

IN THE COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 16 OF 2013  
(High Court HAC 142 of 2011 at Lautoka)

BETWEEN : ROHIT RANJIT KUMAR  
*Appellant*

AND : THE STATE  
*Respondent*

Coram : Calanchini P

Counsel : Mr W Pillay for the Appellant  
Mr L Burney with Ms U Tamanikaiyaroi  
for the Respondent

Date of Hearing : 2 June 2015

Date of Ruling : 20 July 2015

RULING

- [1] This is an application for leave to appeal against conviction. The Appellant was tried in the High Court at Lautoka on one count of rape that between 1 and 31 March 2011

he had unlawful carnal knowledge of the complainant (name suppressed) without her consent contrary to section 207 (1) and (2) (a) of the Crimes Decree 2009. The Appellant was found guilty by the unanimous opinion of three assessors with whom the learned trial Judge agreed. The Appellant was convicted and sentenced on 27 March 2013 to a term of 16 years imprisonment with a non-parole term of 15 years.

- [2] The Appellant filed a timely application for leave to appeal against conviction and sentenced on 28 March 2013. A Notice of amended/additional grounds of appeal upon which the Appellant sought leave was filed on 5 April 2013. That notice set out 13 grounds of appeal against conviction and 3 grounds of appeal against sentence. At the hearing of the application Counsel for the Appellant informed the Court that the application for leave to appeal against sentence was not proceeding and that he would not be making any submissions in relation to sentence. The thirteen grounds of appeal against conviction (as amended) are as follows:

- “1. ***THAT*** the Learned Trial Judge erred in law and in fact in refusing the Appellant’s application under section 116 of the Criminal Procedure Decree to recall the complainant for the purpose of re-examination of her Previous Conviction which was not disclosed to the Defence but only found by the Appellant’s Counsel after the address by the Defence and the State’s Counsel before the Summing Up by the Learned Trial Judge. That the said refusal to recall the Complainant caused a substantial miscarriage of justice.
2. ***THAT*** the Learned Trial Judge disregarded the proposition of law that was cited by the Appellant’s Counsel when the Appellant’s Counsel made the application to recall the complainant under **Section 116 of the Crimes Procedure Decree** on the basis that the Prosecution failed to disclose the Previous Conviction of the Complainant who had given evidence and the Appellant’s Counsel had no opportunity to cross-examine her due to the non-disclosure of her Previous Conviction. The following authorities were cited by the Appellant’s Counsel and a copy of Submission served on the State’s Counsel since the Court refused to accept the Appellant’s written Submission and as such the Appellant’s Counsel read his written Submission.
  - (i) ***WILSON v. POLICE [1992] 2 NZLR p.533,***
  - (ii) ***DEVI v. VUDINIABOLA & OTHERS 9 FLR p.158,***

- (iii) *ADAMS ON CRIMINAL LAW 2001 edition, Chapters 5.28.02, 5.28.04 and 5.28.05,*
  - (iv) *(ARCHIBOLD CRIMINAL PLEADINGS EVIDENCE AND PRACTICE 2001 EDITION Paragraphs 8-251 to 253,*
  - (v) *ZAFIR TARIKA ALI & ORS v. THE STATE Fiji Court of Appeal Criminal Appeal No. ABU 0041 of 2010 paras 7-14.*
3. *THAT the Prosecution's non-disclosure of the Previous Conviction of the Complainant to the Appellant led to a denial of a fair trial and as such a substantial miscarriage of justice.*
4. *THAT the Learned Trial Judge erred in law and in fact in not adequately/sufficiently/ referring/directing/putting/considering himself or the Assessors the Medical report of the Complainant (Prosecution Exhibit No.1) in particular **D16 Summary and Conclusions** which read "Examination-inconclusive of whether she was raped due to the nature of her history (happened 2 months) and absence of bruising/ lacerations. It does confirm, however, that KAJAL has been sexually active."*
- That such failure by the Learned Trial Judge caused a substantial miscarriage of justice.*
5. *THAT the Learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of **RAPE**. That after the Assessors had found the Appellant guilty of Rape the Learned Trial Judge took less than five minutes to pronounce his Judgments finding the Accused guilty of the Charge of Rape. There was a substantial miscarriage of justice by the Learned Trial Judge when he came to a decision within five (5) minutes of the guilty verdict of the Assessors when he failed to analyse all the facts before him.*
6. *THAT the learned Trial Judge erred in law and in fact in not analyzing all the facts before him before he made a decision that the Appellant was guilty as charged on the charge of **RAPE**. Such error of the Learned Trial Judge in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence, giving rise to a grave miscarriage of justice.*
7. *THAT the Learned Trial Judge's failed to evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Learned Trial Judge to independently assess the evidence*

