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

CRIMINAL APPEAL NO. AAU 108 OF 2015
(High Court HAC 38 of 2014 at Labasa)

BETWEEN : **RITESH VIKASH CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Ms S Nasedra for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **27 March 2019**

Date of Ruling : **24 May 2019**

RULING

[1] Following a trial in the High Court at Labasa the appellant was convicted on one count of rape and was sentenced on 27 August 2015 to 10 years imprisonment with a non-parole term of 7 years.

[2] 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). Section 35(1) of the Act gives to a judge of the Court of Appeal power to grant leave.

[3] On a perusal of the file it is apparent that the delay in this application coming on for hearing has been due to counsel's late filing of written submissions, direction for which had been given as early as January 2017. The appellant's submissions were filed on February 2019 and the Respondent's submissions were filed shortly afterwards in March 2019.

[4] The test for granting leave to appeal conviction is whether the appeal is arguable before the Court of Appeal (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013). The ground of appeal upon which the appellant relies is:

> *"The learned trial Judge erred in law and in fact when he misdirected the assessors that the complainant was tired at the end of the day as to the reason why she admitted in cross examination and re-examination that the accused did not penetrate her vagina with his penis when no evidence was adduced during the trial by the complainant that she was tired."*

[5] At the time of the offence the complainant was 14 years old. The offence allegedly occurred in April 2014. The trial took place in August 2015. The complainant was one year older at the time of giving her evidence. It is stated that she was mentally slow but there was no evidence called as to what that term meant nor as to any physical examination of the complainant. The appellant maintained that he did not know that the complainant was mentally slow. The appellant denied that penetration had taken place.

[6] In her evidence in chief the complainant stated that the appellant had penetrated her vagina with his penis. In cross-examination and re-examination she stated and confirmed that penetration had not occurred. It would appear that State Counsel in closing submissions claimed that the reason for the answers given by the complainant in cross-examination and re-examination was because the complainant had become tired by the end of the day. However at no stage was the complainant asked by Counsel or the trial

judge if she was tired. In other words there was no evidence to support that submission by State Counsel. The learned trial Judge accepted the submission and made reference to it both in his summing up to the assessors and in his judgment.

[7] In my judgment the manner in which the submission by Counsel for the State was considered by the trial Judge raises an arguable point that should be considered by the Court of Appeal. As a result leave to appeal against conviction is granted.

Order:

Leave to appeal conviction is granted.

W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL