IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO: AAU 0008 OF 2013
[High Court Case No: HAC 40/12 LBSA]

BETWEEN	:	**PENI TUROGO**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	Goundar JA
Counsel	:	Appellant in Person Mr. M. Delaney for the Respondent
Date of Hearing	:	23 June 2014
Date of Ruling	:	6 March 2015

RULING

[1] Initially, the appellant was charged with three counts of rape and one count of indecent assault in the High Court at Labasa. Before the commencement of trial on 29 January 2013, the State with the leave of the trial judge amended the Information by substituting the rape charges with three representative counts of incest by male. The fourth count of indecent assault remained. After the conclusion of the trial, the appellant was convicted on all four charges. On 1 February 2013, he was sentenced to a total term of 11 years' imprisonment with a non parole period of 9 years. This is his timely application for leave to appeal against his conviction and sentence. He also seeks bail pending appeal. The test for leave is whether the appeal is arguable. The test for bail pending appeal is more stringent. The test is whether the appeal has every chance of success.

[2] The appellant has elected to represent himself in this appeal. The grounds of appeal in the appellant's own words are:

Conviction appeal

Ground 1: *That the Trial Judge failed to warn himself properly on the issues of lies in the Summary of Facts which did not contain evidence of the offence.*

Ground 2: *That the observation of the Trial Judge in this case is erroneous and biased towards the victim.*

Ground 3: *That the trial Court did not consider that the victim did not report but there was a impersonator who tricked the whole scenario.*

Ground 4: *The trial Court did not consider that the victim was not allowed to give evidence in Court despite the police harassed her by saying that "they will lock her up for good if she does not change her statement after the charge was changed from Rape to Incest.*

Ground 5: *That the Appellant was not properly represented, though the seriousness of the offence for which he was charged was clear to the court.*

Ground 6: *"That Police at Dreketi and Seaqaqa had abused their powers and breached procedures whilst investigating his case".*

Ground 7: *"That the officer at the Labasa DPP's Office has abuse their office as public servants on numerous occasion whilst handling his case".*

Ground 8: *The Appellant submit that the victim's statement contradicted her evidence in Court.*

Ground 9: *That the learned Trial Judge erred in law in not directed himself and the Assessors on the non corroborated evidence of two witnesses where the two doctors have contradicted statement and the victim have two uncorroborated statements.*

Ground 10: *Burden of Proof, the Trial Judge erred in law in not directing the assessors on the no consistency of all the witnesses statement where the onus of proof required before the jury are entitled to convict.*

Ground 11: *The learned Trial Judge erred in law by not making such orders for the alteration of the charge to be amended during trial.*

Sentence Appeal

Ground 1: *That the sentence ordered by the Trial Court is extremely harsh and excessive.*

[3] In my judgment, the grounds of appeal are either misconceived, vague or lack the necessary particulars to make an assessment whether they are arguable. However, this is to be expected when an appellant elects to represent himself. It is difficult to comprehend what the appellant means by ground 1 when he says that the trial judge failed to warn himself on the issue of lies contained in the summary of facts. Since the appellant did not plead guilty, the prosecution did not tender any summary of facts in support of the charges. So the issue of lies contained in the summary of facts does not arise.

[4] Like ground 1, ground 2 is also difficult to comprehend. I am not sure what the appellant means when he says the trial judge was biased towards the victim. There is no evidence to suggest that the trial judge was biased either towards the victim or the appellant.

[5] The evidence of how the allegation of incest surfaced and was reported to the police was summarized in the summing up. Apparently, the victim's mother got suspicious when she found the appellant and the victim chatting in the kitchen at odd hours of one night. She expressed her suspicion with a relative who was a police officer. Eventually, when the police interviewed the victim, she admitted having consensual sex with her father (the appellant) on numerous occasions after she turned 14. When the allegation surfaced, the victim was still under the age of 18 years and was attending school. All these evidence was

before the trial court and there was no evidence that an impersonator was involved. Ground 3 is not arguable.

[6] When the victim gave evidence at the trial, she said she voluntarily gave her statement to the police. There was no evidence that she was threatened by the police to implicate the appellant. Ground 4 is not arguable.

[7] Ground 5 is misconceived. The appellant was represented by a competent counsel at the trial.

[8] Grounds 6 and 7 lack merit. There was no evidence before the trial judge that the police or the Office of the Director of Public Prosecutions abused their investigative or prosecutorial powers in this case.

[9] There was no evidence of any previous inconsistent statement made by the victim that was led at the trial. The trial judge was not obliged to give directions on previous inconsistent statement. Ground 8 is not arguable.

[10] Section 129 of the Criminal Procedure Decree 2009 has abolished the corroboration rule in sexual offence cases. Therefore, the trial judge was not obliged to give any collaboration warning for the victim's evidence. Ground 9 is not arguable.

[11] At paragraph 5 of the summing up the trial judge gave clear directions that the burden of proof was upon the prosecution throughout the trial, and that burden never shifted on the accused. Ground 10 is not arguable.

[12] The prosecution had discretion to amend the charge before the close of its case. In this case, the amendment was made before the commencement of the trial. Counsel for the appellant did not object to the amendment. There is no arguable ground to suggest that the appellant was embarrassed in his defence by the amendment.

[13] In sentencing the appellant, the learned trial judge referred to earlier cases on incest (**Lalta Prasad v State** Cr. App. No.059/2007, **State v Kumar** [2010] FJHC 160, Hac 176.2008S (14 May 2010), **State v Ledua** [2004] FJHC 118, Hac 0003.2004 (28 June 2004), **State v Naidu** [2004] FJHC 492; HAA 0080.2004L (29 October 2004), **State v Tamani** [2005] FJCA 4 AAU0025.2003S (4 March 2005)) and said the tariff was between 10-15 years' imprisonment. Using a starting point of 12 years, the learned trial judge after adjusting for the mitigating and aggravating factors, arrived at a sentence of 11 years' of imprisonment with a non parole period of 9 years. The sentence is within the range for the offence of incest. There is no arguable error in the sentencing discretion of the trial judge.

Result

[14] The grounds of appeal against conviction and sentence are not arguable. Leave to appeal is refused. It follows the application for bail pending appeal must fail as well because the appellant has not satisfied that he has every chance of success. Bail is refused.

COURT OF APPEAL FIJI

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Hon. Justice Daniel Goundar
Justice of Appeal

Solicitors:
Appellant in Person
Office of the Director of Public Prosecutions for the State