

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

CRIMINAL APPEAL NO. AAU 91 OF 2016
(High Court HAC 89 of 2013)

BETWEEN : GURJEET SINGH

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Mr A Bale for the Appellant
Ms S Tivao for the Respondent

Date of Hearing : 22 May 2019

Date of Ruling : 31 May 2019

RULING

[1] Following a trial in the High Court at Lautoka the appellant was convicted on one count of rape and one count of common assault. The assessors returned unanimous opinions of not guilty on the count of rape and unanimous opinions of guilty on the count of common

assault. In a written judgment delivered on 23 June 2016 the learned trial Judge comprehensively reviewed the evidence and explained the reasons for convicting the appellant on both counts and for his disagreeing with the unanimous not guilty opinions of the assessors. On 5 July 2016 the appellant was sentenced to seven years imprisonment for the rape conviction and six months imprisonment for the common assault conviction. The sentences were ordered to be served concurrently with a non-parole term of 5 years imprisonment.

[2] This is his timely application for leave to appeal against conviction on the count of rape pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (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, 30 November 2013).

[3] The relevant facts were conveniently summarized by the trial Judge in his sentencing decision and for the sake of brevity are adopted in this Ruling but omitting some irrelevant material. The complainant visited the appellant, her former boyfriend, at his apartment and started drinking alcohol with him and two others. They were engaged in friendly conversation consuming alcohol till late at night. However, at one point, later in the night, the accused “*got wild*” at the complainant and slapped her on her face underneath the right eye. She started crying and went to the bedroom to “*isolate herself*” from the appellant. The appellant went to the bedroom to comfort her. He made her sit up and while comforting her he pulled her shoulder and t-shirt. The complainant started to struggle and asked the appellant to go away. The appellant pushed her back on the bed, “*pulled her skirt and panty and forcefully inserted his erect penis into her vagina, penetrating it deeply several times while she was struggling and pushing him away.*” After the incident, she was taken, at her insistence, to the police station by the appellant’s cousin. She was medically examined at the hospital. The doctor found the injuries on her face and at the base of her introitus to be consistent with forceful sexual intercourse.

The appellant admitted having had sexual intercourse with the complainant but maintained that it was with her consent.

- [4] There are 17 grounds of appeal against conviction, a substantial number of which have not been sufficiently particularised or particularised at all. The Court cannot assess whether those grounds are arguable. None of the 17 grounds of appeal are the subject of any substantive submission in the appellant's written submissions on leave to appeal.
- [5] In so far as the remaining grounds do raise an identifiable issue, they relate to the trial judge's assessment of the evidence and the witnesses. In his judgment the Judge has clearly set out the strengths and weaknesses of the prosecution case and has carefully considered the evidence of the appellant and his witnesses. He has explained the reasons for accepting the evidence given by the complainant and the prosecution's medical evidence. In the absence of any substantive submissions on those grounds it is not possible for the Court to conclude that there is sufficient merit for the Court of Appeal's consideration.
- [6] In relation to the specific issues raised by the appellant, it is sufficient to make the following observations. First is the issue of the possible effect of the appellant's bearing (marble) implant in his penis on the complainant's '*introitus*.' That issue is considered by the trial Judge in paragraphs 18 – 20 of the judgment. The second issue raised in the grounds of appeal is the conclusion in paragraph 35 of the judgment that the witness Ashneel could not be regarded as an independent witness for the accused. The trial Judge has stated the reasons for that conclusion. One of the reasons is that the Judge regarded his testimony as implausible and that such evidence was given on account of Ashneel being the appellant's cousin and drinking companion. Thirdly, the trial Judge regarded the inconsistencies and omissions, in the complainant's evidence as not sufficiently material so as to affect her credibility. Fourthly, the Judge has adequately considered the letters of withdrawal of the complaint by the complainant and has accepted the reasons provided by the complainant.

- [7] There is no other issue raised by the grounds of appeal that requires a specific comment and neither party has addressed any of the issues raised by the notice of appeal
- [8] In my view the scatter gun approach to drafting grounds of appeal is unhelpful. The grounds are not in any logical order and are in vague and general terms. They have been drafted with a view of covering every possible basis for allowing the appeal under section 23 of the Court of Appeal Act.
- [9] It is often said that when drafting grounds of appeal it is a good idea to select only those grounds that have genuine merit and are likely to be decisive on appeal. It is not possible from either the written or oral submissions to determine which grounds the appellant regards as the strong grounds. To a certain extent the same issues have been drafted in different ways.
- [10] It must be recalled that under section 237 of the Criminal Procedure Act 2009 a trial judge is permitted to disagree with the opinions of the assessor. However if a trial judge does disagree with the assessors, then the judge is required to deliver a written judgment with cogent reasons for doing so. The trial Judge has delivered a written judgment and his reasoning is sound and cogent.
- [11] The appellant has not submitted any convincing reason why the Court of Appeal would interfere with the findings and conclusions of the trial Judge. On the material provided by the appellant the grounds of appeal are not arguable because either they are not sufficiently particularized or they lack merit. As a result leave to appeal against conviction is refused.
- [12] The appellant has also filed an application for bail pending appeal. On the material that is presently before the Court there is no basis for concluding that there exists special circumstances that would enable the Court to consider granting bail pending appeal. The application is refused.

Orders:

- 1) *Application for leave to appeal conviction is refused.*
- 2) *Application for bail pending appeal is refused.*



W. Calanchini

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