

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0029 of 2016
[High Court Criminal Case No. HAC 011 of 2014]

BETWEEN : **URAIA CAUCAU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Ms. Lee. S for the Appellant**
Mr. Korovou. MD for the Respondent

Date of Hearing : **17 September 2018**

Date of Ruling : **04 October 2018**

RULING

- [1] The Appellant has sought leave to appeal against the conviction and sentence on a single count of rape under section 207 (1) and 207 (2) (a) the Crimes Decree, 2009 (now the Crimes Act, 2009) alleged to have been committed at Nagigi Village, Cakaudrove, in the Northern Division for having had carnal knowledge of P (name withheld) without her consent.
- [2] Originally, there had been another accused other than the Appellant but at the end of the prosecution case he had been acquitted by the Learned Trial Judge on the basis that the prosecution had not made out a *prima facie* case against him.

- [3] Upon conclusion of the trial, the Assessors returned unanimous opinions of guilt of rape against the Appellant and was convicted by the Trial Judge who sentenced him to 08 years imprisonment with a non-parole period of 06 years.
- [4] In his timely application for leave, the Appellant had raised the following grounds and the counsel for the Appellant further amended ground 01 set out in the Amended Notice of Appeal dated 29 May 2018 at the hearing.

Against the conviction

(1) *'The Learned High Court Judge has caused a miscarriage of justice without having regard to the totality of the evidence at the trial, in particular to the following:*

- (i) *found that there was penetration but State failed to prove beyond reasonable doubt the lack of consent; and*
- (ii) *concluding that the Appellant's evidence regarding defence case was very simple, thereby showing cause that the defence evidence and/or case was unfairly analysed and unfairly directed to the assessors; and*
- (iii) *accepting the complainant and her evidence as credible with total disregard of the complainant's earlier some evidence which saw the 02nd accused person being acquitted with a no case to answer.*

Appeal against sentence

(2) *'That the learned sentencing Magistrate (sic) erred in principle and fact to enhance the sentence in particular to the following:*

- (i) *relying on aggravating features which are already part of the offence of rape;*
- (ii) *Appellant was punished twice based on the same fact.'*

- [5] It is clear that none of the above grounds on conviction involves a question of law alone and therefore section 21(1)(b) comes into play and with regard to the appeal against the sentence section 21(1)(c) would become applicable. Therefore, for the Appellant to appeal to the Court of Appeal against the conviction and sentence on the above grounds of appeal, he has to first obtain leave and to do so he should pass the test for leave to appeal.
- [6] The basic purpose of requiring leave of the court is to ensure that unmeritorious cases do not consume the limited resources of the appellate court. The requirement of leave is the central mechanism by which appellate courts can control the quantity and quality of cases heard and determined on appeal. In **Coulter v R** [1988] HCA 3; (1988) 164 CLR 350 (11 February 1988) the High Court of Australia said
- 'The jurisdiction which the court exercises in determining an application for leave is not a proceeding in the ordinary course of litigation ... It is a preliminary procedure recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention.'*
- [7] Granting leave or not is not just a formality but requires an examination of the merits of the particular case. The legal test for granting leave should be able to balance, on the one hand, the rights and interests of the aggrieved person in being able to have a decision or judgment of the lower court reviewed by a higher court with, on the other hand, the problem of appellate courts being swamped with increasing numbers of unmeritorious appeals. It should be neither too stringent nor too liberal. Whilst the legal test should be able to exclude unmeritorious appeals, it should not also exclude meritorious appeals.
- [8] The applicable test for granting leave to appeal to the Full Court as established in **Chand v State** AAU0035 of 2007: 19 September 2008 [2008] FJCA 53 and regularly followed is articulated as follows

'To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal'.

[9] Therefore, the main task at the leave stage is to differentiate an arguable ground of appeal from a non-arguable ground of appeal. Chand does not state how to distinguish an arguable ground from a non-arguable ground. Ordinarily, an arguable ground should mean a ground which is capable of being argued plausibly. It cannot be based on a mere argument for the sake of an argument. In other words, it should be reasonably arguable (DeSilva v The Queen [2015] VSCA 290 (5 November 2015)). The threshold for leave to appeal has also been described as having a ‘sufficiently arguable ground’ (Bailey v Director of Public Prosecutions [1988] HCA 19; (1988) 78 ALR 116; (1988) 62 ALJR 319; (1988) 34 A Crim R 154 (3 May 1988) or even having a ‘real prospect of success’ (R v Miller [2002] QCA 56 (1 March 2002)). ‘No prospect of success’ and ‘reasonable prospect of success’ too have been used as appropriate tests to decide the question of leave to appeal. If a ground of appeal is not at least reasonably arguable on merits then there is little point in the matter being allowed to reach the Full Court.

[10] S v Smith [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7 the Supreme Court of Appeal of South Africa enunciated the correct approach as to whether leave to appeal by the high court should have been granted or not as follows:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (emphasis added)

[11] In my view the test of ‘reasonable prospect of success’ could be employed to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal. I shall proceed to consider the Appellant’s appeal accordingly.

Facts in brief

- [12] According to the prosecution, the complainant, 26 years of age, was living with her 03 children in her house on 20 December 2013. The Appellant and another had visited her in the late afternoon when she was alone at home and set down on the settee. The Appellant had later pulled her panty down and inserted his penis into her vagina despite resistance on the part of the complainant who once had pushed the Appellant down. Someone had come and disturbed the intruders and they had run away. The Appellant had given evidence and admitted going to the complainant's house at the relevant time ostensibly carrying cassava to her. He claimed to have rested and even slept in the house only to be awakened by the complainant and he had then gone out to a farm. He had denied inserting his penis into her vagina at the material time.

Appeal against conviction

- [13] The Appellant's ground 01 (i) relates to the element of consent. His argument is that the Trial Judge should have acquitted him similar to the acquittal of his co-accused at the end of the prosecution case on the basis of 'no evidence' on lack of consent. In other words the Appellant contends that the Trial Judge should not have accepted the complainant's evidence on the element of lack of consent in respect of him while at the same time acquitting the other accused on 'no evidence' on the same element.
- [14] The basis for the Trial Judge's acceptance of the complainant's evidence as regards the Appellant and his decision to acquit his co-accused for want of evidence on the element of consent is summarised by the Trial Judge in his Ruling on 'no case to answer' dated 16 February 2016 as follows

'As for Accused 2, I find there is no case to answer by him. The prosecution had established that Accused 2 penetrated PW1's vagina with his penis at the material time. However, the prosecution led no evidence on whether or not PW1 consented to the same and whether or not Accused 2 knew she was not consenting to sex, at the material time. The first element of rape was established (that is, penial penetration of PW1's vagina). The second element of rape (i.e. non-consent by PW1) and the 3rd element (i.e. knowledge by Accused 2 that PW1 was not consenting to sex at the time) were not established by the prosecution, at the close of their case. The prosecution

therefore had not made out a prima facie case against Accused No.2 and he is found not guilty as charged and acquitted accordingly. (emphasis added)

[15] Accordingly, the Trial Judge had held that though there was evidence of penial penetration, the prosecution had failed to elicit any evidence on lack of consent on the part of the complainant and the knowledge of such lack of consent by the co-accused and therefore, he decided to acquit him at the close of the prosecution case. Thus, it is not that the Trial Judge had believed the complainant on the element of consent in respect of the Appellant and not believed her with regard to the other accused. It was never a question of credibility that prompted the Trial Judge to acquit the co-accused.

[16] This distinction drawn between the Appellant and his co-accused in terms of the evidence available could be further seen in the following passage from the said Ruling.

‘..... PW1 said both accused inserted their penis into her vagina at the material time (1st element of rape). She said, ... she pushed Accused No.1 down when he attempted to insert his penis into her vagina. As such there was a case to answer against Accused No.1.’

[17] The summing up throws more light on the case against the Appellant.

‘As to the second element of rape, as discussed in paragraphs 9 (ii) and 11 hereof, the complainant appeared to say that, by her action at the time, that is to say, she pushed the accused down when he inserted his penis into her vagina, she was exhibiting her non-consent to the accused's actions, at the time. In other words, by pushing the accused down, she was, by her action, showing she was not consenting to the accused inserting his penis into her vagina, at the time.’(emphasis added)

[18] Therefore, I hold that ground of appeal (1)(i) has no ‘reasonable prospect of success’ and is therefore not reasonably arguable.

[19] I shall consider ground (1)(iii) at this stage because it is somewhat interconnected with ground (1)(i). As pointed above the decision of the Trial Judge to acquit the co-accused and call for a defence from the Appellant was not based on her credibility but purely on the availability or otherwise of *prima facie* evidence against each one of them on the essential elements of the offence of rape.

[20] **Walili v State** AAU0055 of 2013:26 May 2017 [2017] FJCA 55 is a decision which examined the duty of the Trial Judge at the close of the prosecution case.

'[31] Section 231 of the Criminal Procedure Act 2009 requires the court to consider two important issues when the evidence of the witnesses for the prosecution has been concluded. If the court considers that there is no evidence that the accused person committed the offence, it shall record a finding of not guilty. If it considers that there is evidence that the accused person committed the offence, then it shall inform the rights available under section 213 (2) (a), (b) and (d) to the accused. [32] Therefore, at the close of the prosecution case the trial Judge is bound to give his mind to this vital issue as to whether there is evidence that the accused person committed the offence. The test to be applied at this threshold is whether there is some relevant and admissible evidence in respect of each element that must be proved before the accused could be convicted of the offence alleged against him in the Information [see State v Anthony Frederick Stephens (1998) 44 FLR 165]. It has been also formulated to read as whether there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offences i.e. whether there is a prima facie case. Matters of the credibility and weight of the evidence are not within the province of the judge at this stage of the trial (see Sisa Kalisoqo v State Criminal Appeal No. AAU 0052 of 1984 and State v. Mosese Tuisawau Criminal Appeal No. AAU 0014 of 1990). These pronouncements have been adopted in a large number of judicial decisions across a long time span and remain valid to date even under section 231(1) and section 231 (2) of the Criminal Procedure Act 2009.'(emphasis added)

[21] The Trial Judge had done exactly what is expected of him as seen from his Ruling. Having given his mind to sections 231(1) and (2) of the Criminal Procedure Decree, 2009 he has reminded himself as follows and proceeded to analyse the available evidence and decided to acquit the co-accused and call upon the Appellant to make his defence.

'If there is direct or circumstantial evidence, touching on all elements of the offence, the weight and value of those evidence, are not for the court but the assessors to decide, there is a case to answer.

[22] Therefore, I hold that ground of appeal (1)(iii) has no ‘reasonable prospect of success’ and is therefore not reasonably arguable.

[23] Dealing with the ground of appeal (1)(ii), it is necessary to consider full context in which the Trial Judge’s comment that the defence case was very simple had been made. The impugned paragraph is as follows.

‘17. On 16 February 2016, the first day of the trial proper, the information was put to the accused in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution’s case, wherein he was put to his defence, he choose to give sworn evidence and called no witness in his defence. That was his right.

18. The defence’s case was very simple. On oath, he admitted he went to the complainant’s house, at the material time. He said, he took some cassava to her. He said, he went into the complainant’s house and rested. He said, he also slept in the same. He said, a while later, the complainant woke him up, then he went outside and went to a farm. He denied inserting his penis into the complainant’s vagina at the material time.

19. Because of the above, he is asking you, as assessors and judges of facts, to find him not guilty as charged. That was the case for the defence.’(emphasis added)

[24] It is very clear that the Trial Judge had not used the phrase ‘very simple’ to belittle the Appellant’s defence but to show that it was uncomplicated and direct. In fact, further examination of the summing up makes it clear that the Trial Judge had put the defence case fully to the assessors. The summing up does possess those essential qualities of objectivity, even-handedness and balance required to ensure a fair trial as discussed in detail in **Chand v State** AAU112.2013: 30 November 2017 [2017] FJCA 139 and does not offend the rules on directions to the assessors set out in **Tamaibeka v State** AAU0015u of 1997s: 08 January 1999 [1999] FJCA 1 and all other decisions referred therein.

[25] In any event it does not appear that any re-directions had been sought on the use of the words '*The defence's case was very simple*' by the Trial Judge. The appellate courts have from time and again commented upon the failure of the defense counsel in not raising appropriate directions with the trial judge and said failure to do so would result in the appellate court not looking at the complaints against the summing-up in appeal based on such misdirections or non-directions favorably. Thus, appellate courts would be slow to entertain such a ground of appeal. The Supreme Court said in **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and once again reiterated this position in **Tuwai v State** CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.

[26] The Court of Appeal in **Rohit Prasad v. State** AAU 0010 of 2014: 04 October 2018 observed on the same matter as follows.

'Needless to say that when such grounds of appeal are raised a considerable time of the appellate court has to be spent in dealing with them which the appellate court could otherwise devote to the real issues involved in the culpability or otherwise of an appellant.'

[27] Therefore, I hold that ground of appeal (1)(ii) has no 'reasonable prospect of success' and is therefore not reasonably arguable.

Appeal against sentence

[28] Ground (2)(i) against the sentence is based on the premise that the Learned High Court Judge had relied on aggravating features which were already part of the offence of rape. Those alleged features are found (underlined for emphasis by me) in the sentence order dated 18 February 2016. They are as follows.

'The aggravating factors were as follows:

(i) Exploitation of the Vulnerable. You knew that the complainant was a solo mum and lived alone with her young children. On the pretext of taking her some cassava, you walked into her house, forcefully took off her clothes and raped her;

(ii) By offending against the complainant, you showed no regard whatsoever to her dignity and her right to enjoy a peaceful existence and her human rights;

(iii) Despite your right to defend yourself in a court of law, you showed no remorse during the proceeding.'

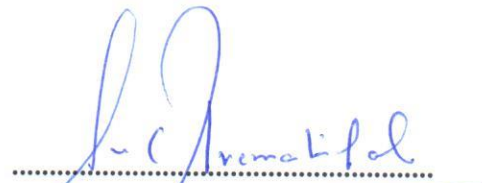
[29] The Appellant complains against the use of the words '*forcefully took off her clothes and raped her*' saying that the complainant's evidence had revealed that the Appellant had removed her panty and not cloths and that '*forcefully*' and '*raped her*' are part of the offence and should not have been counted as aggravating factors. I do not think that a hair-splitting argument is warranted on the use of the word 'cloths' instead of the 'panty'. It is also clear that the words '*forcefully ... and raped her*' are found under the heading '*Exploitation of the Vulnerable*' which is a legitimate concern that could be taken into account by a sentencing judge as an aggravating factor. The words '*forcefully ... and raped her*' should not be taken in isolation as done by the Appellant but should be looked at contextually and the words '*forcefully ... and raped her*' are really subsumed under the said heading of '*Exploitation of the Vulnerable*'.

[30] On the other hand, 'force' is not necessarily an element of the offence of rape. What is required is the lack of consent which cannot be equated with force, for lack of consent could be due to many reasons other than force.

[31] Therefore, I hold that ground of appeal (2)(i) has no 'reasonable prospect of success' and is therefore not reasonably arguable.

- [32] Upon ground (2)(ii) against the sentence, the Appellant argues that the sentences '*You knew that the complainant was a solo mum and lived alone with her young children*' and '*you showed no regard whatsoever to her dignity and her right to enjoy a peaceful existence and her human rights*' have the same meaning and amount to double counting as contemplated in Senilolokula v State AAU0095 of 2013: 14 September 2017 [2017] FJCA 100. I disagree. The former relates to taking advantage of the complainant's venerability and the latter is concerned with disrupting the complainant's right to have a peaceful life with dignity as a normal human being. These are two different matters that could have been counted as separate aggravating factors.
- [33] Therefore, I hold that ground of appeal (2)(ii) has no 'reasonable prospect of success' and is therefore not reasonably arguable.
- [34] In my view both matters raised by the Appellant regarding the sentence do not come under any of the errors of sentencing as adopted by the Court of Appeal in Bae v State AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in Naisua v State CAV0010 of 2013: 20 November 2013 [2013] FJSC 14. Those decisions had followed House v The King [1936] HCA 40; (1936) 55 CLR 499) where it was held that before an appellate court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion in that if the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts or if he does not take into account some relevant consideration, then the appellate court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself.
- [35] Therefore, I refuse leave to appeal against the conviction and sentence on all grounds of appeal urged.




.....
Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL