IN THE COURT OF APPEAL
[On appeal from the High Court]

CRIMINAL APPEAL NO. AAU0124 OF 2013
[High Court Case No. HAC242/11]

BETWEEN	:	**ISEI KORODRAU**	*Appellant*
AND	:	**THE STATE**	*Respondent*
Coram	:	Goundar JA	
Counsel	:	Mr. S. Sharma for Appellant Mr. Y. Prasad for State	
Date of Hearing	:	12 August 2014	
Date of Ruling	:	16 January 2015	

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of rape and sentenced to 8 years' imprisonment. This is his application for leave to appeal against conviction only pursuant to section 21(1) of the Court of Appeal Act. The test for leave is whether the grounds of the appeal are arguable before the Full Court.

[2] The grounds of appeal are:-

1. The Learned Trial Judge erred in law and in fact when he failed to direct the assessors to consider the charge of attempted rape which was available on the evidence adduced.

2. The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence to assess the credibility of the complaint.

3. The Learned Trial Judge erred in law and in fact when he failed to direct the assessors and/or caution them about the dangers of relying on photograph identification.

4. The Learned Trial Judge erred in law and in fact when he failed to direct the assessors and/or caution them about the dangers of relying on the identification parade which was convened after the photograph identification.

5. The Learned Trial Judge erred in law and in fact when he directed the assessors under the *Turnbull guidelines* to consider whether a police identification parade was held which was prejudicial to the Appellant. Furthermore the Learned Trial Judge also erred in law and in fact when he failed to explain to the assessors the effect of daylight savings on the lighting at the scene and its apparent dangers/weaknesses.

6. The Learned Trial Judge erred in law and in fact when he did not adequately put the defence case to the assessors.

Ground 1 – Attempted rape

[3] Ground one is misconceived. At trial, it was an agreed fact that the complainant was raped. The issue was whether the appellant was the perpetrator? A charge of attempted rape can be sustained if there is evidence of the accused intended to commit rape and with that intention he did something which was more than mere preparation for committing rape.

[4] The complainant's evidence was that the appellant penetrated her vagina with his penis, without her consent. The medical evidence of bodily injuries was used by the prosecution to show use of force or violence. But the medical examination could not confirm sexual intercourse had taken place. According to the history relayed to the doctor by the complainant, she was assaulted by a Fijian male who attempted to rape her. This history was recorded by the doctor in the medical examination form of the complainant. At trial, the doctor gave evidence. What was said to the doctor by the complainant was an out of court statement. The evidence of the complainant was that the appellant had sexual intercourse with her using force. The appellant's case was that the complainant was mistaken in her identification and that when the offence was committed he was at his home. Clearly, there was no credible evidence to sustain a charge of attempted rape. Ground 1 is not arguable.

Ground 2 – Recent complaint evidence

[5] Evidence of recent complaint is admitted in sexual cases to show consistency in the conduct of the complainant and to negative consent (**Kory White v R** [1999] AC 210). If the evidence is admitted then the assessors should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial.

[6] Both the complainant and the named person to whom the complaint was made must testify as to the terms of the complaint for recent compliant evidence to be admitted. According to the complainant, she left home for work at around 5.30am to catch the bus. On the way to the bus stand, she saw the appellant walk passed her in a zigzag manner. Suddenly she felt someone grabbed her neck from behind. When she turned around she saw the appellant. He dragged her away from the pathway to an isolated location. When she screamed, he punched her several times in the face. He pulled her down in a ditch and raped her. Immediately after the incident, the complainant returned to her home. She told her landlady, Aisha Bibi about the assault and not the rape. Aisha Bibi gave evidence that the complainant left her home for work around 5.30am. After 20 minutes, she returned home with blood oozing from her face. The complainant told Bibi that a boy had grabbed her from the roadside and punched her several times. The complainant did not say anything about rape. Clearly, the complaint made to Bibi did not disclose the unlawful sexual conduct on the part of the appellant, which could have supported the complainant's credibility.

[7] Lack of recent complaint evidence means the trial judge was not obliged to give recent complaint directions. Ground 2 is not arguable.

Ground 3 – Photograph identification

[8] Two issues can arise from identification by photographs. The first issue is whether identification by photograph is admissible. This is a question of law alone. At trial, the defence took no objection to the admissibility of identification by photographs, nor is the

appellant raising an issue on appeal regarding the admissibility of photograph identification that was led at trial.

[9] The appellant's complaint relates to the lack of direction on the evidence of identification by photograph. Evidence was led that the complainant identified the appellant from 30 photographs shown to her by a police officer at Valelevu Police Station. Counsel for the appellant submits that the learned trial Judge should have directed the assessors on the dangers associated with relying on identification by photograph. In **Peter David John Lamb v R** 71 Cr. App. R. 198, the prosecution led evidence of an album of Criminal Records Office photographs to show the striking coincidence that two witnesses of the attack on the victim had picked out the defendant's photograph from 900 such photographs. On appeal, the English Court of Appeal held that the production of the photographs as part of the prosecution case, without anything being said or done by the defence, was an irregularity rendering the conviction unsafe. In the present case, the photographs were not produced in evidence. However, the assessors could have inferred from the evidence that the appellant had previous police history, or why else the police had his photograph. In that regard, the evidence of identification by the photograph had prejudicial effect and the trial judge gave no directions to dispel that prejudicial effect. This ground is arguable.

Ground 4- Identification parade

[10] This ground was abandoned at the leave hearing.

[Ground 5 – Turnbull directions

[11] There are 3 limbs to Turnbull directions:

(i) caution or the need for special care direction;
(ii) circumstances under which the identification was made direction;
(iii) any inherent weakness in the evidence direction (see **Joseva Vakanawakoro v The State** unreported Cr. App. No. AAU00114 of 2011; 5 December 2014) at para [13]).

[12] While the trial judge gave directions on the first and second limbs, he did not point out to any weaknesses in the identification evidence to the assessors. This ground is arguable.

Ground 6 – Alibi

[13] The appellant did not give any notice of alibi as required by the law. At trial he elected to give evidence. He said at the time of the alleged offence he was at his home. He called no other witnesses. The learned trial judge gave a brief direction on alibi as follows:

> *"Accused giving evidence took up the defence of alibi. In order to bring this evidence he should have given necessary notice to prosecution before the commencement of the trial. No such notice has been given to prosecution by the accused."*

[14] The above directions are arguably inadequate. While I accept that the appellant was required to give notice of his alibi, but once the evidence was led without notice and without objection from the prosecution, the trial judge should have made it clear to the assessors that the appellant did not carry any burden to prove he was somewhere else at the time of the alleged offence and it was the prosecution who carried the burden to disprove the alibi. This ground is arguable.

Result

Leave refused on grounds 1 and 2.

Leave granted on grounds 3, 5 and 6.

Ground 4 was abandoned.

COURT OF APPEAL
FIJI

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Hon. Mr. Justice D. Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State