

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 040/2013

BETWEEN: FILIPE BABA

APPELLANT

AND: THE STATE

RESPONDENT

COUNSEL: Mr S Valenitabua for the Appellant
Ms A Vavadakua for the Respondent

Date of Hearing: 17/07/2014

Date of Ruling: 12/09/2014

RULING

[01] Filipe Baba (hereinafter "the Appellant") was charged for Rape contrary to Section 149 and 150 of the Penal Code, Cap. 17 in the Magistrates Court of Suva under case No: 1849/2008.

[02] The particulars of offence were:

"Filipe Baba on the 26th day of October 2008 at Lami in the Central Division had unlawful carnal knowledge of Makelesi Suraki without her consent.

- [03] On 31/05/2012 the appellant appearing in person informed the court that he was ready for trial and waived the right of counsel. The trial was commenced on 25/06/2012. During the trial prosecution called 07 witnesses and for the defence the Appellant gave sworn evidence and called a witness on his behalf.
- [04] On 09/09/2013 the Learned Magistrate found the Appellant guilty and sentenced him to 08 years imprisonment with non-parole period of 07 years. The Appellant was sentenced on 26/09/2013.
- [05] Being aggrieved, the Appellant has appealed against both conviction and sentence on 24/10/2013. Further the Appellant filed an amended Petition of Appeal on 07/02/2014.
- [06] Before commencement of Appeal proceedings, the Appellant through his counsel filed a Notice of Motion supported by his Affidavit and prays to this Court, that he be given leave and the Correction Officers be ordered to present himself to CWM Hospital for medical examination. This is in relation to his ground of Appeal No: 13 in the amended Petition of Appeal filed on 07/02/2014. The appeal ground No: 13 of the Appellant says as follows:

“That learned Magistrate erred in law and in fact in admitting the Appellant’s medical report when the doctor who prepared the same failed to attend Court to tender the same. The medical report of the Appellant was a fabrication as the doctor’s report about foreign objects in the Appellant’s penis was false”

- [07] The Appellant seeks this order in order to tender his medical report as part of his fresh evidence on appeal.

The Law

- [08] In the case of **Gallagher v The Queen** (1985) 160 CLR 392, the Court on dealing with the issue of “fresh evidence” stated that;

“an appellate court will conclude that the unavailability of fresh evidence at the time of trial involved a miscarriage of justice only if it considers that there is significant possibility that the jury,

acting reasonably, would have acquitted the accused of the charge if that evidence had been before it"

- [09] The local, commonly cited, authority on calling fresh evidence is the case of **Waisake Tuimereke and Apenisa Ralulu Crim. Appeal No.11 of 1997** because it discusses in some detail the issue of calling fresh evidence. In that Appeal case, the Court considered the decision of **Ratten v. R. [1974] HCA 35; (1974) 131 CLR 510**. In cases for which fresh evidence ought to be called, the Court would grant such an application if, to refuse such application would constitute a miscarriage of justice.
- [10] In the **Ratten** case cited above, the Court had stated that it is not a miscarriage of justice if such evidence was actually or constructively available to the Appellant:
- ".....there will be no miscarriage of justice simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict at the trial would most likely have resulted".*
- [11] The Respondent submits that the evidence sought to be adduced by the Appellant in this case is not fresh evidence. It was always available to him to get his private part examined by a medical doctor. Further he was always on bail prior to and during the trial; therefore he was at liberty to obtain a medical report at those crucial points.
- [12] The Appellant on 25/06/2012 had waived the right of a counsel and proceeded to the trial in person. Before this date the Appellant informed the Court that he is going to represent himself. Page 13-14 of the Court Record. Therefore, it is incorrect to say that the trial proceeded in the Magistrate Court against the accused without an opportunity to be legally represented.
- [13] The Appellant had the ample opportunity to ask from the complainant of existence of marble type object in his penis. But on perusal of court record of his cross examination the Appellant did not put a single question with regard to any marbles in his penis at that time.
- [14] Further at page 37 of the Court Record the Appellant had accepted that the Medical Report read out by the substitute doctor was indeed his own Medical Report. He stated to Court that:

"This is my Medical Report. I had signed in page No: 2. This is an examination of my private part". (Exhibit No: 4)

- [15] The Appellant was examined by the doctor just two days after the allegation. The Appellant had ample opportunity and time either to object for his medical report or to request for fresh examination when his trial was proceeding. Now the Appellant makes application for fresh evidence nearly 06 years after the allegation.
- [16] Having examined the court record, the Appellant's and Respondent's submissions, I conclude that the evidence sought to be adduced by the Appellant almost after 06 years is not fresh evidence. It was always available to him throughout the trial but he failed to call such evidence during the trial.
- [17] Due to aforesaid reasons, I dismiss his application for a medical examination.
- [18] The Appellant has 30 days to appeal.



A handwritten signature in black ink, appearing to be "P. Kumararatnam".

P Kumararatnam
JUDGE

At Suva
12/09/2014