**IN THE COURT OF APPEAL, FIJI**
**[On Appeal from the High Court of Fiji]**

**CRIMINAL APPEAL NO:AAU0024 of 2016**
**[High Court Case No: HAC90 of 2014]**

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| **BETWEEN** | **:** | **AVITESH RAM** |
| | | ***Appellant*** |
| **AND** | **:** | **THE STATE** |
| | | ***Respondent*** |
| **Before** | **:** | **Hon. Mr. Justice Daniel Goundar** |
| **Counsel** | **:** | **Mr. M. Yunus for the Appellant**<br>**Mr. M. Korovou for the Respondent** |
| **Date of Hearing** | **:** | **19 January 2017** |
| **Date of Ruling** | **:** | **24 January 2017** |

# RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of one count of indecent assault and one count of rape. The offences being part of one transaction, the appellant was sentenced to a total term of 10 years and 1 month imprisonment with a non-parole period of 7 years. The appellant seeks leave to appeal against both conviction and sentence pursuant to section 21(1) (b) and (c) of the Court of Appeal Act, Cap 12. The test for leave to appeal against conviction is whether the appeal is arguable (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013). The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

[2] The alleged incident occurred on 15 March 2013 at the appellant's residence. The residence belonged to the appellant's mother. The appellant who was 27 years old was residing with his mother. The complainant was 16 years old at the time. At trial, it was an agreed fact that the complainant was residing at the appellant's residence when the allegation arose. The complainant's evidence was that she was sleeping in her bedroom when the appellant entered the room and sexually assaulted her by touching her breasts, genitals and poking his fingers into her vagina. She resisted and screamed for help. At one point, the appellant's mother came, swore at the complainant and pushed the appellant back on to the complainant. The next morning, the complainant reported the assault to her grandmother and mother. The appellant gave evidence. He denied the allegations. The assessors unanimously found the appellant guilty of indecent assault but not guilty of rape. The trial judge convicted the appellant of both, indecent assault and rape.

[3] The grounds of appeal are:

Ground 1 - The Learned Trial Judge erred in law and in fact by convicting the Appellant for second count of Rape, in the absence of any medical evidence, contravening his right to a fair trial enshrined in the Constitution.

Ground 2 – The Learned Trial Judge erred in law and in fact when he did not properly direct the assessors on how to approach the previous inconsistent statements of some witnesses.

Ground 3 – The Learned Trial Judge erred in law by failing to order a second psychiatric report to determine the mental status of the Appellant at the time of the trial.

Ground 4 – The Learned Trial Judge erred in law by overturning the unanimous verdict of the assessors in respect of the second count (Rape).

Ground 5 – The Learned Trial Judge erred in law and in fact when he overturned the verdict of the assessors in respect of the second count (Rape) without giving cogent reasons for the decision.

Ground 6 – The sentence is harsh and excessive in all the circumstances of the matter.

[4] **Medical evidence**

At trial, the prosecution did not lead any medical evidence. Mr Yunus cites no authority to support his argument that the prosecution is required to adduce medical evidence to sustain a conviction for rape. The appellant was represented by counsel at the trial. I have been informed that the complainant's medical report was disclosed to the appellant. At trial, the defence chose not to rely on the medical evidence. He is barred from complaining now on appeal. Ground one is unarguable.

[5] **Previous inconsistent statements**

Mr Yunus's contention under this ground is that the trial judge should have directed on the previous inconsistent statements of the witnesses in accordance with the principles laid down by the Supreme Court in *Swadesh Kumar Singh v State* [2006] FJSC15. The case of *Swadesh Singh* dealt with the principles when a witness had made previous sworn inconsistent statements. Those principles did not apply to the present case because the alleged inconsistencies did not arise from previous sworn statements. The trial judge's directions on previous inconsistent statement contained at paragraph 55 of the summing-up are adequate and correct. In any event, in his judgment, the trial judge did not find that the inconsistencies raised by the defence affected the credibility of the witnesses. This ground is unarguable.

[6] **Unsound mind**

Before the trial commenced, the trial judge had obtained a psychiatric assessment report on the appellant. The report stated that the appellant was not suffering from any mental illness at the time of the alleged offences. Mr Yunus's contention is that the trial judge should have obtained a further psychiatric assessment report when the appellant behaved in an abnormal manner when giving evidence at the trial. Whether or not to obtain a psychiatric assessment report on an accused is a matter of discretion

for the trial judge. The trial judge may obtain a psychiatric assessment report if he or she has reason to believe that the accused may be of unsound mind. In the present case, the appellant may have behaved in an abnormal manner when giving evidence, but there was no reason for the trial judge to believe that the appellant was of unsound mind. The appellant gave rational evidence and even his trial counsel made no complaint to the trial judge that the appellant was incapable of giving evidence due to unsound mind. This ground is unarguable.

[7] **Unanimous not guilty opinion**

This ground raises a question of law alone. Leave is not required. The ground involves construction of section 237(4) of the Criminal Procedure Decree 2009. Section 237(4) states that when the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion,...". Mr Yunus submits that since section 237(4) refers to only the majority opinion, there is no power to disagree with the unanimous opinion of the assessors, which in the present case was not guilty of rape. This submission flies in the face of the clear power given by section 237(2) that states "the judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors". Furthermore, there is a long list of case law on the trial judge's power to give judgment that is not in conformity with the majority or unanimous opinions of the assessors. In my judgment, the question of law posed cannot possibly succeed and is frivolous.

[8] **Cogent reasons**

Mr Yunus submits that the trial judge's reasons for disagreeing with the unanimous not guilty opinion of the assessors on the charge of rape are not cogent. The trial judge gave detailed written reasons for not agreeing with the opinions of the assessors. He analyzed all the evidence and found the complainant to be a truthful witness. He believed the complainant when she said the appellant touched her breasts and poked his fingers into her vagina. These findings were open on the evidence. This ground is unarguable.

[9] **Sentence**

The sentence of 10 years' and 1 month imprisonment for rape of a juvenile girl in a contested case is on the lower end of the tariff for rape (*Raj v State* unreported CAV003.2014; 20 August 2014). In my judgment, the trial judge's assessment of the aggravating and mitigating factors was correct. I am not convinced that there is an arguable error in the exercise of the sentencing discretion.

**Result**

[10] Leave refused.

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Hon. Mr. Justice Daniel Goundar
**JUSTICE OF APPEAL**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State