*before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice.*

8. ***THAT** the Learned Trial Judge erred in law and in fact in totally omitting to direct the Assessors or himself that the Complainant did not make a recent complaint either to his family members or to the members of the Church Group where she was attending. It follows therefore that her credibility could be in doubt for the delay in reporting to the Police some two months after the incident.*
9. ***THAT** the Learned Trial Judge erred in law and in fact in not directing himself and or the Assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

#### **PARTICULARS**

- (a) *That there was uncontested evidence that the Complainant's father approached the Appellant through a person who was working with him in May 2011 for payment of \$3000.00 which the Appellant refused to give and then the Complainant's father reduced to \$1500.00 which the Appellant again refused to give and then the Complainant's father again refused to \$500.00 which the Appellant again refused to give when the Appellant told the Complainant's father to go and report the matter to the Police as he had done nothing wrong to the Complainant. That thereafter on the 20<sup>th</sup> day of May 2011 the Complainant went and reported the matter to the Police.*
- (b) *The delay in reporting by the Complainant to the Police was over two (2) months. There was no recent complaint by the Complainant to anyone.*
- (c) *The Medical report which was uncontested stated that the Doctor who had examined the Complainant gave an option that it was inconclusive that the victim was raped in accordance with the history that was given by the Complainant.*
- (d) *That there was uncontested evidence of Defence Witness 1 who stated in Court that the Complainant's father requested for monies from the Appellant and that if the monies were paid the Complainant would not report the matter to Police.*
- (e) *That the uncontested evidence of blackmailing the Appellant demonstrated that the allegation against the Appellant was fabricated.*

- (f) *That the Caution Interview of the Appellant (Defence Exhibit No.2) where the Appellant stated to the Police:-*

*“Q36. I am putting it to you that you are telling lies and you forcefully took her clothes and raped her. What can you say about this?”*

*A. No I did not have sex with her.*

*Q37. If you saying you did not have sex then why KAJAL is alleging you that you raped her. What can you say about this?*

*A. May be they want to put me into problem. They want to spoil my name and also to get money from me.*

*Q38. What do you mean to say that they want to get money from me?*

*A. Became they came to me asking to give \$3000.00 from me to settle her case. I told her I did do anything with the daughter why shall I pay. Later they asked for \$1500.00. I also denied and again they came for \$500.00 but I again denied giving saying why shall I pay if I did not do anything with her.”*

- (g) *The statement of the Appellant stated above demonstrated a sort of alibi in another words it was encumbent upon the State to disprove the above allegations or to call any witness to rebut the statements made by the Appellant in his Caution Interview.*

10. ***THAT** the Learned Trial Judge erred in law and in fact in not adequately directing/ misdirecting that the Prosecution evidence before the Court proved beyond reasonable doubts that there were serious doubts in the Prosecution case and as such the benefit of doubt ought to have been given to the Appellants.*

- (a) *That there was uncontested evidence that the Complainant's father approached the Appellant through a person who was working with him in May 2011 for payment of \$3000.00 which the Appellant refused to give and then the Complainant's father reduced to \$1500.00 which the Appellant again refused to give and then the Complainant's father again refused to \$500.00 which the Appellant again refused to give when the Appellant told the Complainant's father to go and report the matter to the Police as he had done nothing wrong to the*

*Complainant. That thereafter on the 20<sup>th</sup> day of May 2011 the Complainant went and reported the matter to the Police.*

- (b) The delay in reporting by the Complainant to the Police was over two (2) months. There was no recent complaint by the Complainant to anyone.*
- (c) The Medical report which was uncontested stated that the Doctor who had examined the Complainant gave an opinion that it was inconclusive that the victim was raped in accordance with the history that was given by the Complainant.*
- (d) That there was uncontested evidence of Defence Witness 1 who stated in Court that the Complainant's father requested for monies from the Appellant and that if the monies were paid the Complainant would not report the matter to Police.*
- (e) That the uncontested evidence of blackmailing the Appellant demonstrated that the allegation against the Appellant was fabricated.*
- (f) That the Caution Interview of the Appellant (Defence Exhibit No.2) where the Appellant stated to the Police:-*

*“Q36. I am putting it to you that you are telling lies and you forcefully took her clothes and raped her. What can you say about this?*

*A. No I did not have sex with her.*

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(g) *The statement of the Appellant stated above demonstrated a sort of alibi in another words it was encumbent upon the State to disprove the above allegations or to call any witness to rebut the statements made by the Appellant in his Caution Interview.*

11. ***THAT** the Learned Trial Judge erred in law and in fact in directing the Assessors to use their common sense without directing them that they have to first find the facts they rely upon as proved and then to draw the necessary inference using their 'common sense'. The direction could well be misinterpreted by the Assessors that they have the option to speculate.*

12. ***THAT** the Learned Trial Judge erred in law and in fact in not considering the provisions of Section 231(1) of the Criminal Procedure Decree after the close of the Prosecution case and after hearing the Prosecution Witness who had given evidence. The Learned Trial Judge found that there was a Case to Answer without fully analyzing the Prosecution evidence and as such by putting the Appellant to call evidence erred in law and in fact and as such there was a substantial miscarriage of justice.*

13. ***THAT** the Learned Trial Judge did not apply all the rules of law in considering whether upon the Prosecution evidence there was a Case to Answer against the Appellant. He disregarded his own Authority in the case of **STATE v. PONIJESE SERU Lautoka High Court Criminal Case No. HAC 042 of 2011** where the Prosecution evidence were weaker when compared to the Appellant's case."*

[3] To the extent that these grounds of appeal raise questions of mixed facts and law the Appellant requires the leave of the Court under section 21 (1) (b) of the Court of Appeal Act Cap 12 (the Act). Pursuant to section 35(1) of the Act a justice of appeal may exercise the power of the Court to grant leave to appeal. The test for granting leave to appeal in this jurisdiction is whether any ground of appeal raises an arguable point that is worthy of the consideration of the Court of Appeal. In England, under a similar provision, the test is expressed to be whether the justice of appeal feels that it is necessary for the Court to hear the prosecution on the merits. Although the prosecution routinely appears as respondent to the application for leave and routinely argues against the granting of leave, it is nevertheless only necessary for the Appellant to show that any one of his grounds of appeal is arguable.

- [4] In written submissions filed on behalf of the Respondent it is submitted that a merely arguable point that a trial judge fell into error is not sufficient for the grant of leave to appeal if there is no possibility that the Court might allow the appeal on that ground. To the extent that the two propositions in the submission are not inconsistent, the first proposition is a matter for the Court under section 21(1) of the Act or the justice of appeal under section 35(1) of the Act and the second proposition is a matter for the Court of Appeal under section 23 of the Act. For the sake of completeness, it is necessary to refer to the decision of the Supreme Court in Tiritiri –v- The State (CAV 9 of 2014; 14 November 2014) wherein the court observed at paragraph 36 that the test for granting leave to appeal under section 21(1) of Act is a low threshold and does not involve the justice of appeal assessing the merits of the appeal or the chances of success. The merits of the appeal are to be assessed and the appeal determined by the Court of Appeal in accordance with section 23(1) of the Act. The provisions of section 35(1) and 35(3) must be read together whilst section 35(2) is a stand alone provision which may be considered at any time.
- [5] In order to assist the justice of appeal in applications for leave to appeal, it is the usual practice of this Court to direct both the Appellant and the Respondent to file written submissions prior to the hearing of the application. In order for that assistance to be meaningful it is also the practice that the Respondent's submissions be filed in answer to the Appellant's submissions. In this case directions were given on 10 April 2015 for the Appellant to file and serve written submissions within 21 days and the Respondent was required to file and serve answering submissions within 21 days thereafter. The Appellant failed to comply with the Court's directions. Written submissions in support of the grounds of appeal were not filed prior to the day of the hearing. Instead counsel handed to the Court a document with the heading "*Appellant's Skeletal Submissions*" on the morning of the hearing of the application. The requirement to file written submissions was known to the legal practitioners on record since they had instructed an agent to appear in 10 April 2015. There was no explanation given for non-compliance with the Court's directions.
- [6] Turning to the grounds of appeal against conviction. The first three grounds in the notice of amended/additional grounds of appeal relate to section 116 of the Criminal

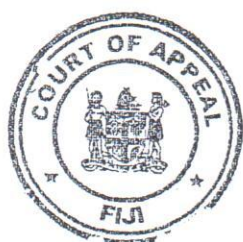
Procedure Decree 2009. The grounds were discussed in some detail in the bail ruling delivered on 17 June 2013 and for the reasons stated therein I am satisfied that the grounds raise an arguable point.

- [7] Ground 4 raises an issue concerning the directions given by the learned trial Judge to the assessors concerning the medical report of the examination of the complainant. The directions are set out in paragraph 14 of the summing up. At the conclusion of his summing up the learned Judge asked Counsel whether they required any further directions to be given to the assessors. Counsel for the Appellant stated that he wanted *“the Court to address on the doctor’s finding of inconclusive of rape.”* The judge proceeded to direct the assessors’ attention to paragraph D16 which set out the doctor’s opinion. Counsel then indicated that he was happy. It should also be noted that it was not for the doctor to give an opinion as to whether the complainant had been raped. The doctor’s evidence should have been restricted to opinions concerning penetration and the presence of injuries. Given the wide definition of *“consent”* in section 206 of the Crimes Decree, it was not for the doctor to give any opinion on the question of consent. This ground has no merit and leave is refused.
- [8] Grounds 5 to 7 relate to the judgment of the learned trial Judge. Pursuant to section 237(3) when the trial judge agrees with the opinions of the assessors and when his summing up of the evidence is on record it is not necessary for any judgment (other than the decision of the court which must be written down) to be given. Although the Supreme Court has stated that it is desirable for a trial judge to indicate the evidence that he has accepted in reaching his conclusion, there is no statutory requirement for him to do so and as a result these grounds are not arguable. Leave is refused.
- [9] Ground 8 refers to the failure of the learned Judge to give directions to the effect that the complainant did not make a *“recent complaint”* to her family members or to the members of the church group. Although the learned judge does not specifically refer to the words *“recent complaint”*, he does summarise the evidence in relation to when and to whom the complaints were made. There was no request by Counsel for the Appellant to have this matter clarified by the trial Judge in his summing up and in my view the ground does not raise an arguable point. Leave is refused.

- [10] Grounds 9 to 11 raise issues concerning directions or lack of directions given by the trial judge in relation to a number of issues raised by the Appellant during the course of the trial. There was no request by a very experienced legal practitioner for any further directions to be given to the assessors on any of the matters raised. In my judgment it was sufficient for the trial judge to direct the assessors that they should consider all the evidence in reaching their opinions of guilty or not guilty. This he did and in my judgment the grounds are not now arguable.
- [11] Grounds 12 and 13 raise the issue of the correctness of the trial Judge's conclusion that there was a case to answer after the case for the prosecution had been completed. In particular, the grounds appear to challenge the learned Judge's determination under section 231(1) of the Criminal Procedure Decree. The Judge is required to record a finding of not guilty, after the case for the prosecution has concluded and after hearing (if necessary) submissions from counsel, if the court considers that there is no evidence that the accused person committed the offence. In my judgment the evidence of the complainant prevented the trial judge from reaching such a conclusion and as a result the grounds are not arguable. Leave is refused.
- [12] As a result leave to appeal against conviction is granted on grounds 1 – 3 and is refused on all of the remaining grounds set out in the Appellant's Notice of Amended/ Additional Grounds of Appeal filed on 5 April 2013.

**Order:**

1. *Leave to appeal against conviction granted on grounds 1 – 3.*
2. *Leave refused on grounds 4 – 13.*



*W. Calanchini*

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