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

CRIMINAL APPEAL NO. AAU 152 of 2016
(High Court HAC 42 of 2015 of Labasa)

BETWEEN	:	**SOVITA SEVAKASIGA** **PENIJAMINI TAWAKE** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Calanchini P**
Counsel	:	**Mr T Lee for the Appellants** **Ms S Alagendra for the Respondent**
Date of Hearing	:	**24 January 2019**
Date of Ruling	:	**22 February 2019**

RULING

[1] Following a trial in the High Court at Labasa the appellants were each convicted on two counts of rape. On 19 August 2016 each appellant was sentenced to a term of imprisonment of 10 years 10 months and 2 weeks with non-parole terms of 8 years 10 months and 2 weeks.

[2] The appellants each filed a timely notice of appeal against conviction and sentence. On 10 August 2018 the appellants filed amended notices of appeal against conviction and sentence. Then, on 24 January 2019 each appellant signed an application to abandon the appeal against sentence. The hearing proceeded as applications for leave to appeal conviction only.

[3] The applications are made pursuant to section 21(1) 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: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[4] The grounds of appeal upon which each appellant relies are:

> *"(i)* ***THAT*** *the learned Trial Judge erred in principle and fact in the Summing Up by failing to give a cautionary warning to himself and the assessors on corroboration when the evidence adduced proved that a warning ought to have been given.*
>
> *(ii)* ***THAT*** *the learned Trial Judge erred in principle and fact in the Summing Up by not adequately directing the assessors on the law regarding whether the State has proven beyond reasonable doubt the lack of consent.*
>
> *(iii)* ***THAT*** *the learned Trial Judge caused a miscarriage of justice in convicting the Appellant without having regard to the totality of the evidence at trial, in particular that the State had failed to prove beyond reasonable doubt the lack of consent."*

[5] The first ground claims that a warning should have been given on corroboration in relation to the evidence of the complainant. However since the introduction of the Criminal Procedure Act 2009, pursuant to section 129, no corroboration of the complainant's evidence is necessary for an accused to be convicted and in such cases there is no requirement for a warning in the absence of corroboration. This ground is not arguable.

[6] Grounds 2 and 3 are essentially concerned with the issue of consent. Ground 2 is concerned with the directions given in the summing up and ground 3 is concerned with the analysis of the evidence in the judgment. So far as the directions to the assessors are concerned, it must be recalled that the assessors are required to give opinions as to guilt. Those opinions are not binding on the judge. Where the trial Judge has delivered a written judgment stating the reasons for his agreeing with the unanimous opinions of guilty, then attention must necessarily turn to the judgment rather than the summing up.

[7] In this case neither appellant denied that sexual intercourse had taken place. The only issue was whether sexual intercourse had taken place without the consent of the complainant. The learned Judge has summarized the evidence adduced at the trial. The Judge has indicated that he accepted the evidence of the complainant. It must follow that he has concluded that there was no material inconsistency in her evidence that would have created a reasonable doubt. The Judge has stated that he considered the evidence of the complainant to be truthful and reliable. He has also stated that the evidence of the complainant was sufficient to establish the elements of the offences, in particular lack of consent, beyond reasonable doubt. As a result I have concluded that these grounds are not arguable.

[8] For the above reasons, leave to appeal against conviction is refused.

Orders:

1. *The applications for leave to appeal against conviction are refused.*
2. *The applications to abandon the appeals against sentence are to be listed for hearing before the Full Court on a date to be fixed.*

COURT OF APPEAL FIJI

W. Calanchini

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