

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0004 OF 2016
(High Court Case No: HAC 0215/2014)

BETWEEN : **TOMASI KOROIVOSA**
Appellant

AND : **THE STATE**
Respondent

Coram : Basnayake, JA

Counsel : Appellant in person
Mr. Y. Prasad for the Respondent

Date of Hearing : 21 May 2018

Date of Ruling : 1 June 2018

RULING

[1] This is an application for leave to appeal against a conviction and sentence. The appellant was convicted on a charge of rape and sentenced to 10 years imprisonment with a non-parole period of 8 years on 11 December 2015.

[2] The appellant filed this appeal against the conviction and the sentence on the following grounds;

Appeal against conviction:

- i. ***THAT*** the Learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of RAPE. Such error of the Learned Trial Judge in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.
- ii. ***THAT*** the Learned Trial Judge's failure to evaluate the evidence prior to returning a verdict of guilty as charged and the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict, has given rise to a grave and substantial miscarriage of justice.
- iii. ***THAT*** the Learned Trial Judge erred in law and in fact in not directing himself and/or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.
- iv. ***THAT*** the Learned Trial Judge erred in law and in fact in not adequately directing/ misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.
- v. ***THAT*** the Learned Trial Judge erred in law and in fact in not adequately directing himself the significance of Prosecution witness conflicting evidence during the trial.
- vi. ***THAT*** the Learned Trial Judge erred in law and in fact in not directing/and/or adequately directing the Assessors and himself on the previous inconsistent statements made by Prosecution witnesses. The Learned Trial Judge ought to have directed the Assessors and himself that when a witness is shown to have made previous statements inconsistent with the evidence given by the witness at the trial, he ought to have directed the Assessors that the evidence given at the trial should be

regarded as unreliable. The failure to do so caused substantial miscarriage of justice.

Appeal against sentence:

- vii. ***THAT*** *the Appellants appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.*
- viii. ***THAT*** *the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into account relevant considerations."*

The prosecution case

- [3] The charge is one of rape. The parties admitted that the alleged victim, namely, Iliesa, was under 13 years of age at the time of this offence. Iliesa and the appellant are cousins. The appellant and Iliesa lived in adjoining houses. The prosecution called as witnesses the complainant (Iliesa), his mother and the doctor who examined Iliesa and issued a Medical certificate.
- [4] The evidence of Iliesa is that on 7 June 2014 he (Iliesa) went to the appellant's house on invitation. When he went, he was told by the appellant to lie down on the bed, which he did. The appellant had then put his penis into his anus and stayed there for about five minutes. When Iliesa's sister came the appellant had left the house saying he was going to play volleyball. Thereafter he (Iliesa) had got dressed and gone to his house and complained to his parents when they came home in the evening. He had told the police that the appellant got him (Iliesa) to sit on the appellant. He also told the police that the appellant had rubbed his bum with his penis.
- [5] The mother of Iliesa said that when she came home at about 6.30 p.m. she was told by her daughter and thereafter Iliesa that the appellant, having taken his clothes off, made him to sit on the appellant. Dr. Merelesia Ranatawake said that she found perianal blisters when examining the boy. She said that this could be due to friction or rubbing or

penetration of an anus by an object like a penis. Penetration is one of the ingredients that the prosecution required to prove beyond reasonable doubt.

- [6] The appellant said in evidence that Iliesa came to his house and having removed his (Iliesa's) clothes tried to sit on the appellant's lap and the appellant pushed him. He said when he returned after playing volleyball Iliesa's mother called him and asked him. He tried to explain to her and then he was chased away.
- [7] The learned Judge had drawn the attention of the Assessors to the inconsistencies. Under cross examination Iliesa had admitted once that the appellant did not commit the crime.
- [8] In the absence of the Record of the High Court and without scrutinising the evidence carefully, I am not in a position to decide whether the learned Judge had explained well enough to the Assessors the evidence of the prosecution case, the inconsistencies *per se and inter se*. The evidence of the appellant is that the complainant (Iliesa) after removing his clothes sat on the appellant. Iliesa had told the police that he (Iliesa) sat on the appellant's lap and the appellant rubbed his penis on the bum. Iliesa said in evidence that the appellant put his penis into his anus. Iliesa's mother said that he was told by Iliesa that the appellant got Iliesa to sit on the appellant's lap.
- [9] I am of the view that grounds 'i' to 'vii' are concerning matters relating to proof and that they are arguable grounds. Hence leave to appeal is granted on the conviction and the sentence.

Result

- [10] *Leave granted on all grounds on the conviction.*



A handwritten signature in blue ink, appearing to read 'E. Basnayake', written over a dotted line.

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL