IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CRIMINAL APPEAL AAU 35 OF 2013
(High Court HAC 50 of 2012)

BETWEEN : **APOROSA TUICOLO**

Appellant

AND : **THE STATE**

Respondent

Coram	:	**Calanchini P** **Waidyaratne JA** **A. Fernando JA**
Counsel	:	**Ms A Veretawatini for the Appellant** **Mr L Burney for the Respondent**
Date of Hearing	:	**13 September 2016**
Date of Judgment	:	**30 September 2016**

JUDGMENT

Calanchini P

[1] Following a trial in the High Court at Suva before a Judge sitting with three assessors the Appellant was convicted on one count of rape contrary to section 207(1) and (2) (a) of the

Crimes Decree 2009. On 8 April 2013 the Appellant was sentenced to a term of imprisonment of 10 years with a non-parole term of 8 years.

[2] At the trial it was alleged that the Appellant on 26 July 2011 at Nataveya Village in Naitasiri had carnal knowledge of the complainant without her consent. The Appellant had pleaded not guilty and was represented by Counsel. Following a three day trial the two assessors returned opinions of guilty on the charge. In his judgment delivered on 3 April 2013 the learned trial Judge indicated his agreement with the opinions of the assessors, and formally convicted the Appellant.

[3] By letter dated 16 April 2013 the Appellant filed in person a timely notice of appeal against conviction and sentence. On 28 April 2014 the Legal Aid Commission filed an amended Notice of Appeal on behalf of the Appellant. The amended notice stated that the Appellant relied on four grounds of appeal against conviction and one ground against sentence. In a written Ruling delivered on 15 September 2014 the single Judge of the Court refused leave to appeal against both conviction and sentence.

[4] By a letter dated 18 April 2015 the Appellant in person indicated that he wanted to appeal to the Supreme Court against the refusal to grant leave. In accordance with section 35(3) of the Court of Appeal Act Cap 12 (the Act) the letter was taken up as a renewed application for leave to appeal against conviction and sentence before the Court of Appeal.

[5] Although the Appellant's letter raised a number of issues, when the hearing of the appeal commenced Counsel for the Appellant indicated that the Appellant was pursuing two issues only. The first was that he wanted his challenge to the Ruling of the single judge to be heard by the Supreme Court. The second issue was:

> *"It is important in the interest of justice to verify the alleged victim's identification because if the allegation was false and made up, the facts of the case require proper clarification on identification."*

[6] In relation to the first issue the position under the Act is quite clear. An application for leave to appeal against conviction and or sentence that is required under section 21(1) (b) and (c) of the Act may be heard by a single judge of the Court of Appeal under section 35(1) of the Act. The single judge may grant leave or refuse leave or dismiss the appeal. If the judge refuses leave to appeal then the Appellant may renew his application for leave to appeal to the Full Court under section 35(3) of the Act. In the event that the single judge dismisses the appeal under section 35(2) of the Act because he has concluded that the appeal was frivolous, vexatious or had no chance of succeeding because there was no right to appeal, then the Appellant's only course of action is to appeal to the Supreme Court against the decision to dismiss the appeal: **Tubuli –v- The State**, CAV 9 of 2006; 25 February 2008 and **Naisua –v- The State** CAV 10 of 2013; 20 November 2013. The position is that the application before this Court must be regarded as a renewed application for leave to appeal against conviction and sentence. It is a renewed application for leave on account of the Justice of Appeal having refused leave to appeal. The judge in his Ruling having refused leave left open to the Appellant the option of renewing his application before this Court. Had the Justice of Appeal dismissed the appeal then the Appellant could have filed a petition for leave to appeal to the Supreme Court.

[7] In relation to the second ground, the Appellant's concern relates to the identification of the complainant. This issue was also raised by the Appellant both in his initial notice of appeal filed in person and in the amended notice of appeal filed by the Legal Aid Commission. In the amended notice of appeal ground one against conviction was worded:

> *"The learned Trial Judge erred in law and fact when the identity of the complainant was never verified prior to the amendment of the complainant's name on the information."*

[8] The background to this issue is that State Counsel for the Respondent applied to amend the surname of the complainant as stated in the Information.

[9] The application by the prosecution arose as a result of the complainant, at the commencement of her evidence, confirming that her surname was different from that stated in the information, in her statement to the police, in the medical report and in the agreed facts. The application had been made for the first time on 25 March 2013 before the trial started. The learned Judge indicated that the issue should be determined when the complainant was called to give her evidence. The application was considered at the commencement of the second day of the trial at which time the complainant had completed her evidence in chief and was under cross-examination by Counsel for the Appellant.

[10] Counsel for the Appellant opposed the application. The basis of the objection was that there was no evidentiary proof by way of a birth certificate or a relative giving evidence to that effect. The amendment was allowed. The submission filed by the Appellant stated that the Appellant was not able to determine whether the person who appeared at the trial as the complainant was the same person who had made the original complaint to the police.

[11] The evidence relied upon by the Respondent at the trial was conveniently summarised by the learned trial Judge in the course of the sentencing decision at paragraph 3. The Complainant resided at Nataveya Village in the province of Naitasiri with her grandmother. She had never attended school and was unable to read or write. On the day of the incident, 26 July 2011, before lunch, while the complainant was cooking dalo with a relative in the kitchen of her home, the Appellant, who is her neighbour, called her from his sister's house. He asked the complainant to bring his bed sheet which was on the clothes line to the house. The Complainant did as she was requested and took the sheet to the same house. As she entered the house the Appellant closed the door behind her and dragged her inside. The Appellant then forcibly removed her sulu and underwear and closed her mouth. While she was lying on her stomach the Appellant inserted his penis into her anus.

[12] The Appellant denied the charge. His defence was that he did not have anal sex with the complainant and that he was elsewhere at the time of the incident. His alibi was that he was at a Talica Bativesi's house when the offence occurred.

[13] At the trial it was never suggested to the complainant in cross-examination that she was not a neighbour of the Appellants. Furthermore it was never suggested to her during the course of the cross-examination that she was not the person who had made the complainant of rape first to a relative and then to the Police. It was suggested that she had made up the complaint.

[14] It is clear that the identity of the complainant was not raised as an issue at the trial. Counsel for the Appellant sought to challenge the testimony of the complainant by cross-examining her on inconsistencies between her evidence in court and her previous out of court statement to the police. It was also suggested to her that she had invented or made-up the complaint. The actual name of the complainant was of no consequence in the context of the trial since the defence was based on a denial and an alibi. For all of the above reasons I would refuse leave to appeal and order that the appeal be dismissed.

Waidyaratne JA

[15] I have read in draft the judgment of Calanchini P and agree that the appeal should be dismissed.

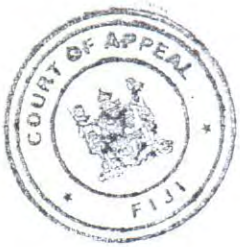
A Fernando JA

[16] I agree with the reasoning and conclusion of Calanchini P.

Orders:

1. *Leave to appeal is refused.*
2. *Appeal is dismissed.*

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



Hon. Mr Justice Waidyaratne
JUSTICE OF APPEAL

Hon. Mr Justice A. Fernando
JUSTICE OF APPEAL