

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

CRIMINAL APPEAL NO. AAU 66 OF 2016
(High Court HAC 148 of 2013)

BETWEEN : THE STATE

Appellant

AND : PENIASI TABAKANAVANUA

Respondent

Coram : Calanchini P

Counsel : Ms P Madanavosa for the Appellant
Mr I Ramanu for the Respondent

Date of Hearing : 20 March 2019

Date of Ruling : 29 March 2019

RULING

- [1] Following a trial in the High Court at Suva the respondent was acquitted on one count of rape. He had been charged under section 207(1), 2(a) of the Crimes Act 2009.

[2] This is the State's timely application for leave to appeal against acquittal pursuant to section 21 (2)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives power to a single judge of the Court to grant leave. The test for granting leave to appeal against acquittal is whether the appeal raises an arguable point that is fit for the consideration of the Court of Appeal.

[3] In the notice of appeal filed on 6 June 2016 the appellant pleaded four grounds of appeal. At the hearing Counsel for the appellant indicated that the State is relying on only grounds 3 and 4 in support of the application for leave. Those grounds of appeal are:

"3. The learned trial Judge erred in law when he directed the assessors to evaluate the evidence, including truth and liability on a "question of probabilities" and when he further invited the assessors and therefore himself to "consider all the probabilities" in arriving at a decision on "which version" was the "more probable" one based on their common sense."

"4. The learned trial Judge erred in law in directing the assessors and himself to assess the credibility of the evidence for the prosecution and of the accused in a case where the accused had remained silent and had offered no evidence; therefore giving submissions made by Counsel for the accused evidentiary force which they were, in law, not entitled to have."

[4] Although the hearing proceeded on the basis that the State required leave on the basis that those two grounds involved questions of mixed fact and law, it is arguable that the grounds involve errors of law alone for which leave is not required under section 21(2)(a) of the Act. In this application, however, regardless of how the matter is approached, the outcome, for the reasons stated below, is the same.

[5] There are two preliminary observations to be made. First, the respondent at the trial pleaded not guilty but did not give evidence nor did he call any witnesses. Secondly, the

trial proceeded on the basis that the only issue in dispute was consent since the respondent had admitted in his caution interview that sexual intercourse had taken place but with the consent of the complainant.

- [6] It is also necessary to recall that criminal trials in Fiji are conducted by a judge sitting with, usually, three assessors. However it is the judge who ultimately decides issues of both fact and law albeit with guidance provided by the opinions of the assessors as to guilt: Section 237 of the Criminal Procedure Act 2009 and **Prasad -v- The Queen** [1980] UKPC 37; Privy Council Appeal No.32 of 1979, 17 November 1980. It follows that in the event that there has been either a misdirection or an omission in the directions given by the trial judge to the assessors, that defect or those defects may be remedied in the judgment that determines the outcome of the trial following the delivery by the assessors of their opinions.
- [7] Turning to the first ground of appeal relating to the use in various expressions of the word "*probabilities*." To the extent that the trial Judge could be said to be directing the assessors and himself to apply a lower standard of proof, then those expressions work in favour of the prosecution and do not prejudice the case for the State. If anything the use of the word probabilities would have constituted a ground of appeal for the respondent in the event that a conviction had resulted. In his judgment delivered on 6 May 2016 the learned Judge has correctly applied the correct standard of "*beyond reasonable doubt*" in paragraph 11. There is no merit in this ground.
- [8] In relation to the second ground of appeal the Judge has not made any comment about assessing the credibility of the accused's evidence. This was the correct approach since the accused chose to remain silent and called no evidence. The Judge took into account the inconsistencies in the evidence given by the complainant. There is no merit in this ground.

- [9] For all of the above reasons leave to appeal against acquittal is refused and the appeal is dismissed under section 35(2) of the Act.



W. Calanchini

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