

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

CRIMINAL APPEAL NO. AAU 0119 of 2013
(On appeal from High Court No. HAC 008 of 2010)

BETWEEN : SAILASA KOROITAMANA

Appellant

AND : THE STATE

Respondent

Coram : Chandra JA
Basnayake JA
Prematilaka JA

Counsel : The Appellant in person
Mr. S. Babitu for the Respondent

Date of Hearing : 14 November 2017

Date of Judgment : 5 June 2018

JUDGMENT

Chandra JA

- [1] The Appellant was charged under sections 149 and 150 of the Penal code (now repealed) for having unlawful carnal knowledge of the complainant on 12 October 2008 at Korovuto, Ba. After trial the Appellant was convicted on a unanimous verdict of the

assessors with which the learned trial Judge agreed and was sentenced to a term of 8 years with a non-parole period of 6 years.

[2] The Appellant appealed against his conviction and sentence on the following grounds:

- a) *The learned Judge erred in law and in fact when he did not correctly sum up to the assessors the Appellant's case through his evidence at the trial that the Appellant denied having carnal knowledge with the complainant, without complainant's consent and that at the time of the sexual intercourse the Appellant knew that the complainant was not consenting or was reckless as to whether she was consenting.*
- b) *The learned Judge erred in law and in fact when he did not deduct the one month and five days which period that the Appellant spent in remand from his sentence.*

[3] The Single Judge of the Court of Appeal refused leave on conviction on the basis that the issue was the credibility of the complainant. That, the assessors and the trial judge found her credible and accepted her evidence as true after the appellant's case was fairly put to them. That, the contention that the trial Judge did not fairly put the appellant's case to the assessors is not arguable.

[4] The appeal against sentence was refused on the basis that the learned trial Judge had considered the remand period and made appropriate allowance for that fact as part of the mitigating factors.

[5] Thereafter the Appellant by an undated letter to his Lordship the Chief Justice and urged as follows:

"The learned trial Judge erred in law when his Lordship wrongly admitted the victim's medical report in regards that the victim had not consented to be medically examined by the doctor. By doing so the doctor's evidence was not supported by the affidavit to support the same."

[6] Justice Basnayake has in his judgment at paragraph [3] ruled that this is not a valid ground of appeal for the reasons set out therein.

- [7] When the appeal was taken up for hearing, the Appellant who appeared in person handed up a handwritten document dated 14th November 2017 captioned as additional grounds of appeal setting out provisions of the Constitution regarding fair trial, which I consider are irrelevant and therefore not valid grounds of appeal. This brings about a situation where there are virtually no grounds of appeal to be considered.
- [8] My brother Judge, Justice Basnayake has stated at paragraph [4] of his judgment that he is of the view that the conviction should be set aside on the ground that it cannot be supported by the evidence adduced (section 23(1)(a) of the Court of Appeal Act) and has proceeded to grant leave to appeal as per Section 35(3) read with Section 21(1)(b) of the Court of Appeal Act and set aside the judgment of the High Court.
- [9] With utmost respect to my brother Judge, Justice Basnayake I beg to differ. To my mind the evidence before Court was sufficient to bring about the conviction of the Appellant. I would consider the Appellant's appeal on the basis of whether the conviction of the Appellant as determined by the High Court can stand or whether there was any miscarriage of justice.
- [10] The witnesses for the prosecution were the Doctor who had examined the Complainant, the Complainant and the Police Office WDC 3059 Naduma. The Appellant chose to give evidence and he denied the charge.
- [11] In her evidence, as narrated in the judgment of Justice Basnayake, at paragraphs [12] to [14] of his judgment (except for the comments made regarding the evidence), the complainant has stated that the Appellant accompanied her that morning to proceed to Ba for her to go to Lautoka, and that was as pre-arranged the previous night with the Appellant's wife.
- [12] The Complainant has stated in her evidence that they took a rest at the Bus stand after proceeding for some time and that it was then that the Appellant had committed the offence on her. A vehicle had approached the bus stand and the Appellant had at that

stage moved away from her and run off. She had thereafter got herself dressed and gone to a house where she had taken refuge before getting back to Lautoka.

- [13] Section 129 of the Criminal Procedure Decree 2009 (now Act of 2009) provides as follows:

"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; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."

- [14] Therefore corroboration is not a requirement to prove a sexual offence in Fiji. It would be sufficient if there is evidence led at the trial which is consistent with the conduct of the complainant and her evidence at the trial.

- [15] Referring to evidence regarding recent complaint his Lordship Chief Justice Gates in Anand Abhay Raj v. The State [2014] FJSC 12; CAV0003.2014 (20 August 2014) stated as follows:

"[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence"

- [16] In this case though the complainant stated that she had gone to a house that she came across soon after the incident occurred and sought refuge there having stated to the inmates of that house about her plight. The prosecution failed to lead any evidence from the inmates of the house who had given refuge to the complainant. In the absence of such evidence, the doctor's evidence who examined her on the same day could be considered to see whether her conduct was consistent with the evidence she had given at the trial.

[17] The complainant stated that she was examined by the Doctor that evening and the Doctor gave evidence. The Doctor stated in her report that, the complaint of the victim was consistent with history, painful vaginal area, history being that her uncle had intercourse forcefully with her. The Doctor has not stated whether it was a recent penetration or not. When questioned whether penetration was possible by the insertion of a foreign object she stated that if a foreign object was inserted, there ought to be lacerations in the vagina. According to her report there were no such lacerations.

[18] The Doctor's Report revealed the following: (at page 75) D12 to D14:

"D(12): Specific Medical Findings :

(a) No bruises over her body.

(b) Pain over the vaginal canal and perineum.

(c) Vaginal exam: No Hymen visible. Small vagina.

*(d) Erythematous * scars * lacerations*

Whitish vaginal discharge noted.

D(13) Other Observations: (any distinguishing marks (cynical or otherwise, including tattoos)

None

D(14) Professional Opinion: eg. Age of injury, causation, gravity)

Injury consistent with history

Painful vaginal area on examination

Erythematous/ oedematous."

[19] The Doctor stated that the bruises referred to in the report at D12 to D14 were consistent with the history and finding. According to D12, Specific Medical Findings, the victim had pain over the vaginal canal and perineum, no hymen visible, small vagina, extremely tender around vagina scars and lacerations. These findings are consistent with the victim's complaint of forced penile penetration. Therefore the Doctor's evidence can be considered as being consistent with the evidence of the complainant as she had been examined the very day that she complained of being sexually assaulted by the Appellant.

[20] Does the complainant's evidence lack consistency? It would be necessary to consider whether the inconsistencies in the evidence of the complainant were sufficient to say that her evidence lacked credibility.

[21] Firstly, there is the position she had told the Doctor that soon after the Accused had sex with her she ran away to a cane field (*as stated in the Medical Report that was produced*), whereas in her evidence she stated that she ran away and sought refuge in a house that she came by.

[22] The relevant portions of the cross-examination were as follows:

"Page 98 – Q. Korovuto to Ba, it takes about 2 hours?

A. Yes.

Q. You and the accused walked to Ba?

A. Yes.

Q. You said the accused tried to touch you and tried to hold you?

A. Yes. He used both hands to put me down.

Q. Did you shout?

A. Yes. But it is an isolated place.

Q. You gave statement to the police ?

A. Yes.

Q. Can you recognize it?

A. Yes. (She identified her signature on the statement).

Q. Did you mention to the police about your story?

A. No.

Q. That statement was given everything fresh on your mind?

A. Yes.

Q. Was the accused standing up when he took off his clothes?

A. Yes, I tried to run away but he held my hand. He was holding my hands and took off his clothes. At that time I was pushed down on the ground.

Q. I suggest to you that you on the ground and the accused removing the clothes is it possible to remove the clothes?

A. He did to me."

[23] Under cross-examination the victim stated that she did not tell her story to the Police after she was shown the statement that she made to the Police and when she identified her signature therein. There is nothing to indicate what was meant by "her story". Apparently what was meant was her statement to the Doctor that she ran into the cane field.

[24] She had been examined by the Doctor, before she made her statement to the Police. It is quite possible that she may not have recounted the exact manner in which she conducted

herself soon after the accused had sex with her forcefully, as she may not have got over the stress that she had undergone.

- [25] She was asked further whether the accused was standing when she took off her clothes. She went on to state that she tried to run away but that the accused held her hands and took off her clothes and was pushed down on the ground.
- [26] Under examination-in-chief the victim stated that the accused had stood up and had got hold of her and pushed her on the ground and started to take off her clothes. I do not see much of a contradiction, in the evidence given in examination-in-chief and the cross-examination, so as to discredit the witness. As stated in Abhaya Raj's case (supra) the exact manner in which the accused acted need not be stated by the victim who had been the subject of the offence. There may sometimes be minor variations in the manner in which the victim describes the incident, but the question is whether such variation affects the credibility of the witness. The Assessors and the learned trial Judge when they found the Appellant guilty would not have considered the variations in the victim's evidence as being *material and would have considered the entirety of her evidence*.
- [27] The victim was also questioned under cross-examination that she made the allegation against the accused was because she wanted to get back to her partner which she denied.
- [28] Was there any motive on the part of the victim to make the allegation against the accused, who had accompanied at the ungodly hour to proceed to Ba? He was unknown to her as she had met him only the previous day. The Appellant had assisted her in helping her to get back to where she wanted to go. In such a situation would she make a serious allegation against the Appellant unless the Appellant had really committed the offence on her forcefully. Would it not be a situation where the accused took advantage of the situation, at an isolated place unknown to the victim, at the early hours in the morning to satisfy himself?

- [29] The Appellant gave evidence and denied the allegation. He in his evidence stated that he accompanied the victim having agreed to take her to the bus stand to proceed to Ba. He said there was no bus stand. He however stated that she went up with her to the house and she knocked at the door of the house. But he did not state as to what he did afterwards.
- [30] He did not state as to why they went to that house and what he did afterwards once the victim went inside the house. If that was so, why did the victim make the allegation against him? Why should she make such a serious allegation against him, after he acted like a good Samaritan for her to proceed to Ba?
- [31] The evidence of the accused would also throw some light in considering the evidence of the victim. His evidence is consistent with the evidence of the victim from the time that they left the house that morning till the time that the victim had gone to the house where she sought refuge except for the fact that their taking a rest at the bus stand and his commission of the offence. His stating that there was no bus stand and denying that he had sex with the victim was the difference. His position that there was no bus stand as stated by the victim and his denial of committing the offence was obviously to discredit the victim.
- [32] The cross-examination of the complainant also showed that the Appellant knew that there was no consent on the part of the victim and that she had shouted out though it was an isolated place and that he held her when she tried to run away.
- [33] The Assessors brought in a verdict of guilty having seen the victim and accused giving evidence and the learned trial Judge too would have observed the victim's demeanor and deportment when concurring with the verdict of the Assessors. The Assessors brought in a unanimous verdict of guilt as they found that the evidence of the victim was credible. The learned trial Judge too was satisfied with the verdict of the Assessors when he concurred with them. In those circumstances I do not consider that the conviction is questionable.

- [34] The Respondent filed written submissions on the two grounds on which leave was refused by the single Judge as stated above, as the Appellant had not filed any written submissions though directions had been given to file written submissions.
- [35] The written submissions of the Respondent dealt with the position of the summing up of the learned trial Judge.
- [36] In his summing up at paragraphs 25, 26 and 34 the learned trial Judge brought to the attention of the Assessors that the Appellant had denied the allegation and that the burden was on the prosecution to prove his guilt and to consider the position of the Appellant with caution.
- [37] The learned trial Judge summed up the case of the prosecution and the defence in a balanced manner as required and especially regarding the element of consent for the offence of rape which he summed up specifically at paragraph 32 of the summing up.
- [38] I do not see any deficiency in the summing up of the learned trial Judge as it satisfied the requisites of a summing up set out in Silatolu v. The State [2006] FJCA 13; AAU0024.2003S (10 March 2006) :
- "[13] 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 orderly, objective and balanced analysis of the case; R v. Fotu [1195] 3 NZLR 129."*
- [39] For the reasons set out in my judgment, the appeal of the Appellant is dismissed and the conviction is affirmed.

Basnavake JA

- [40] This is an appeal under Section 35 (3) of the Court of Appeal Act. The appellant seeks leave from the Full Court of the Court of Appeal. Originally the appellant made a leave to appeal application before a single Judge of the Court of Appeal. This application was refused on 5 December 2014 against the conviction and the sentence (pgs. 4-7 of the Record of the High Court (RHC)). In the event of refusal by a single Judge, Provision has been made under Section 35 (3) of the Act to re-agitate on the same matter before the Full Court. This appeal was made by the appellant through an undated letter to His Lordship the Chief Justice and received by the Chief Justice's Chambers on 24 June 2015 (pgs. 2-3 of RHC). When this case was called on 29 September 2017, the Hon. President of the Court of Appeal had fixed this case for hearing for 14 November 2017.
- [41] The letter contained the following ground which the appellant urged as the only ground of appeal and is relying on, namely, "*The learned trial Judge erred in law when his lordship wrongly admitted the victim's medical report in regards that the victim had not consented to be medically examined by the doctor. By doing so the doctor's evidence was not supported by the affidavit to support the same*". The Medical Examination Form (MEF) column B(5) requires the signature of the complainant which permits the doctor to examine the complainant. Although the doctor had examined the complainant and completed the MEF (pg. 73-78) the complainant's signature had not been obtained. However the complainant while giving evidence said that the examination was done by the doctor with her permission. Therefore this cannot be considered as a valid ground of appeal. At the hearing of the appeal the appellant tendered to court a three page handwritten document with the heading, "Appellant's additional grounds on leave to appeal".
- [42] The appellant has not taken the matters that I have considered as grounds of appeal in the leave application (pg. 23-24) or the amended leave application (20-21) or in the letter to His Lordship the Chief Justice (pgs. 2-3) or the additional grounds tendered in open court

during the hearing of this appeal. I am of the view that in terms of Section 23 (1) (a) of the Court of Appeal Act, the conviction should be set aside. The section is as follows:-

23 (1) *The Court of Appeal-*

(a) *on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence....(only what is relevant is reproduced).*

I am of the view that the conviction cannot be supported having regard to the evidence. Hence I grant leave to appeal at the outset as per Section 35 (3) read with Section 21 (1) (b) of the Court of Appeal Act.

The Facts

- [43] The appellant was charged under Sections 149 and 150 of the Penal Code (now repealed) for having unlawful carnal knowledge of the complainant on 12 October 2008 at Korovuto, Ba. At the time of the alleged offence the complainant was 18 years of age less one month and a day (born on 11 November 1990 (as per the Medical Examination Form (MEF)-pgs. 73-78 of the RHC)). The appellant having pleaded not guilty, the case was taken up for trial.
- [44] The prosecution called 3 witnesses, namely: 1. Dr. Fane Lord (pgs. 92-95 of the RHC); 2. The complainant (pgs. 95-98); 3. WDC 3059 Naduma (pgs. 99-100) and marked in evidence the MEF. After the closing of the prosecution case the appellant gave evidence from the witness box (pgs. 100-102). After the summing-up (pgs. 33-39) the assessors unanimously found the appellant guilty of the offence. The learned Judge thereafter convicted the appellant (pgs. 31-32) and sentenced to (pgs. 25-30) 8 years imprisonment with a non-parole period of 6 years.

The evidence

- [45] Dr. Fane graduated from the Fiji School of Medicine in 2004. She held a post graduate diploma in surgery by 2010. At the time of giving evidence in 2013 she was reading for her Masters in surgery. The complainant was examined by her on 12 October 2008 at 8.25 p.m. at Lautoka Hospital.
- [46] The doctor states in evidence that based on the history given by the complainant and the examination findings she came to the conclusion as per D 16 (pg. 76) that, "*Sexual assault case penile penetration of vagina forcefully*". She states as per D 14 that the "*injury consistent with history. Painful vaginal area on examination erythematous/oedematous*". She refers to D 12 as her specific medical findings. There are 4 categories as a, b, c, and d in D 12 which the doctor completes as follows:
- (a): No bruises over her body.
 - (b): Pain over the vaginal canal and perineum
 - (c): Vaginal exam: No Hymen visible. Small vagina. Extremely tender around vagina.
 - (d): Erythematous No scars No lacerations. Whitish vaginal discharge noted.
- [47] According to the history given to the doctor (D-10 in MEF) the victim was living with her aunt at Korovuto, Ba. In the evening the appellant (referred to as uncle) had offered to take her home. On the way they had stopped at a bus stop where the appellant had started touching her and she had run into the cane field but her uncle had already had intercourse forcefully with her". D 12 Erythematous is calling blood into a region of the body. Oedema is swelling. She admitted that oedema could be due to infections. The doctor was specifically questioned whether oedema could be due to forced penetration of the vagina. The doctor said that it depends on the object being used (pg. 94).
- [48] The doctor agreed that there should have been bruises considering the small vagina vault and forceful intercourse. She also agreed that D 14 (MEF) is due to D 10 and 12. D 10 is the history of the complainant and D12 is specific medical findings. She said that she did

not collect any fluid for further examination. She also said that there was no discharge of blood.

[49] The following questions and answers were given by the doctor in cross-examination (pg. 94):

Q. Are you aware of the related symptoms of rape?

A. Yes.

Q. Bruises forms part of allegation?

A. Yes, but no bruises here.

Q. D 12 Erythematous?

A. Calling blood into a region of the body. Not swelling. Oedema is swelling.

Q. There could be an infection into the vaginal area?

A. Yes.

Q. Oedema could be caused due to infection?

A. Yes....

Q. Is it a symptom of forced penetration of vagina?

A. It depends on the object being used.

Q. D 12 (b)?

A. Small vagina. Traces fluid from vaginal infection.

Q. According to D 12 (Medical Examination Form (MEF) marked P1 (pgs. 73-78) vaginal vault is small and given the history she was forcefully not consented to intercourse. Should not there be bruises?

A. Yes

Q. If the history related to an infection would your opinion also differ?

A. Yes.....

Q. Was there any infection around the vagina?

A. Without history, No. Without history I did not cite any infections. No discharge of blood.

In Re-Examination

.....

Q. D 12 to D 14?

A. These were consistent with the history and findings.

Q. In this one the issue is with regard to penile penetration. Now is that possible no penetration? Assuming there was other object was inserted in the vagina.

A. If a foreign object is inserted there ought to be lacerations in the vagina....

Evidence of the complainant

[50] Around the time of the incident she was residing in Lovu Seaside with her female partner. On 11 October 2008 (previous day of the incident) at 2 a.m. a person said to be an aunt of

hers (Mere) had come and taken her away to Korovuto. The appellant and his wife too had been staying in this place. The complainant stayed there only one day. The complainant got help from the appellant's wife to return to where she came from. She said that the appellant's wife had arranged for the appellant to accompany her to Ba. On 12 October 2008 at 3 a.m. she left Korovuto to go to Lovu Seaside. According to her both of them walked for about two hours. The appellant was carrying her bag. The appellant had requested her to take a rest at a bus stand to which she had agreed. In the shelter she had been told to sit as Mere and her husband might see them. This shows that she had left the place discreetly without the knowledge of her aunt Mere.

- [51] In the bus stand the appellant had started to get closer to her and touched her. She states that she pushed him away. She said that the appellant stood up and got hold of her and pushed her on the ground and took her clothes off and put his penis into her vagina. She said that this was done for a while. He had got off her on the approach of a vehicle. She had then put her shorts on and run off the road. The appellant was still at the bus stand and had started to follow her. She had then run into a house and told the story to the members of the house and got a phone call to her aunt who had collected her and gone straight to Lautoka hospital. She admitted to having given her consent to the doctor to examine her.
- [52] Under cross-examination she admitted that at Lovu Seaside she was living with her female partner. She admitted that she walked with the appellant from Korovuto to Ba at 3 a.m. The walk had taken about 2 hours. She admitted that she made a statement to the police but did not mention her story. Why did she say that she did not mention her story to the police? It appears that her story to the police is different from the evidence given in court. Did she fear that she would be questioned on what she told the police and in order to escape a confrontation said that the police was not told what happened? The police should have been the first to be told.

At page 98

Q. Was the accused (appellant) standing up when he took off his clothes?

A. Yes. I tried to run away but he held my hand. He was holding my hands and took off his clothes. At that time I was pushed down on the ground.

Q. I suggest to you that you on the ground and the accused removing his clothes is it impossible (possible) to remove the clothes?

A. Yes

Q. I suggest to you that Sailasa (appellant) did nothing to you?

A. He did to me.

Q. The only he did was he carried your bag?

A. No

Q. The only reason you make this allegation due to you wanted to go back to your partner?

A. No.

[53] I am of the view that the evidence relating to the sexual act in the examination –in-chief appears to be different to the evidence in cross-examination. Previously her position was that the complainant and the appellant were both seated. Then the appellant stood up and having held the complainant who was seated pushed her down and removed her clothes and put the penis into her vagina. In cross-examination she stated that the appellant removed his clothes standing while holding her hand and she could not get away. Could this be regarded as a minor contradiction? Did she lie to the doctor with regard to the place she was living in? She told the doctor that she was living with her aunt where as she admitted under cross-examination that she was living with her female partner. What was she doing from 6 o'clock in the morning till 8.25 in the night to see the doctor if she was in such pain. However her evidence is that she went straight to the hospital from the house that she took refuge in. Was she in pain for all that time or was it feigned? Why did she tell the doctor that the appellant was her uncle? In evidence she referred to the appellant as brother.

[54] Woman detective Constable 3059 Mariama Naduma said that the complainant went to Lautoka Hospital and was examined by the doctor who reported it to the police and the appellant was arrested. The appellant gave evidence from the witness box (pgs. 100-102). He denied the rape. He also denied that there was a bus shelter.

Summing-up

[55] The learned Judge drew the attention of the assessors to the agreed facts and the law. The agreed fact is that on 12 October 2008 the appellant was with the complainant at Korovuto in Ba. With regard to consent the learned Judge said that the offence of rape is made out only if there was no consent. The learned Judge made reference to the evidence of witnesses separately (Doctor at page 36, the complainant at pages 36 and 37, WDC Naduma and the appellant at pg. 37). At page 38 the learned Judge reminded the assessors the burden of the prosecution to prove the lack of consent. The learned Judge also reminded the assessors (pg. 38) the burden on the part of the prosecution to prove the charges even if the assessors reject the version of the appellant; *“That it is not for the accused to prove his innocence. The burden of proof lies with the prosecution to prove the accused guilt beyond reasonable doubt and that burden stays with them throughout the trial”*.

[56] The learned Judge said in the summing-up in paragraph 12 (pg. 35) that in order to prove the offence of rape the prosecution has to prove the following elements beyond reasonable doubt.

1. The accused had the carnal knowledge of the complainant;
2. Without her consent;
3. He knew or believed that she was not consenting or didn't care if she was not consenting.

Carnal knowledge is the penetration of vagina or anus by the penis.... (para. 13). The learned Judge said that in the history to the doctor the complainant said that while they were in the bus shelter, the accused touched her and forcefully had sexual intercourse. On examination the doctor had found the complainant suffering from pain in her vagina canal and the perineum. No hymen was visible and extremely tender around the vaginal area. A whitish discharge (*in the vagina*) was also noted. According to her professional

opinion there is evidence of forceful penile penetration of the vagina of the victim (paragraphs 16, 17 and 18 of the summing-up).

[57] In paragraph 28 of the summing-up the learned Judge said that, “As per the medical report evidence of penile penetration to victim’s vagina is present. But no bruises were found on her body. The doctor had reported the matter to the police. In paragraph 30 the learned Judge states that, “The accused denied the charge of committing rape on the victim. But he admitted that he went along with the victim in the early hours on 12.10.2008”.

[58] In paragraph 31 the learned Judge states that, “Force insertion of the penis into the vagina of the victim is sufficient to prove the charge of rape”. In paragraph 32 the learned Judge states that, “The State has to prove lack of consent before you can find the accused guilty of rape. If you find there was consent and that he is thereof not guilty of rape”. The learned Judge also summarized the evidence of the complainant, the investigating officer and the appellant. It appears that the learned Judge had considered the evidence of the doctor as conclusive with regard to penetration. There is no analysis at all on this important aspect without which the case cannot move forward.

Analysis

[59] The appellant admitted that the complainant and the appellant were at Korovuto in Ba on 12 October 2008. Other than that did the prosecution prove that the appellant had sexual intercourse with the complainant as alleged by the complainant? The only evidence produced by the prosecution is that of the complainant, the doctor and the MEF. How convincing is the evidence of the complainant? At the time of the incident the complainant was about 18 years of age. According to her she has been living in Lovu Seaside for about a month with a female partner. At 2 a.m. on 11 October 2008 a person unknown to her took the complainant away from Lovu Seaside to Korovuto. This person, namely, Mere claimed to be an aunt and had come to take the complainant away from where she lives now on the instructions received from the complainant’s mother.

- [60] The complainant stayed in Korovuto only one day. The complainant met the appellant and his wife at Korovuto. The complainant sought the help of the appellant's wife to get back to where she came from. The appellant's wife arranged for the appellant to take the complainant to Ba. The complainant left with the appellant from Korovuto at 3 a.m. on 12 October 2008 to go to Ba, which is a 2 hour walk. The complainant was told that the appellant is a brother of the complainant and the complainant having trusted the appellant decided to go with him. The truth with regard to this relationship has not been verified.
- [61] It has to have been dark at 3 o'clock in the morning and there would have been no other. The man was carrying her bag and both were walking. After walking for 2 hours the complainant had apparently taken a rest in a bus shelter on the advise of the appellant. Thereafter the appellant having touched her and held her, had pushed her to the ground and removed her clothes and while holding the complainant, the appellant had also removed his clothes and inserted the penis into her vagina. Was not there a struggle in this melee? Would there not have been bruises and other injuries in her body and in the genitals? There is no evidence as to how rough the ground was where the alleged intercourse took place.
- [62] There is no evidence of the clothes of the complainant being examined either by the doctor or by the police or any other person to whom she had complained soon after the alleged rape. The doctor too had not taken any samples from her genitals for examination for DNA. There was no police investigation with regard to the place where the alleged incident took place. The appellant states in evidence that there is no such bus shelter. It appears that the learned Judge has not expressed his opinion about the probabilities of the complainant's evidence together with the other evidence and that of the appellant's denial other than presenting the evidence of the complainant and the doctor to the assessors.
- [63] Medical practitioners are able to give evidence of what the complainant said during the course of an examination. However, the purpose of any such conversation is not to prove the truth of what the complainant said happened, but to indicate the reason why the

medical practitioner examined particular parts of the complainant's body (High Court of Australia in Ramsay v Watson (1961) 108 CLR 642 at 649). The complainant had not told the doctor that she was living with another woman. If that was told the doctor would have examined her considering her sexual behavior with her partner. Why did she tell the doctor that the appellant was her uncle? In evidence she said that she believed when told that the appellant was her brother and she trusted him to go with him at 3 o'clock in the morning. How did the uncle become the brother while giving evidence in court?

[64] The doctor finds no injuries and/or bruises on the body of the complainant including her genitals. The doctor finds a vaginal whitish discharge. No blood. The complainant states that a complaint of rape was made immediately after the alleged rape and she was taken to hospital straight away. According to her the incident happened between 5 and 6 in the morning. She was examined by the doctor at 8.25 in the night. What happened in the meantime? Where was she all that time and with whom? How long did it take for her to reach Lautoka Hospital from Ba? The story that she went straight to hospital cannot be true. She was not questioned for her delay in seeing the doctor. She was in great pain at the time of the examination by the doctor at 8.25 p.m. If there was so much pain why did she not see the doctor before? Is it true that she went straight to the hospital? Did the journey take more than 12 hours to reach the hospital, a distance of 35km? In the MEF she has told the doctor that the appellant offered to take her home in the evening. She did not say it was on the previous day evening. This may have been to evade answering for the delay.

[65] It appears that the absence of hymen too has been attributed to the alleged rape. The doctor only states that the hymen is not visible. She does not state that the disappearance of the hymen is due to the alleged act of rape. However this appears to be one of the findings that made her say that the history is consistent with the examination in D 14 of the MEF. *"Soon after rupture of the hymen, whether by penile penetration or by masturbation, the edges of the torn hymen will show slight bleeding, swelling and perhaps bruising"* (Lawyer's Guide to Forensic Medicine by Bernard Knight 2nd Edition

(1998) pg. 135). The same author describes the following facts that would help in proving penetration (pgs. 188-190).

- Recovery of semen from the depths of the vagina.
- Injury to female genitalia.
- Reddening, swelling and bruising of the vulva.
- Rupture of hymen. In this case the hymen was not visible.
- Injuries to the vaginal wall from bruising and abrasions to lacerations.
- Venereal infections.
-

Other signs that would strengthen the prosecution case

- Injuries on thighs, buttocks and abdomen. Finger-nail scratches on the inner side of the upper thighs are especially significant, from efforts to force open the legs. Finger-tip bruises in the same area and on the buttocks and small of the back also suggest forcible clutching of the woman.
- Scratches and bruises on the buttocks, shoulder blades, back of thighs and calves may also suggest forcible contact with the ground. Soiling by dirt, earth, leaves etc., may be found on the skin or clothing.
- Blood or semen stains on the thighs, pubic hair, abdomen or buttocks.
- Hairs foreign to the girl may be recovered from the pubic hair or clothing.
- Marks on the breast are relatively common, including finger bruises, nail scratches and bites.

[66] In Mason's Forensic Medicine for Lawyers (Fifth Edition) at page 134 states as follows; *"The medical examiner may well have little difficulty in saying positively that sexual intercourse has taken place when a previously vaginal hymen has been recently penetrated, particularly if this has been accompanied by some force. The external genitalia are often bruised or swollen and obvious laceration of the hymen, together with bleeding, may well be present"*.

- [67] Doctor Fane does not find any blood or bruises or any other injury on the complainant anywhere in her body. She only finds some whitish vaginal discharge. According to the evidence of the complainant, sexual intercourse took place on the ground after pushing the complainant and forcefully removing her clothes. He was on top of her body having sex for a while according to her evidence. The doctor agreed in evidence that with a small vagina and forceful sex there should have been injuries. She found none. It appears that the history related to the doctor has influenced her more than the medical examination. The doctor believed that the complainant was in pain and frightened. Why did she tell the doctor that it was done by the uncle? Was it to convince the doctor and to make her believe her story?
- [68] According to the doctor it is the history and the specific findings under D 12 that made her say that the injury was consistent with the examination. None of the findings in D 12 would help to conclude that there was penetration. Considering the above material I am of the view that the prosecution has failed to prove the sexual intercourse. The opinion expressed by the doctor appears to be non-conclusive. I am of the view that the learned Judge himself has not given his mind to any of the matters mentioned other than considering the evidence of the complainant and the doctor in finding that the appellant had sexual intercourse with the complainant as alleged in the charge.
- [69] The prosecution did not call any witnesses to whom she says she complained to. The complainant's evidence needs no corroboration. However can one believe her evidence? According to her the appellant was having his penis in her vagina for a while. Did she not do anything to get away? There is no evidence of any intimidation or force used to prevent her from escape. When he came close to her she says that she pushed him. According to her it's a passing vehicle that separated the two. Thereafter she put on her shorts and ran off the road while the appellant stayed in the bus shelter.
- [70] She had gone into a house and told them the story. Why didn't the prosecution call any of these persons to whom the story was told to see how much her evidence was consistent and in cases where consent is in issue, as tending to negative consent (Lillyman [1896] 2

QB 167, White v R [1999] 1 Cr. App R 153, R v O [2006] 2 Cr. App R 27 CA, Archbold 2005 Edition 8-103). The story said to have uttered soon after the alleged incident does not attach any weight to the complainant's evidence with regard to the truth in the absence of the witness to whom the complaint was made. No such witness was produced. What she had told the doctor was that she ran into a cane field and not a house.

[71] In terms of Section 129 of the Criminal Procedure Act corroboration of the complainant's evidence is not required for a conviction. The section states thus; "*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;..*". However in Tawatatu v State [2017] FJCA 50 (26 May 2017) the Court of Appeal having considered the above section and the strong reliance of the section by the prosecution that the medical report already listed among the disclosures need not be produced, expressed the view that if available that would help to dispense justice and that there is no prohibition in so producing.

[72] The prosecution could have called the person to whom the complainant had related her story soon after the alleged incident to see how consistent the complainant's story was. Lord Justice Potter in Regina v Venn [2003] EWCA Crim 236 relied on the case of R v Keast [1998] Crim LR 748 where it was observed that the distress of the complainant shortly after or at the time of the allegation of rape or indecent assault could be admitted to show consistency with the description of the incident given by the victim, but it could not be regarded as confirming the victim's story from an independent source.

[73] Lord Justice Potter in paragraph 45 held that, "Historically, the rules concerning the admissibility of evidence as to the distress of a complainant were developed in the context of the requirement for corroboration in relation to sexual offences, which requirement has since been abolished. However the observations as to the circumstances in which evidence as to distress may carry probative weight in such case remain valid: see for instance R v Redpatch [1962] 47 Crim App R 319 and R v Chauhan [1981] 73 Crim App R 232 which make it clear that such evidence should carry no weight if it is only part and parcel of the making of a complaint".

- [74] The court record reveals obtaining summons on the following lay witnesses namely; 1. Meresini Vueti; 2. Josateki Damni; 3. Litiana Dinai. The first name revealed in evidence is the complainant's aunt referred to as "Mere" who had brought her from Lovu Seaside, Lautoka. The other two may be those the complainant allegedly met soon after this incident and related her story. However none of them were called to give evidence.
- [75] How reliable is the evidence of the complainant? The doctor states that she is a person with a small vagina. If forceful sex took place (the appellant having pushed her on the ground and removing her clothes by force while lying over her) as she has alleged could she have been able to escape without a scratch on her buttocks? According to the complainant there was full penetration. The appellant was on top of her with his penis inside her vagina for a while. Again could she have escaped again without having to suffer any injuries on her genitals? Although her evidence is that she went to the hospital straight away, it does not appear to be so.
- [76] Dr. Hemal Jayawardena in Forensic Medicine & Medical Law 2nd edition at page 125 while explaining the reasons for absence of injuries in rape cases states thus, "Where there is threat or if the woman loses consciousness the injuries could be minimal or absent. The other reason for there being no injuries is where the allegation is false". Could the evidence of the complainant be accepted as true? There is no evidence of any threat to her life from the appellant. The complainant was even able to push the appellant away while the appellant was attempting to get near her.
- [77] Erythematous/oedematous found on the complainant are not attributed to as signs of penetration by the doctor. The conclusion of the doctor is penile penetration of the vagina (D 16 of MEF). This opinion is based on the history and findings of the doctor at D 12 of MEF. The appellant denied having sex with the complainant in evidence. The cross-examination of the doctor and the complainant too was done on the footing that there was no sex. That is the stance taken throughout the defence. Considering all these material could one accept the evidence of the complainant as true?

- [78] Lord Reading CJ held in Abramovitch (1914) 84 KB 397 that, *“If an explanation is given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may be reasonably true, although they are not convinced that it is not true, the prisoner is entitled to be acquitted, in as much as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution”* (Viliame Naicori v State AAU 0106 of 2013 (14 September 2017)).
- [79] If her evidence cannot be accepted as true there is no necessity to look for corroboration. If the sexual act is not proved the case should fail. However if one believes her evidence with regard to sexual intercourse, the next question is consent. Is there sufficient evidence of non-consent? Again the only evidence available is that of the complainant. Has the learned Judge addressed himself with regard to the many complicated evidence already mentioned?
- [80] In R v Bree [2007] 2 Cr. App R 13 Sir Igor Judge P 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 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 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”* (R v H [2007] EWCA Crim. 2056, R v Kirk [2008] EWCA Crim 434, R v Ali (Yasir) 2015 2 Cr. App R 33 CA, R v Malone [1998] 2 Cr. App R 447 CA.

- [81] Sir Igor 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"*. For those reasons the conviction was quashed.
- [82] If the inconclusive medical evidence is left out, what remains is only the evidence of the complainant. How much weight can be attached to the evidence of the complainant considering all the infirmities of her evidence and the denial of the appellant? Considering the totality of the evidence could the court hold that the charge has been proved beyond reasonable doubt? The following statement of the Supreme Court in **Ram v State** (2012 FJSC 30 (CAV 0001 of 2011, 9 May 2012)) as stated by Prematilaka JA in **Walili v State** [2017] FJCA 55 (26 May 2017) is appropriate; *"In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this court in evaluating the evidence and making an independent assessment thereof, is essentially supervisory in nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case"*.
- [83] Has the learned Judge in his summing up made a fairly balanced and fair presentation of the case to the assessors? (**Vilikesa Volau v State** [2017] FJCA 51 9 (26 May 2017)). I am of the view that the learned Judge has erred by failing to make a fair presentation of the facts and also by not addressing himself and analyzing those facts which if considered properly would have arrived at a different conclusion in favour of the appellant. Considering the totality of the evidence I am of the view that it is unsafe to allow this verdict to stand. Therefore I am of the view that the conviction should be quashed and the sentence set aside.

Prematilaka JA

[84] [3] I have had the benefit of reading in draft the judgments of my brothers Chandra, JA and Basnayake, JA and given the dissenting conclusions arrived at in the respective judgments. I consider it appropriate and necessary for me to write a short judgment of my own. Basnayake, JA has proposed to allow the appeal and quash the conviction while Chandra, JA has concluded that the appeal be dismissed and the conviction be affirmed.

[85] This appeal arises from the conviction of the Appellant on a single count of rape under section 149 and 150 of the Penal Code, Cap 17. The Appellant is alleged to have had carnal knowledge of P (name withheld) without her consent on 12 October 2008 at Korovuto, Ba in the Western Division.

[86] After trial all three assessors had expressed opinions on 22 August 2013 that the Appellant was guilty of rape. The Learned High Court Judge on the same day had concurred with the assessors' opinions and convicted the Appellant in his Judgment. On 23 August 2013 the Learned Judge had imposed a sentence of 08 years of imprisonment with 06 years as the non-parole period (*i.e.* during which the Appellant would not be eligible to be released on parole).

Preliminary observations

[87] The Appellant had filed an application for leave to appeal in person on 25 September only against the conviction setting out 03 grounds of appeal. Legal Aid Commission on behalf of the Appellant had subsequently tendered an Amended Application for Leave to Appeal against the conviction (one ground of appeal) and the sentence (one ground of appeal) on 18 August 2014. The single ground of appeal against the conviction urged by the Legal Aid Commission was not any of the three grounds set out originally by the Appellant. Though the original leave to appeal application was late by two days, the Single Judge of this Court who delivered the Leave to Appeal Ruling on 05 December

2014 had granted an extension of time to seek leave to appeal against the conviction and sentence. Accordingly, on the same day the Single Judge had with the aid of counsel and written submissions for both parties considered the sole ground of appeal against the conviction and the single ground of appeal against the sentence contained in the Amended Application for Leave to Appeal but refused leave to appeal in respect of both.

[88] Therefore, it is clear that neither the counsel nor the Single Judge had been concerned with any of the grounds of appeal against the conviction as set out in the original application for leave to appeal when the matter of leave to appeal was considered on 20 October 2014 and it could be safely assumed that therefore, all the parties concerned had been content with pursuing the two grounds of appeal against the conviction and sentence set out in the Amended Application for Leave to Appeal at the leave hearing.

[89] Thereafter, the Appellant had sent a letter to His Lordship the Chief Justice on 24 June 2015 stating *inter alia* that he was not satisfied with the change of his ground of appeal by the counsel for the Legal Aid Commission and wanted two different grounds of appeal accepted. The new grounds of appeal proposed were in a nutshell as follows.

(i) The Leaned Trial Judge should not have admitted the Medical Report as evidence as the complainant had not consented to the examination.

(ii) The Appellant was charged under the Penal Code but was sentenced under the Crimes Decree.

[90] The first of the above grounds is found under paragraph 5(c) of the Appellant's original application for leave to appeal.

[91] Section 35(3) of the Court of Appeal Act permits an appellant to renew an application for leave to appeal refused by the Single Judge before the Full Court hearing the appeal. In his letter to His Lordship the Chief Justice the appellant had sought to exclude the ground of appeal urged by the Legal Aid Commission and instead have the above two grounds accepted.

- [92] Therefore, technically the Appellant cannot be said to have made a renewed application under section 35(3) by the said letter dated 24 June 2015 as the two grounds therein were neither considered nor refused by the Single Judge. However, when the hearing into the appeal before the full Court took place on 14th November it was assumed that the hearing takes place consequent to a renewed application, for the ground of appeal dealt with by the State in its written submissions and in the oral submissions of the counsel for the State was confined to the sole ground of appeal urged in the Amended Leave to Appeal Application and refused by the Single Judge. The Appellant had not filed any written submissions but appeared in person at the hearing. Thus, the Registry and the State had treated the Appellant's letter dated 24 June 2015 as a renewed application under section 35(3) but no submissions were made on the two grounds contained therein either by the State or by the Appellant but the appeal was argued on the ground of appeal which the Appellant had sought to expressly exclude in the said letter.
- [93] Since section 35(3) does not prescribe a particular form in which the appellant may have the application for leave to appeal determined by the Full Court, the letter dated 24 June 2015 may reasonably be treated as sufficient to invoke the jurisdiction of the Court of Appeal under section 35(3). In a somewhat similar context, a letter to withdraw an appeal has been treated as an application to abandon the appeal under Rule 39 of the Court of Appeal Rules (vide Namulo v State Criminal Appeal No. AAU20.2010: 7 June 2012 [2012] FJCA 35) and the same principle may safely be applied to section 35(3) as well.
- [94] However, whether section 35(3) permits an appellant to have new grounds of appeal not considered nor refused by the Single Judge, determined before the Full Court, as the Appellant had sought to do in this instance, is arguable. In my view, if it is permitted the filtering process through leave to appeal procedure as articulated in Chand v State Criminal Appeal No. AAU0035.2007: 19 September 2008 [2008] FJCA 53 which is quoted below, would be rendered nugatory and superfluous.

'[15] The right of appeal as prescribed by Parliament must be a meaningful right. A meaningful right of appeal is achieved by a procedure that avoids clogging appeal rolls with frivolous and unmeritorious appeals. This is particularly so in our jurisdiction, where majority of appeals are filed by prisoners without any legal assistance. I am not suggesting that all appeals filed by the prisoners are frivolous, but experience has shown that some appeals are frivolous and unmeritorious, thus, clogging appeal rolls and denying resources to appeals that are meritorious.

[16] The leave procedure allows the Court to filter meritorious appeals from unmeritorious appeals so that meritorious appeals are allocated resources to achieve a full and meaningful hearing by a higher court. Leave procedure, in my view, is not intended to limit the constitutional right of appeal. To succeed in an application for leave to appeal, all that is required of the appellant is, to demonstrate arguable grounds of appeal.'

- [95] In Chand the Court also held that the constitutionality of the leave to appeal procedure has been upheld on the principle that a leave procedure prescribed by a statute will survive a constitutional challenge if it ensures that the higher court will be able to make an informed reassessment of the issues raised. Section 35(3) of the Court of Appeal Act is designed to fulfil this requirement.
- [96] Therefore, I am of the view that an appellant cannot raise new grounds of appeal not taken up, nor considered or refused by the Single Judge by way of a renewed application under section 35(3). However, as discussed in some detail later in the judgment an appellant can raise new grounds of appeal before the full Bench by making use of the mechanism for amendment of notice of appeal provided under Rule 37 of the Court of Appeal Rules.
- [97] The difference between the two situations is that a renewed application under section 35(3) is available as of right (to make sure the constitutional right of appeal to re-agitate the grounds refused by the Single Judge at the leave stage) where no leave of Court is required; nor could the Respondent object to such an application; not even a time frame is prescribed for such an application to be made. However, under Rule 37 for amendment of notice of appeal two different precondition have to be satisfied to raise new grounds of appeal depending on whether the amendment is sought under Rule 37(1) (a) or 37 (1) (b).

[98] Coming back to the Appellant's grounds of appeal the situation is further complicated by the fact that at the hearing of the appeal the Appellant submitted to Court another document dated 14 November 2017 containing additional grounds of appeal against the conviction and sentence. They are summarised below. However, no grounds of appeal had been set out against the sentence in the body of this hand-written document.

- (i) The Appellant was charged under the Penal Code but was sentenced under the Crimes Decree, 2009.
- (ii) The Trial Judge had failed to direct the assessors on the previous inconsistent statements of the prosecution witnesses.
- (iii) The Medical Report of the complainant had been wrongly admitted as evidence.

[99] It appears that the last two grounds above stated are found under paragraph 5(a) and 5(c) of the Appellants original leave to appeal application filed in person dated 25 September 2013.

[100] If the Appellant cannot raise new grounds of appeal by the letter addressed to His Lordship the Chief Justice on 24 June 2015, could it be treated as a supplementary notice to amend his application for leave to appeal? Rule 37, however, speaks of amendment to notice of appeal only and not amendment of application for leave to appeal. Yet, the Second Schedule to the Court of Appeal Rules prescribes Form No.4 for both notice of appeal and application for leave to appeal. In terms of Rule 38 once leave to appeal is granted the application for leave to appeal would be deemed to be a notice of appeal. Therefore, it would only be logical to conclude that Rule 37 is applicable to both the notice of appeal and an application for leave to appeal.

[101] If that be the case, the Appellant's letter addressed to His Lordship the Chief Justice on 24 June 2015 containing the third of the above grounds of appeal, could be treated as a supplementary notice to amend his application for leave to appeal under Rule 37 (1) (b)

of the Court of Appeal Rules as it had been submitted well within the time prescribed thereof.

- [102] In my view, amendment of notice of appeal or application for leave to appeal would involve an amendment of the existing ground/s of appeal and/or the introduction of fresh ground/s of appeal. Therefore, even if section 35(3) of the Court of Appeal Act does not permit an appellant to have new grounds of appeal determined before the Full Court other than the grounds urged but refused by the Single Judge, it may be permissible to bring up such new grounds before the Full Court under Rule 37 (1) (b) without the leave of the Court, provided such supplementary notice has been served on all the parties on whom the notice of appeal or application for leave to appeal had been served. Since, the said letter is part of the record the State should be deemed to have been served with and be aware of it. However, neither party made submissions on the grounds of appeal thereof casting the burden on this Court to rule on the third fresh ground of appeal as a substantive ground of appeal on its own under Rule 37 (1) (b).
- [103] In terms of Rule 37 (1) (a), notice of appeal (or application for leave to appeal) could also be amended by or with the leave of the Court of Appeal at any time. The power of full Court to amend the notice of appeal has been well recognized (*vide* Daunabuna v State Criminal Appeal No. AAU 0120 of 2007: 14 October 2008 [2008] FJCA 55 & Volau v State Criminal Appeal No. AAU0079.2008: 13 October 2008 [2008] FJCA 54). Therefore, the Appellant's attempt to amend his application for leave to appeal by introducing new grounds on 14 November 2017 could have been considered at the hearing provided the State had been given notice of the proposed amendments and was ready to assist Court. However, it was clear that the hand-written document dated 14 November 2017 was being submitted to Court only at the hearing and the State was obviously not in a position to assist Court whether leave of Court should be granted to urge those new grounds. Thus, the matter falls squarely on this Court to consider the question of leave in respect of the first and second fresh grounds of appeal under Rule 37 (1) (a).

[104] Be that as it may, at this stage it is pertinent to initially consider the two grounds of appeal against conviction and sentence upon which the State had filed written submissions and made oral submissions at the hearing. I venture to do so on the footing that those were the only grounds the Appellant was entitled to re-agitate before the Full Court by virtue of section 35(3) when he submitted his letter to His Lordship the Chief Justice after the Leave to Appeal Ruling in as much as it is only those two grounds that were before the Single Judge at the leave to appeal hearing. They are as follows

‘The Learned Judge erred in law and in fact when he did not correctly summed up to the assessors the Appellant’s case through his evidence in the trial and that was the Appellant denied having carnal knowledge with the complainant, without the complainant’s consent and that at the time of the sexual intercourse the Appellant knew that the complainant was not consenting or was reckless as to whether she was consenting.’

‘The Learned Judge erred in law and in fact when he did not deduct the one month and five days which was the period that the Appellant spent in remand from his sentence.’

[105] However, as pointed out earlier the Appellant had expressly requested that the first of above grounds on conviction be excluded in his letter to His Lordship the Chief Justice on 24 June 2015 and not sought to agitate the ground of appeal against sentence before the full Court. Yet, the hearing before the full Court was concerned with only that ground against the conviction.

[106] Justice Basnayake has stated that the matters that His Lordship has considered in the judgment as grounds of appeal have not been taken up by the Appellant at any stage and proceeded to grant leave to appeal before considering the same. His Lordship seems to justify this approach on the strength of section 23(1) of the Court of Appeal Act.

[107] However, with all due respect to His Lordship, I am unable to agree that section 23 (1) should be considered as a gateway for the Court of Appeal to consider matters *ex mero motu* as grounds of appeal not urged before Court at any stage, particularly when the Respondent (and even the Appellant) had not been heard on the same. In my mind such a course of action would jeopardize the harmony in the statutory scheme in the Court of Appeal Act and the Court of Appeal Rules with regard to the orderly disposal of appeals.

It would open an unwarranted floodgate and lead to uncertainty and confusion in identification and determination of grounds of appeal as all the parties including the Court itself should know before or at least at the hearing as to what grounds of appeal would be considered in deciding the appeal. Such a liberal interpretation and broadening of the scope of section 23 would neither necessary nor justified. It is my understanding that section 23(1) sets out broad guiding principles as to when and in what circumstances the Court of Appeal would interfere with a conviction or an acquittal and the consequential orders it could make in the process. Section 23 should be read with all other allied provision of the Court of Appeal Act and Rules made thereunder.

[108] Justice Basnayake and Justice Chandra have arrived at contrasting conclusions on the Appellant's sole complaint on the conviction as set out in the Amended Application for Leave to Appeal. Justice Basnayake on this ground of appeal has concluded that the Learned Trial Judge had erred in not analyzing and making a fair presentation of the facts which if considered properly would have led the assessors arrive at a finding favorable to the Appellant. On the other hand Justice Chandra had not seen any deficiency in the summing up of the Trial Judge.

[109] Both Basnayake JA and Chandra JA have set out the facts in sufficient detail and there is no need for repetition of the same. Having perused the totality of evidence led at the trial and considered the fact that the Appellant had taken up an unequivocal position of denial of any sexual intercourse with the complainant, I tend to agree with Justice Chandra that the summing up on essential elements of sexual intercourse and consent cannot be said to be deficient in any respect. No such specific non-direction or misdirection had been pointed out on behalf of the Appellant either.

[110] I am also mindful that this ground of appeal has two contradicting stances. One is on the alleged failure of the Trial Judge to have summed up to the assessors of the Appellant's denial of sexual intercourse with the complainant without her consent and the other is the alleged failure by the High Court Judge to have directed the assessors whether the Appellant knew that she was not consenting or he was reckless as to whether she was not

consenting to the sexual intercourse. However, it was never the Appellant's position that he had sexual intercourse with the complainant and believed or had reason to believe that she was consenting. These two positions are diametrically opposed to each other.

[111] In my view, once the Appellant denied any sexual intercourse with the complainant, what was left to the assessors was only the evidence of the complainant with regard to the act of sexual intercourse and the element of absence of consent. The Appellant for obvious reasons could not challenge the latter. It appears that the medical evidence is consistent on material particulars with that of the complaint on the aspect of sexual intercourse and want of consent in that the doctor had testified that there was evidence of forceful penile penetration of the vagina of the complainant. Section 129 of the Criminal Procedure Act has specifically done away with the necessity of corroboration of the complainant's evidence and this includes both the act of sexual intercourse and the element of lack of consent.

[112] The Learned High Court Judge had dealt with the elements of the offence of rape, presumption of innocence and the burden of proof on the prosecution and the evidence led at the trial in clear terms. He had then drawn the attention of the assessors to the fact that the Appellant had denied having sexual intercourse with the complainant. Yet, he had also directed them to consider the issue of consent as well as an element of the offence to be proved by the prosecution. It is apt to quote some of the passages where the Trial Judge has referred to the twin aspects of act of sexual intercourse and lack of evidence.

'In order to prove the offence of Rape the prosecution has to prove following elements beyond reasonable doubt.

- 1. The accused had carnal knowledge of the complainant,*
- 2. without her consent,*
- 3. He knew or believed that that she was not consenting or didn't care if she was not consenting.'*

'Carnal knowledge is the penetration of vagina or anus by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.'

'..... Therefore, the offence of rape is made out only if there was no consent from the alleged victim.'

'Ladies and gentleman of assessors, in this case State has to prove lack of consent before you can find the accused guilty of rape. If you find there was consent and that he is thereof not guilty of rape.'

'You must also carefully consider the accused's position as stated above. Please remember, even if you reject the version of the accused that does not mean that the prosecution had established the case against the accused. You must be satisfied that the prosecution has established the case beyond reasonable doubt against the accused.'

'Ladies and gentleman of assessors, remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove his innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and that burden stays with them throughout the trial.'

[113] It is also relevant to quote from the Single Judge Ruling on this ground of appeal.

'The learned trial judge directed the assessors that they could convict the appellant if they were satisfied that the appellant had sexual intercourse with the complainant without her consent. The assessors were also directed that even if they rejected the appellant's evidence as not true, they could only convict if they were satisfied of the guilt on the evidence led by the prosecution. These directions were tailored according to the issues raised at trial. At no stage there was an issue that the appellant did not know the complainant had not consented to sex. His evidence was that he did not have sexual intercourse with the complainant at all. In these circumstances, any directions on knowledge would have confused the assessors.'

[114] Therefore, I am convinced that the summing up measures up to the standard required, contains the necessary ingredients and deals with all relevant aspects in the context of the totality of evidence led in the case. It does not offend the principles laid down in Silatolu v The State Criminal Appeal No. AAU0024.2003S: 10 March 2006 [2006] FJCA 13. In the circumstances, I am of the view that there is no merit in the ground of appeal that was argued before us and in this respect agree with Justice Chandra's conclusion.

[115] Neither would I say that as a whole the summing up is not a fairly balanced and a fair presentation of the case to the assessors or that the summing up lacks those essential qualities of objectivity, evenhandedness and balance required to ensure a fair trial as discussed in great detail in Chand v State Criminal Appeal No. AAU112 of 2013: 30 November 2017 [2017] FJCA 139.

- [116] In any event, I must also place on record that the appellate courts will not look at favorably where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the trial judge as His Lordship the Chief Justice commented in Raj v State Petition for Special Leave to Appeal No. CAV0003.2014: 20 August 2014 [2014] FJSC 12. The counsel for the Appellant had not sought any re-directions though the Trial Judge had given that opportunity at the end of the summing up.
- [117] What is left to be considered now is how to deal with the new grounds of appeal urged by the Appellant in his letter to His Lordship on 24 June 2015 and his hand-written document dated 14 November 2017. Since the sole ground urged in the letter dated 24 June 2015 is included among the three grounds of appeal in the document dated 14 November 2017, I would only consider the latter.
- [118] On the fresh grounds of appeal, Basnayake JA in His Lordship's judgment has ruled that the ground of appeal based on the alleged 'wrongful admission of the medical report' cannot be considered as a valid ground of appeal. Similarly, though not expressly stated, His Lordship does not appear to have considered the other two grounds urged by the Appellant in his hand-written document submitted to Court at the hearing of the appeal on 14 November 2017. Chandra JA seems to have agreed with the exclusion of the aforesaid ground of appeal by Basnayake JA and has stated that all grounds of appeal set out in the document dated 14 November 2018 are not valid grounds of appeal.
- [119] However, as pointed out above the Appellant has to first succeed in obtaining leave of the Court in order to get the Court to consider those three grounds of appeal in terms of Rule 37(1) (a) of the Court of Appeal Rules. I would consider the question of leave in respect of those grounds with the benefit of the Appellant's submissions contained in his letter to the Chief Justice on the first ground and his submissions set out in the document dated 14 November 2017 in respect of all three grounds. Yet, I do not have the benefit of submissions of the State on the same.

[120] As pointed out earlier, Justice Basnayake has ruled out the first ground of appeal based on the alleged ‘wrongful admission of the medical report’ and Justice Chandra has agreed with that. I agree with both my brother judges on this conclusion for the reasons given below.

[121] The Appellant’s complaint is based on the premise that the complainant had not consented to the medical examination and therefore medical report should not have been admitted in evidence. Admittedly, the consent of the complainant had not been obtained onto the Medical Examination Form. However, the complainant in her evidence has stated that she had given her consent to the doctor for the examination and that evidence had not been challenged at all. In any event, the counsel for the Appellant had not raised any objection to the admission of the Medical Examination Form in evidence. Therefore, this is not an arguable ground of appeal and I refuse leave in terms of Rule 37(1) (a) of the Court of Appeal Rules.

[122] The second fresh ground of appeal raised is that the Trial Judge had failed to direct the assessors on the previous inconsistent statements of the prosecution witnesses. The Appellant had not pointed out any such inconsistent statements under this ground of appeal. Nor do I see from an examination of the evidence any such inconsistencies that go to the root of the matter and shake the foundation of the prosecution evidence. The broad guideline is that discrepancies, inconsistencies or omissions which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280; Nadim v State Criminal Appeal No. AAU0080 of 2011: 2 October 2015 [2015] FJCA 130; Turogo v State Criminal Appeal No. AAU.0008 of 2013: 30 September 2016 [2016] FJCA 117). Therefore, this is not an arguable ground of appeal and I refuse leave in terms of Rule 37(1) (a) of the Court of Appeal Rules.

[123] The third and final ground of appeal sought to be raised by the Appellant is that he was charged under the Penal Code but was sentenced under the Crimes Decree, 2009. He has

cited several constitutional provisions in his document dated 14 November 2017 including section 14 (2) (n) which states that every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing. However, the constitutional provisions cited by the Appellant are not relevant to the facts of this case as held by Chandra JA.

- [124] The most relevant legal provision with regard to the Appellant's complaint (if true) is section 392 and 393 of the Crimes Decree, 2009 which are as follows

'392. — (1) Nothing in this Decree affects the validity of any court proceedings for an offence under the Penal Code which has been commenced or conducted prior to the commencement of this Decree

'(2) When imposing sentences for any offence under the Penal Code which was committed prior to the commencement of this Decree, the court shall apply the penalties prescribed for that offence by the Penal Code'

393. — (1) for all purposes associated with the application of section 392, the Penal Code shall still apply to any offence committed against the Penal Code prior to the commencement of this Decree, and for the purposes of the proceedings relating to such offences the Penal Code shall be deemed to be still in force.'

- [125] The Appellant had allegedly committed the offence of rape on 12 October 2008 prior to the commencement of the Crimes Decree on 04 November 2009 and therefore, in terms of section 392(2) the Trial Judge was bound to apply the penalty prescribed for rape by the Penal Code which he had indeed done. There is nothing to indicate that the Trial Judge had acted under the Crimes Decree in imposing the sentence on the Appellant. On the contrary, the Trial Judge had specifically referred to the Penal Code in the Sentence Ruling on 23 August 2013. Thus, the Appellant's complaint is baseless.

- [126] On the other hand the Trial Judge had relied on several provisions of the Sentencing and Penalties Decree 2009 (now the Sentencing and Penalties Act 2009) in the matter of sentence of the Appellant. Section 61(1) of the Sentencing and Penalties Decree 2009 required the Trial Judge to apply the provisions thereof in sentencing the Appellant in as

much as the proceedings against the Appellant had commenced prior to the commencement of the Sentencing and Penalties Decree on 04 November 2009 and the Appellant had not been sentenced prior to that date. Section 61(1) is as follows.

'A court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of this Decree if no sentence has been imposed on the offender prior to the commencement of this Decree.'

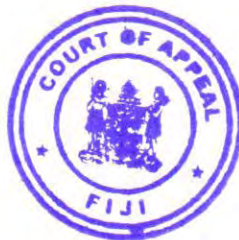
[127] Therefore, third and final ground of appeal is also not an arguable ground of appeal and I refuse leave in terms of Rule 37(1) (a) of the Court of Appeal Rules.


[128] Thus, the Appellant is not entitled to have the three fresh grounds of appeal collectively set out in the letter to the Chief Justice dated 24 June 2015 and his hand-written document dated 14 November 2017, heard before the full Court by virtue of Rule 37 (1) (a) of the Court of Appeal Rules. I may also add that even if I were to consider them as grounds of appeal proper under Rule 37(1) (b) my decision would be the same and I would reject them as they have no merits. Hypothetically, even if they were before Court as renewed grounds of appeal under section 35(3) I would still be inclined to reject them.

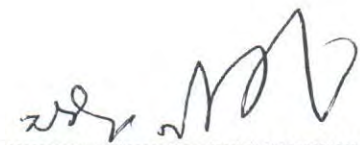
[129] In conclusion, I may state that in my view, neither the opinion of the assessors nor the verdict of the Learned Judge could be considered as unreasonable. I think, having regard to the evidence led the Appellant could have been convicted of the charge levelled against him and therefore the verdict of guilt against the Appellant could be supported. Neither is there any wrong decision on a question of law for the judgment to be set aside. Nor do I see any other ground showing that there had been a miscarriage of justice. Thus, I would dismiss the appeal in terms of section 23(1) of the Court of Appeal Act.

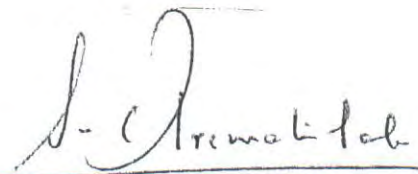
Orders of the Court are: (Basnayake JA dissenting)

1. *Appeal dismissed.*
2. *Conviction and sentence affirmed.*




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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL


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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL


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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL