

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

Criminal Appeal No. AAU 0156 of 2015
(High Court Case No.104 of 2013)

BETWEEN : **THE STATE**

Appellant

AND : **SAKEASI SAULEQARAKI**

Respondent

Coram : **Gamalath, JA**

Counsel : **Ms. S. Tivao for the Appellant**
Mr. M. Fesaitu for the Respondent

Date of Hearing : **17 May 2019**

Date of Ruling : **6 June 2019**

RULING

- [1] The State has filed a timely leave to appeal application against the acquittal of the Respondent, Sakeasi Sauleqaraki, who stood trial in one High Court at Suva, on two counts of Rape under Sections 207(1) and (2) (a) of the Crimes Decree 2009 and another count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Decree, 2009.

[2] The particulars of the offences are as follows:-

Count One: SAKEASI SAULEQARAKI on the 14th day of January 2013 on Gau Island in the Eastern Division had carnal knowledge with Arieta Radinidravuwalu, in that he penetrated the vagina of the said Arieta Radinidravuwalu, without her consent.

Count Two: SAKEASI SAULEQARAKI on the 14th day of January 2013 on Gau Island in the Eastern Division penetrated the vagina of said Arieta Radinidravuwalu with his fingers, without the said Arieta Radinidravuwalu's consent.

[3] After trial on 27 November 2015, the assessors returned the unanimous opinion of 'guilty' in respect of the both counts as described above.

[4] The learned Trial Judge disagreed with the said opinion and delivered his judgment on 30 November 2015, and acquitted the respondent (accused person at the trial).

[5] Against the decision to acquit the respondent (accused person), the State is presently seeking leave to appeal based on the following five grounds;

Ground 1

The Learned Trial Judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the Assessors and in particular, by failing to take into account, and properly consider, the following evidence led at trial in respect of Count 1 on the Information:

- (a) The complainant's evidence that the accused had told her to open the zip of pullover she was wearing; that she had been scared and put her hand over her chest instead; and the accused person's overt act in then taking the complainant's hand off her chest;

- (b) The Accused person's admissions under cross-examination that "mmm"(low inflection) means "no"; and that he was trying to rely on the more English sounding "mmm" (drawn inflection) to support his case for consent; and
- (c) The complainant's evidence that the Accused had only asked her whether she liked what he was doing after he had touched her breast, and at no other point.

Ground 2

The learned Trial Judge erred in law and in fact by relying on the complainant's non-expert opinion on the Accused person's state of mind at the time of commission of the act that constituted Count 1 of the Information.

Ground 3

The learned Trial Judge erred in law and in fact by differing from the unanimous opinions of the Assessors on the narrow issue of the Accused person's state of mind in respect of Count 1 and 2 on the Information in circumstances where the learned Trial Judge and the Assessors were ad idem on the facts.

Ground 4

The learned Trial Judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the Assessors and in particular, by failing to give reasons for relying on the evidence of the Accused and rejecting the evidence of the complainant on Count 2 of the Information.

Ground 5

The learned Trial Judge erred in law and in fact by failing to give cogent reasons for departing from the unanimous opinions of the Assessors and in particular, by failing to take into account and properly consider, the complainant's evidence that she had told the Accused that she was in pain; that she had cried; and that

the Accused had then pushed her to the ground prior to him inserting his fingers in to the complainant's vagina.

- [6] In relation to the leave application, the question that needs to be addressed at this point is whether there are arguable grounds of appeal arising out of the issues raised by the State against the decision of the learned Trial Judge to acquit the appellant. See **Naisua v State**, (unreported) Cr.App. No CAV 0010 of 2013; 20 November 2013. As can be seen through the grounds of appeal by the State, it is clear that they contain questions of mixed law and facts and hence the need for leave to proceed as per section 21(1) of the Court of Appeal Act, Cap 12.
- [7] The cumulative effect of the grounds of appeal is that they are directed at the fact that the learned Trial Judge had failed to adduce cogent reasons to substantiate his decision to over- turn the opinion of the assessors and thereby to acquit the respondent. The manner in which the disagreeing judge should approach the issues has been well articulated in the decision of **Ram Bali v Regina** [1960] 7 FLR 80 at 83 (Fiji CA), **Shiu Prasad v Regina** [1972] 18 FLR 70 at 73, **Johnson v State** [2013] FJCA 45; AAU9.2010 (30 May 2013).
- [8] Guided by the abovementioned principles and dicta, I shall now examine the reasons adduced by the learned Trial Judge in overturning the opinion of the Assessors.
- [9] Firstly, the learned Trial Judge had analysed the evidence as follows:-

“The complainant was 18 years at the time of the alleged incident; the accused is the younger brother of her father. The complainant was living with the accused and his family at the relevant time at Nawaikama, on Gau Island. On 9 January 2013, after visiting another relative of them, the accused and the complainant had been returning home when the accused had sexually assaulted the complainant, both digitally and penile. The Complainant claimed the act was not consensual”.

[10] The complainant had maintained that she was frightened by what the accused (respondent) was doing and she had expressed her unwillingness by making the sound “mmm”, an expression of disapproval.

[11] In the Judgment, in order to conclude that the accused (respondent) had consent of the complainant (victim), the learned Trial Judge had given the following reasons;

“It is not disputed that the accused asked the complainant while he was touching the complainants breast and before he inserted his penis into her vagina, whether the complainant “like what he was doing” and the complainant responded by saying “mmm”. Complainant herself admits in her evidence that the accused was not in a position to interpret her response “mmm” properly, because it was dark and it was her evidence that the accused could have ‘taken as she was consenting’, given her conduct”.

[12] In a rather perplexing statement the learned Trial Judge had concluded that “there was no evidence of any circumstances which shows that the accused knew that the complainant was not consenting or he did not care whether she was consenting”.

[13] Having regard to this arguable point based on facts, one cannot overlook the undisputed evidence that while the victim was being subjected to the alleged sexual abuse, the accused (respondent) had been repeatedly asking the victim (complainant) whether she “liked what he was doing”. In that context, the conclusion which the learned Trial Judge had drawn in paragraph [12] of the Judgment had been that “the complainant herself creates a reasonable doubt in my mind on whether the accused knew or believed that she was not consenting and whether the accused was reckless as to whether she was consenting”; this is an arguable matter that cannot be resolved without examining the entirety of the evidence and the attendant circumstances relating to this case. In that context the manner in which the learned Trial Judge had ruled out the possibility of having non-consensual sexual intercourse is a question that needs to be addressed. It

indeed is relevant to decide the existence of consent and further it involves a question of mix law and facts relating to this leave application.

[14] As could be gathered from the Summing Up and the Judgment, the relationship between the accused (respondent) and the complainant (victim) was based on a hierarchical order, in which the accused (respondent) held power over the complainant (victim) and the complainant, who was living under the care of the accused (respondent) may have been subjugated under his power. The unequal social structure that had existed between the accused person (respondent) and the complainant (victim) may have played a prominent role in deciding on the issue of consent, a matter that should be understood having regard to the entirety of the facts of the case.


[15] In the back drop of what has been stated above, the issue of 'consent' the main thrust that has become the arguable matter in this leave to appeal application poses a valid ground of appeal, based both on a matter of mixed law and facts. I am of opinion that the grounds of appeal upon which the appellant relies has merit.

[16] In the circumstances, the application for leave to appeal is granted.

Result

[17] Leave to appeal is allowed on all grounds.




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Hon. Justice S. Gamalath
JUSTICE OF APPEAL