

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

CRIMINAL APPEAL AAU 125 OF 2015
(High Court HAC 221 of 2014)

BETWEEN : **FABIANO DAKAI NADUVA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Mr M Fesaitu for the Appellant**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **8 August 2018**

Date of Ruling : **23 October 2018**

RULING

[1] Following a trial in the High Court the appellant was convicted on one count of rape and on 22 September 2015 was sentenced to 12 years 11 months imprisonment with a non-parole term of 11 years.

[2] The appellant filed a timely notice of appeal against conviction on 2 October 2015. An amended notice of appeal dated 20 December 2015 included a notice of appeal against sentence that was out of time by about one month. On 3 May 2018 the appellant signed an application to abandon his appeal against sentence. That application is to be listed before the Court of Appeal on a date to be fixed.

[3] A further amended notice of appeal against conviction was filed on 28 May 2018 by the Legal Aid Commission on behalf of the appellant relying on the following grounds of appeal:

“That the learned trial Judge erred in law and in fact in failing to consider that the complainant’s evidence is unreliable in that.

i) There is a material discrepancy of what was reported to her mother as opposed to her mother’s evidence of what the complainant reported.

ii) The medical evidence contradicts the complainant’s evidence that the appellant touched and pinched her vagina.

iii) The complainant admitted in cross examination that her mother told her to say that the appellant touched her pussy which goes to support the appellant’s case that the complainant’s mother made up the allegation against him.”

[4] This is his application for leave to appeal under section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[5] Briefly, the circumstances that resulted in the conviction of the appellant were that the complainant was a 4 year old child at the time of the offence. She was the appellant’s sister’s daughter, in other words, the appellant’s niece. On the day in question in the sitting room, the appellant called out to the complainant who came to him. The appellant

inserted his fingers into her vagina. When she said it was painful, the appellant said to her “*never mind.*” The complainant’s mother was sleeping and the complainant went to her mother and told her what had happened. Sometime later the mother reported the matter to the police.

- [6] The appellant’s defence at the trial was that the act complained never occurred and that the complainant’s mother had told the complainant to make up the complaint on account of an argument the mother had with the appellant earlier in the day.
- [7] At the time of the offence in May 2014 the complainant was not yet 4 years old, having been born on 8 October 2010. At the time of trial in September 2015 she had not yet turned 5 years old. To state that the complainant was still very young is an understatement. In order to raise an arguable point concerning the reliability of the evidence given by the complainant at the trial, the appellant relies on a discrepancy in the evidence given by the complainant and her mother concerning the complainant’s complaint to her mother, on what is described as a contradiction in the medical evidence and on an admission made by the complainant while she was being cross-examined.
- [8] The learned Judge in his judgment delivered on 11 September 2015 has considered each of the matters raised by the appellant. He has considered the age of the complainant and has concluded that the inconsistencies do not affect her credibility. The Judge has dealt with the issue raised by the medical evidence and has relied on section 207(2)(b) of the Crimes Act 2009. The Judge has accepted, without hesitation, the evidence given by the complainant and noted that she was able to demonstrate how the appellant had penetrated her with his fingers.
- [9] In my judgment the ground of appeal is not arguable and the application for leave to appeal against conviction is refused.

Orders:

1. *Leave to appeal against conviction is refused.*
2. *Application to abandon appeal against sentence to be listed before the Court of Appeal on a date to be fixed.*



W. Calanchini

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