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

CRIMINAL APPEAL AAU 68 OF 2016
(High Court HAC 19 OF 2015)

BETWEEN : **DAVID JOSAIAH BROWN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee with Mr K Prasad for the Appellant**
Mr M Korovou for the Respondent

Date of Hearing : **18 September 2018**

Date of Ruling : **29 November 2018**

RULING

[1] Following a trial in the High Court at Labasa the appellant (Brown) was convicted on one count of indecent assault under section 154(1) of the Penal Code Cap 17 (now repealed), on one count of sexual assault under section 210(1) of the Crimes Act 2009, two counts of rape under section 207(1) and (2) (a) of the Crimes Act and on one representative count of rape under section 207(1)(2)(a) and section 70(3) of the Crimes Act. On 11 May

2016 the appellant was sentenced to 15 years imprisonment in respect of each rape conviction, 7 years imprisonment for sexual assault and 12 months imprisonment for indecent assault. The sentences were ordered to be served concurrently with a non-parole term of 12 years.

[2] The appellant filed in person a timely notice of appeal against conviction and sentence on 31 May 2016 pursuant to section 21(1)(b) and (1)(c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and the test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (**Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013).

[3] The grounds of appeal against conviction are:

> *"(1) That the charges were defective in regards to the unfair reliance of the State to lay "representative counts" against the appellant, in particular to the following:*
>
> *(a) The dates on the charge were unfair and unreasonably long thus denying the appellant the right to a fair and balanced trial.*
>
> *(2) The learned trial Judge erred in principle and fact by lacking (sic) to provide a fair and balanced summing up when directing the ass, to the following:*
>
> *(a) the law on consent was not directed to the assessors;*
> *(b) the error to direct the assessors that the assessors must judge the case on the strength of the prosecution case,*
> *(c) uttering the words "well, that was the extent of his evidence and it is evidence for you to evaluate and give whatever weight you think fit."*
>
> *(3) That the conviction was unsafe and unsatisfactory having regard to the totality of the evidence at trial, in particular to the following:*

(a) found that there was penetration but the State failed to prove beyond reasonable doubt the lack of consent; and
(b) no other independent evidence was let by the State to corroborate the presence of the appellant in Batinivuniwai settlement Bua between 1 December 2011 to 30 March 2013."

[4] The ground of appeal against sentence is:

"The learned trial Judge erred in principle when sentencing the appellant, in particular, to the following:

(a) not clearly setting out the aggravating features to warrant the enhancement of 7 years; and
(b) not properly discounting the sentence for the appellant's good records."

[5] The background facts may be stated briefly. The appellant is the father of the complainant who was born on 22 August 2001. At the time of the indecent assault she was either 6 or 7 years old. At the time of the sexual assault she was either 10 or 11 years old. At the time of the first rape conviction she was 11 years old. At the time of the second rape conviction (the representative count) she was either 11 or 12 years old. At the time of the third rape conviction (the fifth count) she was either 12 or 13 years old. The complainant had for most of her life lived with her maternal grandparents while her parents and her 3 brothers lived separately in various locations. In the school holidays she would visit and stay with her parents wherever they were living and it was on these occasions that the offences took place. In 2008 the appellant removed the complainant's clothes and touched her breasts and genitals. In 2012 he did the same and also in that year he had sexual intercourse with her. In 2013 the appellant raped his daughter repeatedly and sometimes as much as 3 times a day. The appellant committed these offences while her mother was at work for long hours from before dawn until evening. The complainant's brothers were sent outside by the appellant. In the school holidays of 2014 the appellant again raped the complainant. She was overwhelmed by her father's authority, anger and threats. At one stage he told her that he would kill her if she told anyone what was happening. She eventually told her aunt and the Police were informed. His defence was that the incidents never happened i.e. "that he didn't do it."

[6] The submissions filed by the appellant are premised on what appears to be a misconception. At paragraph 11 it is stated that "*it seems that the appellant was charged with representative counts.*" However that is not correct. Only the fourth count (i.e. the second rape count) pleads that the appellant was charged with one representative count of rape between 1 January and 31 December 2013. This procedure is permitted under section 70(3) of the Criminal Procedure Act 2009. The evidence that is required to establish guilt beyond reasonable doubt in respect of a representative count relating to sexual misconduct was discussed by the Court of Appeal in **Hobson v R** [2013] EWCA Crim. 819; [2013] 1WLR 3733. The appellant's only complaint was the length of time over which it was alleged the multiple incidents of rape took place. However there is no complaint concerning the directions given by the trial Judge in his summing up. Those directions were consistent with the guidelines set out by the Court of Appeal in **Holson** (supra).

[7] The other issue raised by ground 1 is the time frame in which the prosecution alleged that the offences were committed. In my opinion that again only becomes an issue in relation to the fourth count being the representative second count of rape. In counts 1 and 2 the age of the complainant justifies the length of time and in counts 3 and 5 the length of time is not unreasonable. The only comment that is required in relation to ground 2 is that it was at all times the position of the appellant that the offences never took place and that the complainant *"was being used to make up these stories"* (para. 26 of the summing up). Furthermore, apart from the fifth count, consent was not relevant. In relation to the fifth count, since the appellant denied that he ever had sexual intercourse with the complainant, the issue of consent does not require any specific comment from the judge. Leave is refused on ground 2.

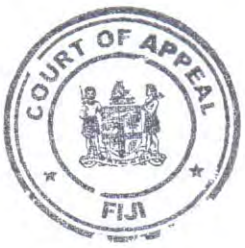
[8] Ground 3 raises two issues. The first again relates to consent. It is not necessary to repeat the comments made in relation to the issue of consent raised in ground 2. The second issue concerns the lack of supporting evidence that the appellant was present in the location where the offences were committed. There was direct evidence given by the

complainant which once accepted by the trial judge, was sufficient to establish guilt beyond reasonable doubt. Ground 3 is not arguable.

[9] As for the appeal against sentence, the principal complaint is the enhancement of the sentence by 7 years on account of aggravating factors without explaining what were the aggravating factors. However it must be acknowledged that the trial judge had adopted the approach of selecting a starting point which was at the lowest end of the range of 10 – 16 years for such an offence. He was thus entitled to regard all the aggravating factors for the purpose of enhancement. The age of the complainant when the offences began was a matter that was rightly regarded as an aggravating factor. The breach of trust and the actual relationship of the appellant to the complainant were serious aggravating factors. The sentence was within the range even allowing one year for good character. The head sentence imposed by the trial judge does not point to an error in the exercise of the sentencing discretion. Leave is refused.

Orders:

1. *Leave to appeal against conviction is refused.*
2. *Leave to appeal against sentence is refused.*



W. Calanchini

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