

IN THE COURT OF APPEAL  
AT SUVA

CRIMINAL APPEAL NO. AAU 39 OF 2013  
(High Court HAC 42 of 2013)

BETWEEN : APOLOSI DOMONA  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Chandra RJA

Counsel : Mr. S. Waqainabete for the Appellant  
Mr. T. Qalinauci for the Respondent

Date of Hearing : 7 April 2015

Date of Ruling : 1 May 2015

RULING

[1] This is an application for leave to appeal against conviction and sentence imposed on the Appellant on being found Guilty of one count of Rape contrary to Section 149 and 150 of the Penal Code (Cap.17).

- [2] The Appellant who is the father of the complainant, had gone into the room of the complainant at night after dinner when she was asleep and was alleged to have had raped her. The complainant had told the incident to her aunt the following morning and thereafter a complaint had been made to the Police.
- [3] The Appellant was found guilty by the Tavua Magistrate's Court and after a long and contested trial was referred to the Lautoka High Court for sentencing. The Appellant was sentenced by the Lautoka High Court on 19<sup>th</sup> March 2013 to a term of 18 years imprisonment with a non parole period of 16 years.
- [4] The grounds of appeal against conviction and sentence urged by the Appellant are:
- (1) That the learned Magistrate erred in law and in fact when he did not consider in his judgment the serious doubt that arose from the admission of the complainant under cross examination of state witnesses relating to the allegation.
- (2) The learned Sentencing Judge erred in law when he gave a sentence that was outside of the accepted tariff to the Appellant.
- (3) The learned sentencing Judge erred in law when he did not separately deduct the 3 months remand period from the total sentence after considering the aggravating and mitigating factors.
- [5] The Appellant in order to get leave to appeal has to show that the grounds of appeal are arguable in terms of Section 21 of the Court of Appeal Act (Cap.12).
- [6] The Appellant has submitted that the evidence of the complainant under cross examination suggested that there was only an attempt to rape and that it was only in re-examination that she had stated that she had intercourse with the Appellant without her consent.

- [7] The Appellant further submitted that the medical evidence led in the case raised doubts as to whether there was recent penetration at the time that the complainant was medically examined.
- [8] The Respondent submitted that the Appellant in his caution interview had admitted that he had intercourse with the complainant on the day in question.
- [9] It would be necessary to consider the entirety of the evidence in the case to consider whether this ground raises an arguable point as it raises mixed questions of fact and law, which the full Court would be in a position to consider and therefore leave is granted.
- [10] As regards the ground of appeal on sentence relating to the tariff, it has been argued by the Appellant that the learned High Court Judge went beyond the tariff in sentencing the Appellant to 18 years. The Respondent has conceded that this ground is arguable.
- [11] It is established that the tariff for rape is between 10 to 16 years in the case of a child victim as stated in **Raj v. State** [2014] FJSC 12. CAV0003.2014 (20 August 2014).
- [12] The learned High Court Judge by imposing a sentence of 18 years had gone beyond the established tariff and therefore leave is granted on that ground.
- [13] As regards the third ground of appeal, it was argued that the learned High Court Judge failed to grant the concession of deducting the period that the Appellant had spent in remand when sentencing the Appellant. The Respondent has conceded that this ground is also arguable.



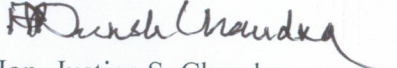
[14] The learned High court Judge had failed to consider the period of three months that the Appellant had been in remand separately when sentencing the Appellant as was required. This requirement is well established as set out in Naivalurua Koroitavalena v. The State Criminal Appeal No.AAU 0051 of 2010 (5 December 2014).

[15] In view of the above position leave to appeal is granted on the third ground of appeal as well.

*Orders of Court:*

Leave to appeal against conviction and sentence is granted on the grounds urged by the Appellant.



  
Hon. Justice S. Chandra  
Resident Justice of Appeal