

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

**CRIMINAL APPEAL AAU 103 OF 2016**  
**(High Court HAC 144 of 2013 at Lautoka)**

**BETWEEN** : **PRADEEP KUMAR** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr G O'Driscoll for the Appellant**  
**Ms P Madanavosa for the Respondent**

**Date of Hearing** : **12 July 2018**

**Date of Ruling** : **30 August 2018**

**RULING**

[1] Following a trial in the High Court at Lautoka the appellant was convicted on 4 counts of rape. On 20 July 2016 he was sentenced to 12 years imprisonment on each count to be served concurrently with a non-parole term of 8 years.

[2] This is his timely application for leave to appeal conviction and sentence pursuant to section 21(1)(b) and (c) of the Court of Appeal Act 1949 (the Act). Section 35 (1) of the Act gives a single judge of the Court power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (Naisua -v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013).

[3] The grounds of appeal against conviction and sentence as stated in the Notice of Appeal filed on 16 August 2016 are as follows:

- “1) ***THAT*** the Learned Trial Judge erred in law and in fact in not analyzing the evidence against Appellant on each charges separately.
- 2) ***THAT*** the Learned Trial Judge erred in law and in fact in not directing himself and the assessors that there was no recent complaint by the Complainant hence they had opportunity to do so and as such there was a substantial miscarriage of justice.
- 3) ***THAT*** the Learned Trial Judge erred in law and fact in failing to consider/and/or to direct himself and the Assessor’s that the doctor’s evidence could not have confirmed that it was the Appellant’s penetration that had caused the laceration and that there were possibilities that such injury could be caused by forceful penetration when the vagina is dry therefore, there was a reasonable doubt as to whether the injuries alleged to be suffered by the Complainant were caused by penetration and as such a substantial miscarriage of justice.
- 4) ***THAT*** the Learned trial Judge erred in law and fact in not accepting that the injuries sustained could be self-inflicted, therefore there was a reasonable doubt as to whether it was the Appellant who had caused the injuries to the Complainant.
- 5) ***THAT*** the Learned Trial Judge erred in law and in fact in not directing himself when finding that the evidence of the Complainant was credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave to police and that she gave to the medical doctor. Failure to direct himself on previous inconsistent statement in law of the complainant caused substantial miscarriage of justice.



- 6) **THAT** the Learned Trial Judge erred in law and in fact in not accepting the evidence given by the Appellant without any cogent reasoning.
- 7) **THAT** the Learned Trial Judge did not consider/analyze the Defence case adequate/or in detail in particular the evidence of the Accused's wife Keshni Lata who was present at the time of the alleged incident with the victim but did not see the Appellant committing the offence as charged. In the circumstances there was a substantial miscarriage of justice.
- 8) **THAT** the Learned Trial Judge erred in law and in fact in not adequately directing himself that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellant.
- 9) **THAT** the Learned Trial Judge erred in law and in fact in commenting on the evidence raising a new theory on the facts, uncanvassed during the course of the trial whereby the defence has had no opportunity of commenting upon it.
- 10) **THAT** the Learned Trial Judge erred in law and in fact in not directing himself to refer any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.
- 11) **THAT** the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/ referring/directing/putting/considering the Appellant's case to the Prosecution and Defence evidence.
- 12) **THAT** the Appellant reserves the right to appeal such further and other Grounds as the Appellant may be advised upon the receipt on the Court Record.
- 13) **THAT** the Appellants appeal against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.
- 14) **THAT** the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellants and not taking into relevant consideration.
- 15) **THAT** the Learned Trial Judge erred in law and in fact in not taking into consideration the Provisions of the Sentencing and Penalties Decree 2009 when sentencing the Appellant. ”

- [4] The grounds of appeal against conviction are yet again another example of the scatter gun approach to drafting an appeal notice. Ground 1 argues that the trial judge did not analyse the evidence in respect of each count in the course of his summing up. However in the summing up the learned Judge has discussed the evidence of each count separately in paragraphs 35, 42 and 43. Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under section 237(3) of the Criminal Procedure Act 2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed -v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014. Therefore ground 1 is not arguable and leave to appeal is refused on this ground.
- [5] Ground 2 complains that the learned Judge did not direct the assessors nor himself as to the absence of “a recent complaint” by the complainant. Recent complaint evidence is admitted for the purpose only of indicating consistency in relation to the allegation. It has no other probative value. If there was no recent complaint then there was no requirement to give any directions on how it should be considered by the trier of fact. This ground is not arguable and leave to appeal is refused on this ground.
- [6] Grounds 3, 4 and 5 raise speculative possibilities without any factual basis. Counsel has indicated in the submissions that further particulars will be provided on receipt of the record as Counsel did not appear at the trial. There is no material to enable the Court to be satisfied that the grounds are arguable. Leave to appeal is refused on those grounds. Merely reciting case law without any factual basis is of no assistance.
- [7] In relation to ground 6 for the reasons stated earlier there is no requirement in law for the judge to give a judgment when the summing up is on record and when he agrees with the opinions of the assessors under section 237 of the Criminal Procedure Act. Leave is refused on this ground.



[8] For grounds 7 to 11 leave is refused for the same reasons. There are insufficient particulars and the mere recitation of case law does not assist in determining whether leave should be granted. The grounds are far too generally worded without any reference to the summing up in support of the allegations. Leave to appeal is refused on those grounds of appeal against conviction.

[9] In relation to the sentence appeal the sentence of 12 years imprisonment with a non-parole term of 8 years is at the lower end of the tariff. The appellant has not identified an arguable error in the exercise of the sentence discretion. Leave to appeal against sentence is refused.

Orders:

1. *Leave to appeal against conviction is refused.*
2. *Leave to appeal against sentence is refused.*



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