

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

CRIMINAL APPEAL NO. AAU 49 OF 2016
(High Court HAC 53 of 2016 at Labasa)

BETWEEN : **ILAISA CAKAU** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Ms S Nasedra for the Appellant**
Mr A Jack for the Respondent

Date of Hearing : **27 March 2019**

Date of Ruling : **24 May 2019**

RULING

[1] Following a trial in the High Court at Labasa the appellant was convicted on one count of rape and was sentenced to 16 years imprisonment with a non-parole term of 12 years.

[2] Initially the appellant filed a timely notice of appeal against conviction and sentence. However by way of an amended notice of appeal filed on 7 February 2019 the appellant had relied only on three grounds of appeal against conviction. The appellant is required to submit a signed notice seeking leave to abandon the appeal against sentence. That matter will then be listed before the Court of Appeal on a date to be fixed.

[3] The present application is therefore the appellant's timely application for leave to appeal against conviction pursuant to section 21(1) 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 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, 30 November 2013).

[4] The grounds of appeal are:

- "1. That the learned trial Judge erred in law and fact when he failed to provide cogent reasons for overturning the unanimous not guilty verdicts of the assessors.*
- 2. That the learned trial Judge erred in law and fact when he failed to consider the issue of delayed reporting of the complaint thus questioning the credibility of the complainant."*

[5] In relation to the first ground it must first be observed that the assessors do not return verdicts. The assessors' role is to provide opinions as to the guilt of the accused for the guidance of the trial judge whose task it is to reach a verdict of guilty or not guilty based on the evidence and taking into account the opinions of the assessors. The trial Judge is not obliged to agree with the opinions of the assessors but when in disagreement with their opinions he is required to provide a written judgment with cogent reasons for that disagreement: Section 237 of the Criminal Procedure Act 2009.

[6] In the present case the assessors returned unanimous opinions of not guilty. The learned trial Judge disagreed with those opinions. In his judgment the learned Judge stated that he accepted the evidence of the complainant and her mother. At the time of the offence the complainant was 11 years old. At the time of the trial she was 12 years old. The Judge was satisfied that she was telling the truth. By contrast the Judge found the appellant's evidence to be "*rather contrived and implausible.*" Even under vigorous cross-examination the complainant's evidence remained "*unshaken.*" This ground has no merit.

[7] The second ground alleges that there was delay in reporting the offence without any explanation for that delay and that as a result a reasonable doubt existed as to the guilt of the appellant. In my opinion the learned Judge provides an explanation in his judgment for the delay when he described the 12 year old complainant as a 12 year old girl having to talk about matters that were personal and embarrassing for a shy reticent girl. Nevertheless he found her evidence convincing and believable. This ground lacks merit.

Orders:

- 1) *Leave to appeal against conviction is refused.*
- 2) *The appellant is required to sign a Rule 39 notice seeking leave to abandon his sentence appeal which will then be listed before the Court of Appeal on a date to be fixed.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL