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

Criminal Appeal No. AAU 083 of 2016
(High Court Case No. HAC 369 of 2012)

BETWEEN : 1. **VILIVO VAKATALEBOLA**
2. **ILAISA VOLA DREDRE**
3. **PAULIASI CAKAU**

Appellants

AND : **THE STATE**

Respondent

Coram : **Bandara, JA**

Counsel : **Mr. S. Waqainabete for the Appellants**

Mr. L. J. Burney for the Respondent

Date of Hearing : **21 May 2019**

Date of Ruling : **7 June 2019**

RULING

[1] This is a timely application for leave to appeal against the conviction following a trial in the High Court in Suva. The three Appellants were charged under Section 207(1) (2) (a) of the Crimes Decree No. 44 of 2009 for Rape of UT (name withheld).

[2] The assessors had unanimously given opinions that the appellants were guilty and the learned Trial Judge had concurred and convicted the Appellants against all charges. On the 22nd June 2016, he sentenced them to 10 years, 10 months and 2 weeks imprisonment with a non-parole period of 8 years, 10 months and 2 weeks.

Factual Background

[3] The complainant (aged 13 years) was studying at Gospel High School, Suva. At the time of the incident she was staying with her mother and is the only child in the family. On the 10th October 2012, the complainant, without her mother's knowledge, had gone out with her friends to have a swim in the Tovata Pump creek.

[5] At the pool she had given her phone to a boy known as Iliesa for safekeeping, whom she had got to know previously having met at a function at her home. Iliesa, in return had entrusted the phone to one of his cousins.

[6] After some time the complainant had entered the cave in Tovata creek in search of the person who had her phone. When the complainant reached the middle of the cave, a boy had grabbed her. She had felt her trousers and panties pulled down and then someone penetrating her vagina with his penis. She was surrounded by a group consisting of 6 to 7 boys who had sexual intercourse with her, taking turns, without her consent. She could not identify the culprits since the cave was in semi darkness.

[7] After the culprits left, she put on her clothes and came outside of the cave where she met Iliesa. She told him what had happened. Iliesa took her to a vacant house and asked her whether he could have sexual intercourse with her. She consented and both had consensual sex. In the early hours of the following day, Iliesa took the complainant to her home.

[8] Subsequently upon being asked by her mother where she was and why she got late, she disclosed the whole incident. Her mother then proceeded to report the incident to the Police. The Police commenced investigations and arrested the three appellants.

[9] The only available evidence to connect the appellants with the crime, proving their identity as the culprits, consisted of their caution interview statements. Upon the arrest of the three appellants, their caution interview statements were recorded, wherein they admitted having had sexual intercourse with the complainant without her consent. The prosecution proved the identity of the Appellants through their admissions.

[10] The prosecution had proved beyond reasonable doubt that the three caution interview statements were made voluntarily by the three appellants, and there were no oppression, ill treatment or inducement by the Police.

[11] The amended notice of appeal against conviction which had been filed on 1/11/18, contains five grounds of appeal against the conviction. No grounds of appeal has been filed against the sentence.

[12] Law pertaining to appeal is governed by Section 21(1) of the Court of Appeal Act Cap.12. The appellant has a right to appeal on any question of law alone where leave is not required. Leave is required to appeal on any question of mixed law and fact, or fact alone, and to appeal against sentence.

[13] The test for leave to appeal against conviction is whether the appeal is arguable.

[14] I now consider whether the grounds of appeal are arguable.

Ground 1 of the appeal reads:

The learned trial Judge erred in law and in fact when she misdirected itself in its voir dire ruling when it viewed the challenge to the alleged confession in the Caution

Interview statement the first and second appellants was not on the issue of voluntariness but on the issue of fabrication which needs to be considered by the assessors with appropriate direction when in fact it also challenges its voluntariness through the evidence led by the 1st and 3rd Appellants.

[15] It is common ground that all the appellants challenged the admissibility of their caution interviews on the basis that they were not made voluntarily. The Learned trial Judge came to the finding in paragraph 19 of the "Voir dire" Ruling, "... *there is no issue of voluntariness to be decided by this Court and the issue of fabrication will have to be put to the assessors with appropriate directions*".

[16] This approach taken by the learned Trial Judge has not given rise to any miscarriage of justice in view of the clear directions given by him in the summing up from paragraph 86 to 101.

[17] Specifically in paragraph 100 of the summing up the learned Trial Judge states that:-

> *"You should take into account all the circumstances in which the statements were made in assessing its value. The State says each accused person has made some sort of confession to the Police. You can convict a person on his confession alone. It has been said that people don't admit committing an offence unless it is true. Of course people are known to make false confessions too. Before you can act on confessions of each accused person you have to be satisfied beyond reasonable doubt of three things as follows:-*
>
> *(i) That each accused did make the confession;*
> *(ii) That each confession is true; and*
> *(iii) Whether each accused made these confessions voluntarily in the sense that it was obtained without oppression, ill treatment or inducement".*

[18] The voluntariness of the confession was an admissibility issue for the trial Judge to determine. In his ruling the trial Judge was satisfied that the prosecution had proved voluntariness beyond reasonable doubt. Weight or truth of the confession was for the assessors to consider.

[19] After all, "the role of assessor is to tender opinions, to assist a Judge. They are not deciders of fact or ultimately of a verdict", **Noa Maya v The State** [2015] FJSC 30; CAV 0009.2015 [23 October 2015].

[20] The assessors have been rightly directed by the learned High Court Judge that they may only rely on the admissions if they were sure, that the admissions were true and had been made voluntarily and the appellants in fact made the confessions and whether the confession were true.

[21] The issue of fabrication raised in ground one of the appeal has been well covered by the learned Trial Judge in paragraph 88 of the Summing Up;

> *"(88). Whether each gave his statement voluntarily and whether the statements set out a set of events in relation to the rape of UT on which you can rely and accept is a matter for you. Of course if you believe that the interview is false that it was made up of either by the Police you may think that you cannot put any weight on it. However if you believe that each accused gave his statements without force or fabrication, you may think that they set out a version of the evidence which will assist you in deciding on the guilt or otherwise of them. However, the question of what weight you can put on the admissions is a matter of fact for you to decide".*

[22] Therefore, ground 1 is unarguable.

[23] *Ground Two*

The learned Trial Judge erred in law and in fact when he failed to properly consider the evidence led in the entire trial that support the fact that the admission in the record of interview of all appellants were not made voluntary given the unlawful manner it was taken.

This ground of Appeal is set in a broad perspective without a proper basis. Carefully considered summing up and meticulously detailed judgment has fully and properly considered the evidence led in the entire trial specifically the totality of the evidence on the issue of voluntariness, which is an admissibility issue for the trial judge to determine.

[24] Therefore, ground 2 is unarguable.

[25] *Ground Three*

The Learned Trial Judge erred in law and in fact when he did not properly consider the general unfairness that existed during the time of the interview of the appellants.

First Appellant

1. *PC Kibau admitted under cross examination the following:*
   a. *Applicant only reached class 8 in his level of education and he had limited knowledge of English.*
   b. *He could not show from the station diary where it shows that he had taken this appellant for reconstruction of the scene.*
   c. *He admitted that by the time he gave the appellant the right to counsel, Legal Aid Office would have been closed and the giving of the said right would be pointless.*

Second Appellant

1. *Cpl. Ilai admitted under cross-examination the following:*
   a. *That the right to alter, add or to correct the statements was not given to this appellant.*
   b. *That he as the interviewing officer, he did not take the appellant for reconstruction but send his officers.*
   c. *He admitted that what he did when he only send his officers to conduct the reconstruction on his behalf was unfair and not according the standard procedure.*
   d. *He admitted that there was no entry in the station diary to prove that this appellant was taken for reconstruction of the scene.*
   e. *Admitted that at the time of the interview at 7.50 am, the Legal Aid Office was still close and giving legal right to the appellant was pointless.*

Third Appellant

DC Epeli admitted under cross examination the following:

a) *That before the conclusion of the interview, he did not read back the statement to the 3rd Appellant;*
b) *That he did not use the word inducement in Q34. Which relates to the point of complain by the appellant which was inducement.*
c) *The 3rd Appellant could not secure legal Aid assistance as their office was still closed at the time of the interview.*

[26] The learned trial Judge had exercised his discretion to admit the confessions having looked into the voluntariness and fairness specifically, in relation to the 3rd appellant's caution interview at paragraph 29 of the voir dire ruling. The learned trial Judge had stated; *"After the consideration of the evidence it is the considered view of this Court that*

the caution statement of the 4th accused is voluntarily made and is not procured by improper practices. This court also finds that no general unfairness exists in the way in which the interviewing officer conducts himself in recording the caution statement of the 4th accused".

[27] Therefore, ground three is unarguable.

[28] <u>Ground Four</u>

The Learned Trial Judge erred in law and in fact when it failed to properly consider the evidence of the complainant under cross examination which raises doubts that are beyond reasonable doubts.

At paragraphs 57 to 62 of the Summing Up, the learned Trial Judge has well considered at the issues of inconsistency of the complainant's version of events in evidence, and issues pertaining to promptness of her complaint.

[29] Therefore, ground 4 is unarguable.

[29] <u>Ground Five</u>

The Learned trial Judge erred in law and in fact when he failed to consider the credibility of the police officers witnesses called by the Respondent after they changed their testimony during the trial as compared to what they said during the voir dire regarding whether or not they attended to the reconstruction of the scene.

In written submissions filed on behalf of the Appellants it has been stated;

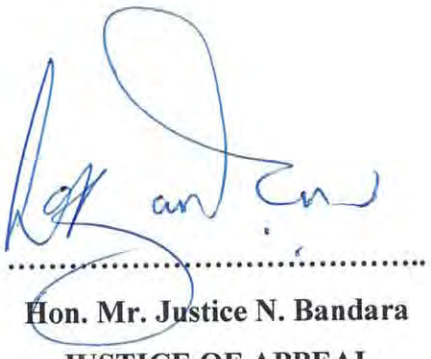
> *"This ground of appeal can only be argued when the trial is made available".*

[31] The learned trial Judge in his summing up and judgment has carefully and in detail considered the credibility and truthfulness of the evidence of the police officers. The learned Trial Judge having given adequate reasons, has clearly come to the finding, that the Police Officers who gave evidence as truthful and reliable witnesses.

[32] Therefore, ground 5 is unarguable.

Result

[33] Leave to appeal is refused on conviction.



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Hon. Mr. Justice N. Bandara

JUSTICE OF APPEAL