph 28 of the summing up as follows:

“The defence also alleged that there was a delay in reporting the case of rape even though the allegation of assault was promptly reported. Even when the case of rape was reported on 10 March 2011, there was no reference to accused by his name. The defence pointed out there should have been an identification parade. The defence therefore says that the identity is not established. Evidence of the victim revealed that she was ashamed of what had happened to her therefore felt uncomfortable in reporting the rape incident on the first opportunity It is for you to consider whether you accept that explanation and whether it is in consistence with the conduct of a woman in the position of the victim.”

[6] Counsel for the appellant submits that the above directions were inadequate because the trial judge failed to direct that the evidence of recent complaint goes to the consistency of the victim's conduct. This submission is misconceived. The medical history was not evidence of recent complaint. In fact there was no evidence of recent complaint in this case and the trial judge quite properly directed the assessors that whether the explanations given by the victim for not making prompt complaint regarding rape was consistent with the conduct of a woman in the position of the victim.

[7] This ground is not arguable.


Ground 2 – Directions on confession

[8] The State concedes this ground is arguable. At paragraph 80 of his summing up, the trial judge directed the assessors that they could act upon a disputed confession if they felt sure that the confession was voluntarily made. Arguably this was a misdirection. Voluntariness is an issue that goes to the admissibility of a confession. The trial judge had ruled the confession was voluntarily made after holding a voir dire. Once the confession is ruled admissible, the assessors have to consider whether the confession was in fact made by the accused and that the confession was true (*Burns v The Queen* [1975] 132 CLR 258.) In determining the weight to be given to a disputed confession, the assessors can take into account all the circumstances under which the confession was made including the grounds upon which the confession is disputed. For these reasons, the State's concession is fair and correct. This ground is arguable.

Result

[9] Leave to appeal against conviction is granted on ground 2 only.




Hon. Justice D. Goundar
JUSTICE OF APPEAL