

IN THE COURT OF APPEAL
[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal No: AAU 0077 of 2011
(High Court HAC 094 of 2010)

BETWEEN : **GANESH GOUNDAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Basnayake JA
Kumararatnam JA

Counsel : **Mr. M.N. Sahu Khan for the Appellant**
Mr. L. Fotofili for the Respondent

Date of Hearing : **8 September 2014**

Date of Judgment : **2 January 2015**

JUDGMENT

Calanchini P

- [1] I have had the advantage of reading the draft judgment of Basnayake JA and agree with his proposed orders. I venture to add some additional observations on the issue of consent and the directions to the assessors on the issue of consent and evidence.
- [2] Under section 207 (2) (a) of the Crimes Decree 2009 a person rapes another person if the person has sexual intercourse with the other person without the other person's consent. In the present case the Appellant admitted having sexual intercourse with the 14 year old complainant. The only issue for the assessors and for the learned trial judge was whether that sexual intercourse was with the consent of the complainant.
- [3] Section 206 of the Decree provides some assistance in relation to the issue of consent. Section 206 (1) states that:

"The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent."

- [4] It was for the prosecution to establish beyond reasonable doubt that sexual intercourse had taken place without the consent of the complainant. The prosecution was required to establish that the complainant had not freely and voluntarily consented to have sexual intercourse with the Appellant. Although section 206(2) provides some guidance for the prosecution as to the circumstances when consent that has been obtained cannot be said to have been given freely and voluntarily, none of those circumstances apply to the present case.

- [5] The prosecution did not call any evidence in order to establish that the necessary mental capacity to give consent was not possessed by the complainant. The sole question in issue was whether the prosecution on the evidence had established beyond reasonable doubt that the complainant had not consented freely and voluntarily to sexual intercourse with the Appellant.
- [6] How then should the learned trial judge have directed the assessors and himself on this issue. It must be noted that under the Criminal Procedure Decree, it is the task of the assessors to give an opinion to the court as to whether an accused is guilty or not guilty. That opinion is not binding on the trial judge. In his judgment he may either agree or disagree with the opinion of the assessors. His verdict should be accompanied by a brief statement as to why he agrees with the opinion of the assessors and a more detailed reasoning in the case where the judge disagrees with the assessors. In this case it would have been possible for the lack of directions in the summing up to have been rectified by a substantive judgment setting out the evidence that supported the decision to enter a conviction against the Appellant.
- [7] I agree with the observations of Basnayake JA concerning the summing up to the assessors on the issue of consent. Furthermore, the judgment of the learned trial judge is extremely brief and adds nothing to the paucity of guidance on the evidence in the summing up.
- [8] In my judgment properly directed assessors would have been left with no choice but to conclude that on the evidence adduced at the trial the prosecution had failed to establish beyond reasonable doubt that sexual intercourse had taken place without the consent of the complainant. Furthermore with a proper reference to the relevant evidence the trial judge would have been in no doubt that it would have been appropriate to agree with the assessors and to enter a verdict of not guilty in his judgment.

- [9] I also agree that it is in accordance with the provisions of both the Criminal Procedure Decree (section 162) and the Crimes Decree (section 215) that the Appellant be convicted of the lesser offence.

Basnayake JA

- [10] The appellant was tried before a Judge and three Assessors for having carnal knowledge of Emma Batiluva without her consent, contrary to section 207 (1) & (2) (a) of the Crimes Decree No. 44 of 2009 (pg. 74 of the High Court Record). He was convicted after the Assessors unanimously found the appellant guilty of the offence charged. The appellant was sentenced (pg. 76 HCR) to 12 years imprisonment with a minimum of 9 years before parole. The appellant appealed against the conviction and the sentence on 24 August 2011 with a notice of appeal (pg 1 HCR).
- [11] On 30 November 2012, sitting as a single judge, I granted leave to appeal against the conviction.

Evidence of Emma

- [12] At the trial the only evidence for the prosecution was that of Emma. The appellant gave evidence for the defence. Emma was born on 16 April 1996. At the time of the incident on 9 August 2010, she was 14 years and 3months of age. On the day of the incident, at about 12 noon, the appellant had invited her for lunch. At that time Emma was in Nadi. The appellant was at Lautoka. They were several miles apart. He had promised to pay her fare for transport. When she arrived at Lautoka the appellant had met her and the fare for transport was paid by him. The appellant had then taken her to a restaurant. This was next to Village 4 cinema and by the side of the road. Emma said that there was a restaurant

down stairs. The incident took place in a room upstairs where she had gone with the appellant.

- [13] She said that the appellant opened the door leading to this room, and having pushed her inside, put a pillow over her face, pulled down her pants and raped her by inserting his penis into her vagina. She said that she tried to push him but could not do so as she had a pillow over her face.
- [14] Thereafter she had gone back to Nadi. Her transport fare was again paid by the appellant. When she went home she had met Ansude, who is a friend and a neighbour. She had told her that she was raped. Then she had got to know that her mother was looking for her. Scared of the mother, she had gone back to Lautoka with the money given by the appellant. She had not spoken to anyone else. When she got off the bus at Lautoka she had met the appellant and told him that she was running away from home. She had then gone in the appellant's vehicle to Marine Drive and stayed there until she was taken to the Lautoka Police Station by the police. She had met her mother at the police station. She stated that due to fear she did not tell her about the rape. She also said that the appellant never bought her lunch that day.
- [15] Under cross-examination she admitted that she had met the appellant prior to this incident. She further said that she sent a text message to the appellant after she boarded a bus asking him to call back. The appellant had then called back to say that he would wait for her at the Lautoka bus stand. From near the bus stand Emma had got into a minibus with the appellant and arrived at the Diamond Hotel. Emma said that the appellant went inside the hotel and that she thought that he went inside to bring food. She also said that the appellant had told her that he wanted to have sex with her and that she told him that she had not had sex before. It was suggested to her that she talked to him for half an hour sitting on the bed and that she took off her clothes willingly. She denied this. She

admitted that no damage was done to her clothes although the appellant removed them by force. It was suggested that she was a willing partner to sex with the appellant, which she denied.

- [16] She also said that she complained to Ashwana and then to Elenoa. She admitted that she did not complain of rape to the Lautoka police when the police arrived at Marine Drive. As to the reason why she came back to Lautoka, she said that it was to meet an aunt. This is the first time she came out with this story.

- [17] She said that she was sure that she was not given lunch by the appellant. Later she admitted that the appellant gave her a box of Chow Mein which she said she gave it to a lady.

(Proceedings at pgs. 8, 9 HCR):

Came back from Nadi Ganesh gave you lunch?

No I am sure.

Tell police he gave you box of chow mein?

He gave it to me. I gave it to lady.

Her earlier position was that she was not given lunch by the appellant. When confronted, she said that she did not eat it but rather that she gave it to a lady. Again, she said that she was hungry;

(Proceeding at pgs 9 & 10);

Why when you hate him, why accept food from him and eat with him?

I was hungry

Eat with him?

No we did not eat together.

She admitted that she did not tell the police that she gave her lunch to a lady. She also said that when she came back to Lautoka, she met the appellant when she got off the bus.

(Proceedings at pg. 10):

Why on return go with him?

Met him when I got off. Sat by tree when he came he brought food.

She admitted to telling her mother that nothing happened when she met her at the Lautoka Police Station, as she was angry.

(Proceedings at pg. 11)

Therefore at police station asking you, you say nothing happened

She was angry

But you said nothing happened?

Yes told her nothing happened but told Namaka police.

She said to court that she went back to the appellant as she had no relatives.

The prosecution closed the case with her evidence.

Evidence of the appellant

- [18] He denied that he used force on Emma while entering into the hotel room. He also denied to having put a pillow on her or pulling her clothes. He admitted to having had sex with her. He said that Emma freely had sex with her.

“She went freely with me to do it”.

Under cross-examination, he said that the girl sent him a text asking him to call back. Then he had called and asked her whether she could come to Lautoka. She had said that she is coming to see him. The appellant knew Emma as she used to travel in his van. When she came to Lautoka he had gone with her to look for some spare parts. After that, they had both decided and gone to the Diamond Hotel. While the appellant went to the

reception, Emma had stayed outside. There is no food service at the Diamond Hotel. At that time the appellant had also had no food with him. After they went inside the room the receptionist had given a towel for which he had paid \$5.00. This was refunded on its return. He said that before coming to the hotel she knew that they were going to have sex. He said that he had a conversation with her and had sex; it was not done forcibly. After that the appellant had taken the girl to the bus-stand and given her money to go home. He said that if he had had sex by force, she would not have come back to meet him again. He also said that the day prior to the trial, Emma's mother called him and claimed a sum of \$10,000.00. Emma's mother had given him 3 missed calls.

Summing up

- [19] The learned Judge at the commencement explained the duties that a judge and the Assessors have to discharge. Thereafter the learned Judge explained the onus and the burden of proof. He said that, *"The prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution. How does the prosecution succeed in proving the defendant's guilt? The answer is by making sure of it. Nothing less will do. If after considering all the evidence you are sure that the defendant is guilty you must return a verdict of guilty. If you are not sure, your verdict must be "not guilty"*". The learned Judge then explained the ingredients of the offence of rape and said, *"The only issue in dispute is whether sex was with Emma's knowledge and consent. The issue of consent is the central issue to which nearly all of the evidence has been directed. Emma says she went to Lautoka to meet Ganesh (appellant) for lunch, that he forced her into the room at the Diamond Hotel, covered her mouth with a pillow and raped her. Ganesh on the other hand says that she was texting him beforehand and sex was by mutual agreement after one if not two discussions on the day in question. You must look at all of the evidence and decide where the truth lies. You will examine the evidence of the victim Emma, and of course you will examine the evidence of Ganesh himself. It has been a very short trial and I don't propose to go over the evidence. It will still be fresh in your mind but remember that Emma said she had no idea that there was going to be any sex*

on the day whereas Ganesh says that it was a matter discussed and they came to a mutual agreement to have sex”(emphasis added).

- [20] Referring to the interview under caution, the learned Judge said as follows; *“Ganesh also made an interview under caution in which he denied any force or coercion in having sex with Emma. You will realise that his answers in the interview are consistent with his evidence. In both he says that agreement was reached and that there was no force”*. The learned Judge further stated as follows; *“Ganesh gave evidence to the court but he did not have to. His giving evidence does not take away the burden on the State to prove to you, so that you are sure, that Ganesh raped Emma on that day”*.
- [21] After the summing up the assessors found the appellant guilty of rape. Hence the learned Judge found the appellant guilty of rape and convicted him accordingly.

Submissions of the learned counsel for the appellant

- [22] The learned counsel submitted that the learned Judge has erred by failing to direct the assessors with regard to evidence of the prosecution as well as the defence. The learned counsel submitted that the learned Judge has erred by failing to summarise and to analyse the evidence in his summing up. The learned Judge states in the summing up; *“I don’t propose to go over the evidence. It will still be fresh in your mind”*.
- [23] The learned counsel submitted that Emma met the appellant by arrangement. Emma had sent a text message to the appellant asking him to call back. On this, the appellant had called back and invited her to come to Lautoka. Emma was in Nadi. She had no money for transport. The appellant had agreed to meet her transport expenses. The appellant was waiting for Emma at the Lautoka bus stand. On arrival the appellant had paid for the transport and thereafter both of them had gone to look for spare parts the appellant

needed for his vehicle. It is only thereafter that both of them had gone to the Diamond Hotel. There is no controversy with regard to the evidence of the prosecution up to the time of reaching the Diamond Hotel.

[24] Emma has given an account of rape. What happened thereafter? Both of them had left the hotel, walked to the bus stand from where Emma had gone back to Nadi. The learned counsel submitted that there is no evidence of Emma having complained to anyone about even having sex, quite apart from rape. The learned counsel asked, "Could there not have been anyone at all to complain to while they came down the steps at the hotel?" There is no evidence that Emma was threatened not to talk. There is no evidence that she was in a state of shock although she was of tender age. There is evidence that she was fully grown and mature by then. She had travelled to Lautoka alone from Nadi. She had gone back to Nadi alone as well. The appellant had stayed back in Lautoka. Emma was free to talk to anyone on her journey back to Nadi.

[25] In Nadi, when she goes home she learns that her mother has been looking for her. What does she do then? She travels back to Lautoka and seeks refuge with the appellant. At Lautoka she meets the appellant again at the bus stand. From there both of them go to Marine Drive and stay until such time the police arrive to take them to the Police Station at Lautoka. At the police station she met her mother and told her that nothing had happened. The learned counsel queried, "Is this the natural behaviour of a rape victim?"

