

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

**CRIMINAL APPEAL AAU 2 OF 2016**  
**(High Court HAC 254 of 2013)**

**BETWEEN** : **INOKE VALEKULA** *Appellant*

**AND** : **THE STATE** *Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr M Fesaitu for the Appellant**  
**Mr Y Prasad for the Respondent**

**Date of Hearing** : **16 November 2018**

**Date of Ruling** : **18 December 2018**

**RULING**

- [1] Following a trial in the High Court at Suva the appellant was convicted on one count of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009. On 7 December 2015 the appellant was sentenced to 12 years 7 months imprisonment with a non-parole term of 8 years and 7 months.

- [2] The appellant filed a timely notice of appeal against conviction and sentence on 6 January 2016. On 24 April 2018 the appellant (Legal Aid Commission) filed an amended notice of appeal against conviction and on 16 November 2018 the appellant filed an application to abandon his appeal against sentence pursuant to Rule 39 of the Court of Appeal Rules. The application to abandon the appeal against sentence is to be listed before the Court of Appeal on a date to be fixed.
- [3] This is his application for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives 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 raises an arguable point that is worthy of the Court's consideration: Naisua -v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [4] The grounds of appeal against conviction are:
- “1. *The Learned Trial Judge erred in law and fact by expressing comment at page 11, paragraph 45 of his summing up that he is only indicating an approach to the evidence when such comment can lead the assessors to think that he was directing them that they must find the facts in the way he indicated which is prejudicial to the Appellant.*
  2. *The Learned Trial Judge erred in law when he failed to make an independent assessment on the issue of consent.*”
- [5] The first ground is concerned with a part of the last sentence on paragraph 45 of the summing up wherein the trial judge stated that “*I am only indicating an approach to the evidence.*” However the sentence conclude with the comment that “*but the evaluation of evidence would be a matter for you.*”
- [6] The Court of Appeal has frequently observed that one sentence in the summing up should not be considered in isolation. The summing up should be considered in its totality. In

paragraph 2 of his summing up the learned Judge has made it abundantly clear that the assessors are free to accept or disregard any opinion expressed or observation made by him on the facts and the evidence.

[7] It must be recalled that criminal trials in Fiji are by way of judge sitting with assessors. Assessors are not jurors and the trial is not by way of judge and jury. In this case the assessors returned unanimous opinions of not guilty. The judge does not have to accept the opinions of the assessors and in this case he rejected those opinions. Pursuant to section 237 of the Criminal Procedure Act 2009 the judge gave cogent reasons for that disagreement in his judgment delivered on 2 December 2015. In particular the judge stated the reasons why he accepted the evidence of the complainant who was 13 years and 3 months old at the time of the offence. This ground is not arguable.

[8] The second ground concerns the issue of consent. It is claimed that the trial Judge has failed to independently assess the issue of consent. In the appellant's submissions it is clear that the ground of appeal is referring to the summing up. However in his judgment the learned Judge has considered the evidence on the lack of consent and has stated why he has accepted the complainant's evidence. It must again be recalled that here in Fiji the trial judge ultimately decides issues of facts and law. On the facts, findings of the assessors are for the guidance of the trial Judge. This ground is not arguable.

Order:

*Application for leave to appeal conviction is refused.*



*W. Calanchini*

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