

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LABASA

CRIMINAL APPEAL: HAA 03 OF 2016

BETWEEN : MANOJ KUMAR

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr. P Lomaloma for the Appellant
Ms. A Vavadakua for the Respondent

Date of Judgment : 3rd of March 2017

JUDGMENT

Introduction

1. The Appellant had been charged in the Magistrates' Court of Labasa for one count of Rape contrary to Section 149 and 150 of the Penal Code. The Appellant pleaded not guilty and the matter proceeded to the hearing. At the conclusion of the hearing, the learned Magistrate in his Judgment dated 5th of April 2016, found the Appellant is guilty for the above charge. The learned Magistrate then sentenced the Appellant for a period of nine years with non-parole period of eight years. Aggrieved with the said conviction, the Appellant files this Petition of Appeal on the following grounds, *inter alia*;

- i) *That the learned Magistrate failed to inform the Appellant that he can use his father and wife as his witness since DPP did not call his wife and father as state's witness even though DPP summoned them,*
- ii) *The Appellant was denied a fair trial as the charge is from 2006 and case was filed in 2010. The delay was from DPP who vacate the trial dates on last two occasions. I was heard in 2014, four years after the charge was filed,*
- iii) *The learned Magistrate did not give adequate and proper reasons as to why he accepted the Prosecution version and he also did not evaluate all the evidence,*

2. Both the parties were directed to file their respective written submissions, which they filed as per the directions. Subsequent to the filing of the respective written submissions, this Appeal proceeded to hearing on the 31st of January 2017. The learned counsel for the Appellant and the Respondent informed the court that they reply on their respective written submissions and do not wish to make any oral submissions. Accordingly, I now proceed to pronounce my judgment upon consideration of the respective written submissions of the parties and the record of the proceedings of the Magistrates' court.

Ground I

3. The first ground of the appeal is founded on the contention that the learned Magistrate failed to inform the Appellant that he could call his wife and father as witnesses for the defense. The learned counsel for the Appellant submitted that the wife and the father of the Appellant was summoned by the Prosecution, but did not adduce their evidence for the prosecution. Hence, it was a duty of the Magistrate to advise the Appellant that he could call them as his witnesses for the defense. Hence, such failure of the learned Magistrate has prejudicially affected the rights of the Appellant to have a fair trial.

4. Section 179 (1) of the Criminal Procedure Decree has stipulated the procedure for the defense, where it states that;

i) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the making of a defence, the court shall —

a) again explain the substance of the charge to the accused; and

b) inform the accused of the right to —

i. give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or

c) ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence; and

d) the court shall then hear the accused and his witnesses, and other evidence (if any).

5. Accordingly, the learned Magistrate is only required to ask the accused whether he has any witnesses to adduce evidence on behalf of his defense. Such duty conferred upon the learned Magistrate under Section 179 (1) of the Criminal Procedure Decree, does not extend to the effect where the Learned Magistrate could suggest or name the witnesses that the defense could call.

6. The record of the proceedings of the Magistrates' Court confirms that the learned Magistrate has given the Appellant his options in defense. The record of the proceedings of the Magistrates' Court has not elaborated the options given by the learned Magistrate. However, the Appellant does not argue that he was not explained about the procedure of the defense. The appeal ground is founded on the contention that the learned Magistrate failed to inform him that he could call his wife and father as witnesses.

7. I am satisfied that the learned Magistrate has adequately exercised his duty conferred upon him under Section 179 (1) of the Criminal Procedure Decree. Hence, I find the first ground of appeal advanced by the Appellant has no merit.

Ground II

8. The learned counsel for the Appellant in his submissions stated that the Appellant does not wish to argue the second ground of appeal as it has no merit. I accordingly disregard the second ground of appeal.

Ground III

9. The learned counsel for the Appellant submits that the learned Magistrate has not given adequate reasons as to why he accepts the evidence of the prosecution. The learned counsel further argues that the learned Magistrate has failed to evaluate the evidence adduced in the hearing.

10. The learned Magistrate in paragraphs 6 to 8 of the judgment has discussed the principles of burden and standard of proof in criminal proceedings. Having correctly identified the main issue of the matter as the consent of the victim, the learned Magistrate has discussed the laws and applicable principles in defining the consent. He then proceeded to summarize the evidence adduced by the prosecution and the defense. The learned Magistrate has then accepted the evidence given by the victim as credible and reliable.

11. In evaluating the evidence adduced in the hearing, the learned Magistrate has taken into consideration the demeanor of the victim and the Appellant. The learned Magistrate has found the Appellant had thought that he could easily get away with this incident by abandoning the victim at the Home of Hope in Suva.

12. In view of the reasons discussed, I find the learned Magistrate has adequately evaluated the evidence adduced in reaching his conclusion. Hence, I do not find any merits in the third ground of appeal.
13. In conclusion, I disallow and dismiss the petition of appeal.
14. Thirty (30) days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

At Labasa

3rd of March 2017

Solicitors : Penjamini R. Lomaloma Esq

Office of the Director of Public Prosecutions

This Judgment was prepared by Rajasinghe J and was pronounced in Open Court, signed and copies issued to parties by me.



A handwritten signature in blue ink, appearing to read "Achala Wengappuli".

**ACHALA WENGAPPULI
JUDGE**