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

CRIMINAL APPEAL AAU 47 OF 2016
(High Court HAC 170 of 2015 at Suva)

BETWEEN : **KAMLESH LAL**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee for the appellant**
Mr Y Prasad for the Respondent

Date of Hearing : **12 July 2018**

Date of Ruling : **30 August 2018**

RULING

[1] The appellant was charged with one count of rape, one count of assault with intent to commit rape and one count of kidnapping. The trial commenced before a judge sitting with 3 assessors. After a submission of no case to answer the trial judge dismissed the kidnapping count and proceeded to acquit the appellant on that count. At the conclusion of the trial one assessor returned guilty opinions on the 2 remaining counts while the two

remaining assessors returned not guilty opinions on those two counts. In a written judgment with reasons the learned trial judge disagreed with the majority opinions and convicted the appellant accordingly. On 26 April 2016 the appellant was sentenced to 14 years imprisonment on the rape count and 3 years imprisonment on the assault count to be served concurrently with a non-parole term of 12 years with effect from 26 April 2016.

[2] This is his timely application for leave to appeal against conviction and sentence under sections 21(1)(b) and (1)(c) of the Court of Appeal Act 1949 (the Act). Pursuant to section 35(1) of the Act, a single judge of the Court of Appeal has the power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable and 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] The grounds of appeal against conviction are:

> *"1) **THE** Learned Trial Judge erred in law and in fact upon convicting the Appellant when the conviction cannot be supported in regards to the totality of the evidence therefore causing a miscarriage of justices.*
>
> *2) **THE** Learned Trial Judge did not provide cogent reasons when overturning the majority opinions of the Assessors.*
>
> *3) **THE** Learned Trial Judge misdirected the Assessors in paragraph 32 of the Summing Up that "The significance of this report was that it revealed the physical and mental status of the complainant after been with the accused..." when the statement was not brought out in evidence by the doctor (PW2) therefore causing prejudice to the Appellant.*
>
> *4) **THE** Learned Trial Judge misdirected himself and the Assessors on the following evidence which was not adduced by the Complainant during the trials as follows:*
>
> *a) "The Accused took off her clothes..." (line 6 paragraph 28 of the Summing Up)*

b) *"The three boys were slapping her face on the way..." (line 5 paragraph 27 of the Summing Up)*

therefore causing prejudice to the Appellant."

[4] The ground of appeal against sentence is:

"1) ***THE*** *Learned Trial Judge erred in principle and also failed to consider:*

i) Selecting a starting point at the higher end of the tariff;
ii) using the aggravating factors twice, once in the starting point and separately."

[5] The issue in this trial was whether the appellant had unlawful sexual intercourse with the complainant and assaulted her before and during sexual intercourse or whether it was the complainant's boyfriend who had assaulted the complainant. The medical evidence clearly supports the claim that the complainant had been assaulted and that sexual intercourse had taken place with some degree of force. However the medical evidence does not support the evidence given by the complainant as to the ferocity of the violence that she was subjected to on the same day as the medical examination. Furthermore the learned judge has not made any analysis of the evidence that it was the appellant who drove the complainant to the Police Station and to the hospital for the medical examination. It is in my opinion arguable on the lack of logical consistency that the judge has not given sufficiently cogent reasons for disagreeing with the majority opinions of the assessors. Leave to appeal against conviction is granted on all grounds.

[6] In relation to the appeal against sentence, the complaint is that the discretion has miscarried on the basis that the sentence is excessive as a result of double counting.

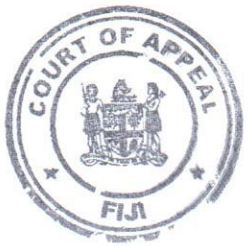
[7] The learned judge correctly identified the maximum sentence for rape as life imprisonment and the tariff as a sentence between 7 to 15 years imprisonment. It must be recalled that the appellant was also convicted of assault with intent to commit rape for

which he was sentenced to 3 years imprisonment although this sentence was to be served concurrently with the 14 years imprisonment for the rape conviction.

[8] Upon a consideration of what the learned Judge has described as aggravating factors in paragraph 6 of the sentencing decision I am inclined to conclude that there is an arguable error in the exercise of the sentencing discretion. Leave to appeal against sentence is granted.

Orders:

1. *Leave to appeal against conviction is granted.*
2. *Leave to appeal against sentence is granted.*



W. Calanchini

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