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

CRIMINAL APPEAL AAU 0113 OF 2016
(High Court HAC 272 of 2014)

BETWEEN : **SURYA DEO SHARMA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Ms S Vaniqi for the Appellant**
Mr L Burney for the Respondent

Date of Hearing : **27 March 2018**

Date of Ruling : **27 April 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on the unanimous opinions of three assessors and the concurring verdict of the trial Judge on one count of

rape contrary to section 207(1), (2)(a) and (3) of the Crimes Act 2009 and on one count of abduction of person under 18 years of age with intent to have carnal knowledge contrary to section 211(1) of the same Act. On 4 August 2016 the appellant was sentenced to an aggregate term of 11 years 11 months and 15 days imprisonment with a non-parole term of 8 years 11 months and 15 days.

[2] This is his timely application for leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). Pursuant to section 35(1) of the Act the power of the Court of Appeal to grant leave may be exercised by a judge of the Court. The test for granting leave is whether any ground of appeal raises an arguable point for the consideration of the Court of Appeal.

[3] The grounds of appeal are:

> *"1. **THAT** the Learned Judge erred in law and fact when he failed to direct the assessors properly in regards to the inherent weaknesses of the prosecution case.*
>
> *2. **THAT** the Learned Judge erred in law and fact when he failed to direct the assessors on the credibility of the complainant who admitted giving three different versions of what happened to the police, and on the possibility that she had been coached on what to say resulting in too much reasonable doubt to safely return with a guilty verdict.*
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> *3. **THAT** the Learned Judge erred in law and fact when he failed to direct the assessors on the credibility of the complainants father as he had motive to lie when the Accused refused to give him money resulting to too much reasonable doubt to safely return with a guilty verdict.*
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> *4. **THAT** the Learned Judge erred in law and fact when he failed to consider the medical report was inconclusive as it was one three days after the alleged rape."*

[4] At the hearing Counsel for the Appellant submitted that the four grounds of appeal can be considered as raising one issue that being the issue of reasonable doubt. In other words, for the purposes of section 23(1) of the Act, do any of the grounds raise an arguable point that would support the conclusion that the verdict should be set aside on the grounds that it is unreasonable. On this point it should be noted that such words as "*unsafe*" or "*dangerous*" have no application for setting aside a verdict under section 23 of the Act.

[5] The background facts may be stated briefly. The appellant was the employer of the complainant's father at the time of the offences. On 5 September 2014 in the afternoon the appellant saw the complainant walking towards her home in her school uniform. The complainant was 12 years old at the time. The appellant stopped his car asked the complainant to get into the car without the consent of her parents. The appellant took the complainant to his house and had sexual intercourse with the complainant on the following morning.

[6] The thrust of ground 1 is that the judge has failed to direct the assessors and himself as to the inherent weaknesses of the prosecution case. The prosecution case relied on the evidence of the complainant and to a lesser extent on the medical evidence. It must be recalled that there is no legal requirement for corroborative evidence. The issue is whether it was open to the trial Judge to accept the complainant's evidence that the appellant had penetrated her vagina with his penis. In his judgment the learned Judge has explained why he has accepted the evidence of the complainant on the key issue of the appellant having had sexual intercourse with her. An appellate court does not enjoy the advantage of being able to assess the evidence in the same way as the trial judge. The inconsistencies in her evidence were acknowledged by the trial Judge but found her evidence on material facts to be *"firm and clear."* This ground is not arguable.

[7] The second ground overlaps with the first ground and is specifically directed towards the inconsistencies in the evidence given by the complainant. The inconsistencies are not identified in the notice of appeal although certain inconsistencies are discussed in the appellant's written submissions. In my judgment the trial Judge has directed the

assessors and himself appropriately in paragraphs 7 – 11 on credibility and in paragraphs 36 – 39 on inconsistencies. This ground is not arguable.

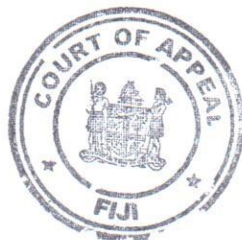
[8] The third ground concerns the evidence given by the complainant's father. It is claimed that the learned Judge should have directed the attention of the assessors and himself to certain matters that may have affected the weight that should be attached to that evidence. However those matters were peripheral and in my judgment did not affect the complainant's credibility. At the hearing Counsel for the appellant informed the Court that this ground was not being pursued.

[9] The fourth ground relates to the weight that should have been attached to the medical evidence. Counsel for the appellant submitted that the trial Judge should have concluded that the medical evidence was inconclusive. However the medical evidence did support the conclusion that sexual intercourse had taken place at about the time, although not precisely, when the appellant was with the complainant. Furthermore, even if the medical evidence was to be regarded as inconclusive, it was still open to the trial Judge to accept the evidence of the complainant and to conclude that the complainant's evidence alone satisfied him beyond reasonable doubt as to the appellant's guilt. This ground is not arguable.

[10] For the reasons stated above, leave to appeal conviction is refused.

Orders:

Leave to appeal is refused.



W. Calanchini

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