IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 117 of 2018
[In the High Court at Lautoka Case No. HAC 124 of 2016]

BETWEEN : **OSEA CAWI**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Mr. T. Tuenuku for the Respondent**

Date of Hearing : **10 August 2021**

Date of Ruling : **13 August 2021**

RULING

[1] The appellant, 30 years old, had been indicted in the High Court at Lautoka with one count of rape of 04 year old girl contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 committed at Sigatoka in the Western Division on 07 June 2016.

[2] The information read as follows:

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

OSEA CAWI *on the 07th day of June, 2016 at Sigatoka in the Western Division penetrated the vagina of **LV** a child under the age of 13 years by inserting his finger into the vagina of the said **LV.***

[3] At the end of the summing-up the assessors had in unanimity opined that the appellant was guilty of rape as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant of rape and sentenced him on 10 October 2018 to an imprisonment of 11 years and 03 months with a non-parole period of 10 years.

[4] The appellant had appealed in person against conviction in a timely manner (just two days out of time). Thereafter, the Legal Aid Commission had tendered amended notice of appeal against conviction and written submission on 30 December 2020. The state had tendered its written submissions on 27 January 2021. Both parties had consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or via Skype.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The sole ground of appeal urged on behalf of the appellant is as follows:

Conviction

'***Ground 1***

'THAT the Learned Trial Judge erred in law and fact when he failed to properly and fully assess the Appellant's defence in denying the offending and raising grounds of fabrication towards the caution interview.'

[7] The trial judge had summarized the prosecution evidence in the sentencing order as follows:

> *'3. You are a 30 year-old mature person at the time of the offence. You are related to the victim as her uncle. The victim was 4 years of age at the time of the offence. The victim came to your room when you were patching a hole on your trouser. She came to you trusting you as her elderly uncle and lied down beside you on the mattress. You inserted your finger into her vagina and then chased her way. She described the experience as painful. The victim relayed the incident to her mother when blood stains were noted in her panty. The matter was reported to police on the same day. The victim was medically examined. The doctor who examined the victim noted injuries and blood in her vagina consistent with a digital penetration.'*

[8] The trial judge also described respective cases in the judgment as follows:

> 5. *The Prosecution called five witnesses including the victim and her mother Mariana. <u>Prosecution's case is substantially based on **the evidence of the child victim**.</u> Other witnesses were called to prove the consistency of the conduct of the victim and the confession to police. <u>Prosecution says that victim's evidence is credible and is further bolstered by the **confession of the Accused** to police, **recent complaint evidence** and the **medical evidence** of the doctor.</u>*
>
> 6. *Defence's case is one of denial. At the end of the Prosecution's case, Accused exercised his right to remain silent. The Defence Counsel cross-examined the witnesses for Prosecution on the basis that the Accused had never done the act alleged in the information and that victim's mother Mariana had made up this allegation against the Accused.*

<u>Conviction ground of appeal</u>

[9] The appellant submits that the victim's mother had not told her police statement that her daughter, the victim had referred to him as 'Koko Osea' but only as 'Osea' as revealed at paragraph 48 of the summing-up:

> 48. *Under Cross Examination, Mariana said that LV told her that it was Koko Osea who had done it. She admitted that in her statement to police it is not stated that her daughter referred to Osea as 'Koko Osea'. Mariana said that LV had told her that Koko Osea did it.*

[10] It appears that the appellant attempts to challenge his identity as the perpetrator. The trial judge had dealt with the appellant's denial and suspected motive behind the rape allegation at paragraphs, 48, 67 to 70 of the summing-up and given his mind to this aspect of the prosecution case in the judgment as well:

> 6. *'Defence's case is one of denial. At the end of the Prosecution's case, Accused exercised his right to remain silent. The Defence Counsel cross-examined the witnesses for Prosecution on the basis that the Accused had never done the act alleged in the information and that victim's mother Mariana had made up this allegation against the Accused.*
>
> 7. *I am satisfied beyond reasonable doubt that the victim had been digitally raped and that it was the Accused Osea Cawi and nobody else that had committed this offence. The victim had known the Accused as her uncle prior to the incident. She had referred to the Accused as ''Koko Osea'' or uncle Osea when she relayed the incident to her mother Mariana. As soon as Mariana heard this she had accompanied the victim straight to the community hall where the Accused was at that time. Mariana confirmed that only Osea that her daughter knew in the village was the Accused.*

[11] Not stopping at that the trial judge had considered the other evidence available against the appellant in agreeing with the assessors including the positive demeanour of the victim and her mother:

> 15. *I observed the demeanor of the victim and her mother. I am not convinced that the victim or her mother had made up this serious allegation against the Accused who is related to the victim as her uncle.*
>
> 16. *The victim had blood stains in her panty soon after the alleged incident. She was medically examined by Dr. Rohitesh on the same day. The medical evidence is consistent with victim's evidence about the allegation of digital rape. Doctor's evidence boosted the credibility of prosecution's version of events although it did not implicate the accused.*
>
> 17. *At questions 28, 32, 33, 34, 40 and 41 in his caution interview the Accused had confessed to the crime. I am satisfied that the Accused had given those answers and had told the truth to police.*
>
> 18. *The victim said "Osea inserted his finger in my vagina and it was paining". The offence of digital rape is established. Prosecution proved the charge beyond reasonable doubt.*

[12] Therefore, this complaint has no merits at all.

[13] The appellant also submits that his confession in the caution interview had been fabricated given that he understood the Nadroga dialect and was interviewed in Nadroga dialect but was asked to sign the record of interview recorded in English when he did not understand English. The appellant complains that this aspect had not been considered by the trial judge.

[14] The trial judge had dealt with this very issue in the *voir dire* ruling as follows:

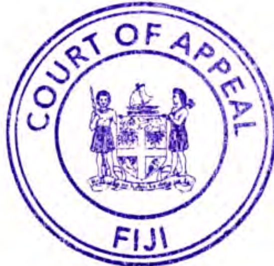
> 8. *WDC Kelera conducted the interview of the accused Osea Cawi at the Sigatoka Police Station on the 08th of June, 2016, in the presence PC Trevor who was the witnessing officer.*
>
> 9. *Interviewing officer Kelera said that accused appeared physically good and was very cooperative in the interview. Interview was conducted in English language as requested by the accused. No complaint was received from him. Osea was not threatened or assaulted. No promise was given to him to obtain a confession. She said that all 50 question ware answered by Osea voluntarily. Osea read the interview before signing and acknowledged that he preferred English as the medium of interview. Witness tendered the hand written interview marked as PE 1B and the English translation as PE 1A.*
>
> 10. *Under cross-examination she denied that she was speaking to the accused in Nadroga dialect and not in English. She also denied that questions and answers were all done in the Nadroga dialect.*
>
> 11. *The witnessing officer, PC Trevor and charging officer, Cpl. Baseisei confirmed interviewing officer's evidence that the accused was fluent in English and that he gave the interview voluntarily.*
>
> 12. *I find that the evidence of the Prosecution to be consistent and plausible.*
>
> 13. *Police officers are consistent in their evidence. Inconsistencies between the record of interview and entries of the Station Diary are not material because the entries had been made by a different officer. I can believe the evidence of the Prosecution that the accused understood the contents of the interview and charge statement before he signed.*
>
> 14. *The accused had gone to Kavanagasau Secondary School where the medium of instructions is English. He had dropped himself out from school after completing Form 4. He has received an English education for a considerable period of time.*

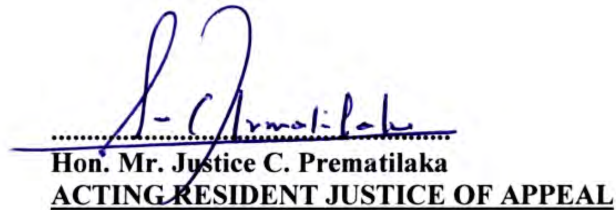
> 15. *Accused has signed the acknowledgement that he preferred English.*
>
> 16. *It is hardly believable that the accused could not understand the contents of the interview. The accused had taken 20 minutes to read the record before he was asked to sign. He had been given an opportunity to add and alter the contents of the interview.*
>
> 17. *I am certain that the accused is fluent in English so that he could understand the questions put to him and the contents of the record of interview and also the charge statement which he had signed voluntarily.*

[15] Thus, it is clear that this grievance of the appellant also lacks any merit.

Order

1. Leave to appeal against conviction is refused.





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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL