

IN THE COURT OF APPEAL  
[On appeal from the High Court]

Criminal Appeal No. AAU0126 of 2013  
[High Court Case No. HAC 97 of 2013L]

BETWEEN : VIJAY KUMAR  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Goundar JA

Counsel : Appellant in Person  
Mr. V. Perera for the Respondent

Date of Hearing : 4 August 2014

Date of Ruling : 19 September 2014

RULING

- [1] Following a trial in the High Court at Lautoka, the appellant was convicted of digital rape and sentenced to 11 years and 5 months imprisonment. The sentence was imposed on 26 November 2013. On 6 December 2013, the appellant lodged a timely Notice of Appeal against his conviction and sentence. The Notice was filed by the appellant in person. Subsequently he was granted legal aid and counsel from the Legal Aid Commission appeared for him in the earlier hearings. On 25 July 2014, the appellant informed the Court that he had withdrawn his instructions from his legal aid counsel and that he had decided to represent himself. Leave was granted to legal aid counsel to withdraw from this appeal.
- [2] On 4 August 2014, the appellant filed his written submissions to seek leave to appeal his conviction and sentence. A total of twelve grounds have been advanced by the appellant.

Some grounds lack detail and are vague. This is to be expected when an appellant elects to represent himself.

- [3] Ground 1 alleges that the learned trial judge failed to give a balanced and adequate summing up. The appellant says he will provide particulars upon receipt of the Court record.
- [4] When a summing up is being questioned for being imbalanced and inadequate, the appellate court looks at the entire summing up and not just isolated passages. The appellant has been given a copy of the summing up after the conclusion of the trial. He does not require the court record to point out the inadequacies in the summing up, if there is any. At trial, the appellant elected to give evidence. The summing up contains a summary of the appellant's evidence and the defence case was fairly put to the assessors.
- [5] Ground 2 alleges that the learned trial judge erred in not having a DNA test of the semen found in the victim's underwear. Ground 6 alleges that the prosecution failed to tender the victim's underwear which contained semen.
- [6] The prosecution case was that the appellant digitally penetrated the victim's vagina using his fingers. The victim gave evidence of digital penetration and not penile penetration. There was no evidence led at the trial that semen was found in the victim's underwear after the alleged assault. These grounds are misconceived.
- [7] Grounds 3 and 10 contend that the trial judge was wrong to stop the appellant from reading his statement when he elected to give evidence.
- [8] When an accused elects to give evidence, his or her evidence must be led in the same manner like any other witnesses. An accused is not entitled to read a pre-written statement in examination in chief. A pre-written statement is a self serving statement and has no evidential value. Under the rules of evidence, such statements are considered prior consistent statements and are inadmissible. There cannot be an arguable complaint arising

from the trial judge's decision to stop the appellant from reading his pre-written statement in the examination in chief.

- [9] Ground 4 deals with the evidence of recent complaint. However the error alleged in relation to the evidence of recent complaint is not clear.
- [10] The victim was the appellant's 8-year old granddaughter. The alleged incident happened at night when the victim was sleeping with the appellant on the same mattress. The following morning the victim informed her grandmother, the appellant's wife that the appellant had put his finger into her vagina.
- [11] In sexual cases, evidence of recent complaint is admissible as an exception to the rule against previous consistent statement only as evidence of the consistency of the complainant's conduct. In *R v Islam* [1998] 1 Cr. App. R 22 and *R v NK* [1999] Crim. LR 980 the English Court of Appeal stated the need to direct the jury on the evidential significance of a complaint in a sexual case. In the present case, the learned trial judge gave no directions on the significance of the recent complaint evidence. Whether the lack of direction on the significance of the recent complaint caused injustice to the appellant is a matter for the Full Court to consider. As far as this application is concerned, the issue is arguable.
- [12] Ground 11 contends that the learned trial judge influenced the two women assessors to give a guilty opinion against the appellant. There is no evidence the trial judge acted outside his judicial duty to influence the assessors. After the closing addresses, the learned trial judge summed up the case to them. Two assessors expressed guilty opinions while one assessor expressed a not guilty opinion. The learned trial judge accepted the majority opinions and convicted the appellant. This ground is not arguable.
- [13] Grounds 5, 7, 8 and 9 complain about the sentence. The tariff for rape of a child has been recently confirmed by the Supreme Court (*Anand Abhay Raj v The State*, unreported Criminal Appeal No. CAV0003 of 2014 (20 August 2014)). The tariff is 10 to 16 years

imprisonment. The appellant received a sentence of 12 years imprisonment for digitally raping his 8-year old granddaughter. Apart from his previous good character, there were no other compelling factors to mitigate the offence.

[14] After considering the comparable cases, the learned trial judge sentenced the appellant using the following process:

*"Considering the above, I commence your sentence at 11 years imprisonment for the charge of Rape.*

***Aggravating factors;***

- (a) *The victim was of a younger and tender age,*
- (b) *You had made the victim sexually active at a young age,*
- (c) *You had traumatized the life of the victim,*
- (d) *You failed to show any remorse for your actions and no repentance,*
- (e) *You breached the trust bestowed on you by the victim.*

*Considering all, I increase your sentence by 2 years now the sentence is 13 years imprisonment.*

***Mitigating circumstances***

- (a) *Family dependent on you and you have a 5 year old daughter who is asthmatic,*
- (b) *You are 57 years old and diabetic.*

*Considering all, I reduce 1 year from your sentence, now your sentence is 12 years imprisonment.*

*You were in remand from 9.4.2013 for a period of 7 months. I deduct that period from above sentence. Now your sentence is 11 years and 5 months.*

*Considering Section 18(1) of the Sentencing and Penalties Decree, I impose 10 years as non parole period."*

- [15] The aggravating factors in this case were the vulnerability of the victim due to her tender age and the serious breach of trust by the appellant, the victim being his granddaughter. If proper consideration would have been given to these factors, then an increase of 2 years would have been justified.
- [16] The age, medical condition and family circumstances of the appellant were not mitigating factors. The only compelling mitigating factor in this case was that the appellant was a first time offender. However, this factor was not considered by the learned trial judge. Whether proper consideration of the appellant's previous good character would have made a difference to the sentence is a matter for the Full Court.
- [17] For the purpose of this application, the point is arguable.

### Result

- [18] Leave to appeal against conviction is granted on the issue of lack of directions on the significance of the recent complaint evidence.
- [19] Leave to appeal against sentence is granted on the issue of lack of consideration of the appellant's previous good character.



At Suva  
19 September 2014

### Solicitors:

Appellant in person  
Office of the Director of Public Prosecutions for State

  
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Hon. Justice D. Goundar  
**JUSTICE OF APPEAL**