

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

CRIMINAL APPEAL NO: AAU0067 of 2015
[High Court Case No: HAC122 of 2013]

BETWEEN : SEVANAIA SIGABANA
Appellant

AND : THE STATE
Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr S Waqanaibete for the Appellant
Mr M Korovou for the Respondent

Date of Hearing : 26 June 2017

Date of Ruling : 3 July 2017

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of one count each of rape and indecent assault and sentenced to 10 years' imprisonment with a non-parole period of 8 years. This is an application for leave to appeal against conviction and sentence. However, at the hearing of this application, the appeal against sentence was abandoned.

[2] The facts were that on 7 April 2013 the complainant woke up in the night as she felt a hand inside her pants. She saw the appellant, her step-father, standing beside her bed and he inserted his finger into her vagina (rape charge). Between 28 April 2013 and 18 May 2013, the appellant put his tongue in the complainant's mouth without her consent (indecent assault charge).

[4] Section 26 of the Court of Appeal Act prescribes for a 30-day appeal period from the date of the decision appealed against. The appellant was sentenced on 2 June 2015. The initial notice of appeal was filed in person by the appellant on 19 June 2015. The appeal is timely. The question is whether the grounds of appeal are arguable?

[5] The grounds of appeal are:

(1) THAT the learned Trial Judge erred in law and in fact when he had misdirected the assessors on the issue of recent complaint in light of the fact that the circumstances of the case does not contain a recent complaint, thereby causing prejudice to the appellant.

(2) THAT the learned Trial Judge had erred in law and in fact when he misdirected the assessors by telling them to consider the evidence of the appellant looking into the washroom whilst the complainant was using the washroom when considering the charge of indecent assault.

(3) THAT the learned Trial Judge had erred in fact when he misstated the evidence for count 2 that the appellant had admitted to 'fondling the witness', thereby causing prejudice to the appellant.

Recent complaint

[6] In the present case, the complaint evidence was not led by the prosecution but by the defence when they called the complainant's mother. The complainant's mother was called as a defence witness. Her evidence was that that the complainant did not report the sexual abuse immediately but after three days. The learned trial judge in paragraph 30(d) of the summing up told the assessors that a recent complaint should not be considered corroboration of the complainant's evidence but it merely shows consistency in the evidence of the complainant, which may enhance her credibility.

[7] Counsel for the appellant submits that since the prosecution did not rely on recent complaint, the trial judge should not have given a direction on the use that the assessors may make of that evidence. It is not clear whether the complainant gave evidence of the complaint she had made to her mother. If she did not give evidence of the complaint, then the mother's evidence of the complaint made to her by the complainant was inadmissible (*Senikarawa v State* [2006] FJCA 25; AAU005.2004S

(24 March 2006). Although the appellant seems to be the author of this alleged error, I am satisfied that it is reasonably arguable that the trial judge erred in directing on recent complaint.

Misdirection on the element of indecent assault

- [8] On count 2, the appellant was charged with indecent assault. The prosecution alleged that the appellant kissed and put his tongue inside the complainant's mouth. The prosecution also led evidence that the appellant peeped into the washroom when the complainant went to use it. The learned trial judge directed the assessors that kissing and or peeing constitutes an indecent assault. Counsel for the appellant submits that an assault requires an application of force and peeing does not involve an application of force. I am satisfied that this ground of appeal is arguable.

Misdirection on the facts

- [9] In paragraph 46 of the summing up, the learned trial judge directed the assessors that 'even on the other allegation of kissing the accused says he fondled the witness'. Counsel for appellant submits that this was a prejudicial misdirection on facts because there was admission made by the appellant that he had fondled the witness. Counsel for the State concedes that this ground is arguable.

Result

- [10] Leave granted.



A handwritten signature in black ink, appearing to read "Daniel Goundar", with a long horizontal line extending to the right.

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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