IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU0014 of 2011
(High Court HAC 83 of 2010)

BETWEEN	:	**SIMELI BILI NAISUA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P**
Counsel	:	**Mr S Sharma for the Appellant** **Mr Y Prasad for the Respondent**
Date of Hearing	:	**2 June 2014**
Date of Decision	:	**13 June 2014**

DECISION

[1] This is an application for leave to appeal against conviction and sentence. Following a trial by Judge sitting with three assessors in the High Court at Suva, the Appellant was convicted on 16 December 2010 on one count of rape. He was sentenced on 8 February 2011 to a term of imprisonment of 15 years with a non-parole term of 11 years.

[2] By letter dated 28 February 2011 the Appellant applied for leave to appeal against conviction and sentence. The appeal was lodged with the Registry on 1 March 2011 and as a result complied with the time limit prescribed by section 26 of the Court of Appeal Act Cap 12 (the Act).

[3] The Appellant's initial application for leave was heard on 12 October 2012 by a single judge of the Court. Following the hearing the learned Judge refused leave and dismissed the appeal pursuant to section 35(2) of the Act. The Appellant filed a petition for special leave to appeal the dismissal of his appeal in the Supreme Court. In a written Judgment dated 20 November 2013, the Supreme Court granted special leave and set aside the dismissal of the appeal by the single judge of appeal. The Supreme Court ordered that the application for leave to appeal be remitted and heard afresh by another single justice of appeal. This is therefore the Appellant's fresh application for leave to appeal against conviction and sentence.

[4] The background material was conveniently stated in the judgment of the Supreme Court and is reproduced in part here. The charge of rape was based on penile penetration of the complainant's mouth. The complainant was a 3 year old girl. The Appellant was referred to as uncle. The Complainant gave unsworn evidence at trial. The Complainant's elder sister gave evidence of a complaint made by the victim to the effect that the Appellant had penetrated her mouth with his penis. It would appear that the conviction was based on the Complainant's unsworn evidence and the Appellant's confession to the police.

[5] The grounds of appeal upon which the Appellant now relies were set out in an Amended Application for leave to appeal against conviction and sentence filed on 6 February 2014. The grounds of appeal are:

> *"1 The learned trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence to assess the credibility of the complainant and also that the complaint was made after witness AQ had assaulted the complainant.*
>
> *2 The learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to*

approach the evidence contained in the caution interview and the weight to be attached to the disputed confession.

3 *The learned trial Judge erred in law and in fact when he did not direct and/or guide the assessors on the cross-examination of the victim by the Appellant resulting in a substantial miscarriage of justice.*

4 *The learned trial Judge erred in principle and also failed to take into account the following relevant considerations:*

(a) Taking a higher starting point at 13 years imprisonment
(b) Adding the aggravating factors which were already part of the higher starting point
(c) Although the period in remand was taken as a mitigation factor there is no indication that it was applied in the reduction of the sentence."

[6] Pursuant to section 21(1) (b) and (c) of the Act the Appellant must first obtain leave to appeal against both conviction and sentence. The application comes before a single judge of the Court pursuant to section 35(1) of the Act.

[7] It is well established that to succeed on an application for leave to appeal against conviction the appellant is required to establish an arguable point that warrants the consideration of the Court of Appeal.

[8] The first ground of appeal concerns the manner in which the learned trial Judge considered the evidence of the complainant's sister and mother. Their evidence falls into the category of what is described as "*recent complaint.*" There is no direction in the summing up on this issue. The appropriate direction to be given to the assessors in relation to such evidence was discussed by the Court of Appeal in **Peniasi Senikarawa –v- The State** (unreported criminal appeal AAU 5 of 2004 delivered 24 March 2006). The ground raises an arguable point and is conceded by the Respondent.

[9] The second ground of appeal concerns the lack of guidance in the directions to the assessors concerning the weight that may be given to the confession in the caution

interview. The Appellant has raised an arguable point and the issue is conceded by the Respondent.

[10] The third ground of appeal claims that the learned trial Judge did not provide any directions or guidance as to the cross-examination of the complainant by the Appellant. Since the only evidence upon which the Appellant could have been convicted was the unsworn testimony of the young complainant and the Appellant's confession to the police, it may be argued that the learned Judge should have summarised the answers given by the Complainant that related to matters upon which the Appellant based his defence. This ground is arguable.

[11] So far as the application for leave to appeal against sentence is concerned, the *"tariff"* for rape of a child is 10 – 16 years : **Raj –v- The State** AAU 38 of 2010. The starting point within that range is determined by assessing the seriousness of the offence itself. In this case the victim was 3 years old. There can be no suggestion that the Appellant has established an arguable point that the learned Judge has erred in principle in selecting a starting point of 13 years. To the extent that the learned Judge has included this matter a second time as an aggravating factor, it is arguable that there has been an error made. Furthermore there must be a clear indication that the learned Judge has deducted from any term of imprisonment that is to be imposed the period served in remand. It is arguable that it is not sufficient to include as a mitigating factor the time spent in remand without express quantification. The application for leave to appeal against sentence is granted.

[12] The Appellant is granted leave to appeal against conviction and sentence.

COURT OF APPEAL FIJI

W. Calanchini

HON. MR JUSTICE W. D. CALANCHINI
PRESIDENT, COURT OF APPEAL