

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

CRIMINAL APPEAL NO: AAU0074 of 2012
(High Court Case No: HAC 177 of 2011Ltk)

BETWEEN : **EDWARD SHARMA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : Goundar JA

Counsel : Ms S. Vaniqi for the Appellant
Mr. M. Delaney for the Respondent

Date of Hearing : 9 May 2014

Date of Ruling : 2 June 2014

RULING

- [1] The appellant was tried in the High Court at Lautoka on one count of digital rape of a 10-year old child. After deliberation, the assessors unanimously expressed opinions of not guilty. The trial judge convicted the appellant, and on 7 August 2012, sentenced him to 12 years' imprisonment with a non-parole period of 10 years.
- [2] The appellant seeks leave to appeal against his conviction and sentence on the following grounds:
1. That the Learned Trial Judge erred in law and in fact when he unceremoniously criticized the three assessors who gave a unanimous verdict of not guilty after his Summing Up regarding the three assessors attire they were wearing in Court while sitting as assessors.

By doing so the Learned Trial Judge's action demonstrated that he wanted the three assessors to convict the Appellant and hence he was bias when he overruled the three Assessors and found the Appellant guilty. The Appellant did not have a fair trial and hence the actions of the Learned Trial Judge in unceremoniously criticizing the Assessors before the Judgment, caused substantial miscarriage of justice.

2. That the Learned Trial Judge erred in law and fact by overruling the Assessors unanimous opinion of "Not Guilty" contrary to his own directions to the Assessors.
3. That the Learned Trial Judge erred in law and fact by misdirecting himself in holding/finding that the evidence of the complainant is independently corroborated by the Medical Practitioner who had examined the girl.
4. That the Learned Trial Judge did not take into consideration the evidence of the Medical Practitioner who stated in court that upon examination the Doctor did not find any of the following:
 - (a) No discharge
 - (b) No abrasion
 - (c) No bruises
 - (d) No bleeding

And by not taking into consideration there was a substantial miscarriage of justice.

5. That the Learned Trial Judge did not take into consideration the evidence of the Medical Practitioner that there could be a possibility that the complainant did not suffer any injuries as during the complainants examination no injuries were found and as such there is a possibility that no injury was caused to her by the Appellant or at all.
6. That the Learned Trial Judge did not consider/analyse the Defence case adequately/or in detail in particular the evidence of the Accused's mother who was present in the room with the victim but did not see the Appellant committing the offence as charged. In the circumstances there was a substantial miscarriage of justice.
7. That the Learned Trial Judge erred in law and in fact whilst applying the laws on overruling the verdict of the Assessors as he did not give cogent reasons as to why he over-ruled the unanimous not guilty opinion of the three assessors in light of the whole of the evidence presented in the trial.
8. That the Learned Trial Judge erred in law and in fact on not adequately directing himself that the defence had raised sufficient doubt against the

prosecution evidence before the court and as such the benefit of the doubt ought to have been given to the Appellant.

9. That the Learned Trial Judge erred in law and fact in not directing himself to the possible defences available on the evidence and as such by his failure there was a substantial miscarriage of justice.
10. That the Appellant reserves the right to advance further appeal grounds upon receipt of the Court Record.

Grounds of Appeal – Against Sentence

11. That the Appellant appeals against sentence being manifestly harsh and excessive.
12. That the Learned Trial Judge erred in law by taking into consideration the victim impact report whereby the appellant was not given an opportunity to rebut or challenge.
13. That the Learned Trial Judge erred in law when he misdirected himself by reliance on common law authorities which are not of a similar nature nor circumstances resulting in a substantial miscarriage of justice.”

Ground 1 - Bias

- [3] Was the trial judge arguably biased? The allegation of bias is founded on the fact that the trial judge admonished the assessors on their attires during the trial. The appellant labels the trial judge’s conduct as ‘unceremonious’ and his comments as ‘derogatory’. Whether the trial judge’s comments regarding the assessors’ attires were derogatory cannot be determined without knowing the actual words used by the trial judge. I am not sure whether there is an audio recording of the High Court proceedings. The trial judge is no longer on the bench and has left the country.
- [4] However, even if I assume that the trial judge acted ‘unceremoniously’ and that his remarks regarding the assessors’ dressings were ‘derogatory’, the circumstances cannot give rise to actual or a perception of bias to an informed and reasonable observer. Firstly, the comments were not directed towards the appellant. Secondly, the comments were regarding the assessors’ dressings and not on a matter contacted to the evidence or conduct of the appellant. Thirdly, judicial officers are responsible to maintain decorum in their

courtrooms. They may admonish counsel, clerks, accused, witnesses, assessors or members of public who show disrespect to the institution of justice by their conduct, manners or inappropriate dressing when the court is in session. On the same note, any admonishment by the judicial officers should be judicious and measured. The purpose of admonishment is to ensure that the institution of justice is respected and the public's confidence in the justice system is maintained. In the present case, there is no nexus between the trial judge's comments towards the assessors' dressings and his decision to convict the appellant and not to accept their not guilty opinions. This ground is not arguable.

Remaining grounds – Evidence to sustain conviction

- [5] The remaining grounds relate to the evidence led in trial and the trial judge's reasons for convicting the appellant and not accepting the not guilty opinions by the assessors.
- [6] The Court of Appeal considers the lack of cogency of the reasons for not accepting the assessors' opinions by examining all the evidence that was led in trial. In this regard, counsel for the State has fairly pointed out a misdirection by the trial judge in his judgment in convicting the appellant. At paragraph 17 of the judgment, the trial judge stated "the evidence of the complainant is independently corroborated by the Medical Practitioner ...". The direction is indeed a misdirection for two reasons. Firstly, the trial judge was not required by the law to look for corroboration to convict the appellant. Secondly, the medical evidence did not corroborate the complainant's evidence in the sense that the evidence did not implicate the appellant to the alleged crime. Whether there was a miscarriage of justice due to this error is a matter for the Full Court to consider. Leave is granted on the remaining grounds of appeal.

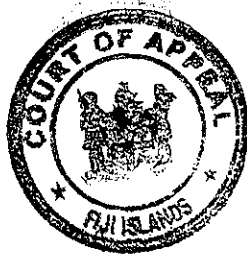
Sentence appeal


- [7] The sentence is clearly within the tariff for rape of a child by a person in trust. However, I have some concerns regarding the use of the unsworn victim impact evidence without giving the appellant an opportunity to challenge it. The question is whether the trial judge was entitled to use the unsworn victim impact evidence without giving the appellant a right to challenge it.

Result

[8] Leave to appeal against conviction is granted on all except ground one.

[9] Leave to appeal against sentence is granted on the issue of the use of the victim impact evidence in sentencing the appellant.




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Hon. Justice D. Goundar
JUSTICE OF APPEAL