

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

CRIMINAL APPEAL NO. AAU0065 of 2012
(High Court Case No. HAC 161 of 2010)

BETWEEN : **KRISHNEEL SHARMA**
Appellant

AND : **THE STATE**
Respondent

Coram : Goundar JA

Counsel : Mr. N. Sharma for the Appellant
Mr. M. Korovou for the Respondent

Date of Hearing : 16 May 2014

Date of Ruling : 2 June 2014

RULING

- [1] This is an application for leave to appeal against conviction and sentence pursuant to section 21(1) of the Court of Appeal Act.
- [2] The appellant was convicted of wrongful confinement and rape after a trial in High Court at Suva. He was part of a joint enterprise to lure the victim into a vehicle and assault her for having an extra marital affair. Others involved were not charged with rape. The prosecution case against the appellant was that while the victim was confined, the appellant digitally penetrated the victim's vagina using his fingers. The appellant was sentenced to 8 years' imprisonment with a non-parole period of 6 years for rape.
- [3] The test for leave to appeal against conviction is whether the ground is arguable before the Full Court. The test for leave to appeal against sentence is whether there is an arguable error in the sentencing discretion of the trial judge.

[4] The grounds of appeal are as follows:

1. That the Learned trial Judge erred in law and in fact in not directing/reminding himself and/or the assessors that the independent medical evidence decisively ruled out the prosecution theory/case that the Appellant raped the Complainant.
2. That the Learned trial Judge erred in law and in fact in not adequately/properly/sufficiently directing the assessors that in circumstantial evidence case as in this case, in view of the evidence, particularly the prosecution medical evidence, it would be unsafe to find the prosecution proved to the required standard.
3. That the Learned trial Judge erred in law and in fact in not adequately/properly/sufficiently directing the assessors about the Defence theory/case.
4. That the Learned trial Judge erred in law and in fact in summing up the case in a prejudicially/improperly/insufficiently manner.
5. That the Sentence is harsh and excessive in the circumstances of the case.

Ground 1 and 2 – Medical evidence

[5] Grounds 1 and 2 concern the medical evidence. The appellant's first contention under this ground is that the medical evidence decisively ruled out the prosecution's case that the appellant had raped the victim. The appellant was convicted not on circumstantial but on direct evidence given by the victim.

[6] The alleged incident took place on the evening of 16 August 2010. The following day, the victim was medically examined. Numerous signs of trauma were found on the victim's body. The examining doctor noted the injuries in the report that was tendered in court without any objection. A second medical examination was carried on 19 August 2010. This examination was carried out to determine if there was any sign of recent sexual intercourse. The examination revealed nil injuries to the internal or external genitalia.

- [7] The medical evidence did not implicate the appellant. However, the medical evidence was relevant because it confirmed the victim's evidence that she was subject of assault while she was confined by the appellant and his co-offenders.
- [8] The victim's version was that although she was digitally penetrated, she did not sustain any injuries to her genitalia. The medical finding confirmed the lack of injuries to the victim's genitalia. Thus the medical evidence was consistent with the victim's evidence and the trial judge quite properly directed the assessors that they could use the medical evidence to assess the victim's credibility. The appellant was not convicted on the medical evidence but on the victim's evidence that the appellant digitally penetrated her vagina using his fingers. Grounds 1 and 2 are not arguable.

Ground 3 - Inconsistency in reporting rape

- [9] This ground relates to the inconsistency in reporting rape. In her initial report to the police on 17 August 2010, the victim did not allege rape. Nor did she allege rape in the history she related to the doctor who carried out the medical examination on 17 August 2010. She alleged rape on 19 August 2010. This explains the need for the second medical examination.
- [10] It is not possible to ascertain the reasons for the late reporting of rape without the court record. The victim may have offered reasons for not reporting rape when she first lodged her complaint with the police. But arguably there is an inconsistency and the trial judge should have pointed out the inconsistency to the assessors and the victim's explanation for the inconsistency when assessing her credibility. This ground is arguable.

Ground 4 – Unfair and prejudicial directions

- [11] This ground concerns unfair and prejudicial direction given by the trial judge on the defence case. The appellant submits that the following direction was unfair and prejudicial:

“Although Krishneel denied the allegations against him, his statements abovementioned appear to support the complainant’s version of events.”

[12] The appellant made no admissions regarding the alleged rape by the victim.

[13] Counsel for the appellant submits that the trial judge’s direction that the appellant’s statements appeared to support the complainant’s version of events could have been construed as an admission by the appellant that he raped her. I find this ground is arguable because the use of the phrase ‘the complainant’s version of events’ included her allegation of rape and there was no evidence that the appellant agreed with that version.

Sentence appeal


[14] It is clear that the trial judge did not give a separate consideration to the appellant’s mitigating factors. The appellant’s mitigating factors were subsumed with his co-offenders’ mitigating factors who were convicted of a less serious charge. Arguably, there is an error in the sentencing discretion of the trial judge.

Result

[15] Leave to appeal against conviction is granted on grounds 3 and 4 only. Leave refused on grounds 1 and 2.

[16] Leave to appeal against sentence is granted.




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Hon. Justice D. Goundar
JUSTICE OF APPEAL