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

CRIMINAL APPEAL NO. AAU 89 OF 2016
(High Court HAC 2 of 2016)

BETWEEN : **WAISALE ROVA LAVETA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr M Yunus for the Appellant**
Mr M Vosawale for the Respondent

Date of Hearing : **12 August 2019**

Date of Ruling : **25 September 2019**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape and one count of sexual assault. On 23 June 2016 the appellant was sentenced to a total term of 12 years imprisonment with a non-parole term of 8 years 6 months effective from the date of sentence.

[2] The appellant filed a timely notice of appeal against conviction and sentence dated 13 July 2016. On 20 March 2019 he applied in writing to abandon his appeal against sentence. This application is to be listed for hearing at the same time as the appeal against conviction in the event that leave is granted or alternatively on a date to be fixed.

[3] This is the appellant's application for leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). In the event that a ground of appeal involves a question of law only leave is not required under section 21(1)(a), otherwise leave is required under section 21(1)(b) of the Act. Section 35(1) of the Act gives to 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 before the Court of Appeal: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[4] On 28 May 2018 the appellant filed an amended notice of appeal relying on the following grounds of appeal against conviction.

> *"1. The Learned Trial Judge erred in law and in fact when despite that challenge by the accused through his counsel that the caution interview was not properly conducted, failed to stop the trial and hold a void dire inquiry to determine the admissibility of the caution interview, as such causing substantial prejudice to the Appellant.*
>
> *2. The Learned Trial Judge erred in law and in fact when he did not write that exact words as spoken by the witnesses in evidence but paraphrased the evidence whilst writing them, causing an abuse of process and substantial prejudice to the Appellant.*
>
> *3. The Learned Trial Judge erred in law and in fact when he did not adequately direct himself and the assessors that the opinion and evidence given by the doctor does not confirm penetration and or slight penetration into the vagina.*
>
> *4. The Learned Trial Judge erred in law and in fact when he failed to direct the assessors on the cross examination of the doctor, but he only directed on the examination in chief and re-examination, causing substantial prejudice to the Appellant.*

5. *The Learned Trial Judge erred in law and in fact in convicting the accused for the offences of rape and sexual offence, because the complainant in cross-examination agree that 'she consented to the acts of the accused.'*

6. *The Learned Trial Judge erred in law and in fact when he did not give a fair and balance summing up to the assessors, causing substantial prejudice to the appellant.*

7. *The Learned Trial Judge erred in law and facts when he failed to direct the assessors on alternative count of Indecent Assault for the offence of Rape despite the defence application for re-direction on the alternative count.*

8. *The Learned Trial Judge erred in law and facts when he failed to direct the assessors on alternative count of Indecent Assault for the offence of Sexual Office despite the defence application for re-direction on the alternative count.*

9. *The Learned Trial Judge erred in law and in fact when he did not properly direct the assessors on how to approach the previous inconsistent statements of some witnesses.*

10. *The Learned Trial Judge erred in law and in fact when he failed to direct the assessors that other evidence of an inconsistent statement cannot be used to enhance the prosecution case, causing substantial prejudice to the Appellant.*

11. *The Learned Trial Judge erred in law to say in the judgment that inconsistencies were not significant, when in fact the inconsistencies were significant and touched the root of the matter.*

12. *The Learned Trial Judge erred in law and in fact when he found the prosecution witnesses credible despite the significant inconsistencies per se and inter se in their evidence."*

[5] The first ground and perhaps the principal ground concerns the caution given by the interviewing police officer to the appellant at the start of the interview. It is alleged that, as a result of a question put to the interviewing officer in cross-examination, the appellant had not been cautioned in accordance with the requirements of the Judges' Rules. The police officer denied the assertion. Before considering this ground it is necessary to comment briefly on the basis upon which the appellant now seeks to rely on the caution.

[6] First, it must be noted that the appellant is not challenging the admissions in the caution interview on the basis that they were not made voluntarily in the narrow sense of the word. Under those circumstances the appellant was required to raise an issue for the exercise of the Judge's discretion to reject the confession voluntarily made and therefore prima facie admissible (**R v Lee** (1950) 82 CLR 133 and **Police v Dunstall** [2015] HCA 26, 5 August 2015 at paras. 59 – 65). The appellant's submission relies on the one question in cross-examination concerning the wording of the caution. However it would appear that as a result of the unhelpful answer the matter was not pursued at the trial.

