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

CRIMINAL APPEAL AAU 30 of 2014
(High Court HAC 124 of 2012)

BETWEEN : **MOHAMMED ALFAZ**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Appellant in person**
Mr M Korovou for the Respondent

Date of Hearing : **5 July 2016**

Date of Ruling : **12 August 2016**

RULING

[1] This is an application for leave to appeal against conviction and sentence.

[2] The Appellant was charged with two counts of rape contrary to section 207(1) and (2)(a) of the Crimes Decree 2009 (the Decree), with one count of rape contrary to section 207(1) and (2)(c) of the Decree and with one count of sexual assault contrary to section 210 (1)(a) and (2) of the Decree. Following a trial before a judge sitting with three assessors in the High Court at Lautoka the Appellant was convicted on all four counts. On 5 February 2014 the Appellant was sentenced to terms of imprisonment of 13 years 7 months and 15 days for each of the rape convictions and 8 years imprisonment for the sexual assault conviction. The sentences were ordered to be served concurrently with a non-parole term of 12 years.

[3] By letter dated 26 February 2014 the Appellant applied for leave to appeal against conviction and sentence. The letter was not received by the Court of Appeal Registry until 17 March 2014. However it is clear that the Appellant had delivered his application for leave to appeal to the Corrections Office within the 30 days prescribed by section 26 of the Court of Appeal Act Cap 12 (the Act). After that, the Appellant cannot be held responsible for any delay that may result as a result of the actions of the Corrections Office. Accordingly the appeal is to be regarded as a timely appeal.

[4] Pursuant to section 21(1)(b) and (c) of the Act the Appellant requires the leave of the Court to appeal against both conviction and sentence. The power of the Court to grant leave to appeal may be exercised by a judge of the Court under section 35(1) of the Act. The question for the Court is whether the Appellant should be granted leave to appeal conviction and sentence. The test for leave to appeal against conviction is whether any of the grounds of appeal raises an arguable error requiring the consideration of the Court of Appeal. The test for leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State**, CAV 10 of 2013; 20 November 2013).

[5] The grounds of appeal against conviction are:

> *"1. The learned Judge erred in law in admitting the confession in the voir dire.*

2. *The learned Judge has erred in not adequately directing the assessors on the medical report.*

3. *The learned Judge erred in law by not giving adequate directions of the 1st charge and misdirecting the assessors on the 2nd, 3rd and 4th charges when there existed unreliable and insufficient evidence to prove the latter charges.*

4. *The learned Judge in not adequately directing the assessors on the circumstantial evidence.*

5. *The learned Judge erred in law when his Lordship failed to draw his mind to the Turnbull guideline requirement on identification and thereafter failed to give directions to the assessors on identification."*

[6] The grounds of appeal against sentence are:

"1. The learned Judge failed to pick the starting point on count 1 from the current sentencing tariff.

2. *The learned Judge for counts 2, 3 and 4 chose a higher starting point rather than the set tariff.*

3. *The Appellant was punished twice by the presiding Judge for the same facts."*

[7] The first ground of appeal against conviction challenges the admission into evidence of the Appellant's caution interview and charge statement, both of which contain admissions against interest. The learned Judge concluded that he was satisfied beyond reasonable doubt that the admissions were made voluntarily which in this case meant that they had been made without force or violence or threats of force on the Appellant. The allegations were denied by the State's witnesses when put to them by the Appellant in cross-examination. Apart from the allegations put in cross-examination the Appellant admitted under cross-examination that he had not complained to any independent person that he had been the victim of violence either before or during the interview. Having observed the witnesses and analyzed the evidence given in the *voir dire* proceedings, the learned Judge concluded that the admissions were made voluntarily and admitted into evidence the caution interview and charge statement. The ground is not arguable and leave is refused.

[8] In relation to ground 2 the learned Judge has fairly and quite properly summarized the contents of the medical report and the status of the doctor who gave evidence and produced the report. It was made clear to the assessors by the Judge that it was a matter for them (and subsequently himself) to consider the evidence and the report during the course of their deliberations. This ground is not arguable and leave is refused.

[9] Ground 3 challenges the sufficiency of evidence of the complainant and the prosecution witnesses to establish guilt beyond reasonable doubt. The assessors were directed by the learned Judge to consider and assess all the evidence before they concluded that the Appellant was guilty. The assessors heard the evidence given by all the witnesses and considered their answers before forming their opinions. Each assessor returned an opinion of guilt in respect of all charges. The learned trial Judge agreed. Both the assessors and the Judge were in the best position to assess reliability and credibility. This ground is not arguable and leave is refused.

[10] Ground 4 complains that the trial Judge failed to direct adequately on the circumstantial evidence. In a trial where the prosecution relied on direct evidence as was the position in this case and where that direct evidence is sufficient for the learned Judge to convict, then the failure to direct on the circumstantial evidence that may have been adduced, does not constitute a miscarriage of justice. This ground is not arguable and leave is refused.

[11] Although ground 5 refers to a failure by the learned trial Judge to give directions on the summing up on the "*Turnbull*" guidelines, it is clear that identification was not in issue at the trial. The Appellant's position was that he did not commit the offences not that it must have been someone else. The Appellant was well known to the complainant as her uncle and his identity was not in issue. This ground is not arguable and leave is refused.

[12] In relation to the appeal against sentence, it must be noted that the complainant was seven years old at the time of the offences. She was the Appellant's niece. The

sentence imposed by the learned trial Judge does not indicate an appealable error in the exercise of his discretion. Leave is refused.

Order:

Leave to appeal against conviction and sentence is refused.

W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL