

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0005.2018
(On Appeal from Court of Appeal No: AAU 0019.2014)

BETWEEN : **LEPANI LIKUNITOGA**

Petitioner

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Madam Justice Chandra Ekanayake, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of Supreme Court

Counsel : Mr. S. Waqainabete for the Petitioner
Mr. S. Vodokisolomone for the Respondent

Date of Hearing: 17 October 2018

Date of Judgment: 01 November 2018

JUDGMENT

Saleem Marsoof, J

1. The only question that arises from this application seeking leave to appeal is whether the trial judge had independently assessed the unanimous finding of the assessors when he disagreed with their finding and returned a verdict of acquittal in the backdrop of the rather bizarre happenings of the Christmas night in 2012, and whether the Court of Appeal was justified in vacating the said verdict and ordering a fresh trial.

2. This question arises in the context that the Petitioner, who had been charged on one count of rape of 22 year old A.N.T (actual name suppressed) before the High Court of Fiji in Suva, was found guilty by all three assessors, with which finding the learned trial did not agree and returned a verdict of acquittal. The Court of Appeal by its judgment dated 8th March 2018, set aside the said verdict, and remitted the case for retrial, and it is against the said judgment of the Court of Appeal that the Petitioner seeks leave to appeal.
3. Before going into details about the High Court trial, the appellate proceedings before the Court of Appeal and the Petitioner's application seeking leave to appeal, it might be useful to outline the material facts of the case.

The Material Facts

4. It was Christmas night, and everyone was celebrating. A.N.T (hereinafter in this judgment referred to as "the complainant"), who was then residing in Pacific Harbour, went to Korociriciri, Nausori on 24th December 2012 to celebrate Christmas with her boyfriend and his sister's family and was there with them on Christmas eve.
5. On Christmas day, the complainant's boy-friend collected money from his sister, her husband and her, and bought Rum, which all four of them drank mixed with Cola.
6. At mid-day the four of them left Korociriciri and on their way to Suva went to the complainant's boy-friends family place at Raiwaqa, where they collected some more money and bought beer, which they consumed. While drinking they all planned to go out clubbing.
7. After drinking they, now eight in number, came to Suva at about 11 pm by taxi. All eight of them went to Ritz, a night club in Suva, and in the club they drank some more beer and danced.
8. After the Ritz closed, the complainant, her boy-friend, his sister and her husband walked towards a second night club, which was at a distance, opposite Baily Clinic. The

complainant and her boyfriend were walking together, and the others had already gone ahead of them.

9. When the complainant and her boyfriend reached the Flea Market around 4.am, they were stopped by the security officer at the Flea Market. As the complainant explained at the trial, “I was standing close by on the upper steps. He (the security officer) told us to come into the Flea Market.”
10. The complainant and her boy-friend climbed over the gate and entered the Flea Market. The Petitioner, who was the security officer in charge of the bus stand side of the Flea Market, gave them a carton to sit and he had gone to another place.
11. Then the complainant and her boyfriend had engaged in consensual sex. After that they had got dressed again and the boyfriend had left to buy something and come back.
12. After the boy-friend had left, the complainant had continued to sit on the carton. Then the Respondent had come and sat next to her and suggested to have sex, which she had refused. Then, the Respondent is alleged to have pushed the complainant on to the ground, taken out her pants and panty, got on top of her and removed her t-shirt too.
13. The Petitioner then had sexual intercourse with the complainant. According to the complainant, she never consented to the act of sexual intercourse with the Petitioner. The Petitioner has not disputed that he had sexual intercourse with the complainant in the premises of the Flea Market, but he claims that it was with her consent.

The High Court Trial

14. The Petitioner was charged in terms of section 207 (1) and (2) of the Crimes Act, 2009, that he on 26th December 2012 at Suva raped A.N.T by having carnal knowledge of the said A.N.T without her consent.

15. After the Petitioner pleaded not guilty to the charge, the case went to trial before the High Court of Suva.
16. At the trial, the fact that the Petitioner had sexual intercourse with A.N.T on 26th December, 2012 was an agreed fact.
17. The trial was short and was held from 24th March 2014 to 28th March 2014 before the High Court of Fiji holden in Suva assisted by three assessors.
18. On behalf of the prosecution, three witnesses, namely, the complainant A.N.T, Dr. Saiasi Caginidaveta and Women Detective Constable 3614 Ana gave evidence.
19. The Petitioner was the only defence witness
20. At the end of the trial, the assessors unanimously found the Petitioner guilty of the charge of rape.
21. The learned trial judge did not agree with the finding of the three assessors, and for the reasons set out in his judgment dated 28th March 2014, overturned the opinion of the assessors to return a verdict of acquittal, as provided in section 237(2) of the Criminal Procedure Act, 2009.
22. In paragraph [5] of his aforesaid judgment, the learned trial judge has set out a few reasons for disbelieving the complainant (whom he refers to a the “victim”), which paragraph is quoted below in full:

“[5] In the cross examination the victim admitted that she did not tell police that she had sex with her boy-friend. She said that she did not go to hospital immediately but went in the afternoon. She had not sustained injuries on her buttocks when she went backward on the floor. Victim admitted that she asked money from the accused. She also admitted that she came and sat down voluntarily where the accused sat on the carton.”

23. It is noteworthy that in paragraph [8] of his judgment, the learned trial judge had elaborated on the facts once again in the following manner:-

“[8] The evidence of the victim clearly corroborates the defence version that she had sex with the accused for money. Further, after agreeing the proposal of the accused, the victim voluntarily came and sat on the carton where the accused was seated. This clearly shows her consent for sexual intercourse with the accused on 26/12/2012. The offence of rape is made out only if there was no consent from the victim.”

24. In paragraph [9] of his judgment, the learned trial judge stressed the duty of the prosecution to prove the case beyond reasonable doubt, and states that in this case “serious doubt has been created”.

Proceedings in the Court of Appeal

25. The Director of Public Prosecutions, on behalf of the State, sought leave to appeal from the judgment of the High Court dated 28th March 2014 on the following grounds:-

1. The trial judge erred by not giving any, or any sufficiently cogent reasons for his reversal of the assessors' opinion.
2. The trial judge erred in fact and law in finding that the assessors' opinion seemed to be perverse.
3. The trial judge misdirected himself and or erred in fact and law when he found that the victim's evidence corroborated the “version” of the Defendant. (D).
4. The trial judge erred in principle by purporting to make a finding that there was corroboration of the defence case (“version”).
5. In the event that such a finding of “corroboration” is not an error of principle, then the trial judge erred in making the finding which was not supported by the evidence.
6. The trial judge did not direct himself (or the Assessors) in regard to recent complaint or evidence of distress.

7. The trial judge did not direct himself (or the Assessors) fully or at all in regard to the issue of consent or alternatively has been inconsistent in his approach to the said issue, whereas in complete contrast in the judgment, the trial judge makes a specific finding that the victim did consent.
 8. The trial judge misdirected himself (and the assessors) by failing to consider that consent can vary in range from whole hearted enthusiasm through to reluctant acquiescence to unwilling submission.
26. The Single Judge of the Court Appeal, by his Ruling dated 12th June 2015, found that all the grounds of appeal urged by the State were arguable, and granted leave to appeal against the Judgement of the High Court.
27. The case was then heard by the Court of Appeal on 20th February 2018, and the Court of Appeal in its judgment dated 8th March 2018, specifically dealt with the matters raised by the learned trial judge in paragraphs [5] and [8] of his judgment.
28. Dealing with grounds (1) and (2) urged by the State in the Court of Appeal, Prematilaka JA, with whom Chandra JA., concurred, and Gamalath JA., agreed in his separate concurring judgment, stated succinctly in paragraph [27] of his well considered judgment that the pieces of evidence adverted to by the trial judge in his judgment at paragraphs [5] and [8] did not justify the conclusion that the complainant had consented to sexual intercourse with the Petitioner.
29. It is noteworthy that Prematilaka JA's reasoning in this regard is found in paragraphs [23] to [26] of his judgment, which I quote below:-

“[23] In my view, the Complainant's evidence that she had not thought of telling the police that she had engaged in sex with her boyfriend and that she had gone to hospital after giving her statement to police in the afternoon cannot have any significant bearing on the issue of consent. In any event she had told the doctor of her prior act of sexual intercourse with her boyfriend. Other than a mere narration of it, the Learned Judge had not drawn the attention of the assessors to this evidence to be considered in relation

to the question of consent. In *Tamaibeka v State* Criminal Appeal No.AAU0015 of 1997S: 08 January 1999 [1999] FJCA 1 the Court of Appeal held:

‘A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case.

[24] It is a fact that the complainant had not sustained injuries on her back. However, there is no unequivocal evidence that she had moved backwards in a gesture to resist or avoid the Respondent on a surface that could have caused such injuries. The Respondent on his part had not stated in his evidence that the floor where he had sexual intercourse with the complaint was such as to cause such injuries if she had moved back. In fact, the Respondent under cross-examination had denied the suggestion put to him that the complainant was trying to move away from him. In any event there is evidence that the complainant was seated on a cartoon when the incident happened and it is not clear that she had moved outside the bounds of it later.

[25] It had been admitted in evidence by the complainant that she had asked for her bus fare from the Respondent. The complainant had not made any attempt to deny that in her evidence. However, it is clear from her evidence that she had requested the bus fare *after the act of forcible sexual intercourse*. She had never spoken to such a request being made either to her or to her boyfriend at any stage prior to the incident. *The Trial Judge once again other than narrating this piece of evidence had not asked the assessors to consider whether an inference of consent could be drawn or a reasonable doubt could be cast from this admission on the issue of consent.*

[26] I do not find any evidence to support the statement ‘*She also admitted that she came and sat down voluntarily where the accused sat on the carton.*’ in the judgment. The Learned Judge had stated this as a fact in the summing up as well even before a redirection on these lines was requested by the respondent at the end of the summing-up. However, the complainant’s evidence reveals that it is the Respondent who had

come and sat where the complainant was seated and suggested to have sex with her. The State was unable to provide any explanation why it had agreed to that re-direction.”(*emphasis added*)

30. It is on this basis that the Court of Appeal allowed the appeal of the State on grounds (1) and (2) taken together.

31. The Court of Appeal also considered grounds (3), (4) and (5) all dealing with the alleged “corroboration” of the defence case by the evidence led at the trial, when even the statement that the complainant had “*admitted that she came and sat down voluntarily where the accused sat on the carton*” was not borne out by the evidence as observed by the Court of Appeal in paragraph [26] of its judgment.

32. In paragraphs [49], [50] and [51] of his impugned judgment, Prematilake JA also dealt with the trial judge’s observation at paragraph [8] of his judgment that the complainant’s admission that she asked for the bus fare *after the Petitioner had sexual intercourse with her* clearly corroborates the defence version that she had sex with the accused for money. In paragraph [51] of his judgment, Prematilake J. observed as follows:-

[51] I cannot understand how the admission by the complainant that she had asked for the bus fare after the forcible sexual intercourse could be considered as corroborating the Respondent’s version of ‘sex for money’. The High Court Judge had clearly erred in drawing a wrong inference from the above facts leading to his wrong decision that the complainant had consented for the sexual intercourse and then to the acquittal of the Appellant. This error amounts to a question of law and his decision is wrong on that.”

33. Having allowed the appeal of the State on grounds (3), (4) and (5), on the above factual basis and on a correct application of the definition of “corroboration” in the light of the decision of the English Court of Appeal in *R v Baskerville* [1916] 2 KB 658 at page 667, which has been adopted in Fiji in *Daniel Azad Wali v The State* [2001] 1 FLR 192, the Court of Appeal turned to ground (6) relating to the question of “recent complaint” and the

omission of the learned trial judge to advert to the testimony of Vitori Tabua, the colleague of the Petitioner who had arrived at the Flea Market almost at the time when the Petitioner had sexual intercourse with the complainant. In paragraph [57] of his judgment, Prematilake JA observed as follows:-

“[57] The Learned Trial Judge had not considered the evidence of Vitori of what the complainant had told him immediately after the alleged incident that the Respondent had forcible sexual intercourse with her and what he saw at that time *i.e.* she was crying and looking sad which could have gone to the consistency and credibility of the complainant. This omission in my view constitutes a wrongful decision by way of an omission or failure on a question of law as to the effect of recent complaint and evidence of distress on the consistency and credibility of the complainant’s evidence on lack of consent.”

34. Prematilake JA allowed ground (6) as well on the above basis.

35. The Court of Appeal considered grounds (7) and (8) together, in regard to the non-directions or misdirections alleged to have been made by the learned trial judge. After clarifying that the gist of these grounds of appeal was that the Judge had misdirected himself as to what consent means in a case of rape, the Court of Appeal considered the question in the light of the recent decision of the Court of Appeal in *Tukainiu v The State* Criminal Appeal No. AAU 0086 of 2013: 14 September 2017 [2017] FJCA 118, which decision has since been affirmed by this Court in *Tukainiu v State* [2018] FJSC 19; CAV0006.2018 (30 August 2018).

36. It is pertinent that Prematilake J. concluded in paragraph [64] of his judgment that in the light of the decision of the Court of Appeal in *Tukainiu*, the learned trial judge’s “confinement of the fault element in the summing up only to knowledge in relation to ‘consent’ is erroneous”. The Court of Appeal accordingly allowed the State’s appeal on grounds (7) and (8) as well, and set aside the judgment of the High Court.

37. However, the Court then considered whether in all the circumstances of the case the interests of justice will best be served by entering a judgment and verdict of conviction or by an order for a new trial in terms of section 23(2) (b) of the Court of Appeal Act, Cap. 12. Prematilake J. observed in paragraphs [67] and [68] of the judgment as follows:-

“[67] The Learned Trial Judge had not addressed the assessors properly and adequately in relation to the issue of consent which was the Respondent’s defence. Neither had he addressed them on the effect of the evidence of recent complaint favourable to the prosecution. *I am unable to say what view the assessors so directed may have taken on the charge of rape against the Respondent in view of both those matters.* The concept of ‘interest of justice’ should not only be applicable to the prosecution and the defence but also to the general public and society at large (See *Togava v State Criminal Appeal No.AAU0006U* of 1990S: 10 October 1990 [1990] FJCA 6).

[68] Therefore, I am not inclined to agree to the request made at the hearing by the State to enter a judgment and verdict of conviction as opposed to its request for a re-trial in written submissions. I think the interest of justice demands that a new trial be ordered.”(*Emphasis added*)

38. Chandra JA., and Gamalath JA have agreed with the conclusion of Prematilaka JA., that the appeal lodged by the State must be allowed, the Judgment of the High Court dated 28th March 2018 must be set aside and the consequent verdict of acquittal quashed, to enable the case being taken up for fresh trial against the Petitioner on the basis of the same charge.

Application for Leave to Appeal to the Supreme Court

39. The Petitioner has sought leave to appeal against the said decision of the Court of Appeal on the following ground set out in his petition for special leave dated 13th April 2018:

“That the Fiji Court of Appeal judges erred in law and fact when they did not properly consider the total evidence of the complainant especially under cross-examination which would definitely raise more than reasonable doubt about the case of the State

and at the same time also supported the defence of the Petitioner although there are errors of the learned trial judge and are as follows:-

- (a) that the complainant came and sat at the carton where the petitioner was and where they had sex;
- (b) that the complainant then asked her fare from the petitioner.”

40. By virtue of section 98(3)(b) of the Constitution of the Republic of Fiji, the Fiji Supreme Court enjoys the exclusive jurisdiction, “*subject to such requirements as prescribed by written law*”, to hear and determine appeals from all final judgments of the Court of Appeal.

41. Section 98(4) of the Constitution provides that no appeal may brought to this Court from such a judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

42. The circumstances under which the Supreme Court is permitted to grant leave to appeal to a petitioner in a criminal petition are set out in section 7(2) of the Supreme Court Act, No. 14 of 1998, which provides that:

“In relation to a criminal matter the Supreme Court must not grant leave to appeal unless:

- (a) a question of general legal importance is involved;
- (b) a substantial question of principle affecting the administration of criminal justice is involved; or
- (c) substantial and grave injustice may otherwise occur.”

43. The stringency of the said criteria is amply illustrated in the following dictum of Lord Sumner in *Ibrahim v Rex* [1914] A.C. 599 at page 614:-

“Leave to appeal is not granted “except where some clear departure from the requirements of justice” exists: *Riel v. Reg* (1885) 10 App. Case. 675; nor unless by “a disregard of the forms of legal process”, or by some “violation of the principles of

natural justice or otherwise, substantial and grave injustice has been done”: *In re Abraham Mallory Dittet* (1887) 12 App. Case. 459.”

44. The aforesaid criteria for granting leave under section 7(2) have been the subject of frequent comment by this Court over many years. In *Katonivualiku v The State* (CAV 1 of 1999; 17 April 2003) the Court observed that:

“It is plain from this provision that the Supreme Court is not a Court of Criminal Appeal or general review nor is there an appeal to this Court as a matter of right and whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, *to an appeal against the judgment of the Court of Appeal.....*”(emphasis added)

45. In *Livia Lila Matalulu and Anor v The Director of Public Prosecutions*, [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003), their Lordships expressed the role of the Supreme Court of Fiji in special leave to appeal matters in the following words:-

“The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by *burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice.*” (emphasis added)

46. The above quoted passage was cited with approval by this Court recently in *Sharma v State* [2017] FJSC 5; CAV0031.2016 (20 April 2017) wherein at paragraph 15 of its judgment this Court observed as follows:-

“Thus, it is clear that the Supreme Court, in exercising its powers vested under section 7 (2) of the Supreme Court Act, is not required to act as a second court of criminal appeal, but will *only consider as to whether the question of law raised is one of general legal importance or a substantial question of principle affecting the administration of criminal justice is involved or whether substantial and grave injustice may occur in the event leave is not granted.*” (emphasis added)

47. Bearing these principles in mind, I shall proceed to consider the only ground relied upon by the Petitioner in this case for seeking leave to appeal in some depth. I believe that my tasks will be easier if I paraphrase the sole ground on which leave has been sought by the Petitioner to give it the dressing of a question without in any way detracting from the ground urged, in the following manner:-

“Did the Court of Appeal err in law and fact when it did not properly *consider the total evidence of the complainant*, especially those arising from *questions put in cross-examination*, raise a reasonable doubt about the case of the State and guilt of the Petitioner?”

48. In my view, this Court cannot ignore the fact that this application for leave to appeal to this Court arises from a decision of the Court of Appeal in which the first ground on which leave to appeal had been sought by the State was that “the trial judge erred by not giving any, or any *sufficiently cogent reasons for his reversal of the assessors’ opinion.*”

49. In this case, the learned trial judge had disagreed with the unanimous finding of guilty reached by the assessors, and the right to disagree with the opinion of the assessors is conferred on the trial judge by section 237 of the Criminal Procedure Act of 2009, which provides in section 237(2) that the trial judge “shall not be bound to conform to the opinions of the assessors.”

50. It is noteworthy that section 237(4) of the Criminal Procedure Act goes on to provide that the trial judge shall give his reasons for differing from the opinion of the assessors. In

exercising his power to disagree with the finding of the assessors, the trial judge as much as any appellate Court should make an objective assessment of the totality of the facts of the case, and *provide cogent reasons for differing from the finding of the assessors*. As this Court had the opportunity to stress in *Mudaliar v State* [2008] FJSC 25; CAV0001.2007 (17 October 2008) at paragraph 112 –

“...assessors continue to play a vital role in the administration of justice in Fiji. That role was considered by the Privy Council in a case from Swaziland, *Maklikilili Dhalamini & Ors v The King* [1942] AC 583. Their Lordships observed at page 588 that the giving of opinions by those who were, for practical purposes ‘assessors’ was part of the proceedings of the High Court, and had to be carried out in open court.”

51. In *Ram v State* Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] this Court, at paragraph 80 of its judgment, highlighted the need to independently assess the entirety of evidence led in a case in the following words:-

“A trial judge’s decision to differ from, or affirm, the opinion of the assessors necessarily involves an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge’s decision is challenged by way of appeal as in the instant case. *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 of a supervisory 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.*”(emphasis added)

52. The question therefore in this appeal is whether the learned trial judge had made a proper assessment of the evidence and provided cogent reasons for differing from the assessors. Prematilake JA has very carefully evaluated the evidence in the case including the points raised in the cross examination of the complainant by the learned Counsel for the Petitioner

in paragraphs [22] to [27] of his judgment and concluded that the learned trial judge's findings "that the above pieces of evidence show the complainant's consent for sexual intercourse is not justified and cannot be supported having regard to the totality of evidence." What is pertinent is that at paragraph [44] of his judgment Prematilake JA has gone on to observe as follows:-

"[44] As pointed out above I have closely scrutinized and examined the totality of evidence but I do not find cogent and compelling reasons either in evidence or in the judgment for the Learned Trial Judge to have disagreed with the 'guilty' opinions of the assessors. Even the reasons given are flawed. Neither do I find that there is such a paucity of evidence against the Respondent to justify the Trial Judge's intervention and disagreeing with assessors and acquit the Respondent. In my view, the assessors could have expressed the opinion on the guilt of the Respondent, as they did, on the evidence available and on the directions received in the summing-up. Their opinion is far from being perverse as claimed by the High Court Judge. On the whole of the evidence available, I see no reason to disturb the guilty verdict which could be supported having regard to the evidence. It is not unreasonable or irrational."

53. The crucial issue in the entire trial and before the Court of Appeal was whether the complainant had consented to having sexual intercourse with the Petitioner, and as the Court of Appeal pointed out in paragraph [59] of its judgment, the learned trial judge had adverted to the question in his summing-up only very briefly, to direct the assessors as follows:-

"In relation to the issue of consent, you have to consider whether the accused knew or *ought to have known* whether the victim was not consenting."

54. That is all that he has said about the issue, which was woefully inadequate considering the provisions of the Crimes Act that deal with the fault or mental element (*mens rea*) of the offence of rape in elaborate detail, that were examined in detail by this Court in the course of its judgment in *Tukainiu v State* [2018] FJSC 19; CAV0006.2018 (30 August 2018). At paragraph 49 of its judgment in that case, this Court cited with approval paragraph [34] of the judgment of the Court of Appeal in which that Court relied on section 21(4) of the

Crimes Act to the effect that “in a case of rape, the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively.”

55. The English common law has faced tremendous doctrinal issues throughout the centuries on the fault element (*mens rea*) for rape, which were highlighted in a decision of the House of Lords in *R. v. Morgan* [1976] AC 182, which was a scandalous case of a husband who had invited three of his friends into his home to have sex with his wife. He told them that his wife was 'kinky', that she enjoyed feigning resistance to sex, and that any such resistance should be ignored. The three friends were subsequently charged with rape. The three friends argued that they had believed what the husband had told them, and as a consequence, had honestly believed that the wife was consenting.

56. The House of Lords, by majority decision, held that the three men were not guilty of rape as they had honestly believed that the wife was consenting, even though they had no reasonable grounds for his belief, going against the trend of decisions such as *Bank of New South Wales v. Piper* [1897] A.C. 383, 389-390 and *Sweet v. Parsley* [1970] A.C. 132, which required the honest belief to be reasonable as well. The majority opinion in *Morgan* as expressed by Lord Hailsham at page 214 of the judgment of the House of Lords, was that since “honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held.” Lord Simon gave expression to the minority view when he said at page 220 that-

“A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.”

57. In my view, the very clear provisions of the Crimes Act have been fashioned to guide trial judges in the task of guiding the assessors as well as themselves in regard to the fault element of a crime that does not impose strict or absolute liability, thereby avoiding the difficulties faced by the common law. Section 13 of the Crimes Act provides in general

terms that “all offences consists of physical elements and fault (or mental) elements, unless the law that creates the offence provides that there is no fault element for one or more physical elements of the offence or that different fault elements apply for different physical elements.” Section 18 of the Crimes Act provides that unless the law that establishes a particular offence specifies some other fault element for a physical element of that offence, the fault element for a particular physical element may be *intention, knowledge, recklessness or negligence*.

58. As this Court has observed in paragraph 47 of its judgment in *Tukainiu v State* [2018] FJSC 19; CAV0006.2018 (30 August 2018), since rape is not an offence that attracts strict or absolute liability as contemplated by respectively, sections 24 or 25 of the Crimes Act, section 23 of the Act, which is quoted below is applicable to a case of rape:-

“(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, *intention is the fault element* for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, *recklessness is the fault element* for that physical element.”(*emphasis added*)

59. Given that recklessness is the fault element for rape, it is necessary to consider the provisions of section 21 of the Crimes Act, which explains how this element should be applied to individual cases in the following terms:-

“21. — (1) A person is reckless with respect to a circumstance if —

(a) he or she is aware of a *substantial risk* that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is *unjustifiable to take the risk*.

(2) A person is reckless with respect to a result if —

(a) he or she is aware of a *substantial risk* that the result will occur; and

(b) having regard to the circumstances known to him or her, it is *unjustifiable to take the risk*.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of *intention, knowledge or recklessness* will satisfy that fault element.”

60. While the learned trial judge had adverted to the element of knowledge in his summing up, he had not addressed the assessors on the mental elements of intention and recklessness, which in the circumstances of the case were very crucial. Nor has he dealt with the fault element specifically in his judgment. In my view, the Petitioner ought to have been aware of the risk he was taking with the complainant, who was a total stranger to him and was possibly still under the influence of liquor. The Petitioner had, while on duty as a security guard at the Flea Market, permitted the complainant and her boy-friend to enter the premises and to have sexual intercourse within the premises, and after the boy-friend left the place, he too had sexual intercourse with the complainant, taking a risk in regard to whether or not the complainant consented to sex. Whether the said risk is justifiable or not is a question of fact in terms of section 21(3) of the Crimes Act, and the learned trial judge should have specifically directed the assessors in this regard to enable them to make an informed finding on the issue of consent.

61. In the factual situation that arose in this case, the Petitioner has invoked the principle that every accused person is entitled the benefit of the doubt. The learned trial judge in his summing up has referred to the boy-friend of the complainant as a “mystery” since he simply disappeared from the scene and there is no information at all as to why he left the complainant alone in the Flea Market virtually at the mercy of the Petitioner. There is some evidence that prior to his departure her boy-friend had spoken briefly with the Petitioner, and in the course of his caution interview, he was asked whether he chased him out, which the Petitioner has denied. There is nothing to show that the Police had attempted to trace this individual, who would have been a material witness.

62. The points made by the learned Counsel for the Petitioner in his lengthy cross-examination of the complainant such as her failure to disclose to the Police that she had engaged in sex

with her boyfriend while in the Flea Market, her refusal at first to go to the hospital for medical examination, and the absence of injuries on her buttocks even after allegedly moving backwards when resisting the Petitioner's attempting to forcefully have sexual intercourse with he, have all been considered by the Court of Appeal in paragraphs [23] to [25] of its judgment which I have quoted fully in paragraph 29 of this judgment.

63. The factually erroneous direction that had been given by the trial judge to the assessors to the effect that the complainant had admitted going over to where the Petitioner was seated and sat beside him, when her testimony was that it was the Petitioner who had gone and sat where the complainant was seated and suggested to have sex with her, has been considered by the Court of Appeal in paragraph [26] of its judgment.
64. What is most material of course is the evidence of Vitori the other security guard, who had come to the complainant's rescue and had taken her to the police post, which has been altogether omitted by the learned trial judge from his judgment, and despite which the assessors still found the Petitioner unanimously guilty.
65. In the circumstances, I do not see any justification for granting leave to appeal on the sole ground advanced by him in support of his present application before this Court. As this Court observed recently in paragraph 18 of its judgment in *Sharma v State* [2017] FJSC 5; CAV0031.2016 (20 April 2017)-

“It is to be observed that the injustice that is said to have occurred must not only be one that is substantial but also one that is grave. As such, even if the party succeeds in establishing that some injustice had been caused, that by itself may not be sufficient to obtain relief unless the party is capable of establishing that the injustice referred to is one that meets the threshold laid down in section 7 (2) paragraph (c) of the Supreme Court Act.”

66. The Petitioner has, in my opinion, failed to satisfy the threshold criteria required to obtain leave of this Court to pursue his appeal based on the only ground urged by him.

67. Learned Counsel for the Petitioner has submitted before this Court that the Petitioner will be unduly prejudiced by having to go through a second trial on the same charge on which he has been acquitted by the trial judge. He has also stressed that considering the time lapse of over five years between the incident that took place on 26th December 2012 and the date on which the retrial would commence, a second trial will not further the interests of justice due to the non-availability of witnesses and the fading memory of available witnesses.

68. In my considered opinion, as the Court of Appeal, very properly observed in paragraph [67] of its judgment that “the concept of ‘interest of justice’ should not only be applicable to the prosecution and the defence but also to the general public and society at large (See *Togava v State* Criminal Appeal No.AAU0006U of 1990S: 10 October 1990 [1990] FJCA 6).” It is obvious that both the complainant and the Petitioner will face some amount of prejudice if they have to go through another trial, but it is equally important to vindicate our cherished system of justice.

69. In my view, it is important to bear in mind that acquitting the Petitioner as prayed for by the learned Counsel for the Petitioner in all the circumstances of this case, will serve neither the interest of justice nor the best interest of society, and might in particular undermine the system of administration of justice in place in Fiji, in which, as already noted the assessors play an important role.

70. I am therefore of the opinion that there is no merit in the submissions made on behalf of the Petitioner, and the ground urged for seeking leave to appeal does not meet the stringent threshold criteria for the grant of leave to appeal to this Court.

71. In these circumstances, the application for leave to appeal has to be refused.

Conclusion

72. In the result, I would make order refusing leave to appeal, and dismissing the Petitioner’s application. I shall make order accordingly.

Chandra Ekanayake, J

73. I have read the judgment of Marsoof J. in draft, and I agree with its reasoning, conclusions and orders proposed.

Kankani Chitrasiri, J

74. I am in agreement with the judgment of Marsoof J. and also agree with his reasons, his conclusions and the orders proposed by him.

Orders of the Court

- (1) Application for leave to appeal is refused; and*
- (2) The Petitioner's application is dismissed.*



.....
Hon. Mr. Justice Saleem Marsoof
Justice of the Supreme Court



.....
Hon. Madam Justice Chandra Ekanayake
Justice of the Supreme Court



A handwritten signature in blue ink, appearing to be "K. Chitrasiri", is written over a horizontal dotted line.

Hon. Mr. Justice Kankani Chitrasiri

Justice of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for the Petitioner.

Office of the Director of Public Prosecutions for the Respondent.