IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0057 of 2015
[High Court Criminal Case No. HAC 116 of 2011L]

BETWEEN	:	**SIONE SADRUGU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. Waqainabete. S for the Appellant** **Mr. Burney. LJ for the Respondent**
Date of Hearing	:	**16 May 2019**
Date of Ruling	:	**06 June 2019**

RULING

[1] The appellant had timely sought leave to appeal against the conviction and sentence on a single count of rape under section 207 (1) and 207 (2) (a) the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed on 28 May 2011 at Nadi in the Western Division by having inserted his penis into the anus of X (name withheld) without his consent.

[2] However, the appellant had later applied to withdraw or abandon the appeal against sentence and proceed only against his conviction.

[3] Upon conclusion of the trial, the assessors had returned unanimous opinions of guilty of rape against the appellant who was convicted and sentenced to 08 years imprisonment with a non-parole period of 06 years by the trial judge.

[4] The appellant's amended notice of appeal dated 20 March 2018 contains the following grounds of appeal against the conviction.

> Ground 1
>
> *'The Learned Judge erred in law and in fact when he failed to give directions to the assessors in his summing up on how to approach and consider the disputed admission contained in the appellant's record of interview in terms of voluntariness and the weight that they may or may not attach to it depending on whether or not they accept the evidence led by the parties.*
>
> Ground 2
>
> *'The Learned Judge erred in law and in fact when he did not properly consider that the admission in the record of interview of the appellant was a result of the assault done by the police before and during the interview.'*

[5] It is clear that none of the above grounds on conviction involves a question of law alone and therefore section 21(1)(b) of the Court of Appeal Act (Cap 12) comes into play. Therefore, for the appellant to appeal to the Court of Appeal against the conviction on the above grounds of appeal, he has to first obtain leave of court and to do so he should pass the appropriate test for leave to appeal.

[6] The basic purpose of requiring leave of court is to ensure that unmeritorious cases do not consume the limited resources of the appellate court. The requirement of leave is the central mechanism by which appellate courts can control the quantity and quality of cases heard and determined on appeal (vide **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173).

[7] In **Coulter v R** [1988] HCA 3; (1988) 164 CLR 350 (11 February 1988) the High Court of Australia said

> *'The jurisdiction which the court exercises in determining an application for leave is not a proceeding in the ordinary course of litigation ... It is a preliminary procedure recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention.'*

[8] In ***Caucau*** , ***Navuki*** and ***Vakarau*** the Court of Appeal also stated

> *'Granting leave or not is not just a formality but requires an examination of the merits of the particular case. The legal test for granting leave should be able to balance, on the one hand, the rights and interests of the aggrieved person in being able to have a decision or judgment of the lower court reviewed by a higher court with, on the other hand, the problem of appellate courts being swamped with increasing numbers of unmeritorious appeals. It should be neither too stringent nor too liberal. Whilst the legal test should be able to exclude unmeritorious appeals, it should not also exclude meritorious appeals.'*

[9] Following **Chand v State** AAU0035 of 2007: 19 September 2008 [2008] FJCA 53 the applicable test for granting leave to appeal to the Full Court has been regularly held to be as follows.

> *'To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal'.*

[10] Therefore, the main task for the appellate court at the leave stage is to differentiate an arguable ground of appeal from a non-arguable ground of appeal. If the threshold for leave to appeal is too low, the appellate court would be clogged and inundated with appeals which are unlikely to succeed in the end consuming the court's valuable time and limited resources when meritorious appeals needing its attention lag behind in the ever increasing queue. In the process, some of the appellants who deserve relief by either getting their convictions set aside or sentences reduced or in any other manner might be forced to serve full sentences without ever having to get their appeals argued before the full court. Moreover, granting of leave in cases which at least have no reasonable prospect of success would give false hopes to the appellants that their appeals may succeed before the full court.

[11] However, ***Chand*** does not state how to distinguish an arguable ground from a non-arguable ground. Ordinarily, an arguable ground should mean a ground which is capable of being argued plausibly. It cannot be based on a mere argument for the sake of an argument. In other words, it should be reasonably arguable (**DeSilva v The Queen** [2015] VSCA 290 (5 November 2015). The threshold for leave to appeal has also been described as having a 'sufficiently arguable ground' (**Bailey v Director of Public Prosecutions** [1988] HCA 19; (1988) 78 ALR 116; (1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 May 1988) or even having a 'real prospect of success' (**R v Miller** [2002] QCA 56 (1 March 2002). 'No prospect of success' and 'reasonable prospect of success' too have been used as appropriate tests to decide the question of leave to appeal.

[12] **S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa, in my view, enunciated the correct approach as to whether leave to appeal by the high court should have been granted or not as follows:

> *'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (emphasis added)*

[13] Therefore, I think that the test of reasonable prospect of success as described in ***Smith*** should be used to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal. I shall proceed to consider the Appellant's appeal accordingly.

Facts in brief

[14] According to the victim, he had met the appellant and his friend in the town and spent the evening with them. He had consumed liquor with them and gone back to his hotel to have a change. He had then gone to a restaurant with them to have dinner. The appellant and the other had asked him to go to a night club and he had agreed. After the trip to the night club, he had gone back to his hotel where he found his mobile phone missing. He had gone back to the club to see whether the people who spent the evening with him were still there. He had met the appellant and the other person again in the club. They had told him that they knew the residence of the person who had taken his mobile phone and agreed to take him to that place. They had then gone in his rental car to the house of that person. However, according to the victim, he had not been actually taken to the place of that person. Instead they had taken him to some other place, where they assaulted the victim and robbed him. They had threatened to kill him and put him into the booth of the car. The victim had pleaded with them not to injure him and do any irrational thing. They had then put him into the back seat of the car and drove somewhere in to the country side. At that place, the friend of the appellant had taken his rental car and gone to look for his money in the hotel. The appellant had stayed with the victim. The appellant had then forced the victim to remove his cloths. He had threatened the victim with a bottle in his hand. The victim had stated in his evidence that he had no option but to surrender to the appellant and remove his cloths. At that time, the appellant had penetrated his penis into the anus of the victim.

Grounds of appeal

[15] The Appellant's first ground of appeal relates to an alleged non-direction in the summing up in that the trial judge had failed to direct the assessors to consider whether his caution interview was voluntary, true and if so the weight to be attached.

[16] It does not appear that any re-directions had been sought on the alleged non-directions by the trial judge despite the trial judge having requested the appellant and the counsel for the prosecution to do so. The appellate courts have from time and again commented upon the failure in not raising appropriate directions with the trial judge resulting in the appellate court not looking at the complaints against the summing-up based on such misdirection or non-directions favorably. Thus, the appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in **Tuwai v State** CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.

[17] However, when the appellant appears in person at the trial the appellate court would not enforce this rule too rigidly, for realistically an undefended appellant would not be in a position to seek redirections, particularly on matters of law. Therefore, I proceed to consider the merits of the first ground of appeal.

[18] The trial judge has *inter alia* said in paragraph 33 of the summing- up as follows.

> *'....In respect of the record of caution interview and the charging statement of the accused person, you are allowed to take into account the contents of these documents if you believe and satisfy that the accused person has given his statement in those documents voluntarily and on his own free will.'*

[19] In **Volau v State** AAU0011 of 2013: 26 May 2017 [2017] FJCA 51 the Court of Appeal having considered several authorities summarized as to how to use a caution interview at the trial as follows.

> *'[20] The following principles could be deduced from the said decisions.*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness.*

(ii) *Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial ('second bite at the cherry') but such evidence goes to the weight and value that the jury would attach to the confession (Chan Wei Keung, Prasad and Murray)……*

(iii) *Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'*

[20] While the complaint of the appellant that the trial judge had not addressed the assessors on the aspect of weight to be attached to his caution interview has substance, his criticism of the summing up of the alleged non-direction regarding voluntariness is devoid of any merit as seen by paragraph 33 of the summing-up. The appellant had not contended that the caution interview was untrue. In any event, the said omission on the aspect of 'weight' cannot be considered in isolation.

[21] Recognising that the issue of weight should have been dealt with by the trial Judge in the summing up, the Court of Appeal in ***Volau*** said that despite the said omissions in the summing up the real question is whether the assessors would have come to a different finding on the evidence available and whether the trial Judge had dissented with their opinion in his judgment being the ultimate decider of facts and law and also on guilt or innocence of the appellant. In answering that question the Court of Appeal referred to the decisions of **Boila v State** CAV0005 of 2006S: 25th February 2008 [2008] FJSC 35) and **Khan v State** Petition for Special Leave to Appeal No. CAV 009 of 2013: 17 April 2014 [2014 FJSC 6]

[22] In ***Boila*** the Supreme Court remarked that

> *"What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (**McGreevy v Director of Public Prosecutions** [1973] 1 WLR 276, applied **Kalisoqo v R** Criminal Appeal No. 52 of 1984). See also **R. Hart** [1986] 2 NZLR 408. The adequacy of a particular direction will necessarily depend on the circumstances of the case."*

[23] In ***Khan*** where the Petitioner's counsel had argued that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, the Supreme Court said *'There is no incantation which must be read here. The required guidance need not be formulaic.'* The Supreme Court reiterated these remarks in **Tuilaselase v State** CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where it was remarked

> *'26.The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'*

[24] Paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** in the summing up is as follows and it does not specifically refer to the aspect of 'weight'.

> *'.....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused".*

[25] In assessing the likely effect of any misdirection, non-direction or irregularity upon the assessors regarding a confessional statement, the observations in **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30] and in **Prasad v The Queen** [1981] 1 A.E.R 319 that in Fiji the decision on guilt or innocence is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict, must be firmly taken into account.

[26] It is of vital significance in this case that the prosecution did not solely depend of the appellant's caution interview to bring home the charge against the appellant but the prosecution case was built on the testimony of the victim and another witness. Both of them were obviously believed by the assessors and the trial judge. In fact the appellant in his evidence at the trial had admitted having robbed the victim with the accomplice but denied that he raped him. Even if the caution interview was disregarded, the appellant could have been convicted on the evidence of the victim and the other witness provided their evidence was believed.

[27] Having gone through the entirety of the summing-up and the judgment, I am convinced that despite the alleged omission in the summing up on the aspect of 'weight' the assessors would not have expressed any other opinion. I have no doubt that on the evidence led at the trial even without the caution interview the case against the appellant has been proved beyond reasonable doubt. Therefore, in the context of the case, the omission complained of is not of material significance. Nor does it have a material bearing on the conviction. It has not resulted in any substantial miscarriage of justice either.

[28] Therefore, I conclude that there is no reasonable prospect of success in the appellant's appeal in respect of the first ground of appeal. Thus, it is not an arguable ground of appeal.

[29] The appellant's second ground of appeal seems to relate to the admissibility of the caution interview. His contention is based on an injury on his left ear and the appellant argues that the injury shows that he made the confessional statement as a result of a police assault. He challenges the voluntariness of the caution statement.

[30] In the trial judge's *voir dire* ruling dated 26 February 2015 the following paragraphs are found on this aspect of the matter.

> *'9.The first prosecution witness is the interviewing officer. He stated in his evidence that he observed a cut on the left ear of the accused, but denied it was bleeding when he was interviewed..... The interviewing officer confirmed that he recorded the two injuries that the accused had sustained before he was arrested in his caution interview.'*

'11.The fourth prosecution witness is the investigation officer..... He stated that the accused was treated well. The injury that the accused had on his left ear at the time of his arrest has recorded in the cell book, which confirms that the accused had that injury before he was arrested.....'

'13.Having considered the evidence presented during the hearing, I am satisfied with the consistent and affirmative nature of the prosecution evidence, which confirms beyond reasonable doubt that the accused gave his statement in his caution interview voluntarily and free of any unfair treatments. I accordingly hold that the caution interview of the accused person is admissible as evidence in the hearing.'

[31] The appellant does not seem to have complained of any police assault to the Magistrate when produced by the police. Nor does it appear that he had presented any medical evidence as to the nature and age of the injury.

[32] I have perused the entirety of the *voir dire* ruling and cannot find any fault in law cited by the trial judge or the analysis of the facts presented to him by both parties. He had specifically considered the appellant's allegation that he was slapped by the police while answering the questions.

[33] The trial judge had also brought to the attention of the assessors the alleged police assault on the appellant as follows in the summing up

'30.The last prosecution witness is PC Aca Bibi, who is the investigation officer of this case. Apart from that he was a member of the arresting team with PW2. He stated that PW2 gave his rights and cautioned him before he was formally arrested. He stated that the accused was treated well. The injury that the accused had on his left ear at the time of his arrest has recorded in the cell book, which confirms that the accused had that injury before he was arrested. He further stated that he translated the caution interview of the accused into English language.'

[34] As I pointed out earlier even if the entire caution interview was ruled out on the basis of involuntariness, still the evidence of the victim and the other witness was sufficient to uphold the conviction. Therefore, the appellant's challenge (even if it is successful) to the admissibility of the caution interview at the *voir dire* would not secure him an acquittal.

[35] In the circumstances, I conclude that there is no reasonable prospect of success in the appellant's appeal on the second ground of appeal as well. Thus, it is not an arguable ground of appeal.

[36] Therefore, I refuse leave to appeal against the conviction on both grounds of appeal.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL