

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

CRIMINAL APPEAL NO. AAU 0051 OF 2016
(High Court Action No: HAC 33 of 2013)

BETWEEN : JOSEFA TUKANA *Appellant*

AND : THE STATE *Respondent*

Coram : Chandra, RJA

Counsel : Ms S Ratu for the Appellant
Mr Y Prasad for the Respondent

Date of Hearing : 19 June, 2019

Date of Ruling : 18 July, 2019

RULING

- [1] The Appellant was convicted by the High Court of Fiji at Suva for one count of Rape contrary to Section 207(1) and (2) (a) of the Crimes Act, 2009.
- [2] After trial the Assessors brought in a unanimous opinion of not guilty which was overturned by the learned High Court Judge.

[3] The Appellant was sentenced on 26th April 2016 to a term of 12 years and 4 months imprisonment with a non-parole term of 10 years.

[4] The Appellant filed a timely appeal seeking leave to appeal on 7 May 2016 and subsequently on being represented by the Legal Aid Commission filed an amended notice of appeal on 18 March 2019 setting out the following grounds of appeal:

Against conviction:

The learned Trial Judge erred in law and in fact when he failed to give cogent reasons for his departing from the unanimous verdict of the Assessors.

Against Sentence:

The learned Trial Judge erred in law and in fact when he did not give a reason for his election of starting point of the sentence.

[5] At the hearing, the Appellant abandoned the appealed against sentence and filed Form 39 regarding same.

[6] The incident where the alleged rape was committed was at the University of South Pacific. The complainant had come to USP in the evening with her cousin and sought permission to visit the complainant's boy-friend who was resident within the campus. The Appellant was a Security Guard at the campus at that time and the complainant had been given permission to enter. At about 9.00 p.m. the Appellant had gone to the room of the complainant's boyfriend as the complainant had not left the campus after her visiting hours had lapsed. While the complainant was being escorted out of the premises, he was alleged to have forcefully raped her. The complainant had complained to her cousin and boyfriend, and had stayed in the boyfriend's room till morning. The matter had been reported to the Police thereafter.

[7] At the trial, the Appellant chose to give evidence and he took up the position that the complainant had consented to have sex with him and that it was at her instance that he had sex with her as she wanted to go back to her boyfriend.

[8] The Assessors brought in a unanimous opinion of not guilty which was overturned by the learned Trial Judge.

- [9] The ground of appeal urged on behalf of the Appellant is that the learned Trial Judge had failed to give cogent reasons for departing from the unanimous opinion of the Assessors.
- [10] Both Counsel cited the decision in **Lautabui v The State** [2009] FJSC 7; CAV0024.2008 (6 February 2009) where the Supreme Court had dealt with this position and had stated:

"[28] Section 299 of the CPC recognizes that a judge has the power and authority to disagree with the majority opinion of the assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge's power and authority in this regard is subject to three important qualifications.

*[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses: **Ram Bali v Regina** [1960] 7 FLR 80 at 83 (Fiji CA), affirmed **Ram Bali v The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad v Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano v The State** [1991] FJA 3 at 5, the reasons of a trial judge:*

*"must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the **whole of the evidence presented in the trial**". (Emphasis added)*

- [11] The learned Trial Judge in his judgment had dealt in detail with the evidence of the complainant and based his conclusion of finding the Appellant guilty on her evidence as he was convinced with her evidence.
- [12] According to **Lautabui v State** (Supra) it is necessary for a trial Judge when overturning the opinion of the Assessors to give cogent reasons and such reasoning should be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. In the judgment of the learned trial Judge in this case there is very little reference to the evidence of the Appellant.

[13] In view of this position I would consider that the ground of appeal adduced on behalf of the Appellant is arguable and I would grant leave.

Order of Court:

Leave to appeal against conviction is granted.



Suresh Chandra
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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL