

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

CRIMINAL APPEAL NO: AAU0057 OF 2012
(High Court Case No: HAC 57 of 2011)

BETWEEN : **LEPANI ROKOLABA**

Appellant

AND : **THE STATE**

Respondent

Coram : Goundar JA

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

Date of Hearing : 5 May 2014

Date of Ruling : 2 June 2014

RULING

[1] Following a trial in the High Court at Lautoka, the appellant was convicted of three counts of rape and sentenced to a total term of 15 years' imprisonment with a non-parole period of 11 years.

[2] The appellant seeks leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act. The grounds of appeal are as follows:

1. The Learned Trial Judge erred in law when he ruled that there was a case to answer in respect of Counts 1 and 2 even though the State had not adduced any evidence of carnal knowledge as required by section 207(2)(a) of Crimes Decree 2009.
2. The Learned Trial Judge erred in law in convicting the Appellant for counts 1 and 2 when the evidence adduced did not support those Counts.

3. The Learned Trial Judge erred in law and in fact when he failed and/or neglected to direct the assessors to the elements of the rape offence mentioned in section 207(2)(a) of Crimes Decree 2009 for counts 1 and 2 and that the State has to prove that the appellant's penis penetrated the vagina of the Complainant.
4. The Learned Trial Judge erred in law and in fact in convicting the Appellant on all three Counts when the evidence adduced by the State was so unreliable.

Ground 1-3 - No evidence of carnal knowledge

[3] Grounds 1-3 were argued together. The appellant was charged pursuant to section 207 (1) (2) (a) of the Crimes Decree. Section 207 (1) (2) (a) requires proof of carnal knowledge. Carnal knowledge involves penile penetration of vulva, vagina or anus. The victim was a 16-year old girl when she gave evidence. She gave evidence of digital penetration and not penile penetration. Digital penetration is an offence pursuant to section 207(1) (2) (b). At the close of the prosecution case, counsel for the appellant applied for a no case to answer. The trial judge rejected that application and found the appellant had a case to answer. It appears that at no stage the prosecution applied to amend the charges to conform the statement of offence to the victim's evidence. The appellant elected to give evidence. He admitted sexual intercourse but said it was consensual.

[4] Whether the trial judge should have upheld the no case to answer application by the defence in light of the evidence given by the victim is an arguable point? However, sexual intercourse was not put as an issue by the defence. The issue was whether the sexual intercourse was consensual. These matters may lead to the conclusion that the appellant's convictions were available on the evidence. That assessment, of course, has to be made by the Full Court.

Ground 4 – Inconsistent evidence

[5] The alleged inconsistency relates to the complaint evidence. The victim's grandmother gave evidence that the victim had complained to her that the appellant had raped her but she did not act upon the complaint. The victim gave evidence that she complained to her grandmother that the appellant had raped her but her grandmother did not act upon her

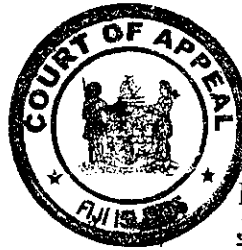
report. Counsel for the appellant has taken a passage from the trial judge's summing up in which the trial judge directed the assessors as follows:


“When the defence counsel asked she said she didn't complain to anyone about those incidents.”

- [6] Whether the victim contradicted herself cannot be considered in isolation. Her entire evidence should be looked at to see whether she had given inconsistent evidence on a material issue. According to the victim's testimony under cross examination, she was consistent regarding her complaint to her grandmother. This ground is not arguable.

Result

- [7] Leave to appeal against conviction is granted on grounds 1-3.




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Hon. Justice D. Goundar
JUSTICE OF APPEAL