

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

CRIMINAL APPEAL NO. AAU 46 OF 2016
(High Court HAC 379 of 2013)

BETWEEN : **NIZAM ALI KHAN** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Mr M Fesaitu for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **12 August 2019**

Date of Ruling : **25 September 2019**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape and three counts of sexual assault. On 8 April 2016 the appellant was sentenced to 13 years imprisonment for the rape conviction and 4 years for each of the sexual assault

convictions. The sentences were ordered to be served concurrently for a total sentence of 13 years imprisonment with a non-parole term of 12 years.

- [2] The appellant filed a timely notice of appeal against conviction and sentence on 4 May 2016 pursuant to section 21(1)(b) and (c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single judge of the Court power to grant leave. On 25 April 2018 the appellant applied in writing to abandon his appeal against sentence. That application will be listed for hearing before the Court of Appeal when the appeal is heard, if leave is granted, or otherwise on a date to be fixed.
- [3] This is the appellant's application for leave to appeal against conviction. The test for granting leave to appeal is whether the appeal is arguable before the Court of Appeal: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [4] On 23 May 2018 the appellant filed an amended notice of appeal against conviction relying on the following grounds:
- “1). **THE** Appellant is adversely prejudiced by the Learned Trial Judge using the facts of the case as examples to define the indecent assault element in the charge of sexual assault therefore causing a substantial miscarriage of justice to the Appellant.
 - 2). **THE** Appellant was prejudiced upon the Learned Trial Judge informing the Assessors in his summing up that a prima facie case was found at the end of the prosecution case.
 - 3). **THE** Learned Trial Judge did not adequately, fairly and objectively put the Appellant's case to the Assessors therefore causing a miscarriage of justices.
 - 4). **THE** Learned Trial Judge did not direct himself and the assessors on the time the complaint was reported, in assessing the credibility of the two complainants' evidence.”
- [5] At the commencement of the hearing Counsel for the appellant informed the Court that the appellant was not pursuing ground 3 and would rely on grounds 1, 2 and 4 only.

- [6] In ground one the issue is the examples used by the trial Judge to explain to the assessors the meaning of certain legal expressions that constitute the elements of the offense. Whether the examples are such as to cause prejudice to the accused amounting to a miscarriage of justice is a matter that the Court of Appeal should consider.
- [7] Ground 2 raises an objection to the reference by the trial Judge to the assessors in his summing up that a “*prima facie case was found against him.*” This was apparently a reference to the no case submission made by the appellant and rejected by the Judge. The extent to which this prejudiced the appellant is a matter that should be considered by the Court of Appeal. There is some risk that the observation may be taken as pre-determination of guilt at that stage of the trial.
- [8] Ground 4 takes issue with the manner in which the Judge considered the delay between the date of the last offence and the date of reporting the matters to the complainants’ mother (about 4 days). This ground is not arguable. There are many reasons why two young complainants (who were sisters) may delay in bringing these matters to the attention of their mother.
- [9] As a result leave to appeal against conviction is granted on grounds 1 and 2. Leave is refused on ground 4 while ground 3 was not pursued by the appellant.

Orders:

- 1). *Leave to appeal against conviction is granted on grounds 1 and 2 only.*
- 2). *Application to abandon the appeal against sentence is to be listed before the Court of Appeal at the same time as the hearing of the appeal against conviction.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL