

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 146 OF 2015
(High Court HAC 113 of 2015)

BETWEEN : VISHWA NADAN

Appellant

AND : STATE

Respondent

Coram : Chandra RJA

Counsel : Mr. K. Tunidau for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing : 15 May 2017

Date of Ruling : 16 June 2017

RULING

[1] This is an application for leave to appeal by the Appellant against his conviction by the Magistrate's Court and sentence by the High Court. He was charged with three counts of rape contrary to section 149 and 150 of the Penal code.

- [2] The Appellant after being convicted by the Magistrate's Court was sentenced to 14 years imprisonment with a non-parole period of 12 years by the High Court on being referred for sentencing to the High Court.
- [3] The Appellant was alleged to have raped the step-daughter of his brother at his family home. The victim had been 13 years old and the Appellant had gone into the room of the victim while she was removing her school uniform and had sexual intercourse with her forcefully and thereafter repeated same on several occasions whenever he found an opportunity to do so.
- [4] In the notice of appeal filed on his behalf there were 8 grounds of appeal. However, when the Appellant was required to file written submissions, the submissions were filed abandoning the 5th to 8th grounds of appeal in the notice of appeal and confined the appeal to the first four grounds of appeal which are as follows:

1. The learned Judge erred in law and in fact by failing to enquire and/or properly enquire into the circumstances of the case pursuant to section 190(3) of the Criminal Procedure Decree 2009.

2. The trial Magistrate and learned Judge erred in law and in fact in convicting the appellant in the first count of rape when in cross-examination and noted at item, 10, paragraph 5 of the judgment, the trial Magistrate said, "She agreed that there was no sex in 2004 and accused only hugged her from the back. She was scared of accused hugging and kissing her."

3. The trial Magistrate and learned Judge erred in law and in fact by failing to consider upon the admission in cross-examination by the victim of the fact that there was no sex in 2004:

i. That the admission proved her allegation in the first count as false and lie;

ii. That the summary of the medical evidence and other prosecution witnesses at item 25 of the trial magistrate's judgment contradicted the admission by the victim of her not being raped in 2004;

iii. That the admission by the victim of her not being raped in 2004 casts a grave and reasonable doubt on the credibility of her evidence in counts 2 and 3 respectively.

4. *The trial Magistrate and learned Judge erred in law and in fact by stating at item 22 of the judgment that the victim had "no reason as per the evidence to concoct the existing allegation against the accused" and item 23 by stating "I doubt the complainant (PW3) had fabricated the allegation against accused as there was no basis for her to do so in relation to the evidence" when this assessment contradicted the admission of the victim that there was no sex and no rape in 2004.]'*

Ground 1

[5] In the present case, the trial was conducted by the Magistrate's Court and on the Appellant being found guilty and convicted, the case was referred to the High court for sentencing. Section 190 of the Criminal Procedure Act, 2009 deals with such a situation and sets out the powers of the High Court.

[6] The manner in which the High Court has to proceed when such a case is referred for sentencing is set out in section 190(3) as follows:

"The High court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court."

[7] According to this sub-section the High Court is required to enquire into the circumstances of the case before sentencing. The High Court Judge is further empowered to deal with the accused as if he had been convicted by the High Court.

[8] On behalf of the Appellant, it was submitted that the sub-section requires a detailed analysis of the evidence led in the Magistrate's Court and a detailed evaluation of the judgment of the Magistrate. It was his submission that the learned High Court Judge's manner of dealing with this requirement in paragraphs 3 and 8 of the sentencing judgment was inadequate and on that basis the learned Judge had erred in law.

- [9] The learned High Court Judge had referred to some aspects of the evidence in paragraph 3 of his sentencing judgment and in paragraph 8 has considered matters which were aggravating circumstances.
- [10] Section 190(3) states that “The High Court shall enquire into the circumstances of the case” before imposing the sentence. The nature and scope of such enquiry is not spelt out. As to whether the learned High Court’s reference to some aspects of the evidence in paragraph 3 of his sentencing judgment was sufficient to satisfy the purposes of the enquiry envisaged in the said section is arguable. On that basis leave is granted on this ground.
- [11] The High Court has the discretion to deal with the accused as if he had been convicted by the High Court itself and the learned High Court Judge has taken into account the aggravating and mitigating factors that had transpired during the trial before the Magistrate’s Court, when imposing the sentence.

Grounds 2 and 3

- [11] These two grounds relate to the same matter as regards a purported admission by the victim under cross-examination that there was no sex in 2004 which affects count 1, and therefore these two grounds would be dealt with together.
- [12] In ground 2 the Appellant refers to paragraph 5 of the judgment of the learned Magistrate where he had stated referring to the evidence of the victim, that “She agreed that there was no sex in 2004 and accused only hugged her from the back. She was scared of accused hugging and kissing her.”
- [13] Ground 2 affects the 1st count as the alleged rape had occurred in 2004. According to the submissions made on behalf of the Appellant, this evidence had transpired under cross-examination of the victim and if that was the case, the conviction on the 1st count cannot stand.

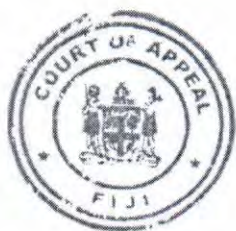
- [14] The submissions on behalf of the Respondent were to the effect that although the learned Magistrate had referred to the evidence of the victim in that manner, he had gone on to refer to other items of evidence of the victim to support count 1.
- [15] In ground 3 the Appellant has referred to the fact that due to the admission by the victim that there was no sex in 2004, her allegations becomes false and affects her credibility not only in relation to the first count but also in relation counts 2 and 3 also.
- [16] It would require an examination of the entirety of the evidence of the victim to arrive at a proper conclusion regarding count 1 and the effect it would have regarding the other two counts.
- [17] I would consider these grounds as being arguable and I grant leave on grounds 2 and 3.

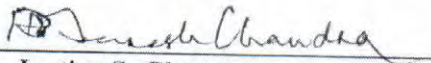
Ground 4

- [18] This ground is also based on the purported admission of the victim that there was no sex in 2004 and is a repetition of grounds 2 and 3 in a different form as having an effect on the entirety of her evidence and that the learned Magistrate had failed to question the veracity of her testimony on oath and thereby erred in law.
- [19] Since I have granted the Appellant on grounds 2 and 3 I do not see the necessity of granting leave on this ground as this ground also encapsulates the basic essence of grounds 2 and 3.

Order of Court:

Leave to appeal is granted on grounds 1, 2 and 3 of the grounds of appeal.




Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL