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

CRIMINAL APPEAL NO. AAU 0043 of 2016
(High Court Action No: HAC 41 of 2014)

BETWEEN	:	**TIMOCI KURIVORA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Chandra, RJA**
Counsel	:	**Mr T Lee for the Appellant** **Mr S Babitu for the Respondent**
Date of Hearing	:	**22 January, 2019**
Date of Ruling	:	**24 May, 2019**

RULING

[1] The Appellant was charged with 1 count of Rape contrary to section 207(1) and (2(b) and (3) of the Crimes Act, 2009.

[2] After trial the Appellant was convicted on 28th September 2015 after the learned trial Judge agreed with the minority guilty verdict of the Assessors.

[3] The Appellant was sentenced to10 years imprisonment with a non-parole period of 5 years imprisonment.

[4] The Appellant filed a timely appeal. Subsequently the notice of appeal was amended and the Appellant relied on the following grounds of appeal:

> "a) *That the learned trial Judge erred in law and in fact in allowing prosecution's application after the State had already closed its case, to call Amelia Heritage as a prosecution witness to give evidence when the requirement contrary to section 234 of the Criminal Procedure Act is not met.*
>
> b) *That the learned trial Judge's comment, "You can expect any person accused of a crime would generally give an innocent version to escape criminal liability" has caused miscarriage of justice to the Appellant.*
>
> c) *That the Learned trial Judge erred in law and in fact when directing the Assessors on the lesser or alternative charge of Sexual Assault thereby denying the Appellant's right to a fair trial in that:*
>
> > i) *There is no prior notice that the alternative charge was going to be put to the Assessors;*
> >
> > ii) *That the trial Judge failed to remind the Assessors of the Appellant's defense when directing the Assessors on the lesser or alternative charge; and*
> >
> > iii) *The sole prerogative in convicting the Appellant guilty of the lesser or alternative charge is the Trial Judge is contrary to section 162 of the Criminal Procedure Act and not the assessors."*

[5] The Respondent filed an application for leave to appeal out of time seeking to appeal against the sentence imposed on the Appellant. The said application was out of time by 4 days, and the Legal aid Counsel for the Appellant had on 25th April conceded that it was a timely appeal.

[6] The ground of appeal advanced by the Respondent is as follows:

> *"That the learned Judge erred in law, fact and principle when sentencing in regard to both the head sentence and the non-parole period, in particular:*
>
> i. *The head sentence was settled after giving excessive credit for the mitigating factors.*
>
> ii. *The non-parole period is manifestly lenient in the circumstances and wholly inconsistent with sentencing norms and practice.*

[7] The victim in the case was seven years of age at the time of the incident. The Appellant was living with the victim's mother in a de facto relationship in a rented house. When the mother of the victim had gone to a night shift, the Appellant had touched the victim's private part with his hands whilst lying on the bed. The Doctor had found the hymen not intact and opined that the perforation of the hymen was suggestive of penetration by a blunt object.

Appeal of the Appellant (Timoci Kurivora)

[8] In the first ground of appeal the Appellant has taken up the position that the learned trial Judge had erred in law and in fact by allowing the prosecution's application to call a witness to give evidence after the Appellant had concluded his evidence which was contrary to section 234 of the Criminal Procedure Act.

[9] The prosecution had closed its case and thereafter the Appellant had given evidence. Thereafter an application had been made by the prosecution to lead the evidence of a witness who had been listed but was not available when the prosecution was leading evidence.

[10] There is no indication in the summing up or the judgment as to whether there was any objection raised on behalf of the Appellant regarding the application made by the prosecution and only the record will indicate whether there was any objection.

[11] Section 234 of the Criminal Procedure Act provides:

> *"If the accused person adduced evidence introducing a new matter which the prosecution could not have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut the matters raised by the defence."*

[12] This section provides for a situation where evidence could be led in rebuttal if the defence had raised new matters in their case by leading evidence. But in the present case, the prosecution had wanted to lead the evidence of witness, Amelia Heritage as it had failed to call her earlier as she could not be located, and summons had not been served on her.

[13] The Respondent argues that no prejudice was caused to the Appellant as no objection was raised by his Counsel when the application was made to lead her evidence and that her evidence was regarding her meeting the victim after the incident.

[14] The learned trial Judge had in his judgment stated that he allowed the bleated application of the prosecution to call Amelia as a witness to ensure that the truth was ascertained and justice prevailed.

[15] Since the purpose of section 234 in calling witness after the defence case is closed was to rebut any new positions taken up by the defence, and the reason adduced to lead the evidence of Amelia was different, I would consider this ground of appeal to be arguable.

[16] In the second ground of appeal, the Appellant has taken up the position that the comment made by the learned trial Judge in his summing up to the effect that "you can expect any person accused of a crime would generally give an innocent version to escape criminal liability" has caused a miscarriage of justice.

[17] A Judge is entitled to comment robustly on the prosecution as well as the defence case in the course of his summing up as long as such comments are fair, objective and balanced. **Tamaibeka v State** Criminal Appeal No. AAU0015 of 1997: 8 January 1999.

[18] The defence taken up by the Appellant was one of denial and he gave evidence and led the evidence of Luisa his ex-defacto partner to give evidence on his behalf. The learned trial Judge made the comment complained of in the course of his summing up in paragraph 59 while mentioning about the evidence of Luisa.

[19] The question posed by the Appellant is as to whether the comment made by the learned Judge brought about a situation where the Assessors would have felt that the Accused had to prove his innocence.

[20] It is to be noted that that Majority of the Assessors found the Appellant not guilty. Further the learned trial Judge had in his summing up stated about the burden of proof in detail and had commented on the evidence of the complainant as well as the Appellant.

[21] In those circumstances, reading the summing up as a whole, the making of the comment complained of may not have prejudiced the Appellant and therefore this ground is not arguable.

[22] The third ground of appeal relates to the direction by the learned trial Judge on the lesser or alternative charges of sexual assault which was considered as having denied the Appellant's right to a fair trial.

[23] The offence that the Appellant was charged with was Rape and there was no alternative or lesser charge advanced by the prosecution. The learned trial Judge in his summing up at paragraph 66 stated as follows:

> *"……………………….In this case the accused is charged with rape. If you find that the Complainant was truthful and the Accused penetrated his fingers into her vagina you must find the Accused guilty of rape. However, if you find that the Accused only touched her vagina but his fingers did not penetrate the vagina or if you have a doubt whether there was penetration, then you may consider the lesser alternative offence of Sexual Assault. ……………………"*

[24] The majority opinion of the Assessors was that the Appellant was not guilty of rape. None of them found the Appellant guilty of sexual assault. The Appellant's defence was one of denial.

[25] It would appear therefore that the majority of the Assessors would not have been satisfied with the evidence of the complainant in bringing a verdict of not guilty. This would have been in line with the defence of the Appellant.

[26] The Appellant's position is that there was no prior notice that the alternative charge was going to be put to the Assessors. There is no requirement in terms of Section 162 of the Criminal Procedure Act to give prior notice of a lesser charge as the trial Judge can consider whether the evidence in the case supports a conviction for a lesser offence and give necessary directions in his summing up. The learned trial Judge had considered the evidence and given a direction regarding the lesser offences which I would consider was in favour of the Appellant rather than being prejudicial to him.

[27] The learned trial Judge had in his summing up commented on the position taken up by the Appellant and the summing up taken as a whole appears to be adequate. In any event the final arbiter was the trial Judge who disagreed with the majority opinion of the Assessors and convicted the Appellant as he was convinced that the evidence was sufficient to find him guilty of the charge of rape.

[28] In those circumstances the 3rd ground of appeal would not be arguable.

Appeal of the Appellant (The State)

[29] The Appellant's appeal is against the sentence on the basis that the learned Judge erred when sentencing in regard to the head sentence and the non-parole period.

[30] The Appellant was a first offender and he was given a sentence of 10 years imprisonment with a non-parole period of 5 years.

[31] The learned Judge had chosen 10 years as the starting point which was within the tariff and cited the decision in **Anand Abhayaraj v The State** CAV003.2014. He had added three years for the aggravating factors and deducted three years for the mitigating factors in arriving at the head sentence of 10 years.

[32] The learned Judge subjected the head sentence to a 5 year non-parole period. It would appear at first sight that the learned Judge had been lenient in fixing a non-parole period of 5 years. But when the current practice adopted by the Corrections is taken into account the Appellant will not be eligible for remission once the 5 years is completed. He would have to serve a further two thirds period of the remaining period of 5 years, which would entitle him for remission only after serving a further period of 3 years and 4 months, which would mean that though the non-parole period is 5 years, he would really have to serve 8 years and 4 months of the head sentence to be eligible for remission.

[33] The head sentence of 10 years is within the tariff and the non-parole period as stated above though given as 5 years by the learned Judge, would not make him eligible for parole at the completion of the 5 years. Therefore the ground of appeal sentence advanced by the Appellant (State) is not arguable.

<u>Orders of Court:</u>

Leave to Appeal against conviction is allowed on ground 1 of the grounds of appeal.

Leave to appeal filed by the State against sentence is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL