

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

**CRIMINAL APPEAL NO. AAU 124 OF 2017**  
**(High Court HAC 009 of 2016)**

**BETWEEN** : SADDAM FIDA HUSSAIN

*Appellant*

**AND** : THE STATE

*Respondent*

**Coram** : Chandra RJA

**Counsel** : Mr P. Kumar for the Appellant  
Mr A. Jack for the Respondent

**Date of Hearing** : 5 December, 2018

**Date of Ruling** : 5 February, 2019

**RULING**

1. The Appellant was charged with one count of Sexual Assault contrary to Section 210(1) and one count of Rape contrary to section 2017(1) and (2) and ()(2) of the Crimes Act, 2009.

2. The Appellant was found guilty by the learned High Court Judge who overturned the opinion of not guilty brought in by the Assessors and was sentenced to 9 years imprisonment with a non-parole period of 6 years on the 28<sup>th</sup> of July 2017.
3. He filed a timely notice of appeal against his conviction and sentence seeking leave to appeal.
4. Subsequently the grounds of appeal in his notice of appeal were amended and read as follows:

*“Appeal against Conviction:*

- [1] *That the learned Trial Judge erred in law and in fact by overruling the Assessors unanimous opinion of “Not Guilty” contrary to his own directions to the Assessors.*
- [2] *That the Learned Trial Judge erred in law and in fact in that whilst applying the laws on overruling the verdict of the Assessors, as he did, he did not give cogent reasons as to why he over-ruled the unanimous not guilty opinion of the three Assessors in light of the whole of the evidence presented in the trial.*
- [3] *That the Learned Trial Judge did not consider the defense case adequately, or in detail, in particular the evidence given in relation to the location and entrance of the bathroom where the alleged incident was supposed to have taken place and also the fact that it was dark and the Appellant was not sufficiently identified by the Complainant.*
- [4] *That the learned Trial Judge erred in law and in fact in not adequately directing himself that the Defense had raised sufficient doubt against the prosecution evidence before the court and as such the benefit of the doubt ought to have been given to the Appellant.*
- [5] *That the Learned Trial Judge erred in law and in fact in not directing himself to the possible defenses available on the evidence and with such failure, there was a substantial miscarriage of justice.*
- [6] *That the learned Trial Judge erred in law and in fact in failing to take into consideration the inconsistencies in the prosecution evidence, in particular the date and time when the alleged offence was supposed to have been committed and that the offence was not possible to have been committed in the manner described by the complainant.*
- [7] *That the learned Trial Judge erred in law to redirect himself in accordance with the submission for redirection made by the Counsel for the Appellant after the completion of the Summing Up.*
- [8] *That the Appellant reserved the right to advance further Appeal*

*Grounds upon receipt of the Court records.*

*Appeal against Sentence*

*[9] That the sentence is manifestly harsh and excessive.”*

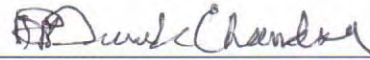
5. In terms of section 21(1) an appeal is available against conviction on any ground of appeal which involves a question of law alone or with the leave of the Court of Appeal on any ground of appeal which involves a question of fact alone or question of mixed law and fact or any other ground which appears to be a sufficient ground of appeal. It is well settled that the test adopted for leave to appeal is to see whether the grounds of appeal are arguable.
6. Grounds 1 and 2 of the grounds of appeal refer to the overturning of the unanimous opinion of the Assessors by the learned Trial Judge. The trial Judge is the final arbiter in the trial and he is entitled to overturn the opinion of the Assessors, but he has to give cogent reasons for doing so.
7. The learned trial Judge in his judgment has given reasons as to why he finds the Appellant guilty and has relied on the credibility of the complainant and the medical evidence.
8. The medical evidence was to the effect that the complainant's hymen was not intact, the medical examination having been done 11 days after the commission of the alleged offence.
9. It may be necessary to consider the medical report, regarding what has been recorded as what had been told to him by the complainant and the summary and conclusion recorded by the Doctor as there appear to be inconsistencies in the evidence presented by the prosecution.

10. This situation would render these grounds arguable as it may be necessary to look into the entirety of the record for a proper assessment.
11. Grounds 3 to 5 relate to the fact that the summing up being inadequate as regards the defence raised, identity of the complainant, the date and time when the alleged incident occurred.
12. There appears to be inconsistencies in the prosecution evidence regarding relevant matters in relation to identity of the Appellant, the location where the incident had taken place, the complainant's subsequent conduct.
13. These are matters which the Full Court would be in a position to consider when the entire record is available and therefore I would grant leave on these grounds.
14. Ground 6 relates to the same matters covered in grounds 3 to 5.
15. Ground 7 relates to a request for re-direction by Defense Counsel which had not been done. Counsel for the Respondent on the other hand had submitted in his written submissions that Defence Counsel should have asked for re-direction.
16. Since both parties are at variance on this issue, it would be prudent to leave it to the Full Court as the record would reveal the nature of the proceedings and therefore leave is granted on this ground.
17. Ground 9 is regards sentence, which is that the sentence is harsh and excessive.
18. Considering the current tariff in sexual assault and rape cases, the sentence is not harsh nor excessive and therefore leave is refused on that ground.

**Orders of Court:**

- (1) Leave to appeal against conviction is granted on grounds 1 to 5 and 7.
- (2) Leave to appeal against sentence is refused.





**Hon. Justice Suresh Chandra**  
**RESIDENT JUSTICE OF APPEAL**