

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

**CRIMINAL APPEAL AAU 21 of 2016**  
**(High Court HAC 336 of 2013)**

**BETWEEN** : **SAKEASI BASAGA**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Calanchini P**

**Counsel** : **Mr T Lee for the Appellant**  
**Ms P Madanavosa for the Respondent**

**Date of Hearing** : **12 July 2018**

**Date of Ruling** : **30 August 2018**

**RULING**

[1] Following a trial in the High Court at Suva the appellant was convicted on seven counts of rape and sentenced to 9 years 9 months imprisonment with a non-parole term of 8 years on each count to be served concurrently. Although some 11 days out of time the respondent does not seek to challenge the need for an enlargement of time. Consequently this is the appellant's application for leave to appeal against conviction and sentence.

[2] The application for leave is made pursuant to sections 21(1)(b) and (1)(c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act allows a single judge of the Court of Appeal to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (**Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] The ground of appeal against conviction in the appellant's amended notice of appeal filed on 6 March 2018 is:

*“The learned trial Judge caused the trial to miscarry in convicting on insufficiency of evidence led by the prosecution.”*

[4] The seven counts of rape were each charged as representative counts pursuant to section 70(3) of the Criminal Procedure Act 2009. The prosecution was permitted to specify the dates between which the acts of sexual misconduct occurred and it was then necessary for the prosecution to prove that between the specified dates at least one act of a sexual nature occurred. The use of representative or specimen counts is usefully discussed in some detail in **Hobson v R** [2013] EWCA Crim. 819; [2013] 1 WLR 3733.

[5] As the learned trial Judge noted in his judgment, it was agreed in the Agreed Facts that the appellant had sexual intercourse with the complainant, who was his step daughter, during the period relevant to each of counts 1 – 7. The remaining element that the prosecution was required to prove beyond reasonable doubt to find the appellant guilty of rape on counts 1 – 7 was the absence of consent to sexual intercourse.

[6] Under section 207(2)(a) of the Crimes Act 2009 a person rapes another person if the person has carnal knowledge with the other person without the other person's consent. In section 206(1) consent is defined as meaning:

*“consent freely and voluntarily given by a person with the necessary mental capacity to give the consent and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.”*

- [7] At the trial the assessors returned unanimous opinions of guilty on all seven counts. At the time of the offences the complainant was 20 years old. In his judgment the learned Judge stated that he found the complainant’s evidence was consistent and truthful. Her evidence was to the effect that the appellant forced her to have sex with him on each occasion and threatened her if she told anybody about the incidents. The Judge did not accept the evidence given by the appellant.
- [8] In my judgment once the learned Judge had concluded that the evidence given by the complainant was truthful, the element of lack of consent had been established. This ground of appeal lacks merit and leave to appeal conviction is refused.

Order:

*Leave to appeal conviction is refused.*



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