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

CRIMINAL APPEAL AAU 70 of 2012
(High Court HAC 32 of 2010 Ltk)

BETWEEN : **TANIELA KARURU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr J Savou for the Appellant**
Mr S Babitu for the Respondent

Date of Hearing : **4 July 2016**

Date of Ruling : **26 July 2016**

RULING

[1] The Appellant was charged with one count of rape contrary to section 207(1) and (2)(a) of the Crimes Decree 2009. Following a four day trial before a judge sitting with three

assessors the Appellant was convicted on the count of rape and on 13 June 2012 was sentenced to a term of imprisonment of 15 years with a non-parole term of 13 years.

[2] By letter dated 12 July 2012 the Lautoka Corrections Centre forwarded the Appellant's notice and grounds of appeal against conviction and sentence to the Court of Appeal Registry. For reasons that are not apparent from the file the material was not received at the Registry until 27 August 2012. However it is clear that the Appellant had delivered his notice of appeal to the Corrections Office within the 30 days prescribed by section 26 of the Court of Appeal Act Cap 12 (the Act). After that, its journey to the Court of Appeal Registry is beyond the control of the Appellant. Accordingly his appeal is to be regarded as timely.

[3] Pursuant to section 21(1) (b) and (c) of the Act the Appellant requires leave to appeal against both conviction and sentence. The power of the Court of Appeal to grant leave to appeal may be exercised by a judge of the Court under section 35(1) of the Act.

[4] The question for the court at this stage is whether the Appellant should be granted leave to appeal against conviction and sentence. The test for leave to appeal against conviction is whether any of the grounds of appeal raises an arguable error. The test for leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State**; CAV 10 of 2013, 20 November 2013).

[5] The grounds of appeal against conviction are:

> *"[i] THAT the learned trial judge erred in law and in fact by failing to exercise his judicial discretion to exclude the Fiji Police Medical Examination form of the complainant from the trial on the ground that it does not contain the complainant's signature or thumb print on section B(5) of the said medical form as to give consent to the doctor to examine her.*
>
> *[ii] THAT the learned trial judge erred in law and in fact by not directing himself and/or the assessors of what weight to be attached to the*

incomplete medical report form of the complainant provided by the prosecution which was not signed by the complainant.

[iii] *THAT the learned trial judge erred in law and in fact by not directing himself and/or the assessors that the police medical form is inconsistent in a sense it does not contain the full and final result of the complainant's hospitalization, x-ray and the final medical condition upon discharge of the complainant.*

[iv] *THAT the learned trial judge erred in law and in fact by not directing himself and the assessors that despite there were evidence of blood stained cloths of both the complainant and the appellant, a DNA test and forensic experts reports was required to link the appellant to the offence charged.*

[v] *THAT the learned trial judge erred in law and in fact that despite the defence did not take the strategic position of possible intoxication, the trial judge ought to have given appropriate direction to the assessors as there was ample evidence before him on intoxication.*

[vi] *THAT the learned trial judge erred in law and in fact by allowing the State to use the appellant's caution interview statement before the assessors to contradict the appellant's evidence, whereas the caution interview statement was already excluded, as a result the same was before the assessors in which the appellant confessed to the offence under police brutality."*

[6] The grounds of appeal against sentence:

"(i) *Time in custody before trial was not deducted.*

(ii) *Double counting of aggravating factors.*

(iii) *Sentence is harsh and excessive in all the circumstances of the case.*

(iv) *Commencement of sentence.*

(v) *Consecutive and concurrent sentence."*

[7] Ground one challenges the admission into evidence of the medical report because there is no indication in the report that the complainant had given her consent for the doctor to examine her. It would appeal that this issue was not raised by the defence at the trial. Counsel appeared for the Appellant. The defence case was that sexual intercourse had taken place with the consent of the complainant and that the appellant had punched the

complainant for unrelated reasons after sexual intercourse. The issue for the assessors and the learned judge was consent. The medical report confirmed that the vagina was torn and that the complainant had suffered injuries. The doctor's observation was that the complainant was traumatized. Counsel for the defence did not object to either the evidence given by the doctor nor the admission into evidence of the report. There is no basis for now claiming that the report should not have been admitted into evidence. This ground is not arguable.

[8] Ground 2 claims that the Learned Judge failed to direct the assessors as to the weight to be attached to the medical report that had not been signed by the complainant. If the admission into evidence was not challenged by the defence it must be assumed that the fact that the complainant had not signed the form was not in issue at the trial. The learned trial Judge's directions on the weight to be attached to the evidence were proper and fair. This ground is not arguable.

[9] It should also be noted that the report was admitted into evidence in accordance with the requirements of section 191 of the Criminal Procedure Decree 2009. There was no reference in the summing up to any challenge to the report as to its admissibility. Counsel for the appellant did not seek any further directions from the learned Judge in relation to the issue raised by the Appellant in grounds 1 and 2.

[10] Ground 3 raises an issue concerning the content of the medical report. It is claimed that the report was incomplete and that directions should have been given to that effect. The issues raised by this ground are irrelevant to the only issue in dispute being consent and therefore there was no requirement for directions in respect of those matters. This ground is not arguable.

[11] Ground 4 raises an issue concerning the lack of DNA testing for blood and the lack of a forensic expert's report. As the only issue to be determined was whether the complainant had consented to sexual intercourse, the complaint by the Appellant relates to matters that were not relevant. The ground is not arguable.

[12] Ground 5 claims that the judge should give directions on the defence of intoxication. The evidence given by the complainant was that he *"smelt filthy"* not that he smelt of intoxicating liquor. In the summing up the learned Judge refers to the evidence given by the Appellants as being that:

> *"Both had gone into the night club and left after he had a couple of beers."*

The evidence did not require the learned Judge to direct on intoxication. Furthermore the only issue in dispute in the trial was consent. The ground is not arguable.

[13] Ground 6 raises the issue as to whether the learned Judge should have allowed the prosecutor at the trial to refer to the Appellant's excluded caution interview in cross-examination to contradict evidence given by him at the trial. There is an arguable point raised by this ground. The issue is whether reference to the excluded caution interview may be used in cross-examination of an accused and if so under what circumstances. This ground raises an arguable issue and leave is granted. The caution interview had been excluded on the basis that the admissions had not been made voluntarily.

[14] In relation to the appeal against sentence, the appellant raises arguable errors in the exercise of the sentencing discretion concerning time spent in custody, consecutive rather than concurrent sentencing and double counting of aggravating factors. Leave to appeal against sentence is granted.

Order:

1. *Leave to appeal against conviction on ground 6 only is granted.*
2. *Leave to appeal against sentence is granted.*

COURT OF APPEAL FIJI

W. Calanchini

Hon Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL