

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

CRIMINAL APPEAL NO. AAU 83 OF 2015
(High Court HAC 68 of 2014 at Labasa)

BETWEEN : MOSESE WAQASAQA

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Ms S Ratu for the Appellant
Mr L Burney with Ms E Rice for the Respondent

Date of Hearing : 17 June 2019

Date of Ruling : 12 July 2019

RULING

- [1] Following a trial in the High Court at Labasa the appellant was convicted on 4 counts of rape and on 25 June 2015 he was sentenced to 13 years imprisonment on each count to be served concurrently with a non-parole term of 11 years.

[2] This is his timely application for leave to appeal against conviction and sentence pursuant to section 21 of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single judge of the Court power to grant leave.

[3] For many years the accepted test for granting leave to appeal against conviction has been stated as being whether there is a ground of appeal that is arguable. The test was considered by the Supreme Court in Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013, 30 November at paragraph 18:

“It is settled that the test for granting leave to appeal against conviction on mixed grounds of law and fact in the Court of Appeal is whether an arguable point is being raised for the Full Court’s consideration – – –. We must add that it is not appropriate to reach any conclusion on the merits of the proposed grounds when considering leave. That conclusion should be left to the Full Court.”

[4] The Supreme Court appears to draw a distinction between considering the appeal in its totality and considering the merits of any of the proposed grounds of appeal. At the leave stage the single judge of the Court should step back and assess whether the appeal is genuinely arguable before the Full Court. Although a particular ground of appeal may raise an arguable point, it does not necessarily follow that the appeal is arguable before the Full Court. Issues raised in grounds of appeal may fall in favour of the appellant as arguable. However when considered in the context of the appeal as a whole it may become apparent that the appeal is not arguable before the Full Court. The question for this Court is what did the Supreme Court in Naisua (supra) mean when it referred to the test as being whether there is an arguable point raised for the Full Court’s attention without considering the merits of the proposed grounds

[5] The nature of the test has become a matter of some interest more recently because of the significant increase in the number of successful applications for leave to appeal against conviction. In a recent decision of this Court in Sadrugu –v- The State [2019] FJCA 87; AAU 57 of 2015, 6 June 2019 (per Prematilaka JA) the test for leave to appeal against conviction was considered in terms of how does the Court distinguish between arguable

and non-arguable appeals at the leave stage. In paragraph 13 of that decision the Judge concluded, having reviewed a number of authorities, that:

“... the test of reasonable prospect of success as described in Smith [2011] ZASCA 15; [2012] 1 SACR 567 (SCA) should be used to differentiate arguable grounds from non-arguable grounds at the stage of leave to appeal.”

- [6] For my part and more in keeping with the observations of the Supreme Court in Naisua (supra) I would suggest that the test be reworded so that the test is understood to refer to the appeal itself as having a reasonable prospect of success rather than any particular ground of appeal.
- [7] In his oral submissions Counsel for the respondent urged the Court to adopt a more rigorous test than one that resulted in leave to appeal being granted on the basis that one ground of appeal raises an arguable point. Counsel submitted that in previous rulings single judges had occasionally moved beyond that test by using such expenses as “worthy of consideration” by the Court of Appeal: Reddy v The State [2015] FJCA 48; AAU 6 of 2014, 13 March 2015. It is apparent that under the test as presently applied a number of appeals are heard by the Full Court that in reality have no chance of succeeding and it must be concluded that this is as a result of the low threshold of the present test. Time and resources are wasted as a result. This Ruling is that of a single judge of the Court and as a result may serve no other purpose than to indicate that the meaning of the test to be applied by a single judge for determining whether leave to appeal against conviction should be granted needs to be re-visited.
- [8] There were initially six grounds of appeal against conviction pleaded by the appellant. However at the leave hearing Counsel indicated that the appellant was relying on only two grounds being:

“i) The learned trial Judge erred in law and in fact when he failed to wholly and adequately present all the evidence adduced at trial to the assessors (ground A)

- ii) *The learned trial Judge erred in law and in fact when he failed to direct the assessors that they must approach her (the complainant's) evidence with caution considering the delay and whether they found the reasons for the delay adequate." (ground D).*

- [9] The ground of appeal against sentence was that the sentence was harsh and excessive.
- [10] The two grounds of appeal against conviction are put forward on the basis that each constitutes a miscarriage of justice under section 23(1) of the Court of Appeal Act. The first ground of appeal alleges that the summing up was not fair, objective and balanced in the sense that the defence case and the appellant's evidence were not sufficiently explained to the assessors. It must be noted that the submissions appear to suggest that it is the opinions of the assessors that determine the outcome of the trial. However, under section 237 of the Criminal Procedure Act 2009 the trial Judge ultimately decides both questions of fact and law. The opinions of the assessors provide guidance for the judge. Both the summing up and the judgment will be considered to determine whether the issues raised by the appellant should be placed before the Court of Appeal.
- [11] In my opinion the judge has adequately put the defence case and summarized the appellant's evidence. In his judgment the judge has stated clearly the reason why he agreed with the guilty opinions of the assessors. He found the evidence of the complainant to be credible and that as a result he accepted her version of the events in preference to the evidence of the appellant whose evidence he rejected. The evidence of the complainant outlined in the summing up, once accepted by the trial Judge, was sufficient to establish the elements of each allegation of rape beyond reasonable doubt. This ground fails.
- [11] The second ground relates to the delay in complaining about the incidents of rape. The trial judge adequately explained how the complainant's evidence is to be considered. He also summarized the evidence of the complainant concerning her explanation for the delay. The assessors and the Judge both accepted that the complainant was telling the

truth about the delay and that the delayed complaint was consistent with the allegations of rape made by the complainant. This ground fails.

[12] In relation to the sentence appeal, counsel for the appellant conceded that there appeared to be no arguable error in the exercise of the sentencing discretion. Counsel for the respondent pointed out that the time spent in remand was considered in a manner that was inconsistent with section 24 of the Sentencing and Penalties Act 2009. Counsel argued that the sentence was within the range for the offence and that under the circumstances that error was not sufficient to constitute an arguable error in the exercise of the sentencing discretion to the extent that a different sentence should otherwise have been imposed by the trial judge.

[13] Although section 24 of the Sentencing and Penalties Act does state that the time spent in remand be deducted from the head sentence as time served, the incorrect application of section 24 by the Judge does not in this case constitute an arguable error in the exercise of the sentencing discretion that would require the intervention of the Court of Appeal.

Orders:

- 1). *Application for leave to appeal against conviction is refused.*
- 2). *Application for leave to appeal against sentence is refused.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL