

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

CRIMINAL APPEAL AAU 116 of 2015
(High Court HAC 142 of 2014)

BETWEEN : TUI MATEO KOLI

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Mr M Fesaitu for the Appellant
Mr M Korovou for the Respondent

Date of Hearing : 13 June 2018

Date of Ruling : 6 July 2018

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on the unanimous opinions of the assessors and the concurring verdict of the trial Judge on one count of

rape contrary to section 207(1) and (2) (b) of the Crimes Act 2009. On 3 September 2015 the appellant was sentenced to 10 years imprisonment with a non-parole term of 9 years.

- [2] The appellant subsequently filed a timely notice of appeal against conviction and sentence pursuant to section 21(1) (b) and (c) of the Court of Appeal Act 1949. Pursuant to section 35(1) of the Act the power of the Court of Appeal to grant leave may be exercised by a judge of the Court. The test for granting leave to appeal against conviction is whether the appeal is arguable. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [3] On 13 June 2018 the appellant filed a notice of abandonment of appeal against sentence pursuant to Rule 39 of the Court of Appeal Rules (the Rules). That application will be listed before the Court of Appeal on a date to be fixed.
- [4] On 28 February 2018 the appellant filed an amended notice of appeal against conviction relying on the following ground of appeal:

“The learned trial Judge erred in law and in fact in convicting the appellant when the penetration element has not been proven beyond reasonable doubt in that:

- i) The complainant’s evidence of her vagina being penetrated by the appellant’s finger is unreliable.*
- ii) The medical findings of the doctor that
 - a) No evidence of recent penetration*
 - b) No evidence of trauma*
 - c) Hymen still intact**
- iii) The confession by the appellant in the caution interview of him penetrating the complainant’s vagina is untrue.”*

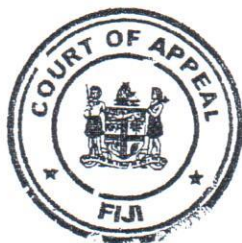
- [5] In relation to the first aspect of the ground of appeal it is a matter for the assessors and the trial judge to assess the reliability of the evidence given by the complainant and the weight to be given to that evidence. The learned Judge has given clear and sound reasons

why he has accepted evidence of the complainant as to the circumstances of the offence. Having accepted her evidence the Judge was satisfied beyond reasonable doubt that the appellant was guilty as charged.

- [6] In relation to the second aspect of the ground of appeal, it must be noted that the medical evidence did not necessarily assist either the prosecution or the defence. The fact that there was no observable indication of penetration of the vagina does not preclude the conclusion that penetration of either the vagina or the vulva did take place.
- [7] Finally, the truthfulness of the confession was a matter for the assessors and the trial judge. The trial judge has correctly directed the assessors and himself in paragraphs 67 to 69 of the summing up. The weight to be attached to the admissions in the caution interview was to be determined by whether the assessors and the judge accepted that the admissions were true. The prosecution carried the onus of establishing that the admissions were true and both the assessors and the judge must be taken to have accepted that the prosecution had satisfied that burden.
- [8] In my judgment the three aspects of the one ground of appeal against conviction do not raise any arguable points. Leave to appeal against conviction should be refused.

Orders:

1. *Leave to appeal against conviction is refused.*
2. *Application to abandon the appeal against sentence is to be listed before the Court of Appeal on a date to be fixed in the September session of the Court.*



W. Calanchini

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