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

CRIMINAL APPEAL AAU 0007 OF 2014
(High Court HAC 79 of 2012)

BETWEEN : **KEVIN NAINOCA PARKER**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr R Vananalagi for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **25 May 2018**

Date of Ruling : **25 June 2018**

RULING

[1] Following a trial in the High Court at Suva before a Judge sitting with assessors the appellant was convicted on five counts of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009 and two counts of indecent assault contrary to section 154(1) of the Penal Code Cap 17. On 15 March 2013 the appellant was sentenced to 3 years

imprisonment on each of the two indecent assault counts and 17 years imprisonment on each of the five counts of rape to be served concurrently with a non-parole term of 16 years imprisonment.

[2] On 2 April 2014 the appellant filed an application for enlargement of time to appeal conviction and sentence. However, it would appear that an initial notice of appeal had been drafted by the appellant shortly after he had been sentenced but had been misplaced by the Corrections Department. As is the usual practice of this Court, under those circumstances the appeal should be regarded as timely since the appellant has no control over the progress of his appeal after he has passed the document on to the Corrections Officers.

[3] In an amended notice of appeal filed on 29 March 2017 the appellant relies on the following grounds of appeal against conviction and sentence:

> *"1. THE Learned Judge erred in law in failing to following the mandatory requirement set out in section 295 of the Criminal Procedure Decree 2009 with regards to the directions as to mode by which a vulnerable witness's evidence is to be given.*
>
> *2. THE Learned Judge erred in law in allowing the complainant's evidence to be given via Skype thereby prejudicing the Appellant's right to a fair trial and in the process causing serious miscarriage of justice.*
>
> *3. THE Learned Judge erred in law in not prescribing the procedure of how the complainant's evidence to be given during cross examination when she was not properly answering some of the Appellant's questions and in particular on the issue of DNA and the questions relating to the father of her child.*
>
> *4. THE Learned Judge erred in law in expediting the trial following the request made by the State and thereby not giving the Appellant ample opportunity to prepare his Defence thereof.*
>
> *5. THE Learned Judge erred in law in expediting the trial following the request made by the State in view of the fact that the Appellant was unrepresented.*

6. *THE Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending.*

7. *THE Learned Judge erred in law when he failed to take into account the period your Petitioner was remanded in custody, that is, 1 year 1 week and 2 days and failed to deduct the same from the total sentence."*

[4] The application for leave to appeal is made under section 21(1) of the Court of Appeal Act 1949 (the Act). To the extent that the appellant's grounds of appeal against conviction involve questions of law only he may appeal as of right under section 21(1)(a) of the Act. To appeal on a ground of appeal against conviction that involves a question of mixed law and fact or fact alone, leave is required under section 21(1)(b). Leave is required to appeal against sentence under section 21(1)(c). Section 35(1) of the Act gives a judge of the Court power to grant leave. The test for granting leave to appeal conviction is whether the appeal is arguable. The test for granting leave to appeal 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.

[5] At the trial the appellant was unrepresented. The complainant gave her evidence via skype due to her medical condition. Issues therefore arose under sections 295 and 296 of the Criminal Procedure Act 2009. The evidence of the complainant was the only evidence against the appellant. At the request of the prosecution the trial date was brought forward. It is arguable that as an unrepresented accused the appellant was prejudiced to the extent that he was denied a fair trial on account of the matters referred to above. Leave to appeal against conviction is granted.

[6] In relation to the sentence appeal the appellant claims that the sentence is harsh and excessive and that the period spent in remand was not taken into account. The learned sentencing judge has identified the tariff as 10 – 15 years for the offence of rape of a child and has selected 14 years imprisonment as the starting point. This is at the higher end of the range and the judge relied on the seriousness of the offence as the reason for selecting 14 years. However, to add a further six (6) years for aggravating factors which,

in the absence of carefully explained reasoning, suggests that there has been some double counting. Furthermore although the judge has deducted 3 years for mitigating factors he has not specified what factors he has taken into account as mitigating and has made no reference to the time spent in remand which was just over 1 year. The judge does not refer to section 24 of the Sentencing and Penalties Act 2009. It is arguable that there has been an error in the exercise of the sentencing discretion. Leave is granted to appeal sentence.

Orders:

Leave to appeal conviction is granted.
Leave to appeal sentence is granted.

COURT OF APPEAL
FIJI

W. Calanchini

Hon Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL