IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No. CAV0019 of 2019
[From Criminal Appeal No. AAU0050 of 2014 and High Court of Fiji Action No. HAC 399 of 2012]

BETWEEN : **WASEROMA KOROI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyasath Gerard Dep, Judge of the Supreme Court

Counsel : **The Petitioner in Person**
: **Ms. S. Tivao for the Respondent**

Date of Hearing : **21 April 2022**

Date of Judgment : **07 June 2022**

JUDGMENT

Marsoof, J:

Introduction

[1] The prohibition of incest or consanguineous sexual relations, such as between a father and his daughter, a mother and her son or between a brother and a sister, is deeply imprinted in legal, religious and moral traditions and is stigmatized as a deviation that leads to grave

sanctions. However, attitudes towards incest are culturally relative, and may differ from one society to another and one era to another.

[2] In Fiji, incest is prohibited by law and section 223(1) of the Crimes Act, 2009 which enacts that "any person who has carnal knowledge of another person, who is to his or her knowledge in a relationship to him or her of parent, grandparent, child, sister or brother, is guilty of an indictable offence." Section 223(2) provides that "*it is immaterial that the carnal knowledge was had with the consent of the other person*" and section 223(5) clarifies that "brother" and "sister" respectively include half-brother and half-sister. The penalty for incest is imprisonment for 20 years, but if it is alleged in the information or charge and proved that the person is under the age of 13 years, the offender shall be liable to imprisonment for life

[3] Rape is also prohibited by law in Fiji, and section 207(1) of the Crimes Act, 2009 provides and "any person who rapes another person commits an indictable offence." The prescribed penalty for rape is imprisonment for life. Section 207(2) provides that a person rapes another person if-

> (a) the person has carnal knowledge with or of the other person *without the other person's consent*; or
>
> (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis *without the other person's consent*; or
>
> (c) the person penetrates the mouth of the other person to any extent with the person's penis *without the other person's consent*.

[4] It will be seen that an important point of contrast between rape and incest is that while the absence of consent is an important element of the offence of rape, consent or the absence of it, is immaterial for the offence of incest. In other words, while a person who had carnal knowledge of another person who is in a relationship to him or her as a parent, grandparent, child, sister or brother can be liable for incest *even if there was consent*, in a case of rape where the absence of consent is not established by the prosecution beyond reasonable doubt, there can be no conviction.

Background Facts

[5] The Petitioner in this case, Waseroma Koroi (hereinafter sometimes referred to as Koroi), was indicted with two counts of having unlawful carnal knowledge of Niumai Wati without her consent, the first alleged to have taken place between the 1st day and the 31st day of January 2010, and the second alleged to have taken place between the 1st day and [sic] the 31st day of February 2010 at Nayavu Village, Tailevu contrary to sections 207(1) and sections 207(2)(a) of the Crimes Act.

[6] Koroi was also indicted with a third count of having unlawful carnal knowledge of Niumai Wati, who was to his knowledge related to him as his daughter between the 1st day of October and [sic] the 31st day of November 2011 at Nayavu Village, Tailevu, contrary to section 223(1) of the Crimes Act.

[7] After trial at the High Court of Fiji at Suva, the assessors were unanimous in their opinion that Koroi was not guilty on the two counts of rape but was guilty of the offence of incest, with which opinions the trial judge [Madigan J.] agreed in his Judgement of 19th March 2014 and convicted Koroi for incest and sentenced him to thirteen years' imprisonment with a non-parole period of eleven years.

[8] Koroi sought leave to appeal to the Court of Appeal urging two grounds of appeal against his conviction and one grounds of appeal against the sentence. In dismissing the appeal and affirming the conviction and sentence imposed by the High Court, the Court of Appeal [Calanchini P., Gamalath JA and Bandara JA] in a unanimous Judgment dated 1st June 2018 wherein it was pointed out at paragraph 25 thereof that the reason for the assessors to find the accused Koroi not guilty of rape charges and finding him guilty of the charge of incest is that they entertained doubt as to whether there was consent on the part of the complainant, and that when "*sexual intercourse is proved beyond reasonable doubt between persons of incestuous relationship, consent becomes immaterial.*"

[9] Koroi invoked the appellate jurisdiction of this Court by his undated letter addressed to this Court and date stamped by the Registry of the Court of Appeal on 28th June 2018 (hereinafter referred to as the "letter of 28th June 2018") within the appealable period specified in Rule 5(a) of the said Supreme Court Rules of 2016. Though the application was not by way of petition or supported by affidavit as required by Rules 4(1) and 4(3) of the said Rules, at the hearing of this application, learned Counsel for the State Ms. Tivao did not take any objection to the application being considered by Court despite the non-compliance with the said Rules.

Grounds of Appeal and Written Submissions lodged in Court

[10] Koroi's application seeking leave to appeal by way of his letter of 28th June 2018 was founded on two grounds of appeal against the conviction and none against the sentence, and thereafter through his undated written submissions received in the Registry of this Court on 21st October 2020 Koroi sought to add to his grounds of appeal against conviction without leave of Court. On the same date another document was lodged in the Registry of this Court titled "Petitioner's Sentence Submission" for the first time raising a ground of appeal against sentence with some elaborate submissions against sentence.

[11] The Respondent filed its written submissions on 1st December 2020, and by two sets of submissions that did not bear any date but were received in the Registry of this Court on 3rd March 2021 entitled respectively "In Reply to State Submission" and "the Submission of the Appellant", Koroi made extensive submissions in support of the grounds of appeal raised by him.

[12] It is convenient to set out below, albeit with some necessary paraphrasing, *the grounds of appeal* urged by Koroi in his letter of 28th June 2018 and his undated written submissions received in the Registry of this Court on 21st October 2020, which are dealt with in the "Submission of the Appellant" received in the Registry of this Court on 3rd March 2021 on which Koroi relied at the hearing of this application for leave to appeal:

(1) The learned Judges of the Court of Appeal erred in law when they did not consider that the medical condition of the complainant as a significant factor that can prejudice the defence if evaluated as insignificant and irrelevant.

(2) The learned judge of the Court of Appeal erred in law when they did not consider that a medical practitioner's presence and evidence at trial would have been of great value to the defence.

(3) The Court of Appeal failed to consider the evidence of the Medical Report in its totality relating to pregnancy claim and sickness of the complainant being HIV positive, Hepatitis B+, VDRL and such anomaly and absence of disclosure prejudiced the case of the defence because it is a sexually transmitted disease.

(4) The courts below did not consider in principle that the Petitioner was a man of integrity and that his answers to the State's question was not interpreted in the right context reflecting his meaning to his answers.

(5) The courts below also did not consider that the mental state of the alleged victim was the reason she was being taken advantage of by Koini to parrot what she alleges from her ulterior motive.

(6) The courts below erred in law and fact in not disclosing that HIV positive, Hepatitis B+, VDRL are sexually transmitted diseases and that the only way it can be avoided is to wear condoms but then that would mean the claim to pregnancy would be false and therefore it was dangerous to convict the appellant on incest.

(7) The sentence is harsh and excessive and the aggravation factor contravenes section 12 of the Sentencing and Penalties Decree."

Analysis of Grounds on which Leave to Appeal is Sought

[13] It is convenient to deal with grounds (1), (2), and (5) together as they are inextricably connected and are substantively the same as ground (1) urged by Koroi in the Court of Appeal and considered by that Court in its impugned judgment, namely that *"The learned Trial Judge erred in law and fact by failing to acquit the Appellant on all charges even though the Learned Trial opined at paragraph 3 of his Judgment that the complainant was*

mentally and emotionally handicapped and that he perceived that she was coached to a certain degree."

[14] I have taken the liberty in paragraph [12] of this judgment of trying to make sense of ground (2) urged by Koroi by removing the obscuring effect of the double negative found in the said ground as originally worded by Koroi in his letter of 28th June 2018 which read as follows:-

> "(2) The learned judge of the Court of Appeal erred in law when they *did not* consider that a medical practitioner's presence and evidence at trial *would not* be a great value to the defence." (*emphasis added*)

[15] The said grounds (1), (2), and (5) are related to the alleged medical condition or "*sickness*" of the complainant Niumai Wati, in regard to which no medical practitioner had testified at the trial and the only document found in the Record of the High Court among the disclosures is a Medical Examination Form filled and signed by the doctor who examined Niumai on 17th May 2012. The said document was not marked in evidence by the prosecution or the defence.

[16] It is noteworthy that the competency of Niumai to testify in court does not appear to have been an issue at the trial, nor was it raised in the course of the cross-examination of Niumai or the other prosecution witness Koini Lagi Nainima when they testified in the High Court, but was adverted to by Koroi for the first time when in the course of his examination-in-chief he stated that Niumai was not schooling because "she had a sickness" and she would "stare at the sky for 30 minutes". Koroi denied having sex with his daughter Niumai and stated that "Koini forced her to complain" because "we are not in a good relationship".

[17] It is significant to note that in the course of his cross-examination, Koroi responded to the questions put to him by the learned Counsel for the prosecution in the following manner:

Q - You surprised she (Niumai) reported to the Police?

A - Yes.

Q - Because she would not have mental capacity to report?

A - Because in her state, can't even complain.

Q - Because of you knowing her condition, you took advantage of her having sex, thinking she would never report?

A - I did not rape her. I gave her good care and supported her in whatever she needed and protect her.

[18] In paragraph 4.4 and 4.5 of the undated written submissions filed by Koroi in this Court and received in the Registry of this Court on 3rd March 2021, Koroi has sought to explain that his testimony was "not taken in the right context" whereby he was thinking as Niumai's father and wanted to defend her by saying that "her mental capacity makes it impossible to complain" and that it was not the case that "because she was sick mentally I was having sex with her, knowing that she won't complain."

[19] In my view, the Court of Appeal, in paragraphs 10 to 23 of its impugned judgment has considered the evidence in its totality, and had rightly concluded in paragraph 21 that in the instant case "there was no evidence to indicate that the witness was mentally ill *to a degree which prevented her from understanding the nature of an oath and giving rational testimony.*" The Court Appeal was also not prepared to believe Koroi's story that Niumai was coached to tell a falsehood by Koini due to some preexisting animosity as suggested by Koroi, and in paragraph 28 of its judgment it observed that "it is difficult to believe that the complainant, who was so well taken good care of, supported in whatever she needed, and protected by the appellant, would proceed to make a false complaint of this magnitude against him, on being forced by Koini, over an incident which in no way concerned the complainant."

[20] Koroi has been found guilty after trial of the offence of incest, and in paragraph 22 of its judgment, the Court of Appeal has rightly observed that the unanimous opinion of the assessors is indicative that they did not have any doubt in their minds when finding Koroi guilty of count 3 for incest while finding him not guilty on the first two counts of rape, which opinion was acted upon by the trial judge in convicting Koroi on the count of incest.

[21] I am of the opinion that grounds(1), (2), and (5) do not raise a question of general legal importance, a substantial question of principle affecting the administration of criminal justice or in any other way satisfy the stringent criteria set out in section 7(2) of the Supreme Court Act, 1998 for the grant of leave to appeal to this Court.

[22] Considering grounds (3) and (6) on which Korov seeks leave to appeal against the impugned judgment on the basis that the courts below failed to consider the evidence of the Medical Report in its totality relating to pregnancy claim and sickness of the complainant being HIV positive, Hepatitis B+, VDRL and that such anomaly and absence of disclosure prejudiced the case of the defence because it is a sexually transmitted disease, it is relevant to note that through the Medical Examination Form referred to in paragraph [15] of this judgment was disclosed by the prosecution, the defence had failed to mark it in evidence by calling the doctor who examined Niumai to testify at the trial, had it been material for the defence case.

[23] It is evident from the said Medical Examination Form that in the backdrop of Niumai's allegation of "sexual molestation by her father"(HCR page 63) the doctor who examined her has noted that Niumai alleged that she "has missed her menses" (HCR page 65 D10), and that she was "reserved and withdrawn"(HCR page 65 D11). It also appears that after the ultrasound scanning of Niumai, the doctor has observed in the said Form that "ultrasound shows that there is no pregnancy as yet" (HCR page 65 D14) and reveals an "average empty uterus"(HCR page 66 D16), and the doctor had ordered further serological investigations for "HIV, HepB, VDRL" and follow up (HCR page 66 D15), but no evidence had been led at the trial of any test results.

[24] It is abundantly clear that grounds (3) and (6) do not raise a question of general legal importance, a substantial question of principle affecting the administration of criminal justice or in any other way satisfy the stringent criteria set out in section 7(2) of the Supreme Court Act, 1998 for the grant of leave to appeal to this Court

[25] Turing to the only other ground urged by Koroi against his conviction, namely ground (4) that "the courts below did not consider in principle that the Petitioner was a man of integrity

and that his answers to the States question was not interpreted in the right context reflecting his meaning to his answers", it is observed that in paragraphs 7.1 to 7.6 of his written submissions Koroi has raised the question of his integrity as the father of the handicapped and mentally retarded daughter whom he looked after well and must be presumed innocent until his guilt is established beyond reasonable doubt. In response, the State has submitted that integrity was a trial issue, and on the basis of the evidence led at the trial, he has been found guilty of incest by the assessors, which finding has been confirmed by the trial judge.

[26] I am of the opinion that ground (4) urged by Koroi does not involve a question of general legal importance, a substantial question of principle affecting the administration of criminal justice or in any other way satisfy the stringent criteria set out in section 7(2) of the Supreme Court Act, 1998 for the grant of leave to appeal to this Court.

[27] The only other ground raised by Koroi is ground (7) against the sentence, wherein Koroi seeks leave to appeal on the basis that the "sentence is harsh and excessive and the aggravation factor contravenes section 12 of the Sentencing and Penalties Decree."

[28] The gravamen of Koroi's submission in this regard is that he has been sentenced to a harsh and severe sentence without the sanction of section 12 of the Sentencing and Penalties Act, 2009, but it is clear from the order on the Sentence dated 20th March 2014 that in fixing a sentence of thirteen years' imprisonment with a non-parole period of eleven years, the trial judge had considered the fact that "Incest is a crime against the order of nature and an attack on the fabric of the nuclear family."

[29] The judge also considered that the crime in this case is aggravated by the fact that "the victim daughter was and still is mentally and emotionally handicapped and aggravated by the fact that she has had to move away from the family house and her siblings."

[30] I am of the opinion that ground (7) raised by Koroi for seeking leave to appeal too does not satisfy threshold criteria imposed by section 7(2) of the Supreme Court for the grant of leave to appeal.

Conclusions

[31] In all the circumstances of this case, there is no basis for the grant of leave to appeal against the impugned judgment of the Court of Appeal, and for the aforesaid reasons, leave to appeal is refused and the petition is dismissed.

Aluwihare, J:

[32] I have had the advantage of reading the judgement of Marsoof J in draft. I agree with the reasoning and conclusions of the judgement and the orders proposed by Marsoof J.

Dep, J:

[33] I have read in draft the judgment of Marsoof J and I agree with his reasoning and his conclusions.

The Orders of the Court are:

(1) Leave to appeal to the Supreme Court is refused; and

(2) The petition is dismissed.

.....

Hon. Justice Saleem Marsoof
Judge of the Supreme Court

.....

Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court

.....

Hon. Mr. Justice Priyasath Gerard Dep
Judge of the Supreme Court

Solicitors:

Petitioner in person

Office for the Director of Public Prosecutions for the Respondent