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

CRIMINAL APPEAL AAU 12 of 2014
(High Court HAC 346 OF 2011)

BETWEEN : **FRANK KONARE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Waqainabete for the Appellant**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **4 July 2016**

Date of Ruling : **11 August 2016**

RULING

[1] This is an application for leave to appeal against conviction. The Appellant had been charged with one count of rape contrary to section 207(1) (2) (a) of

the Crimes Decree 2009 (the Decree), one count of burglary contrary to section 312(1) of the Decree and one count of theft contrary to section 291(1) of the Decree.

[2] Following a trial before a judge sitting with three assessors in the High Court at Suva the Appellant was convicted on each count. On 12 August 2013 the Appellant was sentenced to 8 years imprisonment for the rape conviction, 2 years imprisonment for the burglary conviction and a term of one year for the theft conviction. The sentences were ordered to be served concurrently with a non parole term of 5 years.

[3] By letter dated 12 August 2013 and received in the Registry on 26 August 2013 the Appellant applied for leave to appeal against conviction. The application for leave was timely. The Legal Aid Commission filed on 30 March 2016 on behalf of the Appellant an amended application for leave to appeal against conviction.

[4] Pursuant to section 21(1) (b) of the Act the Appellant requires leave to appeal against conviction when the grounds of appeal involve questions of mixed law and fact. The power of the Court to grant leave to appeal may be exercised by a judge of the Court under section 35(1) of the Act. The question for the Court is whether the Appellant should be granted leave to appeal against conviction. The test for leave to appeal against conviction is whether any of the grounds of appeal raises an arguable error: **Naisua –v- The State** (CAV 10 of 2013; 20 November 2013).

[5] The grounds of appeal against conviction:

> *"1. The learned trial Judge erred in law and in fact when he made this comment in paragraph 29 line 6 and 30 line 6 of the summing up in relation to the complainant's evidence, "she said she never consented to the above, and it appeared*

through her evidence, that the accused well knew she was not consenting to the above at the time" and "It appeared she gave him no permission to enter her house that night." By doing so, the learned trial Judge had usurped the function of the assessors thus resulted in a gross miscarriage of justice.

2. *The learned trial Judge erred in law and in fact when he did not consider the crucial inconsistencies between the evidence of the complainant and the medical doctor under cross-examination when considering the credibility of the complainant in his judgment which was the main determinant factor in accepting whose evidence."*

[6] The first ground of appeal takes issue with two specific sentences in the summing up to the assessors. The first sentence to which objection is taken is the last sentence in paragraph 29 of the summing up which reads: *"She said she never consented to the above and it appeared through her evidence that the accused well knew she was not consenting to the above at the time."*

[7] In considering this ground it is necessary to note that it was not denied by the Appellant that some form of sexual intercourse had occurred. For the purposes of this appeal the issue at the trial was the question of consent.

[8] In the summing up at paragraph 29 the learned trial judge has summarized in a fair manner the evidence given by the complainant as to the circumstances surrounding the two acts of carnal knowledge. The Judge referred to the evidence that she tried to resist but that the Appellant pressed her head on the pillow to stabilize her and to prevent her shouting.

[9] She attempted to resist before the second act of carnal knowledge. She was unable to scream and her resistance was weakened by her struggle. After summarizing her evidence the judge then made the observation that through her evidence it could be inferred that the Appellant knew she was not consenting.

[10] It is quite in order for a judge, based on his experience, to comment on the evidence. However the comments should not go so far as to render the summing up unbalanced. In this case the observation was reasonable as it went no further than to state an obvious inference from the evidence that had been summarized. The observation did not render the summing up unbalanced. In any event, it cannot be said that there was a miscarriage of justice since the assessors each returned an opinion of not guilty in respect of the rape charge.

[11] The second sentence that has been put in issue by the Appellant is the observation in the last sentence of paragraph 30 of the summing up. In my judgment this is no more than a logical inference from the summary of the evidence in relation to the burglary charge. The summing up has not been rendered unbalanced.

[12] In my judgment the direction given in paragraph 1 of the summing up was a sufficient indication to the assessors that in reaching their opinions they were free to disregard whatever opinion he might have expressed and that they were free to form their own opinions. The assessors heard all the evidence. They were directed to reach their individual opinions upon the evidence adduced in the course of the trial: (See: **David John Evans –v- R** 91 Cr. App. R. 173 at 174). In conclusion I consider ground 1 is not arguable and consequently leave is refused.

[13] The second ground in effect challenges the decision of the learned trial Judge to disagree with the opinions of the assessors and to enter a verdict of guilty in respect of the rape charge. Although the assessors had returned unanimous opinions of guilty on the burglary and theft charges they had returned unanimous opinions of not guilty on the rape charge.

[14] In respect of the rape charge and as previously noted the issue at the trial was the question whether carnal knowledge had taken place without the consent of

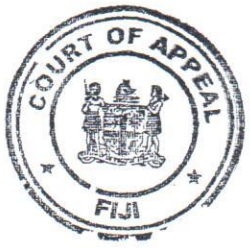
the complainant. It was for the prosecution to establish beyond reasonable doubt that carnal knowledge occurred without consent. In this case the prosecution relied on the evidence of the complainant. Both the judge and the assessors would need to be satisfied that the complainant was a reliable and credible witness in order to be satisfied beyond reasonable doubt. There was some evidence from a relative that added consistency to the complainant's evidence. However the medical report, although confirming that carnal knowledge had occurred recently, did not, so far as can presently be determined, provide any assistance in relation to the issue of consent.

[15] In his judgment the learned Judge does not refer to the inconsistencies raised by the Appellant in relation to the alleged force used against the complainant. Nor is there any reference as to whether the carnal knowledge consisted of sodomy or sexual intercourse. The reference to the medical report by the judge in his judgment refers to *"penetration of the complainant's private part."*

[16] I have concluded that on ground 2 the Appellant has raised an arguable point that the learned Judge has failed to provide cogent reasons for convicting the Appellant of rape when the assessors returned opinions of not guilty.

Order:

Leave to appeal against conviction on ground 1 is refused and granted on ground 2.



W. Calanchini

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