

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

CRIMINAL APPEAL NO: AAU034/2014
(High Court Case No. HAC030/ 2014Ltk)

BETWEEN : **MOHAMMED AZIM**
Appellant

AND : **THE STATE**
Respondent

Coram : **Hon. Mr. Justice Daniel Goundar**

Counsel : **Mr. M. Yunus for the Appellant**
Ms P. Madanavosa for the Respondent

Date of Hearing : **16 February 2016**

Date of Ruling : **1 March 2016**

RULING

[1] Following a trial in the High Court at Lautoka, the appellant was convicted on two representative counts of rape of his 6-year old step-daughter and sentenced to a total term of 20 years' imprisonment with a non-parole period of 18 years. This is an application for leave to appeal against conviction and sentence on the following grounds:

Appeal Against Conviction

1. The Learned Trial Judge erred in law and in fact when he did not held a voir dire inquiry when there was a challenge by the Appellant to his confession in the caution interview statement.
2. The Learned Trial Judge erred in law and in fact when he failed to direct the assessor (sic) on how to approach the evidence contained in the caution interview and weight to be attached to the disputed confession.
3. The Learned Trial Judge error in law and in fact when he failed to direct the Assessors that the Appellant had no burden to prove his innocence and that the standard of prove (sic) does not apply to the defence case.

4. The Learned Trial Judge erred in law and in fact when he failed to remind the complainant of the importance of telling the truth.
5. The Learned Trial Judge erred in law and in fact when he convicted the Appellants on defective statement of the offence and particulars of offence in the amended information filed by the Director of Public Prosecutions.

Appeal Against Sentence

1. That the sentence was manifestly harsh and excessive and wrong in all the circumstances of the case.
- [2] The application is late by 16 days. The reason for the delay is that the appellant was incarcerated and was unable to file a timely Notice of Appeal. At the leave hearing, ground 1 was abandoned. In ground 2, the appellant contends that the trial judge failed to leave the question of whether he had made the disputed confession to the assessors. The directions on the disputed confession are in paragraphs 14 and 16 of the Summing-Up. When the directions are read as a whole, it is clear that the trial judge directed the assessors that it was the appellant's contention that he did not make the confession voluntarily and therefore it was a matter for them to consider whether the confession was true and whether they could rely on it. Ground 2 is not arguable.
- [3] In paragraph 7 of the Summing-Up, the trial judge directed the assessors on the burden of proof as follows:
- “In criminal cases the prosecution has the burden to prove the case. This burden never shifts to the Accused. In other words the Accused is presumed to be innocent until he is proven guilty.”
- [4] The above directions are adequate and correct, and therefore, ground 3 is not arguable.
- [5] According to the trial judge's notes, he made an inquiry and was satisfied that the complainant had the capacity to give truthful evidence. Ground 4 is not arguable.

[6] Lack of consent is an element of rape. The prosecution pleaded lack of consent in the charges. But where the complainant is a child under the age of 13 years, the law is that the child does not have the capacity to give consent to a sexual act. The charges were not defective and the trial judge properly directed the assessors that in the present case, the complainant was 6 years old and therefore she did not have the capacity to give consent to the alleged sexual acts. Ground 5 is not arguable.

[7] The term of 20 years' imprisonment is clearly outside the established tariff of 10-16 years imprisonment for rape of a child. In arriving at the term of 20 years, the trial judge picked a starting point of 16 years, added 6 years to reflect the aggravating factors and reduced 2 years for the mitigating factors. The trial judge did not clearly explain why he picked the high starting point of 16 years. It could be argued that the high starting point was picked based on the aggravating factors and by adding a further 6 years to reflect the aggravating factors the trial judge double counted the same factors. The sentence appeal is arguable.

[8] **Result**

Leave to appeal against conviction refused.

Leave to appeal against sentence granted.



A handwritten signature in black ink, appearing to read 'Daniel Goundar', written over a horizontal line.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the State.