

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

**MISC. ACTION NO. 22 OF 2012**  
**[High Court Case No. HAC 083/11]**

**BETWEEN** : **EMOSI DIANI**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : Goundar JA

**Counsel** : Mr. A. Vakaloloma for Appellant  
Mr. M. Delaney for State

**Date of Hearing** : 26 March 2014

**Date of Ruling** : 16 January 2015

**RULING**

- [1] Following a trial in the High Court at Suva, the appellant was convicted on three representative counts of rape. On 24 October 2012, he was sentenced to 12 years' imprisonment on each count, to be served concurrently.
- [2] On 30 November 2012, the appellant filed an application for leave to appeal against conviction and sentence. The application is late by one week. The State took no issue with the delay. On 20 February 2014, I granted an extension of time to appeal and directed the parties to file submissions on the issue of leave under section 21(1) of the Court of Appeal Act. I have received helpful submissions from both parties. The issue is whether the grounds of appeal are arguable before the Full Court.

[3] The grounds of appeal against conviction and sentence are as follows:

1. That the conviction of the appellant was unsafe or unsatisfactory considering all the circumstances of the case and as such, a miscarriage of justice occurred in that:
  - (a) The absence of any appropriate direction by the learned Judge concerning the weight that must be given to the medical report and medical testimony on behalf of the State considering the age of victim, status of mind of complainant and circumstances and community background of the victim; and
  - (b) The apparent lack of sequence and chronological detail of events, dates and times in which the various offending were alleged to have occurred and the judge's failure to draw possible inferences to the above; and
  - (c) The failure of the learned trial Judge to have directed the assessors on the absence of any sketch plans of the scene of the offence and how far and distance from home, as the inference that it could be inconsistent with the evidence of the complainant as explained in court and as per recorded by interviewing officers; and
  - (d) The failure of the learned Judge to have directed the assessors on the provision of recorded evidence that even though at the material time of complaint the accuse (sic) was the only provider and guardian since being a young girl and after her father died and while the accuse (sic) being very old would always asked of the complainant's help in the gardening, carrying food from the garden and cooking of food at home since the accuse (sic) wife is old and bedridden;
  - (e) The failure of the learned trial judge to direct the assessors to consider the complainant's mental status, non attendance of a formal schooling and now getting to be a young girl and certain interest of a young girl causing the accuse (sic) to be angry as its admits being very strict to the complainant and the punishment due to certain involvement which the accused cannot condoned involving boys and man in the village whereby the complainant is punished and she made up stories which includes sexual offences

made for the purpose to escape the so called ill treatment and punishment.

2. That the learned trial Judge failed to direct the assessors on the apparent and real contradictions that exist between the complainant's police statement and her evidence in court and how the assessors may wish to approach it.
3. That the sentence was harsh and excessive considering the circumstances of the case.

### **Convictions Appeal**

- [4] The first ground challenges the veracity of the victim's evidence. The victim was the appellant's biological granddaughter. The appellant and his wife raised her since she was a baby. Her biological father had passed away and she did not know her biological mother. She never went to school and was illiterate. These facts were not in dispute.
- [5] The sexual abuse started when the victim turned 15 years. The victim gave evidence of numerous incidents of sexual intercourse. Her evidence was that she was forced to have sex with the appellant. The appellant threatened to kill her if she reported the abuse to anyone. One incident was witnessed by the victim's aunt. The aunt gave evidence that she saw the appellant having sex with the victim at a location near the river. The victim said the appellant used to assault her for refusing to accompany him to the plantation where the incidents normally occurred.
- [6] Eventually, the victim complained to the appellant's daughter in law. The daughter in law gave evidence of the complaint. The matter was reported to police. The appellant was arrested and interviewed under caution. He admitted having sexual intercourse with the victim and said the sex was consensual on all occasions. The victim was medically examined. Medical examination revealed her hymen was not intact.
- [7] At trial, the appellant was represented by counsel. He gave evidence and denied the allegations. He denied having sex with the victim.

- [8] The medical report of the victim was tendered without any objection from the defence. Medical evidence did not implicate the appellant. The only relevance of the medical evidence was that the victim's hymen was not intact which may indicate she had sexual intercourse. The medical evidence did not affect the veracity of the victim's evidence. Nor did her age, deprived background or lack of education. These were collateral issues.
- [9] As far as her evidence of forced sexual intercourse was concerned, she gave an account of the events according to her recollection, given that she was subjected to numerous abuses over a period of three years. It would have been quite unrealistic to expect the victim to give a detailed account of every incident. That is why the State brought representative charges rather than individual counts. Furthermore, counsel for the appellant could have sought re-directions on the issues he is now raising on appeal if they were important to the defence case. Counsel chose not to seek any re-directions. Ground one is not arguable.
- [10] The second ground alleges that the victim's evidence was inconsistent with her police statement. Counsel for the appellant has not provided particulars of the alleged inconsistencies. If the victim's evidence was inconsistent with her police statement, then the defence should have cross examined her on the inconsistencies and tendered her police statement as proof of prior inconsistent statement. The police statement was not tendered as proof of prior inconsistent statement and therefore one can fairly say that the inconsistencies were not material to affect the veracity of the victim's evidence. Ground two is not arguable.

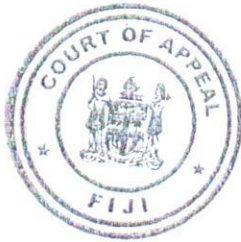
### Sentence Appeal

- [11] The grounds of appeal against sentence relate to the severity of the sentence. A total sentence of 12 years' imprisonment for 3 counts of rape of a juvenile girl by her grandfather over a period of three years is within the tariff for rape.
- [12] This was a bad case of rape. The appellant was the victim's grandfather and guardian. The breach of trust was gross. The sexual abuse was accompanied by death threats. The

evidence against the appellant was overwhelming. He expressed no remorse for his conduct. The total sentence reflects the criminality involved. The sentence appeal is not arguable.

**Result**

[13] Leave to appeal against conviction and sentence is refused.



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Hon. Mr. Justice D. Goundar  
**Justice of Appeal**

**Solicitors:**

Messrs Vakaloloma & Associate for Appellant  
Office of the Director of Public Prosecutions for State