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

CRIMINAL APPEAL NO. AAU 132 OF 2016
(High Court HAC 57 of 2013)

BETWEEN : **PENI NAISAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee for the Appellant**
Mr S Vodokisolomone for the Respondent

Date of Hearing : **20 September 2018**

Date of Ruling : **29 November 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape and was sentenced on 29 August 2016 to a term of imprisonment for 12 years 10 months and 2 weeks with a non-parole term of 10 years 10 months and 2 weeks. This is his timely application for leave to appeal against conviction and sentence pursuant to section 21(1)(b) and (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, 20 November 2013).

[2] The relevant background facts may be stated briefly. The complainant was 7 years old at the time of offending. The complainant's mother and the appellant's wife were friends. On the evening in question, the complainant, her two sisters and her mother came to the appellant's house to visit the appellant's wife. The children watch television while the mothers drank "*grog*" (kava/yaqona). The appellant was cooking dinner in the kitchen when he called the complainant to the kitchen. He got her onto the table and asked her to put down her pants and panties. The appellant then unzipped his trousers and put some cream on his penis and asked the complainant to suck it. She did as she was told. When he heard some footsteps he asked the complainant to dress up and play with the other children. The complainant did not reveal the incident until her sister asked her after noticing the complainant's behavior of sucking a stem of a soursop fruit.

[3] The appellant gave evidence at the trial and admitted that he asked the complainant to lick his left testicle after putting some cream on it. He denied any penetration of her mouth by his penis. At the conclusion of the evidence and after the summing up the three assessors returned unanimous opinions of guilty. The learned Judge delivered his judgment on 23 August 2016 setting out cogent reasons for his agreeing with the opinions of the assessors and proceeding to convict the appellant.

[4] The grounds of appeal against conviction and sentence are set out in the Amended Notice of Appeal filed on 4 July 2018 as follows:-

> *"1. <u>THAT</u> the learned Trial Judge erred in principle and fact by lacking to provide a fair and balance Summing Up when directing the assessors, in particular, to the following:*
>
> *(a) Directing to the assessors the experience regarding reactions of a child of rape and/or sexual offender; and*

(b) Directing the assessors on a different Count; and

(c) Directing to the assessors the complainant's understanding of the term "balls" thereby resulting in establishing the State's case to prove beyond reasonable doubt the element of penetration of penis; and

(d) Mentally and emotionally influencing and challenging the assessors when considering the evidence of complainant who is a child; and

(e) Directing the assessors to consider the inconsistencies of the Appellant's case regarding the obtaining of his caution statement thereby influencing the minds of the assessors to consider the Prosecution witness's evidence to be more reliable and credible.

2. *THAT the conviction was unsatisfactory having regard to the totality of the evidence at trial, in particular, to the following:*

(a) reasoning that complainant referral to her "balls" denoted the genitals generally and not to describe the testicles of the accused when no evidence was adduced by Prosecution to prove this is what complainant meant.

3. *THE Learned Trial Judge erred in principle when sentencing the Appellant, in particular, to the following:*

(a) "double counting" an aggravated feature to enhance the sentence; and

(b) Relying on unsupported facts to enhance the sentence; and

(c) Not properly considering the mitigating factors to adequately decrease the sentence."

[5] The first ground of appeal against conviction alleges that the summing up lacked balance and fairness. The grounds and the submissions are worded in a manner that suggest that the trial had taken place before a judge and jury. However in Fiji the judge has the final word on both facts and law. In relation to findings of fact the opinions of the assessors are provided by way of guidance only to the trial judge who is at liberty to agree or disagree with those opinions. In his judgment the learned Judge has summarized the evidence, considered the inconsistencies in the evidence and concluded that the admissions in the caution interview were made voluntarily and were truthful. The Judge

concluded that the evidence that he accepted for the reasons stated was sufficient to establish the elements of rape under section 207(1)(2)(c) and (3) of the Crimes Act 2009 beyond reasonable doubt. In my view ground 1 is not arguable.

[6] Ground 2 is premised on a misconception as to when the Court of Appeal may set aside a conviction. Under section 23(1) of the Act "*unsatisfactory*" is not a basis for setting aside a conviction. This ground, apart from the misconception, is not arguable for the reasons stated by the learned Judge in his judgment.

[7] In relation to the sentence appeal the appellant seeks leave on two grounds. First that there has been double counting in the list of aggravating factors. The second ground is that there has been insufficient discount for mitigating factors. The judge has correctly identified the tariff for child rape as being 10 – 16 years imprisonment. The judge added four years on account of aggravating factors which he listed in paragraph 11 as:-

> *"(i) Breach of trust the victim had towards you as she was a guest;*
>
> *(ii) Significant degree of opportunistic planning;*
>
> *(iii) Taking advantage of the victim's vulnerability;*
>
> *(iv) Display of total disregard to the victim's wellbeing;*
>
> *(v) The 39 years of age gap between you and the complainant;*
>
> *(vi) Continuing psychological impact on the complainant."*

[8] The respondent has conceded that there is an element of repetition or duplication in this list. The Judge has then deducted 3 years on account of mitigating factors which he listed in paragraph 13 of the sentencing decision as:-

> *"(i) You are a first offender;*
>
> *(ii) You are a 49 year old executive chef of a resort;*

(iii) You are married and support your wife and four children as the sole breadwinner of the family."

[9] In my view the deduction of 3 years was generous as there was really only one matter that could be described as a mitigating factor being that he was up till the time of offending a person of good character.

[10] However it is arguable that there has been an error in the exercise of the sentencing discretion when considering the enhancement of the sentence for aggravating factors and leave should be granted on that basis.

Orders:

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

W. Calanchini

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