IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.HAA 18 OF 2018

BETWEEN	**:**	**ILAITIA COKALACA**
		APPELLANT
A N D	**:**	**STATE**
		RESPONDENT

Counsel	*:*	*Appellant in person*
	:	*Mr. T. Tuenuku for the Respondent*
Date of Hearing	*:*	*10th of December, 2018*
Date of Judgement	*:*	*14th of February, 2019*

JUDGEMENT

Background

The Appellant (will be referred to as the accused sometimes) was charged with one count of Sexual assault, contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009, in the Magistrates' Court of Nausori. The particulars of the offence states;

> *"Ilaitia Cokalaca, on the 28th day of June 2013 at Namuka Village, Nausori in the Eastern Division, unlawfully and indecently assaulted Salaseini Bera by fondling her vagina".*

The accused has pleaded not guilty to the said charge and the matter has proceeded to trial. At the trial the prosecution has lead the evidence of four (4) witnesses. The accused has not given any evidence as the trial was held in absentia.

The learned Magistrate of Nausori, by his judgment dated 05th of March 2018, having convicted the accused has subsequently on the 06th of March 2018 has imposed a sentence of Seven (7) years imprisonment with a non-parole term of Six (6) years.

The accused, being dissatisfied of the said judgment has appealed to this Court. The notice of appeal is dated 12th March 2018, and was received by the courts on 14th of March 2018. Therefore, this appeal is filed within the allocated 28 days.

It seems that the accused has prepared and filed his notice of appeal consisting of 2 grounds, on the 14th of March 2018. Out of the said 2 grounds, 1 was against the conviction and 1 was against the sentence.

The accused having obtained legal assistance and being represented by the Legal Aid later withdrew his instructions and appeared in person.

The appellant has filed his amended grounds of appeal on the 01st of November 2018. By the said amended grounds, the appellant expands his grounds to ten (10); to wit, six(6) grounds against the conviction and to four (4) grounds, against the sentence. Therefore, I consider that the appellant has abandoned the original grounds submitted by him before.

Grounds of Appeal

The amended grounds of appeal urged by the appellant are as follows (in verbatim);

Against the Conviction;

i. That the learned trial Magistrate erred in law and in fact when he unfairly drew his mind in his judgment in paragraph 22, line 2-3 and stated “But in his Caution Statement (PE2) the accused admitted sitting in his grandmother’s porch and joking with her” and the learned magistrate deem just that such Caution Statement conceded to the fact the complainant’s evidence was true when the prosecution couldn’t identify and confirmed what clothe the

accused was wearing at the material time at the crime scene. Therefore such failure to identify the type of cloths the accused wore caused a substantial miscarriage of justice.

ii. That the learned trial Magistrate erred in law and in fact to convict the accused on the complainant's (victims) evidence to what she says when in his own judgment in paragraph 22 line 6-7 and stated "But since he was not in court, I would rely on his caution statement only where he denied the committing the offence". Therefore the learned trial magistrate conceded to the fact that accused caution statement is reliable and credible in denying the allegation. And this raises the question as to why I was convicted when the learned magistrate had never stated that he [Magistrate] had refused the accused statement.

iii. That the learned trial Magistrate erred in law and in fact to convict the accused when the prosecution failed to prove beyond reasonable doubt to show that the victim does not have the chance and possibilities shout or cry out loud at the time of the alleged incident when she fully had the knowledge that grandmother was present at the crime scene. In fact the victim never said the accused had threatened her or closed her mouth. Therefore there were serious doubts in the prosecution case and as such the benefit of doubt ought to be have being given to the appellant.

iv. That the learned Magistrate erred in law and in fact when he unfairly deal with the accused Caution Statement in questions and answers 22-23 in his judgment in paragraph 22 "*But in his caution statement (PE2) the accused admitted sitting in his grandmother's porch and joke with her*" and as such the trial magistrate conceded to the fact that the accused had confessed to the crime alleged against him. Therefore that would resulting in a miscarriage of justice.

v. That the learned trial Magistrate erred in law and in fact in not analyzing all the facts before him before he made a decision that the appellant was guilty as charged on the alleged offence. Such error of the learned magistrate in law by failing to make an independent assessment of the prosecution evidence

before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice and in particular the dates.

vi. That the learned trial Magistrate failed to evaluate the evidence prior to giving a verdict of guilty as charged and the failure of the learned trial magistrate to independently asses the evidence about the different dates the prosecution had produced in court on the alleged offence before confirming the said guilty, have given rise to a grave and substantial miscarriage of justice.

Against the Sentence;

vii. That the learned trial Magistrate and the magistrate court itself erred in law and in fact to listen to the accused case at a reasonable time. It takes a disparity of 4years and two month between 23/7/13 to 8/11/17 and as such practice the learned trial magistrate offended the written law.

viii. That the learned trial Magistrate and the magistrate court itself erred in law and in fact in delaying the accused to take his plea at a reasonable time. It takes a disparity of 2 years and a month between 23/7/13 and 14/9/15 and as such delay infringes the rights for the accused to liberty to other lawful purpose. Therefore the appellant had been adversely affected by the executive and administrative justice system cause a substantial miscarriage of justice.

ix. That the appellant appeals against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

x. That the learned trial Magistrate erred in law and in fact when sentenced the appellant and imposed a 6 year non-parole period to 7 years head sentence is a denial of the appellant's right to rehabilitation program. Therefore 6 years is too close to the head sentence and as such caused a substantial miscarriage of justice in a court of law.

Analysis

1st Ground

Through the alleged 1st ground though somewhat confusing by its contents, it could be safely assumed that the appellant attempts to challenge the identification of the offender. It is evident that the witness (PW1) is a cousin of the accused and they are well known to each other. Though the accused was not identified due to his absence on the trial date, the witness has seen him in court on many occasions before, and knows the accused to be her cousin Ilaitia. There has been no evidence, or at least a suggestion that the PW1 has any other cousin by the name Ilaitia, other than the accused. The appellant by his further submissions, filed on 10/12/18, has drawn the attention of the court to Turnbull principles **R v Turnbull** (1977) QB 224 it is also stated that;

> *"In our judgement when the quality is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the Jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it".*
>
> *"When in the judgement of the Trial Judge, the quality of the identifying evidence is poor as for example when it depends solely on a fleeting glance, or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the Jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification".*

Therefore, I am of the view that this ground is devoid of any merits.

2nd Ground

The alleged ground suggests that it is wrong for the magistrate to consider the appellant's caution statement as reliable and credible in denying the allegation and to convict him when the learned magistrate had never stated that he [Magistrate] had refused the accused statement. Here the appellant takes a sentence in the judgement of the learned magistrate in isolation and tries to misinterpret the same. The entire paragraph, when reproduced in verbatim;

22. *"The accused is not coming to court and hence I did not have the chance to hear his version. But in his caution statement (PE2) the accused admitted sitting in his grandmother's porch and joking with her. Based on this the counsel for the accused even asked whether based on their relationship if the accused can make joke on her. The victim said the joke would not mean touching the private part. This line of questioning by the defense seems to suggest the accused touched her private part as a joke on that day. But since he was not in the court I would rely on his caution statement only where he denied committing the offence."*

Though the appellant is bound by the acts of his counsel, the learned magistrate has been sympathetic enough in deciding, to not to accept the suggested incriminating admission on the appellants behalf in his absence.

3rd Ground

The appellant urges that the absence of any evidence as to the victim's reaction by shouting or crying to the alleged incidence creates a doubt in the prosecution case. As rightly pointed out by his Lordship Justice Rajasinghe in his summing up in the case of **State v Turaga** [2018] FJHC 447;

"……the victims of rape react differently to the trauma and the experience they have gone through……"

Therefore it is apparent that absence of any evidence as to crying or shouting at the time of the incident has not created a reasonable doubt in the mind of the learned trial magistrate.

Further, it should be noted that the counsel who defended the accused in his absence, has not raised a single query on the issue. The ingredients of the offence are;

i) The Accused
ii) Unlawfully and indecently assaulted the victim
iii) On the alleged date.

The evidence elicited in the case clearly shows that the accused unlawfully and indecently assaulted the victim. Furthermore, the stance of the defense is, not whether

such an act is unlawful or indecent, but whether the accused did commit such an act or not.

4th Ground

The appellant alleges that the learned Magistrate erred in law and in fact when he unfairly dealt with the accused Caution Statement in his judgment by stating "But in his caution statement (PE2) the accused admitted sitting in his grandmother's porch and joke with her" and the trial magistrate conceded to the fact that the accused had confessed to the crime alleged against him, hence would result in a miscarriage of justice.

As pointed out before, in analysis of the 2nd ground above, the learned trial magistrate has stated so, in explanation of the defense counsel's incriminating stance. Though it would have been legal and permissible to use such statement when admitted with consent, the learned magistrate has not used it in any way against the accused, in deciding on his guilt.

5th Ground

The appellant alleges that the Magistrate erred in law in not analyzing all the facts before him before he made a decision that the appellant was guilty as charged on the alleged offence. He further alleges that such error of the learned magistrate in law by failing to make an independent assessment of the prosecution evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.

Having well considered the judgment of the learned magistrate, I am satisfied that the facts of the case are properly, and adequately analyzed by the learned magistrate in forming his opinion. The appellant fails to point out a single legally admissible fact, which the magistrate is alleged to have not analyzed. Therefore, as the first allegation is non-substantiated, the subsequent allegation will not arise.

6th Ground

This alleges that the learned trial Magistrate failed to evaluate the evidence prior to arriving at a verdict of guilt and the failure of the learned trial magistrate to

independently asses the evidence about the different dates the prosecution had produced in court before confirming the guilt.

As substantiated by the evidence, the incident has taken place on the 28th of June 2013, and witnesses have reported the matter to the police on the following day. The complainant has been examined by the doctor on the 05th of July 2013, and the accused was arrested and interviewed on the 22nd of July 2013. As far as the evidence is concerned, there has been not a single contradiction in respect of the relevant dates or any other substantial material elicited by the prosecution. It is sad to notice that the appellant has drafted his grounds without proper assessment or consideration of the grounds of appeal.

7th& 8thGrounds (1st& 2ndGrounds against the Sentence)
Since both these grounds allege undue delay in court proceedings, and prejudice alleged to have caused thereby, I will be considering them together.

First of all it should be remembered that even there happened to be an unreasonable delay, in absence of serious prejudice thereby caused to the accused it will not amount to a ground for the vacation or variation of the sentence. In this case the appellant has failed to elicit the way, any such prejudice being caused to him. In any event, I will look in to the alleged delay.

The accused (appellant) was produced before the Nausori Magistrate's Court for the first time on 23rd of July 2013. He was granted bail, and the matter was mentioned on the 16th of August 2013 for the disclosures. On that day since the accused was charged of Rape, an indictable offence, the matter was transferred to the high court. When the matter is taken up in the High Court, The Hon. Director of Public Prosecution has filed information under section 210 (1) (a) of the Crimes Decree, which is an indictable offence triable summarily. Accordingly, the accused has offered with an election and has elected to be tried by the magistrate's court. The matter was called in the Nausori Magistrate's Court back on the 11th of August 2015 and since then trial has been postponed on few occasions due to various reasons (once due to the lack of instructions from the accused). When the matter was mentioned on the 30th of November 2017, the matter was fixed for trial without an adjournment for the 28th of February, 2018.

On the 28th of February, when the matter was taken up for trial before the learned trial magistrate (for the first time), in the morning, the accused was absent. The counsel for the accused has apparently sought time to obtain instructions from the accused and the trial was adjourned till 2.00pm on the same day. When the matter was taken up for trial at 2.00pm, the accused has still been absent and the defense counsel has informed the court that he could not contact the accused, hence sought a further adjournment. The learned trial magistrate has hesitantly granted an adjournment till the 1st of March 2018.

When this was taken up for trial on the 1st of March 2018, the accused has still been absent. The court, being satisfied that there is no excusable reason for the accused's absence, taken this for trial on that day and concluded. The judgment was delivered in the presence of the accused on the 5th of March, whereby the accused was convicted and accordingly was sentenced on the 6th of March 2018. Thereby the learned trial magistrate has imposed on the accused, an imprisonment term of 7 years with a non-parole term of 6 years.

9th Ground (3rd Ground against the Sentence)
The appellant appeals against sentence alleging it being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

The learned trial magistrate has identified the proper tariff to be between 2 to 8 years as for the offence and selected the proper category to be the Category 2 as for the guidelines set out in the case of **State v Laca**[2012] FJHC 1414. The general sentence for a category 2 offence under section 210 of the Crimes Decree is 5 to 6 years, as set out in the case of **State v Naua** [2015] FJHC 105. It should be remembered that this is not a general case; the victim is a disabled girl, in a wheelchair.

In Koroivuki v State [2013] FJCA 15; AAU0018.2010 (5 March 2013), his Lordship Justice Daniel Gounder states;

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final*

term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range".

Therefore, though the recommended tariff is in between 5 to 6 years, the learned magistrate has reasoned out why the accused should be imposed with a sentence outside the tariff in imposing a 7year imprisonment, and in my opinion, it is justified.

10th Ground (4th ground against the Sentence)
The appellant alleges that 6 year non-parole term of imprisonment is too close to the imposed head sentence of 7 years imprisonment.

Section 18 of the Sentencing and Penalties Decree of 2009 states;
18. — *(1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.*

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

Therefore, though the legal requirement is the gap to be at least of 6 months, the imposed sentence carries a gap of 1 year. The appellant alleges that it prevents his rehabilitation. I must confess that it is difficult for this court to comprehend the allegation. In any event I do not see any prejudice being caused to the appellant by this legal term of imprisonment. Though this court could consider, in case of any such prejudice being caused, either to enhance the head sentence or to remove the non-parole period to prevent such prejudice being caused, the circumstances of this case do not warrant such measures. Hence, I do not see any reason to intervene with the sentence of the learned magistrate.

Decision

In the light of the above, I find merit in none of the urged grounds of appeal.

Accordingly, I make the following orders.

1. The appeal is dismissed as it is devoid of any merit.
2. The judgement and sentence imposed by the learned magistrate is affirmed.

Chamath S. Morais
JUDGE

At Suva

14th of February, 2019

Solicitors: ***Appellant in Person***

Office of the Director of Public Prosecutions, Suva, for the Respondent