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

CRIMINAL APPEAL NO:AAU0149 of 2015
[High Court Case No: HAC077of 2013LAB]

BETWEEN	:	**BHUPENDRA KUMAR**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Mr M Yunus for the Appellant Mr M Vosawale for the Respondent
Date of Hearing	:	3 February 2017
Date of Ruling	:	7 February 2017

RULING

[1] Following a trial in the High Court at Labasa, the appellant was convicted of three counts of rape and one count of indecently insulting or annoying a person. He was sentenced to a total term of 11 years' imprisonment with a non-parole period of 10 years. Initially, the appellant applied for leave to appeal against both conviction and sentence pursuant to section 21(1) (b) and (c) of the Court of Appeal Act, Cap 12. Six grounds of appeal were advanced – five against conviction and one against sentence. At the leave hearing, counsel for the appellant abandoned the sentence appeal and ground five against conviction. He sought leave on the following remaining grounds of appeal against conviction only:

> Ground 1 – The learned trial judge erred in law and in fact when he failed to give adequate, sufficient weight to the evidence of your appellant and the defence witnesses.
> Ground 2 – The learned judge has erred in law and misdirected the Assessors about the evidence contained in the caution interview of your appellant in

respect of its truth and or credibility and the weight to be given to the confession.
Ground 3 – The learned trial judge erred in law and in fact when he failed to direct the assessors that prosecution bears the burden to prove beyond reasonable doubt that the confession was voluntarily obtained.
Ground 4 – The learned trial judge erred in law and in fact when he failed to give any direction or guide the assessors in regards to early complaint in sexual offences causing substantial prejudice to your appellant.

[2] The appeal is timely. 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). Section 35(1) of the Court of Appeal Act, Cap.12 gives a single judge power to grant leave.

[3] The victim was an 11-year old boy. The appellant was 44 years old and a relative of the victim. The victim's evidence was that on three different occasions in 2013, the appellant penetrated the mouth of the victim with his penis (the rape counts). On one occasion the appellant exposed himself to the victim and asked him to suck his penis. The victim was disgusted and refused to comply. This was the annoyance charge. Under caution, the appellant admitted penetrating the victim's mouth once. The caution interview was admitted in evidence after an unsuccessful challenge by the appellant. At trial, the appellant gave evidence. He denied all the allegations made against him by the victim. The assessors expressed unanimous opinion of guilty on all four counts. The trial judge agreed and convicted the appellant.

[4] **Unbalanced summing-up**
The appellant's contention is that the summing-up was unbalanced because the trial judge summed up the prosecution case in nine paragraphs while the defence case was summed up in four paragraphs. The fact that the trial judge had used more paragraphs to outline the prosecution case does not necessarily mean the summing-up is unbalanced. The key question is whether the summing-up contains an orderly, objective and balanced analysis of the case (*R v Fotu* [1995] 3 NZLR 129). In the present case, the summing-up is an orderly, objective and balanced analysis of the case.

[5] **Direction on confession**
Grounds two and three are dealt together. The voluntariness of the confession was an admissibility issue for the trial judge to determine. In his ruling, the trial judge was

satisfied that the prosecution had proved the voluntariness beyond reasonable doubt. Weight or truth of the confession was for the assessors to consider. In paragraph 34 of the summing-up, the trial judge directed the assessors to firstly consider whether the appellant did in fact make the confession, and secondly, whether the confession was true (*Burns v The Queen* [1975] 132 CLR 258, 262). The assessors were directed that when considering these questions they were to take into account that the appellant's evidence was that he was forced by the police to make the confession. There is no arguable error in the direction.

[6] **Recent complaint**

The appellant's contention that the trial judge failed to direct on recent complaint evidence has no merit. There was no recent complaint evidence led by the prosecution, and therefore, the trial judge was not required to give direction.

[7] For these reasons, I am not satisfied that the appeal against conviction is arguable.

[8] **Result**

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