

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

**CRIMINAL APPEAL NO.AAU 0029 of 2015**  
**High Court Criminal Case No. HAC 99 of 2014]**

**BETWEEN** : **RAJENDRA GOUNDAR**

*Appellant*

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

*Respondent*

**Coram** : **Chandra, RJA**

**Counsel** : **Mr. Fesaitu M. for the Appellant**  
**Mr. Babitu S. for the Respondent**

**Date of Hearing** : **10 September, 2018**

**Date of Ruling** : **4 December, 2018**

**RULING**

- [1] The Appellant was charged with one count of sexual assault contrary to s.210(1) of the Crimes Act, 2009 and two counts of rape contrary to section 207(1) and (2)(b) of the Crimes ACT, 2009.
- [2] The Appellant was found guilty of the charges with the learned trial Judge concurring with the unanimous opinion of the Assessors.

[3] The Appellant was convicted and sentenced on 27<sup>th</sup> January 2015 to a term of 14 years and 6 months imprisonment with a non-parole period of 12 years.

[4] The Appellant filed a timely appeal on 30<sup>th</sup> January 2015, and his Counsel from the Legal Aid Commission thereafter filed an amended notice of appeal against conviction and sentence setting out the following grounds of appeal:

- i) *The Learned Trial Judge should have not directed the assessors on the history related in the medical report, which is hearsay therefore causing prejudice to the Appellant;*
- ii) *The Learned Trial Judge failed to direct himself and the assessors, on the material contradiction that:*
  - a) *The complainant in her evidence states her coins fell as that place, she was asked to collect those, she then ran to Mala's house;*
  - b) *Whilst, DC Makitala, the investigating officer in her evidence stated she collected some coins from there*

*Therefore, such contradiction is significant, affecting the credibility of the complainant's evidence.*

- iii) *The Learned Trial Judge erred in law and in fact in not adequately directing the assessors on the confession contained in the caution statement particularly whether the Appellant had made the confession.*
- iv) *The final sentence is harsh and excessive in the circumstances.*

[5] The prosecution had based its case on the complainant's evidence. She had been 14 years old at the time of the incident. The Appellant had taken the complainant through a shortcut in a jungle area on the basis of taking her to a shop to buy tinned fish, and had sexually abused and raped her. She had run to a neighbor's house and given a call to her mother. When the mother had come, on her informing the mother, the matter had been reported to the police. The complainant had been medically examined on that day itself and the Doctor gave evidence to the effect that the hymen was not intact and that the injury was a recent one. The complainant's mother, her neighbor Mala, the



investigating officer DC Makitala, DC Aveen Kumar who had caution interviewed the Appellant and DC Surendra Prasad who was a witness to the caution interview and DC Anoop Kumar who had charged the accused gave evidence at the trial. The Appellant had given evidence on his behalf and denied the charge.

- [6] The 1<sup>st</sup> ground of appeal is regarding the learned Trial Judge's direction to the Assessors on the medical evidence led in the case. The complaint is that at paragraph 40 of the summing up that the learned Judge had stated regarding medical evidence, that the findings were consistent with the history. It has been submitted on behalf of the Appellant that the history relayed amounts to hearsay evidence and that Appellant was prejudiced as the Assessors would have relied heavily on the finding of the medical doctor.
- [7] In paragraphs 40 and 41 of his summing up, the learned trial Judge dealt with the medical evidence led at the trial and stated that the findings are consistent with the history. It is possible that the learned trial Judge was referring to what was stated in the medical report. But whether it would have been prejudicial to the Appellant in the manner in which it was stated in his summing up is arguable.
- [8] The second ground of appeal is regarding a contradiction in the evidence of the complainant and the evidence of the investigating officer which was submitted to be a material contradiction.
- [9] The learned trial Judge had in his summing up at paragraph 30 directed the Assessors as to how they should consider contradictions and how they would affect the credibility of witnesses.
- [10] The contradictions relied on behalf of the Appellant are in respect of some coins which the complainant had at the time of the incident which had fallen and apparently there are different versions regarding same in the evidence of the complainant and the evidence of the investigating officer. These are matters that can be considered by the Full Court when the transcript of the evidence is made available.

- [11] There is no reference to any coins in the possession of the complainant which had fallen in the summary of the evidence of the complainant and that of the investigating officer in the summing up of the learned Judge. As to whether the contradictions were material will have to be considered with the totality of the evidence given at the trial.
- [12] In the absence of any reference to the falling of coins which were in the possession of the complainant in the summing up of the learned Judge it is arguable whether the contradiction complained of on behalf of the Appellant was material and whether the summing up was inadequate.
- [13] The third ground of appeal is in relation to the adequacy of the summing up regarding the confession contained in the caution interview statement.
- [14] The learned trial Judge had in his summing up at paragraph 45 directed the Assessors on how they should consider the caution interview statement. It is the submission on behalf of the Appellant that the said direction was inadequate as the learned trial Judge should have stated as to how they should deal with the totality of the evidence in the event of their disregarding the confession. Reliance has been placed on the observation in Volau v. State [2017] FICCA 51; AAU0011.2013 (26 May 2017) paragraph 20.
- [15] The Appellant's evidence at the trial was a complete denial whereas in his caution interview statement there was a confession. The learned trial Judge had stated in his summing up at paragraph 45 that the Appellant had taken up a different position at the trial and that his evidence was inconsistent.
- [16] In the light of this observation by the learned trial Judge it is arguable whether his direction on the caution interview statement at paragraph 45 of his summing up is adequate.
- [17] The fourth ground of appeal is regarding sentence, on the basis that it is harsh and excessive.

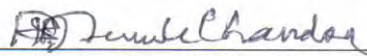


- [18] The Appellant was sentenced to 14 years and 6 months with a non parole period of 12 years for the two counts of rape and 4 years imprisonment for count of sexual assault.
- [19] The learned trial Judge had stated in his sentencing judgment that the Appellant had not availed himself of the opportunity given for mitigation.
- [20] The sentence imposed on the Appellant is within the tariff of 10 to 16 years.
- [21] The ground of appeal against sentence is not arguable in those circumstances.

**Orders of Court:**

- (1) Leave to appeal is granted against conviction on grounds 1 to 3 of the grounds of appeal.*
- (2) Leave to appeal is refused against sentence.*



  
Hon. Justice Suresh Chandra  
**RESIDENT JUSTICE OF APPEAL**