

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

CRIMINAL APPEAL AAU 0090 OF 2014
(High Court HAC 219 of 2012)

BETWEEN : **ISEI KORODRAU**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P**

Counsel : **Appellant in person**
Mr S Vodokisolome for the Respondent

Date of Hearing : **26 March 2018**

Date of Ruling : **27 April 2018**

RULING

[1] This is a timely application for leave to appeal against conviction and sentence. The Appellant was charged with one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act 2009, one count of theft contrary to section 291(1) of the Act and one count of rape contrary to section 207(1) and (2)(a) of the same Act. The Appellant pleaded not guilty to the three charges and following a trial before a judge

sitting with assessors, the Appellant was convicted on all three charges. On 11 July 2014 the Appellant was sentenced to terms of imprisonment of 3 years for aggravated burglary, 3 years for theft and 17 years for rape. The sentences were ordered to be served concurrently with each other and a non-parole term of 16 years was fixed.

[2] The background facts may be stated briefly. On 10 February 2011 the appellant came from a village in Tailevu to visit friends in Raiwaqa. He consumed liquor with his friends until late at night. In the early hours of 11 February 2011 he started wandering around nearby streets in Raiwaqa and Nailuva Road. He came to the property where the complainant stayed. She was asleep in her bedroom at the time. The appellant entered her apartment and grabbed a kitchen knife from the kitchen. He then forcefully woke up the complainant by putting the kitchen knife to her neck. He demanded money from her and then stole items of property from her. During the course of his time in the complainant's apartment the appellant raped the complainant before fleeing the house in the early morning of 11 February 2011.

[3] The initial notice of appeal was brief and the Appellant has subsequently filed a number of amendments and submissions. A concise statement of the grounds of appeal was filed by the Appellant on 7 January 2016 as follows:

- "1) *The learned Judge failed to considered a fair trial included the fair election.*
- 2) *The history of the case was one of nolle prosequi of first count of aggravated burglary second count of theft and third count of rape on 18th March 2011. The appellant was not recharged on the same fact or any new evidence of all counts but on the same facts was presented on 7th 8th 9th July 2014. This ground asks the appellate court to acquit the accused on the real issue of abuse process of the court 3 years later.*
- 3) *That the facts of the case was based on the confession which was considered at the nolle prosequi to be forced by the police but the same confession in now taken to be true on the testimony of professional witness.*

- 4) *That the prosecution's case depends on the fact outlined on paragraph 22 of the summing up which are "demanded money from the complainant then demanded sex from the complainant. . . . the complainant gave herself to him" considering that a nolle prosequi discontinued the trial. The appellant demands humbly that under the circumstances of the case a grave miscarriage of justice has accrued.*
- 5) *That on the paragraph 23 the learned trial judge presiding outlined the investigation possess. It was held in the summing up that this appellant must ask the question as to why the trial did not proceed in 2011, the appellant was discharged on 18 March 2011. The appellant court is ask again review if the admission was baised mainly on the initial fact that the complaint was about the dispossession of the complainant's properties and that she did not complain of the sexual intercourse thus the nolle prosequi.*
- 6) *Assessors accepted the alleged confession because his Lordship directed them at paragraph 24 of his summing up a prima facie case was found against me.*
- 7) *Injuries sustained during caution interview was not to the assessors when deliberating on the truthfulness of the confession.*
- 8) *The learned trial Judge shifted the burden of proof when he directed the assessors at paragraph 29 of his summing up; "It was not clear from the evidence whether or not the accused was part of line up of the police identification parade." The learned trial judge misdirected the assessors when he said; "The complainant's identification evidence is solid". He was telling the assessors to find me guilty."*

[4] Detailed submissions in handwritten form were filed by the Appellant on 11 January 2016. The Appellant has also filed an application for bail pending appeal, an affidavit in support of that application and further written submissions. The Respondent filed on 30 January 2018 written submissions on both leave to appeal and bail pending appeal.

[5] The test for determining whether leave to appeal against conviction should be granted is whether any ground of appeal raises an arguable point. In this case the grounds of appeal against conviction overlap and are to some extent repetitive.

- [6] In ground 1 the appellant claims that he was denied the right to elect the court for his trial. However the offences of aggravated burglary and rape are both indictable offences which must be tried in the High Court. The ground is vexatious and is dismissed under section 35(2) of the Court of Appeal Act.
- [7] Ground 2 raises the issue of being re-tried on the same facts for the same offences after the prosecution had entered a *nolle prosequi* at the earlier trial. However section 49 of the Criminal Procedure Act 2009 permits such a course of action. This ground is vexatious and is dismissed under section 35(2) of the Court of Appeal Act.
- [8] Ground 3 alleges that his admissions in the caution interview were found to have been forced by the Police at the trial in which a *nolle* was entered by the State. A perusal of the High Court file in HAC 57 of 2011 indicates that the trial had not commenced and that there had not been any *voir dire* procedure. This ground is also vexatious and is dismissed under section 35(2) of the Act.
- [9] Ground 4 again raises the issue of being tried on the same facts after the *nolle prosequi* was entered. For the same reasons the ground is dismissed under section 35(2) of the Court of Appeal Act.
- [10] Ground 5 is dealt with above and is factually inaccurate. The ground is vexatious and is dismissed under section 35(2) of the Court of Appeal Act.
- [11] Grounds 6 and 7 relate to the allegation by the appellant that his admissions were not given voluntarily. The directions given by the Judge to the assessors and himself in paragraphs 32 of the summary are adequate and this ground is not arguable.
- [12] Ground 8 challenges the directions on identification given in paragraph 29 of the summing up. The trial Judge directed the assessors that the complainant under cross-examination admitted that she attended a police identification parade and could not point out (i.e. identify) the appellant. The Judge then went on to direct the assessors that "it

was not clear from the evidence whether or not the accused was part of the line-up in the police identification parade.” It is arguable that the trial Judge has not adequately dealt with the issue of identification. Leave to appeal is granted.

- [13] There are some additional after-thought grounds relating to procedural issues in a handwritten document filed on 20 April 2017. Having read the material I am satisfied that they are not arguable.
- [14] The grounds of appeal against sentence are set out in an undated document that has a date stamp of 31 March 2017. The first ground relates to the non-parole term of 16 years as being too close to the head sentence of 17 years and as a result not affording the appellant the opportunity to re-habilitate. The second ground claims that the head sentence of 17 years for the rape conviction was excessive on account of the sentencing Judge considering irrelevant matters.
- [15] The test for granting leave to appeal against sentence is whether the appellant has identified an arguable error in the exercise of the sentencing discretion. The application for leave to appeal sentence is directed at the sentence imposed for the rape conviction. The judge identified the tariff for rape as between 7 – 15 years and he adopted 15 years as the starting point. That was at the highest end of the range. It must be assumed that in selecting 15 years the Judge has taken into account matters that would ordinarily be regarded as aggravating factors. That is a process that is sometimes followed by sentencing judge. However what is not permitted is to then add on a further period of 4 years for aggravating factors that were not expressly identified. There is an argument for concluding that there has been double counting in arriving at the sentence. The ground is arguable. The non-parole term may also be said to be on the high side for which the sentencing Judge has not given any explanation. This ground is also arguable and leave to appeal sentence is granted.
- [16] Finally, the application for bail pending appeal. Both the appellant and the respondent have made comprehensive submissions on the law and the merits. However the

application is misconceived. On 1 November 2013 the Appellant was convicted on one count of rape in the High Court at Suva in HAC 242 of 2011. He was subsequently sentenced to 8 years imprisonment with a non-parole term of 6 years. The appellant filed a timely notice of appeal (AAU 124 of 2013) and leave to appeal on three grounds was granted on 16 January 2015. However on 9 December 2015 the appeal was deemed to have been abandoned on account of non-compliance by the Legal Aid Commission with Rule 44 of the Court of Appeal Rules.

[17] The appellant is a serving prisoner in respect of other convictions and will not be eligible for release until sometime after November 2019. As a result an application bail pending appeal cannot be considered at this stage and is refused.

Orders:

1. *Leave to appeal against conviction on the issue of identification as described in ground 8 is granted.*
2. *Leave to appeal on grounds 6 and 7 is refused.*
3. *The appeal on grounds 1 – 5 is dismissed under section 35(2) of the Court of Appeal Act.*
4. *Leave to appeal against sentence is granted.*
5. *Application for bail pending appeal is refused.*



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