

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

**CRIMINAL APPEAL NO. AAU 146 of 2016**  
**(High Court HAC 84 of 2014)**

**BETWEEN** : SIRELI KACI

**Appellant**

**AND** : THE STATE

**Respondent**

**Coram** : Chandra RJA

**Counsel** : Mr. T. Lee for the Appellant  
Mr . S. Vodokisolomone for the Respondent

**Date of Hearing** : 13 June 2018

**Date of Ruling** : 5 July 2018

**RULING**

[1] The Appellant was charged with one count of rape contrary to sections 2017 (1) and 207(2) of the Crimes Decree 2009.

- [2] After trial the Assessors returned with a unanimous opinion of not guilty. The learned trial Judge overturned the opinion of the assessors and by his judgment delivered on 6<sup>th</sup> October 2015 found the appellant guilty and convicted him.
- [3] On 9<sup>th</sup> October 2015 the Appellant was sentenced to seven years imprisonment with a non-parole period of 5 years.
- [4] The Appellant by letter dated 17<sup>th</sup> October 2016 applied for enlargement of time and leave to appeal his conviction and sentence.
- [5] Thereafter through his Counsel the Appellant filed an application for enlargement of time and an amended application for leave to appeal.
- [6] As the Appellant had wished to canvas his original grounds of appeal in addition to the amended ground of appeal, the Respondent responded to all the grounds of appeal in their written submissions.
- [7] The amended ground of appeal is:-  
*“The learned trial Judge erred in law by not adequately and properly giving a warning or caution to the Assessors as to the reliability of the evidence given by the complainant”.*
- [8] The grounds of appeal filed by the Appellant originally are:  
*(1) The DPP knowingly and intentionally misled the court and the three Assessors by preventing misleading unsubstantiated untested or contradictory alleged evidence resulted in abuse of process and as such is malicious prosecution and a miscarriage of justice when judge delivered the judgment;*  
*(2) The learned trial judge erred on a combination of misdirection on a law in his summing up see paras 9,29,33,35,36. A gross miscarriage of justice.*  
*(3) That the learned trial Judge erred in law and in fact for inadequate direction on the real issue that has caused the trial to miscarry;*

- (4) *Given the deficiencies of the prosecution case it was not in the interest of justice to proceed on the charge of rape when the case was transferred from the Magistrate's Court on the charge of assault to commit rape and as such a grave injustice has occurred;*
- (5) *Sufficiency of evidence;*
- (6) *Inadequacy of the medical report.*
- (7) *Unreasonableness of the guilty verdict cannot be supported by evidenced led at trial – a grave injustice has occurred.*

***Sentence appeal***

- (8) *The trial judge erred in law and in fact in misunderstanding the facts and the circumstances of the case and as such the sentence is excessive and harsh.*
- (9) *The trial judge erred in law and in fact in sentencing one wrong factual basis and exceptional circumstances whereby the sentence is wrong in principle.*

*The trial judge erred in law and in fact in wrongly assessing some salient facts of the evidence, took extraneous and irrelevant matters to guide and effect him. ”*

[9] At the hearing the Appellant's Counsel relied on the amended ground of appeal filed on behalf of the Appellant. Although Counsel for the Respondent had filed written submissions opposing the application for extension of time and appeal, after arguments were heard orally stated that the appeal is arguable.

[10] In view of the concession granted by Counsel for the Respondent at the hearing, it would not be necessary to consider the matters relating to extension of time, though the appeal is 11 months out of time.

[11] The amended ground of appeal relied on by the Appellant's counsel is regarding the adequacy of the summing up by the learned trial Judge. It was submitted that the learned Trial Judge had failed to properly warn or caution the Assessors regarding the evidence of the complainant which was in fact a belated complainant which had been made to the Police 17 months after the alleged incident had taken place.

- [12] This was an instance where the complainant had made a complaint in the first instance regarding an alleged assault and 17 months later had made her complaint regarding rape alleged to have occurred at the time that the alleged assault had taken place. The Appellant had contended that the complainant had made the complaint regarding rape after the Appellant had refused to stay with her.
- [13] The learned trial Judge in his summing up to the Assessors at paragraph 13 had referred to the fact that the complainant had not reported the rape when she made her first complaint to the Police and that she complained about rape 17 months later. Further, that the Defence had suggested that she made the false complaint only after the Appellant had refused to stay with her. Referring to this the learned trial Judge had stated that recent complaint is never capable of corroborating the complainant's account and that it was relevant only to the issue of consistency or inconsistency in the conduct of the complainant. The recent complaint here was only regarding assault.
- [14] Counsel for the Appellant submitted that in such a situation it was necessary for the trial Judge to stress on the acceptance of the explanation given by the complainant for the conflict regarding the complaints. The learned trial Judge has in his summing stated that victims of such crimes do not go to authorities to complain for some time due to shame or fear or shock or confusion.
- [15] This was an instance of a belated complaint and the assessment of the explanation given for such belatedness was important to consider the credibility of the complainant. The appellant also gave evidence and denied the charge. In these circumstances it would be necessary to consider the totality of the evidence led at the trial to determine this question which would be available for the Full Court to consider.
- [16] In such a situation it would be necessary to see whether the summing up was inadequate and would have prejudiced the Appellant. Therefore I consider this ground to be arguable.

[17] In view of this position it would not be necessary to consider the other grounds filed by the Appellant on his own in the first instance which contains this ground. Some of the grounds are vague and incomprehensible.

**Orders of Court:**

*Application for leave to appeal is granted on the amended ground of appeal.*





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