[26] Admittedly the appellant had invited Emma for lunch. However, Emma categorically said in her evidence that she never had lunch. In cross-examination she admits to having received a packet of Chowmein. Then she states that it was given to a lady. This indicates that she did not have lunch. Again she states that she ate it as she was hungry. Thereafter she states that she did not eat it with the appellant. Could one take her to be a truthful witness?

- [27] The learned counsel submitted that none of these matters were mentioned to the Assessors by the learned Judge. The only evidence available against the use of force on Emma by the appellant is that of Emma. There is no evidence of any injury caused as a result of resistance. There is no evidence of the police questioning anyone at the Diamond Hotel with regard to this incident. The fact that she complained to Ashwana and Elona is also not found in her statement to the police. This prevented the police from such investigation. The reason for mentioning these names may be to show that she confided in with someone close to her regarding the incident, to make her evidence seem believable.
- [28] The learned counsel submitted that the learned Judge has erred in law and in fact in stating that “you must look at all the evidence and decide where the truth lies”, implying that the appellant ought to prove his innocence. In this case the only evidence that is available is that of Emma and Ganesh (appellant). When the learned Judge directed the Assessors to look at the evidence and decide where the truth lies (pg. 77) regarding the most crucial issue of consent, it is suggestive that the Assessors must decide who is telling the truth, whether the complainant or the accused. What this means is that if the complainant was telling the truth, then the accused ought to be convicted and if the accused was telling the truth, he should be acquitted. The Assessors could well have misunderstood or got the impression that they had to make a finding either to believe the complainant or the appellant.

The duty of a Judge

- [29] In Murray v The Queen (2002) 211 CLR 193 Kirby J said that, “*It is important, sometimes essential, that judges should relate their instructions on the law to the evidence and issues at the trial* (pg. 216). “*It must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but*

accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments of both sides and a correct statement of inferences which the jury are entitled to draw from their particular conclusions about the primary facts” (Lord Hailsham L.C. in R v Lawrence (1981) 73 Cr.App.R 1 at 5. In the instant case admittedly the only issue that had to be decided was whether Emma consented to the sexual act. Has the learned judge properly addressed this issue to the evidence? There is not much evidence in this case on the act of sexual intercourse. It was only the evidence of Emma and the appellant. Can we just focus our attention to this short evidence and decide the issue of lack of consent. Should we not look into evidence outside the sexual act, starting from the text message to the time of making the complaint to Namaka police, probabilities and improbabilities, truth and falsehood?

- [30] In R v Bree [2007] 2 Cr. App. R 13 Sir Igor Judge P at pg. 18 referring to R v Olugboja (1981) 73 Cr. App. R 344, said that “the court rejected the submission...that a trial Judge was required “merely to leave the issue of consent to a jury in a similar way to that in which the issue of dishonesty is left in trials for offences under the Theft Act. Because of the myriad circumstances in which the issue of consent may arise, the judgment continued, ‘We do not think that the issue of consent should be left to a jury without some further directions. What this should be will depend on the circumstances of each case’”. At page 169 Sir Igor Judge P said, “*The jury were not provided with any assistance about how properly to address these problems*”. Referring to the facts of that case Sir Igor Judge said that, “*In a situation like this, the approach in R v Olugboja that the issue of consent and capacity should be directly addressed, applied with yet greater force.*”

- [31] R v Bree (supra) was a case involving sexual intercourse after consumption of liquor by both parties. Originally the prosecution case was that the victim was so drunk and unconscious and was incapable of giving consent. However the prosecution later changed its stance and conceded that the victim was not unconscious. The defence was that she

its stance and conceded that the victim was not unconscious. The defence was that she was conscious throughout and did in fact consent to sexual activities and intercourse with the appellant. Sir Igor Judge P said that, "From the defence point of view, the drink she had consumed was a factor which may have led her to behave in a way which, if sober, she would not. She had drunk far more than she was accustomed to. This critical aspect of the case was not sufficiently addressed in the summing up; indeed it was not addressed at all. The question whether she might have behaved differently drunk, than she would have done sober, and whether, although and perhaps because drunk, she might have behaved as the appellant contended, and the way in which the jury should consider these important issues, were not mentioned at all." Sir Igor Judge P held that, "In a trial in which the issues of consent and voluntary intoxication were fundamental to the outcome, the jury were given no or no sufficient direction to enable the verdict which they reached to be regarded as safe." On the above reasons the conviction was quashed.

- [32] The appellant was not a stranger to Emma. On this day it is Emma who initiated contact with the appellant and received an invitation. According to the prosecution this invitation was to have lunch. The appellant says that Emma knew that they were going to have sex. According to the appellant, he had spoken to Emma about having sex. Emma said that the appellant had told her that he wanted to have sex and that she told him that she had not had sex before. If this position is true, that would have been an encouragement to the appellant. When Emma said she had not had sex before, could this mean that she did not want to have sex or that she would not mind it? Is this the kind of answer someone wanting to resist sexual advances would give? Although Emma denied it, it was suggested to her that they were seated talking for about half an hour before having sex. It also transpired that this incident took place on a school day. Her mother was at work. Emma had set off from Nadi to Lautoka, all by herself, to meet the appellant on an invitation received from the appellant. It appears from the evidence that Emma had boarded a bus heading for Lautoka even prior to receiving the invitation from the appellant.

Weighing the Evidence

- [33] Should not the court consider the evidence relating to the conduct of Emma and the appellant before and after the act of sexual intercourse? Emma's meeting with the appellant was on a pre-arrangement. After the sexual act Emma left Lautoka to return to Nadi by bus. The appellant accompanied Emma to the bus stand and paid her bus fare. On reaching home, Emma says that she met a neighbour by the name of Ansude to whom she complained of the rape. However, no such person was called to give evidence at least to show the credibility of Emma. The learned counsel for the appellant submitted that the name of Ansude was not mentioned to the police in her statement and this name was mentioned while giving evidence. Did Emma mention the name of Ansude to escape the accusation that her story could not be believed as she had not even told this story to anyone close to her? She said that Ansude had left Fiji and therefore could not be located to verify the truth of this evidence. Did she make up a story about Ansude? Emma did not make a complaint to the police when she was apprehended at Marine Drive by the police, leaving aside the fact of not making a complaint to Namaka police when she returned to Nadi from Lautoka soon after the alleged rape. Neither did she make a complaint to Lautoka police, after she was taken to the Lautoka Police Station. A complaint was made to Namaka police in Nadi on the following day. At that time was she in the company of her mother? Was this complaint made belatedly due to the persuasion of her mother?
- [34] Emma came back to Lautoka to meet the appellant. Both of them had lunch and left to Marine Drive and stayed there until the arrival of the police. Emma told her mother at the police station that nothing had happened. Why did Emma say that she was scared of her mother? Why did she tell the appellant that she was running away from home? She should be scared of her mother only if she did something that her mother would not approve of. Could it be that she was scared to stay at home because she had done something that was reprehensible? Emma would have had to explain to her mother the reason for not attending school that day. She also would have had to explain the reason for going to Lautoka without even informing her (mother)? As to how she got money for the journey? Why did she say that her mother was angry? When she met her mother at

the police station the first thing she said was that nothing had happened. It should be noted here however, that whatever the reason behind Emma's actions, initiating the meeting between her and the appellant, not having told the mother about the whole arrangement, being deceptive about it, it still does not give anyone the right to sexual intercourse with her against her will. On the other hand, the only way to get at the truth of consent or the lack thereof is through the evidence of Emma and the appellant. And even if Emma was in fact raped by the appellant on the alleged day, if there is insufficient evidence to prove beyond reasonable doubt that the appellant had committed such crime, he cannot be convicted of such.

[35] It is to be noted that the incident took place in a public place. Would the appellant have chosen a crowded place to commit the rape? Even if she was not able to raise cries while she was in the hotel room, she could have complained to the hotel staff while she was coming out of the hotel. How is it that she was able to leave the hotel unnoticed? There is no evidence that the appellant prevented her from talking to outsiders. There is no evidence of any investigation done by the police of the hotel where the alleged rape took place. The prosecution case appears to be that the appellant, in the pretext of giving lunch, raped Emma. Emma had gone from Lautoka to Nadi, all by herself and there is no evidence of her having complained to anyone on her way back to Nadi.

[36] Emma did not stay in Nadi. She returned to Lautoka. She returned to the appellant who was waiting for her at the Lautoka bus stand. Unless the appellant was informed of her coming back beforehand, the appellant would not have gone to the bus stand to meet Emma. It appears that thereafter she was provided lunch by the appellant. Emma said that the appellant did not give her lunch. She said that she went to Lautoka as she did not have any relatives. What about her mother? Her home in Nadi? She said this in answer to the questions as to why she returned to Lautoka and to the appellant. Then she said that she was going to her aunt. Was this answer given to avoid an allegation that she went back to

Lautoka to meet her alleged rapist? The story about meeting an aunt is also said for the first time in court. Therefore it was not investigated.

- [37] Why did she say that she had no lunch that day. If she admitted to having had lunch, the next question would have been, "From whom". How can she say that she got lunch from her alleged rapist? Her initial answer was that she did not have lunch. When she was confronted with her statement made to the police she said that it was given to a lady. Later she admitted that she ate it as she was hungry. She also said that she did not eat with the appellant. Did she try to hide her pride; after being raped, to have a meal with the alleged rapist? Has she been caught lying in court with regard to the lunch? The prosecution case was that the appellant raped Emma on the pretext of taking her out for lunch. Did she also lie about Ansude? About going to meet an aunt in Lautoka?
- [38] It transpired that Emma was examined by a doctor. But no medical evidence was produced by the prosecution. The doctor was not called to give evidence. Medical evidence could have been led to strengthen the prosecution case. When medical evidence is available why not lead? Is it because it was not supportive of the prosecution case?
- [39] At the end, it is only the evidence of Emma for the prosecution as against the evidence of the appellant for the defence. Other than that there is no other evidence. These events have to be coupled with the consistent evidence of the appellant as against Emma's evidence which seems shaky. In the light of the above circumstances, could one believe Emma when she states that she was raped? It is very important for the prosecution to prove the truth of their only witness. None of the above matters were placed before the Assessors, for their consideration. All these matters, if properly considered, would have been favourable to the appellant. If Assessors were properly directed, the verdict would have been favourable to the appellant, and the proper verdict, a verdict of "not guilty" for rape.

[40] Kirby J said in Murray v The Queen (supra) (pg. 214), “*Under our law a conviction after such a verdict is liable to be set aside, relevantly, if it follows a trial in which the judge has given the jury a material misdirection about the law. Such a misdirection will be material if it might have deprived the accused of a chance of acquittal of the charge (or of a conviction of a lesser offence).*” The appellant in that case was convicted for murder by shooting. The appellant’s case was that he had not intended to kill the deceased and what happened in effect, an “accident or misfortune.” The appellant denied that he deliberately pulled the trigger. The appellant also stated that he had been struck on the head and got wounded shortly before the shooting. The wound was consistent with the appellant’s evidence that he had been struck on the head by something thrown by the deceased. In police experiments, the gun had a tendency to discharge irregularly when struck.

[41] Kirby J said at page 215, “*The forgoing facts presented the outline of a case arguably consistent with the innocence of the appellant of the charge of murder... made it most important that the jury should receive accurate instruction about the law, with appropriate references to the applicable requirements of the code and to the evidence that bore on its application to this case*”. Kirby J further said (pg 225) “*If the jury accepted, the death occurred by the discharge of the gun caused by the appellant’s being startled or hit and so handling the gun as to result in its discharge in the direction of the deceased, it would be open to the jury to conclude that the death of the deceased had, in the circumstances, occurred “by accident”. At least it would be open to the jury to so conclude if they decided the Crown had not negated as a real possibility that the death was caused by an unintended act on the part of the appellant when all that he wanted to do, by the procuring and pointing the gun was to frighten the deceased and cause him to leave his home*”. With regard to not instructing the jury on section 23 (1) (a) of the Criminal Code (of Queensland) Kirby J at page 222 said, “*It was necessary for the trial Judge to leave the provisions of S. 23 (1) (a) to the jury. She was bound to do so because*

the provision was clearly relevant to the factual case that the appellant was presenting for the jury's consideration and which the prosecution has labelled "a pack of lies"."

- [42] Could one say that the learned Judge had left the most important issue of consent to the Assessors, without any further guidance in the instant case? The learned Judge has related what Emma and the appellant said in evidence and allowed the Assessors to decide the truth of the matter. In R v Li (2003) 140 A Crim. R 288 the issue before the court was with regard to consent. Dunford J said, "The issue was whether the complainant had consented. On this issue, it was her word against his and it was therefore necessary for the jury to scrutinise her evidence with great care before arriving at a verdict of guilty".

A holistic approach to the evidence at hand

- [43] 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.
- [44] Brennan and Deanne JJ in the Australian High Court case of Liberato and Others v The Queen (1985) 159 CLR 507 at 515 (minority) held, "*When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is common place 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 issues 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.” (Emphasis added).

[45] The Court of Criminal Appeal of the Supreme Court of New South Wales in R v Li (supra) following the minority decision in Liberato, quashed the convictions and ordered a new trial on the ground of mis-directions. Dunford J held, “The issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth: They should have been directed:, the test was whether, taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant’s evidence” (at 301). Hunt CJ in E (89 A Crim R 325) said, “A judge should not tell the jury that they must make a choice between the evidence led by the Crown and that given by the accused (Beserick (1993) 30 NSWLR 510 at 528; 66 A Crim R 419 at 435).

[46] In the instant case, the learned Judge in the summing up, explaining the onus and burden of proof states that, “If, after considering all the evidence, you are sure that the defendant is guilty you must return a verdict of “guilty”. If you are not sure, your verdict must be, “not guilty”. However the learned Judge has erred by not explaining the defence case to the Assessors. The defence is that the sexual act was done with the consent of Emma. Emma says that it was done without her consent. Should not the Judge explain and give an analysis of the evidence to the Assessors?

- [47] A Judge must always put defences raised by the evidence to the jury (Cross on Evidence 9th Edition pg. 198 citing R v Kith Kepa Badjan (1966) 50 Cr App Rep 11). The overriding duty of the Judge is to put the defence fairly and adequately to the Jury (Cross citing R v Spencer [1987] AC 128, [1986] 2 All ER 928 at 938). (Also Queen v Sethan alias Delan (1966) 69 NLR 117 at 120, 71 CLW (Ceylon Law Weekly) 22, The Queen v Jayasinhe (1965) 69 NLR 314, 68 CLW 81 cited by Commaraswamy (supra). The judge cannot content himself by simply reiterating the incantation that it is for the jury to decide the facts (Cross on Evidence 9th Edition at pg 199 citing R v Gilbey (1990) (26 January 1990) unreported (cited in Mears v R) (1993) 97 Cr App Rep 239). This is exactly what the learned Judge did in the instant case. The learned Judge has erred by not assisting the Assessors on both law and facts. If assisted, the Assessors would have come to a correct decision by acquitting the appellant on the charge of rape. Hence I set aside the conviction and the sentence for the offence of rape.

Should the appellant be found guilty of another offence?

- [48] Provision has been made by section 162 of the Criminal Procedure Decree 2009 to convict an accused charged with rape for a lesser offence, if the court is satisfied that the evidence adduced supports such conviction. The section is as follows:

Section 162(1)- *Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction made after due process for-*

(f) any sexual offence where the charge has been for rape;

Section 162 (2) states that, “*The court may record convictions for certain offences in accordance with sub section (1) notwithstanding that no charge has been laid for the lesser or alternative offence in accordance with the provisions of this Decree.*”

Offence of defilement

[49] Could the appellant be convicted for the offence of defilement?

Section 215 of the Crimes Decree 2009 is as follows:

“215 (1)-A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.”

In terms of sub section (3) it is no defence to any charge under sub section (1) to prove that the person consented to the act. The fact that the appellant had sexual intercourse with the victim has not been disputed. It is also not disputed the age of the victim. At the time of the commission of this offence, the victim was 14 years of age. Therefore I am of the view that the appellant is guilty of the offence under section 215 (1) of the Crime Decree 2009 and convict him for same. Considering the part played by the victim and the fact that the appellant had been in confinement for more than 3 years, I am of the view that justice will be served by imposing a sentence of 3 years. Hence I impose a sentence of 3 years to be effective from 18 April 2011.

Kumararatnam JA

[50] I agree with the reasons and conclusions reached by Basnayake JA.

The Orders of the Court are:

1. Appeal partly allowed.
2. Conviction for rape is quashed and sentence set aside.
3. The appellant is convicted under section 215(1) of the Crimes Decree 2009.
4. The appellant is sentenced to 3 years imprisonment with effect from 18 April 2011.

W. Calanchini

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

E. Basnayake

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL



P. Kumararatnam

.....
Hon. Justice P. Kumararatnam
JUSTICE OF APPEAL