

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

CRIMINAL APPEAL NO. AAU 0007 OF 2015
(High Court Action No: HAC 56 of 2013)

BETWEEN : **ERONI TAVATAVANAWAI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Chandra, RJA**

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

Date of Hearing : **19 June, 2019**

Date of Ruling : **2 August, 2019**

RULING

- [1] The Appellant was charged with two counts of Rape contrary to Section 207(1) and (2)(b) of the Crimes Act,2009.
- [2] After trial, the learned Trial Judge concurred with the unanimous opinion of the Assessors and the Appellant was convicted, and on 21st November 2014 he was sentenced to 12 years imprisonment with a non parole term of 10 years on each count, the sentences to run concurrently.
- [3] The complainant who was 7 years old at the time of the incident had gone to the canteen run by the Appellant to buy beans and chewing gum, when the Appellant had got her to sit on a chair. He had then put her legs on his shoulders, pulled her underwear to a side and licked her vagina. He is also said to have poked her vagina. He had asked her to lick his penis, which she had refused to do. The Appellant had asked her not to tell anyone about what transpired. After a few weeks when her father found that she refused to go the canteen, she had come out with what had transpired earlier.
- [4] The Appellant filed a timely appeal and subsequently the Legal Aid commission appearing for him filed an amended notice of appeal against conviction setting out the following grounds of appeal:
1. *The Learned Trial Judge erred in law and in fact when he allowed, summed up to the assessors in his summing up and considered the evidence of the medical doctor that was never first led by the State through the complainant in the trial which was hearsay evidence.*
 2. *The Learned Trial judge erred in law and in fact when he did not properly consider the consistency of the evidence of the appellant in his record of interviews to the evidence he gave in the trial which makes him a very credible witness.*
 3. *The Learned Trial Judge erred in law and in fact when he did not properly consider the evidence led through the complainant where she stated that the appellant "touched" and "licked" her vagina thus there was no penetration.*

- [5] At the trial the defence taken up by the Appellant was one of denial of the allegations made by the complainant. His position was that when she came to the canteen to buy beans she had chased the cat that was there and he had smacked her buttocks for that.
- [6] The first ground of appeal is regarding the consideration of the medical evidence given by the Doctor who had examined the victim. Her report had been produced which related the history recorded by her when she examined the victim. The examination had been done after one month of the alleged incident. In her report she had recorded that the victim had told her that her grandfather (Appellant) had touched her buttocks and her perineal area (external female genitalia), afterwards he licked her perineum (external female genitalia). The Doctor had concluded in her report as “Young girl, minor, with history very suggestive of sexual abuse (no penetration evidence).”
- [7] The learned Trial Judge in his summing up to the Assessors had read out the report of the Doctor and referred to her evidence. When the victim had given evidence there had been no reference to the examination by the Doctor nor anything that she had told the Doctor.
- [8] Counsel for the Respondent has submitted that the issue raised in this ground of appeal relates to corroboration and that corroboration is not a requirement. That the doctor’s evidence amounted to hearsay as it was a statement made out of court to the doctor.
- [9] Although such evidence amounted to hearsay evidence, it was a fact in issue before Court and therefore would become relevant. On this basis this ground is not arguable.
- [10] The second ground is on the basis that the evidence of the Appellant was consistent with his record of interview and that the learned Judge did not properly consider such evidence to determine that the Appellant was a credible witness.
- [11] The Assessors brought in a unanimous opinion of guilt against the Appellant and the learned Judge too concurred with that opinion.
- [12] Even though the Appellant’s evidence in court had been consistent with what he had stated in his statement to the Police that does not necessarily make him a credible witness. The Assessors and the learned Judge have not treated him to be so.

[13] This ground is not arguable.

[14] The third ground of appeal relates to the question of penetration which was vital for the charge of rape to be proved.


[15] It would be necessary to consider the evidence of the victim to determine whether there was penetration or not. This would become material specially in view of the fact that in the Doctor's report where the Doctor had related what the victim had told her. There is no mention of the fact that there was penetration.

[16] I would consider this ground to be arguable.

Order of Court:

Leave to appeal against conviction is granted on ground 3 of the grounds of appeal against conviction.




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL