

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

**CRIMINAL APPEAL AAU 0012 OF 2016**  
**(High Court HAC 143 of 2011 at Lautoka)**

**BETWEEN** : **JANEND KUMAR**

**Appellant**

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

**Respondent**

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

**Counsel** : **Mr G O'Driscoll for the Appellant**  
**Ms S Babitu for the Respondent**

**Date of Hearing** : **26 March 2018**

**Date of Ruling** : **27 April 2018**

**RULING**

[1] Following a trial in the High Court the appellant was convicted on one count of rape and sentenced to 7 years imprisonment with a non-parole term of 5 years. This is his timely

application for leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). The test for leave is whether any of the grounds are arguable before the Court of Appeal.

[2] The grounds of appeal are:

"1. **THAT** the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/ referring/directing/putting/considering and/or misdirecting himself and the Assessors the Medical Report of the Complainant.

*Full particulars will be provided upon receipt of The Full Court Record.*

2. **THAT** the Learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of RAPE.

*Full particulars will be provided upon receipt of The Full Court Record.*

3. **THAT** the learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of RAPE. Such error of the Learned Trial Judge in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.

*Full particulars will be provided upon receipt of The Full Court Record.*

4. **THAT** the Learned Trial Judge's failure to evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice.

*Full particulars will be provided upon receipt of The Full Court Record.*

5. **THAT** the Learned Trial Judge erred in law and in fact in totally omitting to direct the Assessors or himself on the following:-

- (a) *That the complainant told the Court that the evidence she had given was the evidence that was told by her parents to give and hence this piece of evidence shows that the complainant's evidence was not hers and not true.*
- (b) *That the charge before the Court was that Janend Kumar on the 14<sup>th</sup> day of June 2011 at Tute's Sea Breeze Hotel in Sigatoka in the Western Division, had carnal knowledge with a girl namely Payal Pashna Kumar without her consent.*

*There was no evidence before the Court that the Appellant took the complainant to Tute's Sea Breeze Hotel in Sigatoka and hence there was a substantial miscarriage of justice.*

- (c) *That PW3 and PW4 the parents of the Complainant (PW2) sat and heard the examination in chief of the Complainant and the cross-examination of the Complainant and thereafter both the witnesses gave evidence despite the fact that the Appellant's Counsel had objected and that no weight or any weight that has to be placed upon their evidence.*
6. **THAT** *the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

#### **PARTICULARS**

- (a) *That the Complainant gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*
- (b) *That the Complainant gave evidence in Court when she stated that whatever evidence she had given was told by her parents to say and this evidence and not re-examined by the State. Inferences can be drawn from her statement that she did not tell the truth but whatever that was told by her parents.*
- (c) *That PW2 gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*
- (d) *That PW3 gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*
- (e) *That PW4 gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*

- (f) *That the identification parade that was conducted by the Police where the lady from the hotel that the Appellant was supposed to have taken the complainant identified two wrong persons and this raised serious doubts as to the identification.*
  - (g) *The Defence Exhibit No.1, the Caution Interview of the Accused was not challenged by the State demonstrated the consistency of the Accused's evidence on oath.*
7. **THAT** *the Learned Trial Judge erred in law and in fact in not adequately directing/ misdirecting 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.*

#### **PARTICULARS**

- (a) *That the complainant gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*
- (b) *That the complainant gave evidence in Court when she stated that whatever evidence she had given was told by her parents to say and this evidence was not re-examined by the State. Inferences can be drawn from her statement that she did not tell the truth but whatever that was told by her parents.*
- (c) *That PW2 gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*
- (d) *That PW3 gave evidence in Court which was inconsistent with the statement she had given to the police in 2011.*
- (e) *That PW4 gave evidence in Court which was inconsistent with the statement she had given to the Police in 2011.*
- (f) *That the identification parade that was conducted by the Police where the lady from the hotel that the Appellant was supposed to have taken the complainant identified two wrong persons and this raised serious doubts as to the identification.*
- (g) *The Defence Exhibit No.1, the Caution Interview of the Accused was not challenged by the State demonstrated the consistency of the Accused's evidence on oath.*

8. **THAT** the Learned Trial Judge misdirected/wrongly directed himself by holding that he was satisfied that the victim's evidence is supported by medical findings of Dr. Lal.

9. **THAT** the Learned Trial Judge misdirected/wrongly directed himself on the issue of identification parade when he held that there is no evidence before me to find out who was this lady who came for the identification and what was her involvement in this matter. There was Defence Exhibits No.1 in particular Question 108 to Question 113. Such misdirection caused a substantial miscarriage of justice.

*(full particulars will be provided upon receipt of the Court Record).*

10. **THAT** the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/ referring/directing/putting/considering himself or the Assessors the evidence of the Appellant on Oath, Defence Exhibits 1 and 2 and four Defence witnesses and as such there was a substantial miscarriage of justice.

*Full particulars will be provided upon receipt of The Full Court Record.*

11. **THAT** the Learned Trial Judge erred in law in not adequately directing/misdirecting himself the previous inconsistent statements made by the main Prosecution witnesses and as such there has been a substantial miscarriage of justice."

[3] The Court is not in a position to determine whether grounds 1 – 4 and 8 raise arguable points as they are too vague and do not comply with Rule 35(4) of the Court of Appeal Rules. In **Rokodreu –v- The State** (AAU 139 of 2014; 5 August 2016) Goundar JA noted: "*The grounds of appeal are vague and lack details of the alleged errors. The notice states that full particulars will be provided upon receipt of the full court record. This is not a reasonable excuse for not complying with the rules requiring the grounds of appeal to be drafted with reasonable particulars so that the opposing party can effectively respond to them.*"

[4] Neither the notice of appeal nor the written submissions provide any particulars in relation to grounds 1 – 4 and 8. As in the **Rokodreu** (supra) appeal, the notice of appeal and the grounds of appeal were filed by the appellant's counsel of choice, Iqbal Khan and

Associates. The written submissions on leave were also filed by Iqbal Khan and Associates. At the leave hearing Mr O'Driscoll appeared on instructions and argued in favour of the application relying substantially on the written submissions.

- [5] Ground 5 raises three issues. The first issue relates to an allegation that the evidence given by the complainant could not be reliable because she had told the Court that she was told by her parents what she should say as evidence. In paragraphs 10 of his judgment the learned trial Judge has concluded, for the reasons stated, that he accepted the evidence of the complainant and rejected the suggestion that her evidence was a made up story. This issue is not arguable.
- [6] The second issue raised in ground 5 relates to the allegation in the charge that the Appellant took the complainant to the hotel which allegation was not supported by the evidence. However as the learned trial Judge pointed out in paragraph 10 of his summing up, this was the evidence given by the complainant herself. This issue is not arguable.
- [7] The third issue relates to the presence of other prosecution witnesses remaining in court when the complainant gave the evidence and when she was cross-examined. As the respondent concedes this issue is arguable.
- [8] Ground 6 claims that there were a number of omissions in the summing up. The first omission (issue (a)) alleges that inconsistencies between the evidence given by the complainant in court and her earlier police statement were not the subject of any directions. The ground does not specify the inconsistencies and nor is there any suggestion that Counsel for the Appellant had requested the judge to re-direct on this issue. The issue is not now arguable. The second issue (b) relates again to the claim that the complainant's evidence was based on her parents' instructions. The learned Judge has dealt with this issue in paragraph 10 of his summing up and the issue of re-examination was not raised by Counsel for the Appellant at the trial. The ground is not arguable. Issues (c) – (e) deal again with further inconsistencies in evidence. Counsel for the Appellant did not request the trial Judge to re-direct on the law relating to prior

inconsistent statements made out of court. The inference is that there were no inconsistencies or that they were not sufficiently relevant to trouble the Judge for directions on the law.

- [9] Issue (f) relates to an identification parade in which a motel worker was asked to identify the accused. The relevance is not readily clear as the appellant was the complainant's uncle and well known to her. The appellant did not deny that he was in the company of the complainant on the day in question. The issue was whether the appellant had sexual intercourse with the complainant without her consent. The issue is not arguable.
- [10] Issue (g) deals with the caution interview that was admitted into evidence as a defence exhibit. It was entirely self-serving as the incident was denied by the appellant. The interview was a prior consistent statement and should not have been admitted as such. No weight could be attached to it and although wrongly admitted the trial Judge was correct when he made no reference to it. This issue is not arguable.
- [11] Ground 7 claims that the learned trial Judge should have concluded on the evidence that the prosecution had failed to prove the case against the appellant beyond reasonable doubt. Particulars (a), (c), (d) and (e) rely on alleged inconsistencies in the evidence given by prosecution witnesses. The alleged inconsistencies are not identified and it is not the task of this Court to search for inconsistencies. The particulars are too vague for further consideration. The particular relating to the evidence given by the complainant has already been considered. The identification parade issue has already been considered as has the weight to be given to a prior consistent statement.
- [12] To the extent that ground 9 claims that the learned trial Judge has suggested in his summing up that the appellant carries a burden of proof the ground involves a question of law alone for which leave is not required. The issue is not, in this case, vexatious or frivolous.

- [13] Ground 10 and 11 raise issues that have already been considered and are, in my opinion, repetitive. They also lack sufficient particularity to enable further consideration.
- [14] In conclusion leave to appeal against conviction is granted in relation to ground 5(c). The appeal may proceed on ground 9 to the extent that it involves a question of law alone. Leave to appeal against conviction on the other grounds is refused.
- [15] The Appellant has applied for bail pending appeal. The application is supported by an affidavit sworn on 2 February 2016. The principles that are considered in an application for bail pending appeal were fully discussed in the decision of Zhong -v- The State [2014] FJCA 108; AAU 44 of 2013, 15 July 2014. In this case neither the material in the affidavit sworn by the Appellant in support of his application nor the grounds of appeal upon which the appeal is to proceed before the Full Court satisfy the threshold of exceptional circumstances. The application is refused.

Orders:

1. *Leave to appeal against conviction on ground 5(c) is granted.*
2. *Appeal to proceed on ground 9 involving an error of law alone.*
3. *Leave to appeal against conviction is otherwise refused.*
4. *Application for bail pending appeal is refused.*



*W. Calanchini*

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