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

CRIMINAL APPEAL NO. AAU 157 OF 2015
and AAU 5 OF 2016
(High Court HAC 205 of 2014 at Suva)

BETWEEN	:	**SEREVI DEGEI** **JOVECI RABUTORO** **LEDUA RARAWA** **ETONIA VOSA** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Calanchini P**
Counsel	:	**Mr M Fesaitu for the First and Second Appellants** **Ms T Kean for the Third Appellant** **Mr R Goundar for the Fourth Appellant** **Ms W Elo for the Respondent**
Date of Hearing	:	**17 October 2019**
Date of Ruling	:	**27 November 2019**

RULING

[1] Following a trial in the High Court at Suva the appellants were convicted on one count of rape and on 10 December 2015 were each sentenced to 14 years imprisonment with non-parole terms of 13 years.

[2] The first three appellants (Degei, Rabutoro and Rarawa) filed timely applications for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). The fourth appellant (Vosa) filed a timely application for leave to appeal against conviction and sentence pursuant to section 21(1)(b) and (c) of the Act. The fourth appellant subsequently signed on 17 October 2019 an application to abandon his appeal against sentence. That application is to be listed before the Court of Appeal on a date to be fixed. As a result this is the application for leave to appeal against conviction by the four appellants. Section 35(1) of the Act gives to a single judge of the Court power to grant leave.

First Appellant (Degei)

[3] The grounds of appeal upon which the first appellant (Degei) relies are as follows:

> *"1. **THE** Learned Trial Judge erred in law and in fact when he did not consider the fact that there was more than reasonable doubt in the Respondent's case where PW2 Salanieta Radaniva agreed under cross examination that in the whole time on 26/6/14, the Appellant was just doing his work at the dance floor and also the fact that she told the police officer who was conducting the Identification parade that it was not the appellant as the appellant was just doing his work at the dance floor.*
>
> *2. **THE** Learned trial judge erred in law and in fact when he did not consider the consistency of the evidence of the Appellant which was supported by PW2 Salanieta Radaniva's evidence regarding the total non-involvement and the absence of your Appellant from the Karaoke room where the alleged rape took place."*

[4] The first ground is essentially a claim that the trial Judge has not summarized the evidence of a witness called by the prosecution that supported Degei's case that he was not involved in the rape. Neither the name of the witness nor any summary of her evidence (in particular cross-examination) appears in the summing up. It is submitted that the Judge has failed to consider that evidence and to determine what, if any, weight it should receive. It is claimed that that ground is arguable. I agree and leave is granted.

[5] Ground 2 raises substantially the same issue and is arguable if not repetitive.

Second Appellant (Rabutoro)

[6] The grounds of appeal upon which the second appellant (Rabutoro) relies are follows:

> *"The learned trial Judge erred in law and in fact when he did not adequately address the issue of identification on the following:*
>
> *i) Any other evidence relating to the identification of the appellant;*
>
> *ii) Propriety of the identification parade."*

[7] Although, the evidence of the complainant concerning the identity of this appellant was certain it is arguable that the alleged defect in the conduct of the identification parade as a result of an earlier sighting by the complainant of the appellant at the police station was prejudicial. In my judgment this ground is arguable.

Third Appellant (Rarawa)

[8] The grounds of appeal upon which the third appellant (Rarawa) relies are as follows:

> *"1. The appellant was prejudiced upon the learned trial Judge informing the assessors in his summing up that a prima facie case was found at the end of the prosecution case.*
>
> *2. The learned trial Judge erred in law and in fact in not directing the assessors on the appellant's case fairly and objectively causing a miscarriage of justice.*
>
> *3. The learned trial Judge failed to properly evaluate and consider the weakness in the identification evidence against the appellant resulting in a miscarriage of justice."*

[9] In my view it is arguable that such a disclosure was sufficiently prejudicial to grant leave on that ground. I have some doubt as to the propriety of such a disclosure when the issue is dealt with by the judge in the absence of the assessors. It may also be argued that there is an element of pre-determination at a certain stage before all the evidence had been heard.

[10] Given the extremely scant reference in the summing up to the evidence adduced by this appellant it is arguable that the directions have not been sufficiently "*tailored*" to fit the defence case.

[11] In relation to the issue of identification this appellant relies on the poor lighting in the venue and the complainants alleged state of intoxication as matters that were not sufficiently considered. This ground is arguable.

Fourth Appellant (Vosa)

[12] The grounds of appeal upon which the fourth appellant relies are as follows:

> *"1. That the learned trial Judge erred in law and fact when he allowed the State witness namely Adi Ema Barbara Toganivalu during the trial to identify the appellant in the dock without prior foundation of identity parade or photograph identification.*
>
> *2. That the learned trial Judge erred in law and fact when he failed to give a fair and balanced summing up by not adequately putting the medical evidence to the assessors."*

[13] This ground challenges the dock identification of this appellant by the complainant without any formal prior identification process. The respondent submits that the complainant had identified the appellant at the police station on the night of the offence. The circumstances under which that had taken place are not apparent at this stage. There is a risk that the complainant identified the appellant in the dock as the person she had seen at the police station on the night of the offence rather than the person who had committed the offence. The ground is arguable.

[14] On the second ground as Counsel did not consider it necessary to seek further directions from the Judge on the medical evidence it can only be concluded that Counsel did not consider that the appellant's case would be assisted by further directions. Leave is refused on the ground.

Conclusion:

1. *Leave to appeal against conviction is granted to the first, second and third appellants.*
2. *Leave to appeal against conviction is granted to the fourth appellant on ground 1 only.*
3. *The application by the fourth appellant to abandon his sentence appeal is to be listed before the Full Court at the same time as the appeals against conviction.*

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL