

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

CRIMINAL APPEAL NO. AAU 105 OF 2013  
(High Court No. HAC 120 of 2012)

BETWEEN : DINESHWAR PRASAD

Appellant

AND : THE STATE

Respondent

Coram : Gamalath, JA  
Prematilaka, JA  
Perera, JA

Counsel : Mr. G. O'Driscoll for the Appellant  
Mr. M. Korovou for the Respondent

Date of Hearing : 24 August 2017

Date of Judgment : 14 September 2017

J U D G M E N T

Gamalath, JA

- [1] The appellant stands convicted on a charge of rape and based on several grounds he is presently seeking to prosecute the appeal against his conviction. There are several grounds of appeal upon which he is placing reliance. However, it is my considered view that in reality this appeal revolves around only one crucial ground of appeal.

The crucial ground is in relation to the issue of the consent. In relation to the said ground of appeal, the main question to be decided is whether the learned Trial Judge had been accurate in his directions to the assessors. The answer to the question is paramount to decide this appeal, for as it transpired from the proceedings in the High Court, throughout the trial the appellant had been steadfast that the charge of rape had been ill-conceived. It is his evidence that the alleged indulgence in the act of sexual intercourse with the victim was consensual. Therefore, this appeal should justifiably focus on the issue of consent as it would supersede the relevancy and the importance of any other ground of appeal. In other words this ground alone shall be determinative of the final outcome of this appeal.

- [2] The appellant was tried on two counts of rape contrary to Section 207 (1) (2) (a) of the Crimes Act No. 44 of 2009. The particulars of the charges are as follows;

***“First Count***

**Statement of Offence**

*Rape : Contrary to Section 207 (1)(2) of the Crimes Decree No. 44 of 2009.*

**Particulars of Offence**

*Dineshwar Prasad on the 8<sup>th</sup> day of March 2012, at Suva in the Central Division had carnal knowledge of Volonia Lusiana Nawaqavou without her consent.*

***Second Count***

**Statement of Offence**

*Rape : Contrary to Section 207 (1)(2) of the Crimes Decree No. 44 of 2009.*

**Particulars of Offence**

*Dineshwar Prasad on the 8<sup>th</sup> day of March 2012, at Suva in the Central Division had carnal knowledge of Volonia Lusiana Nawaqavou without her consent.”*

The assessors had been unanimous in the opinion that the appellant was guilty as charged. The learned Trial Judge convicted the appellant and imprisoned him for 12 years.



- [3] According to the agreed facts at the trial, the victim was only 21 years of age whilst the appellant was 26 years old at the time of the alleged incident. The victim was an undergraduate in the University of Fiji whilst the appellant was a taxi driver. They had known each other prior to the alleged incident. Many including the victim addressed the appellant as “Sonu”.
- [4] On the day of the incident the appellant and the victim had met at Davuilevu, not by design. Together they travelled back to Suva in the taxi hired by the appellant. According to the victim the only idea of getting in to the taxi was to be dropped at her home. However, it had never materialized; according to the victim the appellant seemed to have entertained a hidden agenda and the taxi ended up at Pender Court Apartment, Suva, where the alleged incident of rape had taken place. According to the victim’s evidence she was raped twice at Pender Court.
- [5] This appellant gave evidence at the trial denying the allegation. According to him they went to Pender Court and booked into the room to spend the time together for it was nothing new or unusual for them to be together, in this fashion. According to the appellant they had been sexual partners for some time and he recalled three such earlier occasions where they had indulged in having sex. Therefore, the question of consent for sex was never an issue between the two of them.
- [6] The victim on the other hand maintained that what had occurred at Pender Court was far from being consensual. She denied the fact that they were sexual partners ever before. Thus, she claimed that the appellant had violated her in that night.

### **The issue of consent**

- [7] In the light of this material the question that remains to be answered presently is, does the available evidence provide a sufficient basis upon which the assessors could have arrived at the unequivocal conclusion that the appellant was guilty of the alleged crime of rape?
- [8] In order to find an answer to this question one’s attention should be focused at the learned Trial Judge’s directions to the assessors in the summing up. In other words it



is directly related to the accuracy and the precision with which the learned Trial Judge had finally directed the assessors on the issue of consent. I wish to reiterate that it has been the consistent position of the appellant that there was no question with regard to the issue of consent. The victim had been a willing partner. In that context what becomes important is to closely examine the overall approach of the learned trial Judge in directing the assessors on the issues relating to the standard of proof, burden of proof *vis-à-vis* the weight to be attached to the overall factual matrix of the case against the appellant. In the said backdrop now I wish to turn to the items of evidence which is relevant to the issue of consent.

### **The Evidence**

- [9] The evidence of the victim is that she went out of her house around 7 in the night and visited several restaurants and bars where they were socializing, while consuming alcohol.
- [10] She had consumed a considerable amount of liquor at these places. Approaching the midnight, she and “Sonu” the appellant, had travelled in the same taxi, with the understanding that Sonu would drop her at home. She was tired and sleepy and perhaps even disoriented due to the heavy consumption of liquor. Instead of taking her home, the appellant had ended up with her at Pender Court Apartments. According to the victim the appellant, disregarding her protest, took her into a room forcibly.
- [11] Whilst in the room, he raped her twice. When she resisted his sexual advances, he hit her in the face, causing bruises to her mouth, back of the head and the other parts of the face. Whilst this was in progress once she had lost her consciousness. The appellant had been cursing her using obscene language. After the incident the appellant had abandoned her in the room and gone away in the dead of the night itself.
- [12] The matter was reported to the police in the morning. The victim was examined by the medical doctor and the findings were admitted at the trial without any contest. The



victim had injuries to her face, head and the vagina. The facial injuries were found as bruisers to the lips. There is no dispute over their nature. The prosecution has placed heavy reliance on this evidence to substantiate the claim of the victim that the intercourse was without her consent.

### **Two different versions of evidence on the injuries found on the face**

- [13] There are two clearly irreconcilable versions to the manner in which the victim could have received injuries to her face.
- [14] As referred to earlier, the first version came from the victim herself. She claims that the injuries found on the face were as a result of the assault by the appellant at Pender Court, where she was allegedly raped.
- [15] The other version comes from the evidence elicited by the defense at the trial. Accordingly, in the night of the day of the incident the victim had been visiting several pubs and restaurants with her friends. One such place was “the Bridge”, a night club. At that place she was accosted by her ex-boyfriend whose father was the manager of the pub. At the pub an incident had broken out between the victim and the manager’s son. According to the victim’s evidence this man was her former boyfriend. He resented the fact that she was in the company of one John Fong Toy, one of her distant son’s in law. According to the victim her ex-boyfriend had merely “growled” at her on seeing her in the company of the son in law John Fong Toy. The incident had not lasted even 5 minutes. According to the victim it was a lie to say that her ex-boyfriend hit her in the face in that night causing the injuries on the face. They were caused by the appellant instead, as already stated earlier.
- [16] On the other hand the defense called John Fong Toy to give the other version as to how the victim had come by her injuries. According to John the ex boyfriend of the victim had hit her in the face severely causing the injuries to her lips and the facial area. This had happened long before the victim had met the appellant. Fearing that he would also be assaulted by the ex-boyfriend of the victim, John had not tried to intervene and rescue the victim.



- [17] As can be seen, there are presently two different versions with regard to the manner in which the victim has received the injuries to her face in that night.
- [18] The approach of the learned Trial Judge on the two divergent versions relating to the manner in which the victim had received the injuries carries a significant importance in deciding this appeal. In my opinion, the learned Trial Judge, in his directions to the assessors should have carefully analyzed the two divergent positions on the same point and invited the assessors to decide whether the differences in the versions are capable of causing a reasonable doubt in their minds about the incident relating to the facial injuries found on the victim. It was the bounded duty of the learned Trial Judge to direct the assessors that there is no duty cast on the appellant to prove any matter relating to how the victim had come by her injuries.
- [19] The controversial nature of this evidence has a direct impact on the final outcome of this appeal. On the one hand if the evidence of the victim is accepted without doubt that means the appellant had used violence in the manner that the victim had described. On the other hand if the evidence of John Fong Toy is believed then would it have paved the way to ask two important questions namely, is it that the victim was telling a lie about the manner of receiving the injuries or if the evidence of the witness who presented a different version as to the manner of the victim receiving the injuries is believed, would not that be creating a reasonable doubt about the entire case for the prosecution? However, in both instances, the benefit of the doubt should enure in favor of the appellant.
- [20] This matter, in my view bears a paramount importance in this appeal. Therefore, it is in that backdrop the evidence relating to this issue should be further examined;
- (i) I have already referred to the testimony of the victim at the trial and her description of how she received the injuries to her face in the hands of the appellant. According to the victim's answers in the cross examination, in the night of the incident, at the nightclub "Bridge", her ex-boyfriend never hit her as tried to be portrayed by the defense. The ex-boyfriend was angry with the victim for she was in the company of one John Fong Toy. John Fong Toy is her



own son in law through marriage. Despite the relationship, John Fong Toy gave evidence in support of the appellant.

(ii) John Fong Toy and the victim were close friends. According to John, at the “Bridge”; the victim had drunk 2 pints of rum. Referring to the incident between the ex- boyfriend and the victim, John Foy Tong maintains that the victim was severely punched in the face by her ex boyfriend. There were almost fifteen such blows; At one time this man hit her in the back of her head. Vividly describing the assault further, John said in evidence that “Lusi, the victim, was badly hit by that man. Her face was “full of bruises and swollen.” (emphasis added.)

(iii) Highlighting an omission in his evidence, the learned State Counsel pointed out that the witness had failed to refer to the following matter in his statement to the police;

- “Q. What’s recorded in your statement was what you told?  
A. Everything was not there.  
Q. You told one fair Indian boy, why not manager’s son?  
A. I told them how he looked like. I told police he was manager’s son; Don’t know why they didn’t write.  
Q. None of your descriptions about assaults mentioned in your statement.  
A. He punched her. I told it to police. Police didn’t write the number of times punches.  
Q. Why didn’t you tried to defend her?  
A. I cannot hold her; my ‘mother in law”, I didn’t try to hold the boy as he might have punched me.  
Q. You saw injuries on her face after that?  
A. Yes.”*

(iv) It is clear from the above answers that the witness’s evidence in relation to the assault on the victim by the manager’s son is unimpeached. Clearly, he had made an omission in his police statement when he failed to mention the exact number of punches directed in the victim’s face. However, I find that the witness had given a plausible explanation about the omission.

(v) The law relating to the issue of contradictions and omissions is trite law. Previous statements of witnesses are used to impeach their testimonial



trustworthiness. Contradictions and omissions are used for the purpose of evaluating the testimonial trustworthiness of a witness. Contradictions/Omissions can be *inter se* or even *per se*. This means their existence can be within the evidence of a testimony itself or between the evidence of the witnesses called in by the same party to a law suit. What matters in relation to these entities is that they are used as yardsticks to assess the degree of credibility that can be attached to the testimonial trustworthiness of a witness. In that context, in the opinion of the assessors, if the nature of the contradiction/omission is such that it does not generate any serious doubt about the credibility of the witness, the assessors are free to ignore the contradiction/omission and proceed to act upon the evidence of the particular witness. Assessors as triers of facts can determine the weight that they wish to attach to the evidence of such witness. Even otherwise, notwithstanding the presence of a contradiction/omission of even serious nature, it is legally permissible for triers of facts to act upon the evidence of a witness. That is when the assessors feel comfortable to ignore the omission/contradiction and to consider the rest of the evidence to find where the truth lies. That happens if the reasons for contradiction /omission can be explained away by the witness. However, what is paramount in this regard is that it is the duty of the Trial Judge to direct and guide the assessors on how to act on the contradictions/omissions.

- (vi) It is unfortunate that that had not been fulfilled by the learned Trial Judge in the trial of this case. There is not a word mentioned about either the legal principles involved or the factual assessment that is possible as the triers of facts *vis a vis* the omission.
- (vii) Given the importance of the contentious issue revolving over the issue of consent in this case, the fact that that direction is conspicuously missing from the summing up is a serious matter that affects the final outcome of the appeal. Most certainly it has caused a serious prejudice to the case for the appellant.

[21] Another matter on which I wish to make some observation is in relation to the manner in which the witness John Fong Toy was subjected to cross examination about his



previous statement to police. It is clear from the proceedings that during the cross examination the entire statement was handed over to him to pin point the omission relating to the evidence on “the number of punches”. It is trite law that a witness may be cross examined based on a previous statement made by him in writing, or reduced into writing, without such writing being shown to him. (2012) *Archbold*, pg. 1319, para 8-266.

However, it is important to be borne in that whenever a witness is cross-examined on a previous statement, “this should be done selectively and with precision; it is inappropriate to read to the witness long extracts from the statement, and then merely to ask one or two short questions; such method lengthens the proceedings; makes the cross examination difficult to follow and creates the risk that the assessors/jury will muddle the evidence of the witness with what was said on the previous occasion”. **R v. Clarke & Hewins** [1999] 6 *Archbold* News 2, CA, (97 04 882 W3)

- [22] The above *dicta* is equally applicable to omissions found in the previous statements of witnesses.
- [23] It is noticeable that in the trial, when the witness John Fong Toy was shown his complete statement to the police and questioned him in a broad manner that “none of your descriptions about assaults mentioned in your statement?” the learned High Court Judge did not intervene and correct the situation. It is important for a witness’s attention to be directed at the specific problematic area of the previous statement. In my opinion the witness’s evidence on the issue of assault by the manager’s son at “Bridge” had not been impeached or contradicted. The witness, despite being a relative of the victim through marriage, had testified about the punches that the victim received at the hands of the manager’s son at “Bridge” and it is his position that the victim had bruises on her face after the assault. This clearly throws into doubt the credibility of the evidence of the victim who claimed that the injuries found on her face were as a result of the assault mounted on her by the appellant. In light of these divergent positions with regard to the manner in which the victim is supposed to have received the injuries, there is a doubt about the evidence of the victim on that point. Whether it has an overall impact on the testimonial trustworthiness of the entirety of her evidence is a matter that the learned Trial Judge should have left for the



consideration of the assessors. However, in his summing up the learned Trial Judge seemed to have omitted to carry out that duty diligently.

- [24] The other witness that was called in to testify on behalf of the appellant was one Praveen Kumar, a taxi driver. He got a hire from the appellant, who he described as the boy in Court, the appellant, around 12 midnight to go to Pender Court. On the way the appellant wanted the witness to pull over the car to a side to get the victim into the car. She was then seen idly walking on the side of the road. She sat on the rear seat and the appellant also sat beside her. Both seemed as they were quite intimate. He observed through his back mirror that the victim had comfortably rested her arm on the thigh of the appellant. At one stage on the way the victim wanted to vomit. The appellant had helped her by stroking the back of her chest. Having reached the Pender Court, the appellant and the victim had walked into a room hand in hand.

The witness waited out of the room into which the couple entered to collect his taxi fare. Since it was getting delayed he drove around the area to pick more hires. Later when he returned to collect his \$50.00, the appellant was still in the room while the victim was seen fast asleep in the bed. The appellant had told the victim that he was leaving for home and left the place in his taxi to be dropped at the appellant's house. When the appellant informed the victim that he was leaving, she had mumbled something and returned to her sleep.

The inference that could be drawn from the evidence of this witness is that he had not seen anything suggestive of violence or coercion being used on the victim by the appellant. The evidence of this witness is unimpeached in its important areas and can therefore be acted upon by a court of law for its credibility. It is unfortunate that the learned Trial Judge has not directed the assessors on the specific areas of the evidence of the witness and invited them to draw whatever the inference that they wish to draw in arriving at the finality on the issue of whether the case has been proved by the prosecution beyond any reasonable doubt.



### The evidence of the Prosecution

[25] In so far as the evidence on the absence of consent is concerned, even the prosecution witnesses don't seem to have taken the case for the prosecution much further. Although, independent corroboration of the evidence of a rape victim is not a *sine qua non* to successfully secure a conviction, the obverse of the situation is such that if the testimonies of the rest of the witnesses on whom the prosecution relies are capable of creating doubts about the victim's credibility, that would then be a serious issue with regard to the sustainability of the prosecution's case.

[26] Having said this I wish to turn to the evidence of another witness upon whom the prosecution relied to prove the case against the appellant. He was one Epi Lagidra, the security officer at Pender Court apartments. In his evidence he states that the appellant accompanied by the victim and another person came in a taxi and booked into a room. The appellant wanted the room just for an hour and accordingly made the payment. The witness had observed the three of them looked happy in their company. The appellant had left in the taxi after about an hour. When the witness went back into the room in the morning, the victim was still asleep. The witness woke her up and the victim complained of being raped by the appellant, "Sonu".

Importantly, the place was not lit up in the night; the only light came from the bathroom where the bulb was burning. The witness was manning the place to ensure that the place was running smoothly devoid of any problems. According to his answers in the cross examination, he did not hear any commotion, or any sign of a fight coming from the room that the appellant and the victim were occupying. He said categorically that if there had been any commotion, fight or cry it wouldn't have escaped his attention.

[27] This assertion is very crucial in deciding on the veracity of the evidence of the victim. It was her evidence that she screamed for help, banged on the room door to escape from the appellant's grip. Further, I have already referred to her evidence in which the victim had taken up the position that the appellant, in his fit of aggression, cursed her, yelled at her and beat her up in the face causing the injuries that were later observed. Epi Lagidra had testified to the effect that he did not see any injuries on the



girl when she came in to Pender Court. But on the other hand describing the degree of visibility at the place he had stated that the place was lit up very poorly and the only available light was coming from the bathroom. It may well be so that the poor lighting available at the place may not have been enough for anyone to see anything in detail. In the circumstances his evidence does not take the case for the prosecution any further, particularly as far as the cause for the facial injuries of the victim was concerned.

- [28] As a matter of fact, this witness is most unhelpful to the prosecution to buttress the testimonial trustworthiness of the evidence of the victim. The evidence of Epi Lagidra was ostensibly used to prove the absence of consent. However, the prosecution has not been able to reach that target through this witnesses' evidence. Once again the learned Trial Judge had failed in the summing up to draw the assessors' specific attention to the inferences that could be drawn out of the evidence of this witness. Mere narration of his evidence sans any such specific reference would not be of any help for the assessors to deliberate on facts correctly. That is a serious omission, for without such careful directions being given the assessors wouldn't have known as to how the evidence could be used to arrive at the proper conclusion. In that context the learned Trial Judge had clearly failed to follow the dicta found in the well decided following authority;

In Silatolu v. The State [2006] FJCA 13; AAU0024.2003S (10 March 2006) it was decided as follows:

*"When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; R v. Lawrence [1982] AC 510. It should be an orderly, objective and balanced analysis of the case; R v. Fotu [1995] 3 NZLR 129".*

- [29] On the whole, the collective effect of the evidence of this appeal, namely the evidence of the witnesses for the defense as well as the evidence of the prosecution witness, the security officer at Pender Court, seems to be debasing the evidential value of the



testimony of the victim. The sum total of their evidence goes to show that there was a congenial interaction between the appellant and the victim. Further, there is clearly a controversy with regard to the crucial issue upon which the entire case hinges namely; whether the element of consent has been proven beyond any reasonable doubt?

**Having regard to the summing up has the learned Trial Judge dealt with the aspect of consent adequately?**

[30] Having discussed the gamut of evidence in the preceding passages, another important remaining issue to be dealt with is the manner in which the learned Trial Judge had dealt with the issue of consent in the summing up.

[31] Dealing with the elements of the offence the learned High Court Judge had stated thus;

***“Elements of the Offence***

- (i) *As you read, the alleged charge of RAPE leveled against the Accused is based on Section 207(2) of the Crimes Decree 2009. It states as follows:*
- (a) The person has carnal knowledge with or of the other person without the other person’s consent; or*
  - (b) The person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or*
  - (c) The person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.”*
- (ii) *The Prosecution has to prove the following three elements beyond reasonable doubt for you to find the Accused guilty as charged.*
- The Accused (Dineshwar Prasad hereinafter referred as the Accused) had carnal knowledge with the complainant (Volonia Lusiana Nawaqavou, hereinafter referred as the complainant);*
  - Without the consent of the complainant.*
- (iii) *Carnal knowledge or sexual intercourse is proved when the penis of the Accused has penetrated the complainant’s vagina.*



*In the eyes of law, even a slightest penetration of the complainant's vagina by the penis of the Accused is sufficed to establish "sexual intercourse". Ejaculation is irrelevant and not essential in proving the "penetration". In this instance, 'penetration' is not a contested issue, as both parties have agreed on that.*

- (iv) *If the complainant agrees freely and voluntarily out of her own free will, she is said, to have 'consented' to the alleged sexual act. But, if that 'consent' was obtained by force or threat or intimidation or putting her in fear of bodily harm, that is not a 'free and voluntary' consent on the part of the complainant.*
- (v) *At the same time, the Accused must know that the complainant was not consenting to have sex at the time in issue or that he was reckless in having sexual intercourse with her without knowing whether she was consenting to the act or not. The issue you have to answer in this instance is 'Did the Accused rape the complainant on 8<sup>th</sup> and 9<sup>th</sup> of March 2012?' In doing so, you have to be mindful that there are two separate charges of rape against the accused. The prosecution has to prove the elements of both charges separately and you have to assess the evidence against each charge separately."*

**On the burden and standard of proof, the learned trial Judge had directed the assessors in the following manner**

[32] See page 105, Para [2]:

*" (i) Before reminding and analyzing the already lead evidence in this court, it is my duty to enlighten you on several legal principles, which are involved in a criminal trial. Firstly, the issue of proof. As a matter of law, I must direct you that the responsibility or the onus of proving the case against the Accused rests upon the prosecution. That is a continuing responsibility casts upon the prosecution throughout the trial and it never shifts to the Accused. There is no obligation or duty upon the Accused to prove anything, including his innocence or otherwise. Accused, though charged before a court of law, is presumed to be innocent until he is found guilty by a competent court of law.*

*(ii) What is the standard that the Prosecution has to adopt in proving the case against the Accused? In legal literature, it is said that 'the Prosecution should prove its case against the Accused beyond reasonable doubt.' Its simplified meaning is that if you are to find the Accused guilty of the offence charged, you must be satisfied to an extent where you are sure of his guilt. I re-iterate, that you must be 'sure' of the guilt and nothing less will do. There is no*



*mathematically proven formula for you to be 'sure'. In the final analysis, it rests on the robust common sense of yours, which should not be fixed from emotional responses."*

- [33] Again under the topic Analysis of the Evidence, Page 112, para 6, (i) the learned High Court Judge had this to say:

*"You are very well aware by now that there is no dispute throughout this case, that sexual intercourse took place on two separate occasions in the late night of 8<sup>th</sup> March 2012 or early hours of 9<sup>th</sup> March 2012 at Pender Court Apartment between the accused and the complainant. The prosecution avers that the sexual acts were done without the 'consent' of the complainant. The defense, on the contrary argues that 'whatever' happened during that night had happened with the full consent of the complainant. I have already directed you on the legal background of 'consent' and what you have to decide now is whether the two separate sexual acts performed by the accused were done with the consent of the complainant or not. If you are sure with the prosecution evidence that the accused did have sexual intercourse with the complainant without her consent, you must return with an opinion of 'Guilty'. If you are not fully satisfied or not sure or in two minds to say that if the complainant might have 'consented' to have sex, that means you are in a doubt and the benefit of such a doubt must be the result of an opinion of 'Not Guilty.'*

- [34] Finally in his concluding remarks the learned High Court Judge had the following to be left for the assessors deliberations;

*"In essence, madam assessor and gentlemen assessors, you are confronted with two different versions to say how these two 'sexual acts' took place. At this juncture, I have to tell you once again that there is no burden on the accused whatsoever to prove anything. He needs not to prove that he is innocent. Nevertheless, the accused in this instance put forward his side of the story to you. It is entirely up to you to accept or reject it. If you decide to reject the accused's story that does not necessarily mean the prosecution has proven the case. The prosecution still must prove all the elements of the offence to your fullest satisfaction."*

- [35] The abovementioned paragraphs of the summing up contain the totality of the directions left with the assessors by the learned High Court Judge in regard to the elements of the offence including consent *vis-a-vis* the burden of proof and the standard of proof.



[36] I find the directions are far from being adequate to fulfill the requirements under law. As can be discerned with having reference to the passages highlighted above the learned Trial Judge has failed to direct the assessors adequately as to how they should be evaluating the totality of the evidence to decide on the question of consent. When he directed the assessors that they are only “*confronted with two different versions to say how these two sexual acts take place...*” the learned Trial Judge has clearly taken away from the assessors the need to examine the totality of evidence in deciding whether there is a reasonable doubt that the act of having sex was without the consent. On the contrary, the clear impression that was left with the assessors was to compare between the version of the victim and the version of the appellant and to decide whose evidence that they wish to believe in deciding on the issue of consent. Surprisingly, there was no reference whatsoever about the evidence of John Toy, the taxi driver Praveen Kumar, or even the security officer at Pender Apartment, the witness for the prosecution itself who maintained that he did not hear any sound coming from the room, suggestive of rough handling of the victim. What about the inferences that could be drawn from their evidence in deciding on the issue of consent? Thus, in his directions on the most crucial issue of the case, the issue of consent, the learned Trial Judge had dealt with the matter perfunctorily.

[37] Page 113 – (ii) Referring to the incident of the victim boarding the taxi hired by the appellant and travelling with him up to Pender Court, the learned High Court Judge first relates the version of the victim, followed by the version given by the appellant in his evidence. Then comes the objectionable direction to the assessors.

*“... She claimed that she was forcefully taken inside a room. On other hand, the accused says that he got her into his taxi while she was walking on the road. ... He denied the allegation of having been forcefully taken into the room.*

*Madam Assessors and gentlemen assessors, you have to decide what version of the explanations you are going to believe.”*

[38] Page 113 – (iii) Referring to the alleged incident of violence, the learned Judge has stated thus:

*“The complainant then said the accused assaulted her with punches ... The accused denied his involvement to all these injuries. Dr. Salesi*



*had noted bruises etc... ; The doctor agreed that the two ecchymosis can cause from love bites.  
The doctor said these injuries observed in the complainant are compatible with the history she gave to him,"*

- [39] Whenever the defense raises an issue with regard to the ingredient of consent of the offence of rape, there is a greater responsibility casts upon a trial judge to meticulously scrutinize the available items of evidence and to direct the assessors to determine whether there is merit to the issue raised. It is further incumbent on a trial judge to direct the assessors that there is no onus or burden on the defense to prove the presence of consent or even negate the absence of consent by adducing evidence. There is neither a legal burden nor an evidential burden casts upon the defense facing a charge of rape. If there is a reasonable doubt that is possible to be entertained having regard to the totality of evidence, meaning both the evidence of the prosecution as well as the evidence for the defense, provided such evidence is available, then the appellant shall get the benefit of the doubt and he should therefore be acquitted. In the instant summing up under scrutiny, this clear direction is clearly missing. The trial judge is essentially duty bound to direct the assessors that "the absence of consent must be established by the Crown on a charge of Rape ..."see Crosson Evidence, Fifth edition, "The Incidence of the Burden of Proof" page 97. **R v. Horn** (1912), 7 Cr. App. Rep. 200; **R v. Donovan**, [1934]2 K.B. 498.

- [40] Another serious flaw in the directions to the assessors should also be highlighted. As a prelude to discussing that matter I wish to cite the following passage from the summing up;

*"In essence, madam assessors and gentlemen assessors, you are confronted with two different versions to say how these two 'sexual acts' took place. At this juncture, I have to tell you once again that there is no burden on the accused whatsoever to prove anything. He needs not prove that he is innocent. Nevertheless, the accused in this instance put forward his side of the story to you. It is entirely up to you to accept it or reject it. If you reject the accused's story that does not necessarily mean the prosecution has proven the case. The prosecution must prove all the elements of the offence to your fullest satisfaction."*



[41] There is a very serious non-direction in this approach which is tantamount to a misdirection. Namely, nowhere in the entire summing up the learned High Court Judge had specifically directed the assessors to consider whether the evidence adduced on behalf of the appellant was capable of creating a reasonable doubt in their minds that the sexual intercourse was without the consent of the victim. This is a serious non-direction particularly in view of the nature of the strong evidence that goes into explaining the attendant circumstances of this case. Recalling that the appellant's witnesses as well as even the prosecution's witnesses are unsupportive of the testimony of the victim, especially in relation to the manner in which she received the bruises on her face, a direction should have been given in that line.

[42] The gravity of the complaint does not seem to be coming to an end with that issue alone. There is another very important direction that the learned High Court Judge should have left with the assessors on the issue of assessing the evidence namely, if the assessors neither believed the defense version nor disbelieved it, in such a situation as well the benefit of doubt should enure in favor of the appellant and he should therefore be exonerated from the case. In the summing up that direction to the assessor is completely missing. A superficial direction to the effect that "*if you are not fully satisfied, or not sure or in two minds to say that the complainant might have consented to have sex then that means you are in a doubt*" (*supra para*) is insufficient in a situation like the instant appeal. The learned Trial Judge never directed the assessors on the possible basis upon which they can entertain such a doubt about the issue of consent. The assessors were never left with the direction to take into account the totality of the evidence in deciding on the issue of consent. The assessors should not be looking at the evidence within watertight compartments. It is the totality of the evidence and the inferences that can be reasonably drawn from the evidence that should be taken into account in deciding the absence of consent for sexual intercourse.

[43] Sadly, that very important direction with having reference to the evidence of the case had not been left with the assessors. This in my view is a serious non-direction that is tantamount to a misdirection, capable of vitiating the verdict of this case.



[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:

- (i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- (ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.
- (iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.
- (iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.
- (v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.
- (vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own merits. Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.

The aforementioned guidelines are based on trite legal principles. It is the bounded duty of a trial Judge to leave the assessors with such directions to facilitate their exercise as triers of facts.

[45] This exercise does not come to an end with it alone; it is further incumbent upon the trial judge to analyze the evidence as a whole, not in a general sense, but in a manner

of making specific references to each item of evidence and the inferences that are capable of being drawn from them. Such material should be laid before the assessors for their consideration.

[46] In the instant appeal, I find that the learned trial Judge had failed to leave the assessors with such clear directions and that is a non- direction tantamount to a misdirection of serious nature.

[47] For further elucidation, Gounder v. State [2015] FJCA1; AAU 0077.2011 (2<sup>nd</sup> January 1915); per Basnayake JA.

**On the issue of non direction on the issue of consent**

[48] The learned High Court Judge's clear failure to address the contentious issue of consent fully in the instant appeal has caused an irremediable situation as far as the sustainability of the conviction is concerned.

It is my opinion that given the nature of the totality of the evidence of this case, if the correct direction had been given, the reasonable and a proper opinion would have been one of not guilty.

R v. Haddy [1944] KB 442, 29 Cr. App. R. CCA 122.

Stirland v. DPP [1944] AC 315, HC

R v. Edwards (N.W.), 77 Cr. App. R. 5(CA).

R v. Davis, Rowe and Johnson [2001] 1 Cr. App. R. 8

R v. Prancom [2001] 1 Cr. App. R. 17

R v. N. [2008] 1 Cr. App. R. 1, CA.

[49] As I have already discussed earlier the appellant contended in the High Court that the act of having sexual intercourse was consensual. In the same way, I have repeatedly highlighted the fact the learned trial Judge had failed to adequately refer to the possible doubt that can justifiably be entertained with regard to the fact of consent in this matter. It is agreeable, in the circumstances, that this is tantamount to a failure to refer to defence adequately, in the sense the appellant claimed that the sexual intercourse with the victim was consensual, thus it is not a case of rape.



### Conclusion

[50] As discussed in this appeal the evidence relating to the issue of consent is capable of forming a reasonable doubt and the failure on the part of the learned High Court Judge to direct the assessors accurately on the issue of burden of proof has caused a miscarriage of justice. In the light of the evidence I have given my mind to the possibility of invoking the provisions of the Proviso to Section 23(1) of the Court of Appeal Act 1949 and to explore the possibility whether a retrial can be ordered. However, given the nature of the totality of the evidence I am of the view that the sustainability of a conviction against the appellant is not a realistic possibility.

### Prematilaka, JA

[51] I agree.

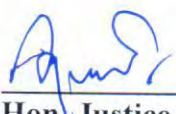
### Perera, JA

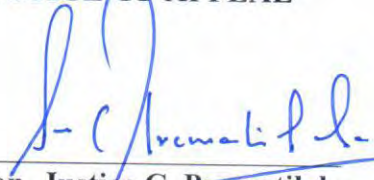
[52] I agree.


### Order

1. *The appeal against the conviction is allowed.*
2. *The appellant is acquitted.*



  
Hon. Justice S. Gamalath  
JUSTICE OF APPEAL

  
Hon. Justice C. Prematilaka  
JUSTICE OF APPEAL

  
Hon. Justice V. Perera  
JUSTICE OF APPEAL