IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO:AAU0034 of 2015
[High Court Case No: HAC248 of 2013S]

BETWEEN	**:**	**MUBARAK HUSSEIN**
		Appellant
AND	**:**	**THE STATE**
		Respondent

Coram	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Mr M Yunus for the Appellant Mr Y Prasad for the Respondent
Date of Hearing	:	14 March 2017
Date of Ruling	:	17 March 2017

RULING

[1] This is a timely application for leave to appeal against both conviction and sentence. Following a trial in the High Court at Suva, the appellant was convicted of one count of burglary, one count of sexual assault and two counts of rape. He was sentenced to a total term of 16 years' imprisonment with a non-parole period of 15 years.

[2] The appeal is governed by section 21(1) of the Court of Appeal Act, Cap 12. Under this section, the appellant is required to obtain leave to appeal on any ground that involves a question of mixed law and fact, or fact alone. Section 35(1) of the Court of Appeal Act, Cap. 12 gives a single judge power to grant leave. The test for leave to appeal against conviction is whether the appeal is arguable (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013). Leave is also required to appeal against sentence. The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (*Naisua v State* unreported Cr App No

CAV0010 of 2013; 20 November 2013). On any question of law alone, the appellant may appeal as of right (section 21(1)(a)).

[3] The grounds of appeal are:

> Appeal Against Conviction
> Ground 1 – The Learned Trial Judge erred in law to shift the burden of prove (sic) to the Appellant to show that the confession was not voluntarily, when he directed the assessors that;
> (i) He admitted he first appeared in the Nausori Magistrate (sic) Court on 3 June. He admitted he never complain of any improper police behaviour. He also did not ask the magistrate for any medical examination for any injuries allegedly made by police.
> Ground 2 – The learned Trial Judge erred in law when he failed to give a written ruling after the completion of the trial within trial before the principal trial.
> Ground 3 – The learned Trial Judge erred in law ruling the confession statement as admissible in Voir Dire without providing any analysing of the evidence to demonstrate how he reached to such a conclusion.
> Ground 4 – The learned Trial Judge erred in law and in fact to convict the Appellant for the offence of rape in absence of any medical evidence to prove penetration, compromising his right to fair trial.
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> Appeal Against Sentence
> Ground 5 – The sentence is harsh and excessive in all circumstances of the matter.
> Ground 6 – The learned Trial Judge erred in law to consider breach of trust as an aggravating factor in absence of any evidence to show that there was a relationship of trust between the Appellant and the victim of alleged crime.

[4] At trial, the appellant waived his right to counsel and chose to represent himself. The victim was a 49-year old married woman with grown up children. On the night in question, she was home alone. Her husband was away. At around 9 pm, she was confronted with an intruder inside her bedroom. The bedroom lights were switched off. The intruder was masked. The intruder threatened the victim with a cane knife. She was gagged. Her hands and legs were tied with a piece of cloth and with a tape. She was blindfolded with a piece of cloth, which was taped to her face. Her clothes were removed. She was subjected to various sexual assaults including digital and penile rape. The intruder ejaculated inside her during penile rape. She was left gagged after the intruder left.

[5] The appellant lived in the same neighbourhood as the victim. The victim's husband gave evidence that when he was leaving his home on the night of the incident, he met the appellant and told him that he was going to Nakasi and his wife was home alone. When the appellant was arrested, he admitted the offences under caution. At trial, the appellant challenged the admissibility of his confession on the ground that it was extracted from him using force and unfair tactics. The trial judge ruled the confession admissible in a voir dire ruling. The appellant gave evidence. He denied committing the alleged offences. The assessors gave opinions that the appellant was guilty. The trial judge agreed and convicted the appellant.

Burden of proof

[6] The appellant's contention that the learned trial judge shifted the burden of proof on the appellant to show that the confession was not made voluntarily has no merit. In paragraph 4 of the summing-up, the learned trial told the assessors that "as a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty."

[7] The trial judge reminded the assessors of the burden of proof at the end of the summing-up in paragraph 30 "Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt". In my judgment, the direction on the burden of proof is impeccable. There is no basis to conclude that the trial judge gave an impression that the appellant was required to prove that he made his confession involuntarily. Ground one is unarguable.

Lack of detailed reasons for the voir dire ruling

[8] The trial judge held a voir dire to determine the admissibility of the appellant's confession. After hearing the evidence on the voir dire, the learned judge ruled the confession admissible on 2 March 2015 and proceeded with the trial. He gave written

reasons for his decision on 6 March 2015, the date the sentence was delivered and the case was concluded. Counsel for the appellant submits that the practice of admitting the disputed confession into evidence after a voir dire and giving reasons later during the trial was irregular. This Court is not aware of any authority that says that such a practice is irregular. Ground two is unarguable.

[9] The trial judge's written reasons were brief. After referring to the relevant principles, the trial judge came to the following conclusion:

> I have heard all the evidence. I accept the prosecution's witnesses evidence as credible, I accept what they said. I rule that the accused's caution interview statements and charge statements are admissible evidence, and their acceptance or otherwise will be a matter for the assessors.

[10] The appellant's contention is that the trial judge had not analyzed the evidence in the voir dire ruling. Central to the issue of admissibility was the credibility of the appellant and the police officers. The police officers denied using force or unfair tactics to extract the confession from the appellant. The appellant's evidence was that they did. The trial judge believed the police officers and ruled the appellant's confession admissible. The trial judge was indeed economical with his reasons. I do not think he made an error by being economical with his reasons. Such a course was approved by the Court of Appeal in ***Ganga Ram*** *v R* (46 of 1983) where it said:

> Accordingly we wish to say that it has always been thought desirable that findings adverse to an accused person, if they must be pronounced during the course of a trial, should be as economically worded as possible.

[11] Further, in *Deo v Reginam* [1984] FijiLawRp 4; [1984] 30 FLR 31 (24 November 1984) it was held that the learned trial Judge was correct in his ruling on the admissibility of the confessions, of doing so briefly without going into the details of the evidence. Similar pronouncement was made by the Privy Council in *Wallace and Others v The Queen (Jamaica)* [1996] UKPC 47 (3rd December, 1996). For these reasons, ground three is unarguable.

Medical evidence

[12] At trial, the prosecution led no medical evidence. But the medical report of the victim was disclosed to the appellant. The appellant's contention that the medical evidence should have been led is devoid of merit. This Court has no jurisdiction to consider evidence that was not led at the trial. Ground four is unarguable.

Breach of trust

[13] The appellant's contention is that the trial judge was wrong to consider the breach of trust as an aggravating factor because the appellant was not related to the victim. I accept that the victim was not related to the appellant, but there was evidence that both lived in the same settlement and the appellant occasionally visited the victim's home to drink kava with her husband. There was evidence of trust arising from the friendship between the appellant and the victim's husband, and that trust was breached when the appellant raped his friend's wife.

Whether the sentence is harsh and excessive?

[14] Apart from the breach of trust, there were many aggravating factors:

- The victim was raped in the safety of her own home.
- The incident happened at night time when the victim was alone and vulnerable.
- The appellant was masked to hide his identity.
- The victim was threatened with a cane knife.
- The victim was gagged – hands, legs tied and taped, face blindfolded and taped.
- The appellant ejaculated inside the victim – thus exposing the victim to pregnancy and sexually transmitted diseases.

[15] In my judgment, the sentence of 16 years' imprisonment reflects the criminality involved. There is no arguable error in the exercise of the sentencing discretion.

Result

[16] Leave refused.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

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