

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

CRIMINAL APPEAL NO. AAU 135 OF 2017  
(High Court HAC 88 of 2017)

BETWEEN : AKUILA NAVUDA  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Calanchini P

Counsel : Appellant in person  
Mr A Jack for the Respondent

Date of Hearing : 18 June 2019

Date of Ruling : 12 July 2019

RULING

[1] Following a trial in the Magistrates Court at Suva (in the exercise of its original jurisdiction) the appellant was convicted on one count of rape contrary to sections 149 and 150 of the Penal Code Cap 17 (now repealed). It would appear that the appellant had elected to be tried in the Magistrates Court. On 3 August 2017 the appellant was sentenced by the High Court to 17 years imprisonment with a non-parole term of 16

years. Having convicted the appellant the learned Magistrate, at the request of the respondent (the State) had purported to transfer the case to the High Court for sentencing on 10 March 2017 pursuant to section 190(1) of the Criminal Procedure Act 2009. Under section 190(4) of the same Act a person whose case has been transferred to the High Court for sentencing has the same right of appeal to the Court of Appeal as if that person had been convicted and sentenced by the High Court. Pursuant to section 301 (1) of the Criminal Procedure Act both the Magistrates Court and the High Court are given jurisdiction to apply the procedures set out in the Criminal Procedures Act to the present case. However the Transfer Order is said to be made under section 35(2)(b)(1) of the Criminal Procedure Decree (now Act) for the arraignment of the accused person whereas the appellant had already been tried and convicted by the Magistrates Court.

- [2] This is the appellant's 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 to a single judge of the Court power to grant leave. The present test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal 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] On 5 April 2019 the appellant filed in person a lengthy hand written document of some 30 pages. The grounds of appeal upon which the appellant appears to rely are not specifically numbered but rather are raised at various points during the course of the written submissions.
- [4] The first ground appears to raise an issue concerning the trial in the Magistrates Court and the sentence being imposed in the High Court. On page 5 of his submissions the ground is stated:

*"That the learned Magistrate erred in law and in fact in trial (sic) the case in the Magistrates Court before transferred (sic) in the last minute to the High Court for sentencing."*

It must be recalled that this case was first called in 2007. For a number of various reasons, not all of which were the fault of the appellant, the trial did not commence in the Magistrates Court until 7 January 2014. On that day Ms Salele appeared as Counsel for the appellant. There is a note in the record that on 7 January 2014 the Defence informed the Magistrate that the appellant had elected a Magistrates Court trial – “*was done by accused earlier.*” However on a careful reading of the record there is no note made by any of the Magistrates before whom the matter had been mentioned to that effect. This ground raises issues of law alone and for which leave is not required. The issues are not frivolous or vexatious.

- [5] The second issue raised by the appellant is that of legal representation. However the appellant informed the Magistrate that he wished to represent himself on 7 February 2017.
- [6] The third issue raised by the appellant is related to identification. The learned Magistrate considered the issue at some length and did so in the context of the guidelines set out in **R v Turnbull** (1997) 63 Cr. App. R 132. The issue of identification was adequately considered.
- [7] There was a submission made at the hearing which also appears to be the basis upon which the appellant seeks leave on a number of grounds to the effect that the complainant did not give evidence at the trial. However the record clearly shows that the complainant gave evidence on 7 January 2014 when the trial started. The respondent was not in a position to continue on 11 February 2014. The matter was continuously relisted for mention at the request of the respondent until 20 December 2016 when the appellant failed to appear although he had been granted bail. On 7 February 2017 the appellant indicated that he wanted to represent himself and on that date the trial resumed.
- [8] I have concluded, after having read the record of proceedings in the Magistrates Court, that the appellant has been disadvantaged by the delay and by the withdrawal of his



Counsel. The effect of those matters on the appellant receiving a fair trial should be considered by the Court of Appeal.

[9] In relation to the sentence appeal there is an arguable error in that the sentence imposed by the High Court in 2017 was not appropriate for the offence that was committed in 2007 when a considerable portion of that delay was not attributable to the appellant.

Order:

1. *Ground 1 raises issues of law alone.*
2. *Leave to appeal against conviction is granted.*
3. *Leave to appeal against sentence is granted.*



*W. Calanchini*

---

Hon Mr Justice W D Calanchini  
PRESIDENT, COURT OF APPEAL