

**IN THE COURT OF APPEAL
AT SUVA**

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0091 OF 2011

BETWEEN : **PENI LOTAWA**

APPLICANT

AND : **THE STATE**

RESPONDENT

COUNSEL : **Mr. A. Rayawa for Applicant**

Ms M. Fong for Respondent

Date of Hearing : **02 July 2013**

Date of Ruling : **05 July 2013**

RULING

- [1] Following a trial in the High Court at Lautoka the applicant was convicted of rape of an Australian female tourist and was sentenced to 6 years' imprisonment. At trial, the complainant's evidence was heard via Skype from Australia.

[2] After filing a timely Notice of Appeal, the applicant engaged counsel to represent him in this appeal against conviction. Since then, counsel for the applicant has filed the following grounds of appeal:

- 1) That the Learned Trial Judge erred in law and in fact in allowing Dock Identification to be made by the Complainant witness, against the Appellant, through the Skype network, when no evidence of Police Identification Parade or evidence of prior knowledge was led as foundation.
- 2) That the Learned Trial Judge erred in law and in fact in failing to address the substantial inconsistencies in the evidence of the complainant witness in the Summing Up.
- 3) That the Learned Trial Judge erred in law and in fact in failing to give the Appellant sufficient time to engage a Legal Counsel of his own choice or to engage Legal Aid Assistance and has resulted in the trial being conducted by an unrepresented Appellant leading to an apprehension of unfairness and denial of natural justice.

[3] Since the grounds of appeal raise questions of mix law and fact, the applicant is required to seek leave of the court to appeal on these grounds (section 21 (1) (b) of the Court of Appeal Act).

[4] At the hearing of leave application, counsel for the applicant submitted that dock identification made via Skype by the complainant in Australia was objectionable, and since the applicant was unrepresented at the trial, he was handicapped in taking lawful objections to the identification evidence led by the prosecution.

Counsel further submitted that in absence of police identification parade, first time dock identification via Skype was suggestive and prejudicial to the applicant.

- [5] The use of video conferencing, Skype and other technologies in judicial proceedings is now common in Fiji. As a matter of fact, Fiji's judiciary now has a technology court. Most of the procedures regarding the use of technologies in judicial proceedings have been developed by the judges rather than by legislation. However, the Criminal Procedure Decree 2009 contains procedures for the use of video or other secure audio visual electronic facilities to hear evidence of a vulnerable complainant or witness.
- [6] Section 295 of the Criminal Procedure Decree provides:
- (1) Before the commencement of any trial, a prosecutor may apply to a judge or magistrate for directions as to the procedures by which the evidence of a vulnerable complainant or witness is to be given at the trial.
 - (2) The judge or magistrate shall hear and determine an application made under sub-section (1) in chambers, and shall give each party an opportunity to be heard in respect of the application.
 - (3) The judge or magistrate may call for and receive any reports from any persons whom the judge or magistrate considers to be qualified to advise on the effect on the complainant or the vulnerable witness of giving evidence in person in the ordinary way or in any particular mode provided for in section 296.
 - (4) In considering what directions (if any) to give under section 296 the judge or magistrate shall have regard to the need to minimise stress on the complainant or the vulnerable witness,

while at the same time ensuring a fair trial for the accused.

(5) A judge or magistrate may hear and consider an application by either party made during the course of any trial for an order prescribing the procedures by which the evidence of a vulnerable complainant or witness is to be given in the trial.

[7] Section 296 of the Criminal Procedure Decree sets out the modes in which evidence may be given by a vulnerable complainant or witness. The relevant provision that applied to this case reads:

(1) On an application under section 295, the judge or magistrate may give any of the following directions in respect of the mode in which the evidence of a vulnerable complainant or witness is to be given at the trial —

(b) where the judge or magistrate is satisfied that the necessary facilities and equipment are available, a direction that the complainant or vulnerable witness shall give his or her evidence outside the courtroom but within a Court precinct, or from some other suitable location, the evidence being transmitted to the courtroom by means of closed circuit television or such similar quality secure audio visual electronic means;

[8] Two issues arise from the above direction. The first issue is whether the phrase “from some other suitable location” is broad enough to include foreign location like Australia. The second issue is whether the Skype technology is a “secured audio visual electronic facility”.

[9] Without the court record, it is unclear whether there was a compliance with section 295 and a direction given under section 296.

What is apparent from the summing-up is that the applicant was convicted solely on the evidence of the complainant. Thus, the credibility of the complainant was a matter that required careful scrutiny by the assessors and the trial judge. How the assessors and the trial judge assessed the credibility without the benefit of seeing her in person and observing her demeanour via Skype is not clear at this stage. Furthermore, how effective was the cross-examination of the complainant via Skype by an unrepresented accused? Should the trial judge have allowed Skype dock identification in the circumstances of this case? Should the trial judge have given appropriate directions on the use of Skype to hear the evidence of the complainant and more specifically on Skype dock identification of the applicant for the first time at trial? All these issues are arguable under grounds one and three.

[10] As far as the inconsistency in the complainant's evidence was concerned, the learned trial judge highlighted the inconsistency in his summing-up and gave careful directions to the assessors as to how they can use the complainant's prior inconsistent statement to assess her credibility at paragraphs [33] and [34]:

You must consider that the evidence of the alleged victim is crucial to this case. In assessing her evidence, you must consider the serious contradiction between her evidence in court that she was raped inside the mangroves and the statement she made to police soon after the incident that she was penetrated thrice in the sea. The statement to police does not constitute evidence. But, the contradiction shown to be in existence, which was not disputed by the prosecution, should be very seriously considered by you to decide whether the incident of rape did occur in the way she narrates beyond reasonable

doubt. If you decide that her evidence should be rejected in view of this contradiction you are free to do so in which case you should form the opinion of 'not guilty'.

If you choose to accept this evidence despite this contradiction, you must then consider whether her narration could be supported by attendant circumstances. Those are, for example, whether she had sustained any injuries, bruises, scratches etc. that could have been expected as a result of the continued struggle inside the mangroves; whether she had produced any mud-stained swim suit that she claimed to have worn.

[11] On grounds one and three, the issues are arguable. Ground two is not arguable.

[12] Leave is granted to appeal against conviction on grounds one and three only.

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DANIEL GOUNDAR
JUDGE

Solicitors:

Rayawa Law for Applicant
Office of the Director of Public Prosecutions for Respondent.