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

CRIMINAL APPEAL NO.AAU 055 of 2016
[In the High Court at Labasa Case No. HAC 077 of 2014]

BETWEEN : **TOMASI YABAKIONO**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**
Bandara, JA
Rajasinghe, JA

Counsel : **Mr. S. Heritage, Mr. A. Prasad & Ms. A. Degei for the Appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **03 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have read the draft in judgment of Rajasinghe JA and agree that the appeal be dismissed.

Bandara, JA

[2] I have read the draft judgment of Rajasinghe JA in draft and agree with his reasons and proposed order.

Rajasinghe, JA

Introduction

[3] The Appellant was charged in the High Court with three counts of Indecently Annoying any Person, contrary to Section 213 (1) (a) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) (2) (a) of the Crime Act. The Appellant pleaded not guilty to these offences; hence, the matter proceeded to the hearing. During the hearing, the Prosecution called the three Complainants to give evidence, while the Appellant gave evidence for the Defence. The learned trial Judge then delivered his summing up. The three Assessors unanimously found the Appellant not guilty of these five counts. However, the learned trial Judge, in his judgment dated the 4th of May 2016, found the Appellant guilty of one count of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act and three counts of Indecently Annoying any Person, contrary to Section 213 (1) (a) of the Crimes Act and convicted him of the same. Moreover, the learned trial Judge found the Appellant not guilty of Sexual Assault as charged and acquitted him of the same. The Appellant was then sentenced to a term of 12 years imprisonment with a non-parole period of 10 years.

[4] Being aggrieved by the said conviction and the sentence, the Appellant filed this appeal. During the hearing, the learned Counsel for the Appellant informed the Court that the Appellant wished to abandon his appeal against the sentence. Hence, the hearing proceeded on the following grounds of appeal against the conviction.

i) That the learned trial Judge erred in law and in fact when he did not give cogent reasons when he overruled the unanimous not guilty opinions of the Assessors,

ii) That the learned trial Judge erred in law and in fact in overruling the unanimous verdict of the Assessors when the said Assessors accepted the Appellant's caution interview denying all the allegations and his sworn evidence in Court,

iii) That the learned trial Judge erred in law and in fact in not analyzing the evidence against the Appellant on each charge separately,

iv) That the learned trial Judge erred in law and in fact finding the Appellant guilty in four out of five offences the Appellant was charged with when there was an unanimous verdict by Assessors of the Appellant being not guilty on all the charges,

v) That the learned trial Judge erred in law and in fact in contradicting himself when he stated in paragraph 48 of the summing up that " I am sure you will consider what he (Appellant) said and if you think that it is true you will find him not guilty of all charges. It is a matter for you and thereafter finding the Appellant guilty,

vi) That the learned trial Judge erred in law and in fact in finding the Appellant guilty on four counts and not finding him guilty on one count was an inconsistent verdict and as such there was a substantial miscarriage of justice,

vii) That the learned trial Judge erred in law and in fact in not directing himself that there was no recent complaint by the Complainants hence they had opportunity to do so and as such there was a substantial miscarriage of justice.

[5] In an appeal like this, the Court is very reluctant to intervene in the judgment delivered by the lower Court. The Appellate Court must recognize and indeed must keep in mind the advantage that the learned trial Judge/Assessors had in seeing and hearing the witnesses and all the material exhibits presented before the trial Court. This Court had no such advantage of seeing the witnesses and observing their demeanour in giving evidence. Hence, this Court must not lightly intervene unless it has scrutinized the impugned judgment/summing up of the learned trial Judge to determine whether His Lordship had erred in fact and law in concluding that the Appellant was guilty of the two offences as charged. In doing that, the Appellate Court must not substitute its own view about the evidence presented in the trial. Therefore, the Appellate Court must consider the evidence presented and determine whether the verdict is unreasonable or cannot be supported. (**vide Section 23 (1) (a) of the Court of Appeal Act, Sahib v**

State [1992] FJCA 24; AAU0018u.87s (the 27th of November 1992), Kumar v State [2019] FJCA 191; AAU149.2015 (the 3rd of October 2019)

First and Fourth Grounds of Appeal

[6] The first and the fourth grounds of appeal are founded on the contention that the learned trial Judge failed to give cogent reasons when His Lordship overruled the unanimous opinion of not guilty by the three Assessors. The learned Counsel for the Appellant submitted that the learned trial Judge determined the credibility of the Appellant only based on his demeanour and deportment while giving evidence.

[7] The repealed Section 237 (4) of the Criminal Procedure Act stated that the Judge has to give reasons for differing with the majority opinion of the Assessors if he disagrees with the majority opinion of the Assessors. The scope of the reason required has been outlined in **Lautabui v State [2009] FJSC 7; CAV0024.2008** (the 6th of February 2009), where the Supreme Court of Fiji held that:

> *"In order to give a judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence" (**emphasis added**)*

[8] The Supreme Court of Fiji in **Ram v State [2012] FJSC 12; CAV0001.2011** (9 May 2012) has expounded the scope of the judgment of the High Court under Section 237 of the Criminal Procedure Act if the trial Judge disagrees with the majority opinion of the Assessors, where the Supreme Court held that:

> "*section 299(2) of the* Criminal Procedure Code, *Chapter 21, which was in force at the time of the High Court trial in 2008, expressly provided that the trial judge "shall not be bound to conform to the opinions of the assessors". According to the proviso to the said sub-section, when the trial judge disagrees with the majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion, and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court". Although the* Criminal Procedure Code *has since been repealed, section 237 of the Criminal Procedure Decree of 2009, which replaced the above quoted provision of the Code, follows the same principle and provides that the trial judge "shall not be bound to conform to the opinions of the assessors" and goes on to re-enact that the trial judge shall give his reasons for differing from the opinion of the assessors."(**emphasis added**)*

[9] In this matter, the Prosecution alleged that the Appellant had sexually assaulted the first Complainant three times in three different instances and forms. The Appellant was the Officer-in-charge of the Police Station, while the three Complainants were junior female police officers. In respect of the first such incident, the Appellant had indecently annoyed the first Complainant by telling her that her husband was having an affair; hence, she should do the same. The second incident was that the Appellant had tried to kiss her by holding her hand when she came to deliver a copy of the fax received at the Police Station. The last incident was that the Appellant had penetrated the vagina of the first Complainant with his penis without her consent in a police vehicle when they were returning from official duty at night. The allegation pertaining to the second Complainant was that the Appellant indecently annoyed her, telling her he wanted to start an affair with her. The third Complainant alleged that the Appellant called her on her mobile phone, saying words with sexual connotations, thus indecently annoying her.

[10] The Appellant denied all these allegations in his evidence. He testified, admitting that he went to official duty with the first Complainant in the night but safely dropped her at her place without any incident. He denied all other charges.

[11] It appears that the Complainants and the Appellant had given conflicting versions regarding the alleged offences, especially regarding the count of Rape. The first Complainant claimed the Appellant raped her in the police vehicle on their way home after attending to an official duty in the night, where the Appellant claimed that he only dropped her back home and nothing else happened.

[12] Brennan J in **Liberato and Others v The Queen ((1985) 159 CLR 507 at 515)** has succinctly discussed the appropriate approach in a case where there are conflicting versions of evidence given by the Prosecution witnesses and the evidence presented by the Defence witnesses. Brennan J held that:

> *"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."*

[13] Basnayake JA in **Goundar v State [2015] FJCA 1; AAU0077.2011 (2 January 2015),** while accepting the principle as expounded in **Liberato (supra)** held that:

> *"The learned judge directed the Assessors to find the appellant guilty or not guilty by considering whose evidence they believe. By so doing the Assessors have been misdirected with regard to the burden of proof, and thereby caused a miscarriage of justice. The Assessors may believe the evidence of Emma and disbelieve the evidence of the appellant. It does not mean that the case has been proved beyond a reasonable doubt. If, after considering the evidence of the whole case, a reasonable doubt is created in the minds of the Assessors with regard to the guilt of the appellant, the appellant is entitled to the benefit of that doubt and entitled to an acquittal. The courts have held in a series of cases that it is not correct to find the guilt of the accused by allowing the Assessors to believe either party"*

[14] Accordingly, the trial Judge and Assessors have to consider the evidence adduced in the case, including the evidence given by the Defence, and then determine whether the Prosecution has proven the charges against the Appellant beyond a reasonable doubt. The duty is not to ascertain who is telling the truth between the Complainant and the Appellant. If the trial Judge accepted the Prosecution's evidence, he still must only find the Appellant guilty if the trial Judge is satisfied beyond a reasonable doubt with the truth of the evidence.

[15] Having carefully perused the evidence adduced during the trial, it is clear that the Defence mainly challenged the evidence of the Complainants on the basis of their failure to report these allegations promptly to the Authorities. Besides, the learned Counsel for the Defence in the trial had put the denial of the Appellant to the three Complainants to comment on it. The learned Counsel for the Appellant in the trial had not raised any issues of inconsistencies between the evidence given by the three Complainants and the statements they made to the Police. Hence, I do not find any merit or basis in the submissions made by the learned Counsel of the Appellant before this Court that the learned trial Judge failed to consider the inconsistent nature of the Complainants' evidence with the statements made to the Police.

[16] The learned trial Judge explicitly explained in the summing up the summary of the evidence given by the three Complainants. His Lordship had sufficiently highlighted the delay in reporting and the reasons the three Complainants gave in the summing up. *(vide paragraphs 30, 35 & 37 of the summing up)*. His Lordship had then narrated the

evidence presented by the Appellant, specifying the main features of the evidence. *(vide; paragraphs 40 to 47 of the summing up).*

[17] In paragraph 5 of the judgment, the learned trial Judge discussed the demeanour and deportment observed in the first Complainant during the trial. This Court in **Matasavui v State [2016] FJCA 118; AAU0036.2013 (30 September 2016)** has outlined the appropriate approach in determining the testimonial trustworthiness of the witness, where Prematilaka JA said that:

> *"Before acting upon the testimony of a witness the following questions should be posed by court. Both go to the credibility of the witness.*
>
> *(i) Is the witness truthful?*
>
> *(ii)Is the witness's testimony reliable?*
>
> *A truthful witness could sometimes be unreliable or his or her version could be distorted due to the intervention of extraneous factors. Therefore both tests are important. In determining whether a witness is truthful and reliable the court would be assessing the testimonial trustworthiness of the witness. Such assessment would have to be based on an objective application of several tests of credibility, such as the tests of promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions (inter se & per se), interestedness/disinterestedness/bias, the demeanour and deportment in court, and the availability of corroboration where relevant.*

[18] As stated above, the demeanour and deportment in Court assist in determining the credibility and reliability of the evidence. The learned trial Judge has not only relied on the Complainants' demeanour but had considered the delay and the reasons for the delay explained by the Complainants. *(vide; paragraph 6 of the Judgment and paragraphs 30, 35 & 37 of the summing Up).*

[19] Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018)** expounded that the correct test for determining the delay in reporting is the "totality of circumstances test". The learned trial Judge had accurately taken into consideration the evidence of the asymmetrical power balance that existed between the Appellant and the three Complainants, as the senior officer and junior female officers.

His Lordship had then considered the probability of such a junior female officer approaching the highest ranks of the Police Force, such as Commissioner of Police or Assistance Commissioners of Police, to report against her immediate superior officer. (*vide paragraph 6 of the Judgment and paragraphs 30 & 35 summing up*). In respect of the third Complainant, the learned trial Judge considered the explanation given by the third Complainant, saying that she was afraid, embarrassed and ashamed, and that kept her from promptly reporting the matter to anyone. (*vide; paragraph 37 of the summing up*)

[20] Considering the evidence presented by the Complainants, the learned trial Judge found the three Complainants to be credible, reliable witnesses and accepted their evidence as the truth beyond reasonable doubt (*vide paragraphs 7, 8, 9 & 15 of the judgment)*. In doing that, the learned trial Judge found that the evidence presented by the Appellant is not true or may not be true (*vide; paragraph 13 of the Judgment*). His Lordship had further explained the reasons for refusing the Appellant's evidence in paragraph 12 of the judgment stating that his evidence consisted of his self-serving evidence about his professional career apart from simply denying the allegations. His Lordship then explained his conclusion that the evasiveness and arrogant manner of giving evidence affected the credibility of his evidence.

[21] Considering the above-discussed reasons, I find that the learned trial Judge has given cogent reasons for disagreeing with the unanimous opinion of the three Assessors in line with the guidelines enunciated by the Supreme Court of Fiji in **Lautabui v State (supra)** and **Ram v State (supra).** Hence, I do not find any merits in the first and fourth grounds of appeal.

Second Ground of Appeal

[22] The second ground of appeal is founded on the contention that the learned trial Judge failed to consider that the Assessors had accepted the Appellant's caution interview denying all the allegations and his evidence given in Court.

[23] I have already discussed the evidence of the Appellant under ground one. Surprisingly there was no caution interview of the Appellant tendered in evidence in the trial. Hence, I find no basis for this ground of appeal.

Third and Sixth Grounds of Appeal

[24] For convenience, I shall deal with the third and sixth grounds together. These two grounds are inter-contradictory. Under the third ground of appeal, the Appellant argues that the learned trial Judge failed to consider the evidence against the Appellant on each count separately. In contrast, the Appellant in ground six contends that the trial Judge's conclusion of finding the Appellant not guilty of sexual assault but guilty of other counts is inconsistent.

[25] The learned trial Judge had considered the evidence presented by the parties in respect of each count separately as required under the law and reached his Judgment. In doing that the learned trial Judge had accepted the evidence of the first Complainant regarding the incident of Indecently Annoying and the Rape, but refused to accept the evidence regarding the incident of Sexual Assault.

[26] Dep JA in **Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015)** said that:

> *"In the past, the courts applied the maxim 'Falses in Uno Falses in Omnibus' - meaning "He who speaks falsely in one point will speak falsely upon all" - to a witness who gives false evidence. The present trend is instead of rejecting the totality of evidence, to act on that part of evidence which is true and reliable. This approach is known as divisibility of credibility. The learned judge should have impressed upon the assessors that due to serious inconsistencies and infirmities in David's testimony he is an unreliable witness and not worthy of credit and it is unsafe to act on his evidence. However the assessors should be informed that they are free to act on his evidence provided he had given a satisfactory explanation or can act on parts of evidence corroborated by independent evidence. The trial judge had failed to give adequate directions regarding this matter."*

[27] In paragraph 7 of the judgment, the learned trial Judge mentioned that he has certain reservations about the kissing incident on the basis of the evidence given by the first Complainant, saying that the Appellant did not actually kiss her. His Lordship had found that there was a reasonable doubt whether she misconstrued the action of the Appellant. However, the learned trial Judge expressly stated in paragraph 7 of the

judgment that he believed the evidence of the first Complainant, apart from the evidence relating to the Sexual Assault. Therefore, the learned trial Judge found one part of the evidence of the first Complainant as being truthful but refused to accept the other part based on a reasonable doubt about whether the first Complainant misconstrued the Appellant's action. Accordingly, I find no merits in these two appeal grounds.

Fifth Ground of Appeal

[28] The learned trial Judge had directed the Assessors in paragraph 48 of the summing up, explaining how to approach the evidence of the Defence. It does not state the conclusion made by the trial Judge. Hence, this ground of appeal has no basis or merits.

Seventh Ground of Appeal

[29] The last ground of appeal is based upon the argument that the learned trial Judge failed to consider that there was no evidence of a recent complaint.

[30] Section 129 of the Criminal Procedure Act states that:

> *"Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted".*

[31] Consequent to Section 129, there is no need for evidence of corroboration in a trial of this nature. Moreover, the evidence of the recent complaint is not evidence of facts. Gates CJ in **Raj v State [2014] FJSC 12; CAV0003.2014** (20 August 2014) has defined the evidence of recent complaint outlining its scope and the application. Accordingly, the evidence of the recent complaint is not evidence of facts complained of but evidence that connects to the issue of consistency or inconstancy of the evidence given by the Complainant. Hence, the evidence of the recent complaint could enhance the credibility and reliability of the evidence presented by the Complainant. The evidence of the recent complaint does not establish the facts of which the Complainant testified nor disprove those facts. Wherefore, the absence of any evidence of the recent complaint does not necessarily discredit the reliability and credibility of the evidence given by the Complainants. Accordingly, I find no merits in this ground of appeal.

Conclusion

[32] Considering the reasons discussed above, if all the evidence presented in the trial, including the evidence of the Appellant, were considered, the conviction entered against the Appellant is reasonable and can be supported.

Orders of Court

i) The appeal is dismissed.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

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