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

CRIMINAL APPEAL AAU 0050 OF 2014
(High Court HAC 399 of 2012)

BETWEEN : **WASEROMA KOROI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Gamalath JA
Bandara JA

Counsel : **Mr S Waqainabete for the Appellant**
Mr Y Prasad for the Respondent

Date of Hearing : **15 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Calanchini P

[1] I agree that the appeal against conviction and sentence should be dismissed.

Gamalath JA

[2] I agree.

Bandara JA

[3] The accused was initially charged with two counts of rape and one count of incest before the High Court of Suva. The complainant was the Appellant's biological daughter. She was mentally handicapped. However the actual extent of her mental disability is not reflected in the trial proceedings.

[4] The assessors unanimously found the Appellant not guilty of rape as per count 1 and count 2, but was unanimous in finding him guilty on count 3 for the offence of incest contrary to Sections 223(1) of the Crimes Act 2009. The learned High Court judge concurred and had sentenced the Appellant to a total period of thirteen years. In terms of Section 18 (1) of the Sentencing and Penalties Act 2009, the High Court Judge has fixed a non-parole period of eleven years.

[5] The instant appeal arises out of the above conviction and sentence.

[6] Incest is a serious offence carrying a maximum sentence of 20 years imprisonment as per section 223(1) of Crimes Act 2009. If the complainant is under the age of 13 years the offender is liable to life imprisonment. However, in the instant case, the complainant had been 28 years of age at the time of commission of the offence. The tariff for incest against adults is a sentence between 9 to 15 years imprisonment, as established by (**State v Tubailagi** [2012] FJHC 1367 HAC 123. 2011 S (12 October 2012)

[7] The particulars of the third count on which he was convicted are as follows.

"That between the 1st day of October 2011 and the 31st day of November 2011 at Nayavu Village, Tailevu in the Central Division had carnal knowledge of Niumai Wati who was to his knowledge related to him as his daughter".

Factual background of the case

[8] Complainant Niumai was the biological daughter of the appellant. She was born and lived in Nayavu along with her father. She was educated up to grade 3. The appellant had looked after her. According to the complainant in January 2010, the appellant had allegedly raped her in the kitchen in their home. The complainant had not consented and had resisted in vain. The appellant allegedly had again raped her at the banana plantation that belonged to him. On another occasion when she was raped by the appellant at their home in the morning, witness Koini who is related to the complainant from her husband's side, had happened to come there. Koini had not seen the incident of sexual intercourse but had seen the complainant naked inside the house along with the accused who was dressed. Upon questioning, the complainant had revealed the incidents of rape to her and told that she was going to report the matter to the police. Koini had narrated in her testimony what she witnessed corroborating the testimony of the complainant to a great extent.

[9] At the appeal hearing before this court two grounds of appeal on conviction and one ground of appeal against the sentence were strenuously argued.

[10] Firstly I proceed to deal with the strength of these two grounds of appeal against the conviction.

"Ground 1 – The learned Trial Judge erred in law and fact by failing to acquit the Appellant on all charges even though the Learned Trial opined at paragraph 3 of his Judgment the complainant was mentally and emotionally handicapped and that he perceived that coached to a certain degree."

[11] This ground of appeal makes, the mental condition of the complainant and whether she was coached, a substantive issue in the arguments.

[12] In his judgment the trial Judge stated, that he perceived that the complainant was coached but had not doubted the fact that sexual intercourse had taken place. However the Trial Judge had not elaborated as to how he came to that conclusion and on what aspects she had been coached.

[13] In the judgment (page 30 of the trial proceedings) the learned High Court judge has stated:

> *"[3] The complainant in this case is mentally handicapped but gave evidence that was clear as far as the rapes were concerned but rather jumbled in other respects. She could not define dates clearly nor could she be sure about her residential movements.* ***I could not help thinking that she had been "coached" to some degree.*** *The evidence of consent was less than satisfactory, she was never asked directly if she consented or not."*

[14] When the above paragraph is taken in its totality it is abundantly clear that the learned high court Judge by no means had come to a conclusion that the complainant was coached to utter falsehood whilst testifying.

[15] According to the learned High Court Judge the complainant has given *"evidence that was clear as far as the rapes were concerned."* If at all the trial judge entertained any doubt as to coaching it only pertains to the degree of defining dates and about her residential movements wherein (according to the judge) she had jumbled whilst giving evidence.

[16] The record of the testimony given by the complainant does not reflect anything, showing that the complainant was coached on any aspect. The trial judge may have made the impugned remark having observed firsthand, the demeanour and deportment of an witness whilst testifying in Court.

[17] It should be specifically mentioned here that the mere fact of a witness is mentally ill does not make the witness incompetent to testify in a legal proceeding. Courts have repeatedly held that the testimony of any witness, regardless of his/her mental condition, is competent evidence unless it contributes nothing whatever because the witness is wholly untrustworthy. Incompetence does not follow from the fact that the witness is insane or mentally ill. What law requires is the trustworthiness of the witness.

[18] In **Commonwealth of Pennsylvania v. Paul D. Ware**,[459 Pa. 334 (1974) 329 A.2d 258] the Supreme Court of Pennsylvania held that,

> *In general, the testimony of any person, regardless of his mental condition, is competent evidence unless it contributes nothing whatever because he is wholly untrustworthy. Incompetency does not follow from the fact that the witness is insane or mentally ill. "The question being whether the person is trustworthy as a witness, the law now asks whether in each case the derangement or defect is such as to make the person highly untrustworthy as a witness; it no longer excludes absolutely." 2 J. Wigmore, Law of Evidence § 492, at 584 (3d ed. 1940).*

[19] In **R v Hill** [(1851) 2 Den.254] it has been held that; *"No witness is competent who is prevented by reason of mental illness, drunkenness and the like from understanding the nature of a oath and giving rational testimony. Where it is contended that a witness is within such category it is for the judge to ascertain whether he is of competent understanding to give evidence and is aware of the nature and obligation of an oath if satisfied that he is the judge should allow him to be sworn and examined, leaving the jury to decide the worth of his testimony."*

[20] In **R v Belamy** (1985) 82 Cr. App. R.22, the Court of Appeal has held that; " _ _ _ *It was no longer necessary that a witness should have an appreciation of the divine sanction of the oath. Accordingly once the judge had found that she was competent to give evidence, she should have been sworn."*

[21] In the instant case there was no evidence to indicate that the witness was mentally ill to a degree which prevented her from understanding the nature of an oath and giving rational testimony. As the trial judge has observed in the judgment (paragraph 38 of the proceedings). The complainant in this case is mentally handicapped but gave evidence that was clear as far as the rapes were concerned but rather jumbled in other respects.

[22] The unanimous verdict of the assessors is also indicative of the fact, that they had not had any doubt to an occurrence of coaching having taken place to any degree.

[23] Having regard to the above I am of the view that the 1st ground of appeal fails.

Ground 2 of the appeal against the sentence.

> *"Ground 2 – Learned Trial Judge erred in law and fact when he convicted the appellant for the offence of incest when the evidence of the complainant had been suggestive for the offence of rape and not incest."*

[24] To constitute the offence of incest, the accused must have taken part in an intentional sexual penetration with another person, who is in a proscribed family relationship which was known to the accused. For incest the prosecution must prove sexual penetration beyond reasonable doubt. However unlike in rape consent is not a defence to incest.

[25] It appears that the reason for the assessors, to find the accused not guilty of rape charges, and finding guilty of the charge of incest is that their entertaining a doubt as to whether there was consent on the part of the complainant. When sexual intercourse is proved beyond reasonable doubt between persons of incestuous relationship, consent becomes immaterial.

[26] The defense of the accused had been that the witness Koini had forced the complainant to make a false complaint, due to the animosity that existed between them, over an incident, which the appellant had described in the following manner in his testimony.(page 85 of the court proceedings)

"Koini forced her to complain. She was the one who came to take Niumai to her house. We are not in good relationship with Koini and her husband because her husband punched my eldest son and he punched my elder brother. That was in 2011"

[27] The appellant in his testimony had further stated the following,
(Page 86 of the trial proceedings)

"Answer – I didn't rape her. I gave her good care and supported her in whatever she needed and protected her.
Question – If that is the case, she would not be making this allegation of rape
Answer – No"

[28] Having regard to the above, it is difficult to believe that the complainant, who was so well taken good care of, supported in whatever she needed, and protected was by the appellant, would proceed to make a false complaint of this magnitude against him, on being forced by Koini, over an incident which in no way concerned the complainant.

[29] Furthermore, in the course of the cross examination the Appellant has stated the following (trial proceedings at page 86)

"Question – you surprised she reported to the police?
Answer – yes
Question – Because she would not have mental capacity to report?
Answer – Because in her state she can't ever complain.
Question – Because of you knowing her condition, you took advantage of her having sex thinking she would never report."

[30] From the above answers of the appellant, it is clear that he had taken advantage of the mental sickness of the complainant and thinking that she would not have the mental capacity to make a complaint, started and continued to have sexual intercourse with her, until the traumatic experience compelled her to complain to the authorities.

[31] Having regard to the above I am of the view that the 2nd ground of appeal too fails.

[32] **Ground of Appeal against Sentence is as follows**

> *"The Learned Trial Judge erred in fact when he stated at paragraph 9 of the sentence that the complainant was mentally and emotionally handicapped when there were no medical finding to suggest the same."*

[33] The crux of this argument is that whether a judge can come to a conclusion that a witness is mentally and emotionally handicapped, without resorting to medical evidence, and consider it as an aggravating factor.

[34] Paragraph 9 of the sentence of the High Court states;

> *[9] Incest is a crime against the order of nature and an attack on the fabric of the nuclear family. In this case the crime is aggravated by a large degree in that the victim daughter was and still is mentally and emotionally handicapped and aggravated by the fact that she has had to move away from the family house and her siblings.*

[35] About the mental condition of the complainant the appellant, the father of the complainant in his evidence stated (page 86 of the court proceedings):

Question:	*Aware that she slow intellectually.*
Answer:	*Yes*
Question:	*No sent her to school*
Answer:	*Yes because of her sickness*
Question:	*You surprised she reported to the police*
Answer:	*Yes*
Question:	*Because she would not have mental capacity to report*
Answer:	*Because in her state can't even complain.*

Turaga-ni-koro the sister of the appellant who was called to testify on behalf of the appellant had stated (page 88 of the court proceedings)

Answer: "she had sickness, mental.

[36] I hold that the learned High Court judge's conclusion that the complainant was mentally handicapped based on the evidence of her close relatives is apt, and considering it as an aggravated ground is correct.

[37] In **Drotini v The State [2006] FJCA 26; AAU0001.2005S (24 March 2006)** it has been held that,

> *" [17] Cases of rape by fathers or step fathers appear before the courts in Fiji far too frequently and, in such cases, the starting point should be increased to ten years. Where there are further aggravating circumstances beyond those basic circumstances, such as repeated sexual molestation of any nature, threats of violence or actual violence or evidence that the offender has attempted to persuade other family members to help cover up the offences or discourage complaint to the police, there should be substantial increases above that starting point."*

[38] In passing the sentence the learned trial judge has taken 10 years imprisonment as the starting point.

[39] By way of an aggravating factor for breaching of trust that is inherent in the crime and since that breach led to the destruction of the family relationship he has added further two years.

[40] The fact that taking advantage of a handicapped victim who it was thought would not lay any complaint – as an aggravating factor the trial judge has added a further two years to the term.

[41] Taking into consideration the accused's previous good character as a mitigating factor, the Trial Judge has deducted one year.

[42] Accordingly the Appellant had been sentenced to a total period of thirteen years with a non-parole period of eleven years. I consider that the above sentence passed by the trial judge, is in line with the statutory and common law principles of sentencing and just in the circumstances of the case, and see no valid reason to interfere with it.

[43] Accordingly I would dismiss the appeal both on the sentence and conviction and affirm the conviction and sentence imposed by the learned trial judge.

Order:

1. *Appeal against conviction is dismissed.*
2. *Appeal against sentence is dismissed.*
3. *Orders of the High Court are affirmed.*

Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Justice W Bandara
JUSTICE OF APPEAL