[7] The appellant is claiming that the confession should have been excluded on the basis of unfairness. In the written submissions Counsel states that the trial judge should have immediately conducted a voir dire on the issue of unfairness based on the one question directed to the interviewing police officer in cross-examination.

[8] Secondly, so far as it is possible to determine at this stage, there was no formal request by Counsel for the appellant at the trial for a voir dire to determine the issue. On the basis that Counsel was in possession of a copy of the caution interview as part of the disclosures prior to the trial, the issue should have been raised by Counsel based on instructions from the appellant.

[9] The appellant's rights were explained to him in two separate paragraphs at the beginning of the caution interview. The first set of rights concerning access to a lawyer and a family member are set out in a paragraph between questions 6 and 7. The second set of rights concerning the right to remain silent and the consequences of saying anything are set out in a paragraph between questions 8 and 9. It appears that the appellant takes issue with the wording. The caution was read out to the appellant after the principal allegation was put to the appellant. In my view that in itself is not prejudicial or unfair. The wording used by the interviewing police officer is only slightly different from that which is set out in the Judges' Rules.

[10] In my view the breach, even if it is conceded that there has been a breach, is so minor in nature compared with the degree of criminality that there was no basis for excluding the caution interview on the basis of unfairness. The appellant was cautioned that he did not have to say anything unless he wished to do so. He was also cautioned that anything that he did say would be put into writing and given in evidence.

[11] In reaching this conclusion I have considered the observations of this Court in **Sharma – v- Reginam** (1970) 16 Fiji LR 5 and **Heinrich v The State** [2019] FJCA 41; AAU 29 of 2017, 7 March 2019. I have also considered the observations of the New Zealand Court of Appeal in **R v Convery** [1968] N.Z.L.R 426 at page 438 to 440. These decisions consider the purpose of the Judges' Rules in the course of a criminal investigation. I have concluded that this ground is not arguable.

[12] In view of this conclusion and in view of the admissions in the caution interview it would appear that the real issue at the trial was consent. In his judgment the learned trial Judge has reviewed the evidence given by the witnesses and has then referred to the admissions made by the appellant in the caution interview. In his judgment the trial Judge has also noted the appellant's contradictory oral testimony and the complainant's inconsistent evidence. For the reasons stated he has accepted the evidence of the complainant and concluded that her evidence established guilt beyond reasonable doubt. However I shall briefly comment on the remaining grounds.

[13] Ground 2 is not arguable. The Judge has no choice, when taking handwritten notes, but to paraphrase evidence. Grounds 3 and 4 are not arguable in view of the admissions made by the appellant in answer to question 51 in the caution interview. Ground 5 relates to consent and the Judge has adequately considered the issue in his judgment. That ground is not arguable. Ground 6 is not arguable first because it is not sufficiently particularized and secondly on account of the appellant's admissions in his caution interviews. Grounds 7 and 8 are not arguable on the basis of the admissions in the caution interview. Ground 9 raises the issue of previous inconsistent statements. The ground is not particularized nor are there any inconsistencies specified in the written

submissions. The ground cannot be considered as arguable in the absence of particulars of inconsistencies. Grounds 10 and 11 fail for the same reasons.

[14] Although ground 12 has been adequately particularized, the issue of consent and inconsistent statements has been considered by the trial Judge in his judgment. The issue raised by the inconsistencies is consent. It is noted that in the copy of the caution interview provided to the court by Counsel for the appellant questions and answers numbered 49 – 61 are missing. The learned Judge concluded that he was satisfied that the complainant had not consented to digital rape or to sexual assault. She was only 15 years old at the time. There is no doubt that the trial Judge was in the best position to assess reliability and credibility. The Judge agreed with the unanimous opinions of the assessors and has given sufficiently cogent reasons for doing so. In my view this ground is not arguable.

Order:

Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL