

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

CRIMINAL APPEAL NO. AAU 0106 OF 2013  
CRIMINAL APPEAL NO. AAU 0117 OF 2013

BETWEEN : VILIAM NAICORI

Appellant

AND : THE STATE

Respondent

Coram : Calanchini, P  
Basnayake, JA  
Rajasinghe, JA

Counsel : Ms. M. Fesaitu for the Appellant  
Ms. J. Prasad for the Respondent

Date of Hearing : 24 August 2017  
Date of Judgment : 14 September 2017

JUDGMENT

Calanchini, P

- (1) I agree that the appeal should be allowed, the conviction for rape quashed and a conviction entered for defilement. I also agree with the sentence proposed by Rajasinghe JA.

Basnayake, JA

- (2) I agree with Rajasinghe JA that the conviction and sentence for rape should be set aside. I also agree with regard to the conviction for the offence of defilement and the 3 year sentence imposed with effect from 8 November 2013.

## Rajasinghe, JA

### Introduction

- (3) The appellant had been charged in the High Court of Suva for one count of rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. Consequent to the plea of not guilty entered by the appellant, the matter proceeded to hearing. The prosecution proposed to adduce the record of the caution interview in evidence, for which the appellant objected. Hence the *voir dire* hearing was conducted on the 7th of October 2013. The learned trial judge on the same day ruled that the caution interview of the appellant is admissible in evidence. The hearing of the substantive charge also commenced on the same day of 7th of October 2013 and concluded on the 9th of October 2013. The prosecution adduced the evidence of five witnesses, including the complainant. Subsequently, the appellant and one witness gave evidence for the defence. The learned counsel for the prosecution and the defence then made their respective closing addresses on the 9th of October 2013. The learned trial judge delivered his summing up on the 11th of October 2013. The three assessors returned with mixed opinions, where two of them found in their respective opinions that the appellant was not guilty for this offence and one assessor found him guilty. The learned trial judge in his judgment dated 11th of October 2013, dissenting with the majority opinion of the assessors, found the appellant guilty for the offence as charged and convicted him accordingly. The appellant was then sentenced to seven (7) years imprisonment with a non-parole period of five (5) years on the 8th of November 2013.
- (4) Aggrieved with the said conviction, the appellant has filed a timely leave to appeal application to the Fiji Court of Appeal on the following grounds, which I reproduce verbatim as follows:
- i) *The learned Judge erred in law when he shifts the burden of proof to the appellant by requiring the appellant to prove his innocent in the Judgment through his credibility and forthrightness in responding to questions in cross examination,*

ii) *The learned judge erred in law when he failed to include in his summing up and also properly consider the evidence under cross examination of PW2 namely Mereani who was the aunty of the complainant and are as follows;*

a) *She agreed that the complainant was shocked to see her,*

b) *She agreed that when the complainant came down to the foot of the hill near the cave to where she stood, the complainant had a guilty look,*

c) *She agreed that she only beat the complainant after she was asking the complainant and the complainant was not saying anything,*

iii) *The learned trial judge erred in law and in fact when he did not direct the assessors on the complainant's evidence which was given on oath where she agreed that only after she was sacked by the aunty, she then begun to talk a bit.*

(5) The respondent also filed notice of appeal and advanced the following grounds against the sentence imposed by the learned trial judge, that:

i) *The sentence is manifestly lenient having regards to the Sentencing guidelines and applicable tariff for the rape of a child,*

ii) *The period spent in remand is not a mitigating factor.*

(6) The single judge of the Court of Appeal in his ruling dated 15th of January 2015, refused to grant leave to the appeal against the conviction as sought by the appellant and also refused to grant leave to the appeal against sentence as advanced by the respondent.

(7) The appellant then renewed his appeal against the conviction on the same grounds pursuant to Section 35 (3) of the Court of Appeal Act. Accordingly, this court heard the respective oral submissions on the 24th of August 2017 and considered the written submissions of the appellant and the respondent. The learned counsel for the respondent informed the court on the date of the hearing that the respondent also renews his appeal against the sentence.



### **Factual Background**

- (8) The respondent alleged that the appellant on the 5th of May 2011, met the complainant at the Bilo gun site as she came to return the keys of his house. He then offered to take her on a site seeing visit around the gun site. The appellant then pulled her into a cave and forcefully removed her clothes. Subsequently, he undressed himself and forcefully had sexual intercourse with the victim without her consent.
- (9) The appellant denied this allegation, though he admitted that he had sexual intercourse with the complainant on the 5th of May 2011 at the gun site. He claimed that it was a consensual sexual intercourse.

### **Ground One**

- (10) Having briefly discussed the factual and procedural background of this appeal, I now turn to the first ground of appeal that is founded on the contention that the learned judge has shifted the burden of proof to the appellant in his judgment.
- (11) The submissions of the appellant pertaining to this ground of appeal is mainly focused on the paragraph twelve of the judgment, where his Lordship has stated that:

*“Coupled with the above, the way the accused re-acted to being cross-examined by the prosecutor after giving sworn evidence, did not put him in a good light. I observed him to be a very evasive witness. He evaded most of the questions thrown by the prosecution. He was not forthright, leading me to the conclusion that he was not a credible witness. Had he been forthright with his answers, I would possibly have reached a different conclusion.”*

- (12) According to Section 237 (5) of the Criminal Procedure Act, the Judgment of the court encompasses the summing up, the decision of the court, together with the reasons for differing with the majority opinion of the assessor.

- (13) The Supreme Court of Fiji in **Ram v State [2012] FJSC 12; CAV0001.2011 (9 May 2012)** has expounded the scope of Section 237 of the Criminal Procedure Act, emphasizing the duty of the judge to provide reasons, if he disagrees with the majority opinion of the assessors in an inclusive manner. Justice Marsoof held ( at para 79) that:

*"After the Criminal Procedure Ordinance No. 23 of 1875 introduced a system of a trial by a judge sitting with assessors as an alternative to trial by jury with respect to certain selected categories of cases involving the native population, trial by jury was abolished altogether by the Criminal Procedure Code (Amendment) Ordinance No. 35 of 1961. The system of trial by a judge and assessors differs in one important aspect from trial by jury, as unlike under the jury system, even the unanimous opinion of the assessors does not bind the trial judge, who is free in appropriate cases, to differ and pronounce his own verdict. Section 84 of the Ordinance of 1875 simply provided that ".....the opinion of each assessor shall be given orally.....but the decision shall be vested exclusively in the judge" but section 299(2) of the Criminal Procedure Code, Chapter 21, which was in force at the time of the High Court trial in 2008, expressly provided that the trial judge "shall not be bound to conform to the opinions of the assessors". According to the proviso to the said sub-section, when the trial judge disagrees with the majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion, and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court". Although the **Criminal Procedure Code** has since been repealed, section 237 of the Criminal Procedure Decree of 2009, which replaced the above quoted provision of the Code, follows the same principle and provides that the trial judge "shall not be bound to conform to the opinions of the assessors" and goes on to re-enact that the trial judge shall give his reasons for differing from the opinion of the assessors."*



- (14) In view of the above observation, this court needs to examine the summing up and the judgment as a whole in order to determine whether the learned judge has misdirected the assessors and himself by shifting the burden of proof on the appellant.
- (15) In paragraph two of the summing up, the learned judge has directed the assessors that they have to decide what happened in this case and which version of the evidence is reliable.
- (16) The learned judge in paragraphs four and thirty of the summing up has specifically explained that the burden of proof rests on the prosecution and it never shifts to the accused, as he is presumed to be innocent until he is proven guilty.
- (17) In spite of his direction given in paragraphs four and thirty, the learned judge has directed the assessors in paragraphs twenty two and twenty six of the summing up, that the decision of accepting which of the conflicting version of events given by the prosecution and the defence mainly depends on their assessment of credibility between the appellant and the complainant. Who is more credible between the appellant and the complainant? The learned judge in paragraphs twenty two and twenty six has stated that:  
  
*(22) The state's case against the accused stands or falls on whether or not you accept the complainant or the accused's version of events on the second and third element of rape, as discussed in paragraphs 9 (i) and 9 (ii) hereof. If you accept the complainant's version of events, then you must find the accused is guilty as charged. If you accept the accused's version of events, then you must find him not guilty as charged. I will not bore you with the details, but I will summaries to you the parties' competing versions of events.*  
  
*(26) So, you will see that the complainant's and accused's version of events on the alleged rape incident are completely at odds with each other. Your decision, on which version of events to accept and/or reject, will depend largely on your assessment on which of the two witnesses is the credible one. In other words, the state's case against the accused stands or falls, on whether or not, you find the*

*complainant or the accused to be a credible witness. You have watched them give evidence in the court room. Who was the more credible of the two? Who was the more forthright of the two? Who was the evasive witness of the two? Who was hiding something from you? Who, from your point of view, was telling the truth? Your answers to the above questions will determine your answers to whether or not the accused is guilty as charged. If you find the complainant to be a credible witness, then you will find the accused guilty as charged. If you find the accused a credible witness, then you will find him not guilty as charged. It is entirely a matter for you"*

- (18) In view of the above two paragraphs, the learned judge has given the direction to the assessors to evaluate the evidence given by the appellant and the complainant, in order to determine who is more credible and telling the truth. If they found that the evidence given by the complainant is credible and truthful, they can find the appellant is guilty. Likewise, if they found the evidence given by the appellant is credible and truthful, the assessors can determine the appellant is not guilty.
- (19) In paragraph thirteen of the Judgment, the learned judge has found the complainant as a more credible witness than the appellant. Accordingly, the learned judge has accepted the evidence given by the complainant. In paragraph thirteen, the learned judge states that:

*"As a result of the above, I found the complainant a more credible witness than the accused, leading me to accept her as a credible witness. I accept her evidence that she did not consent to sex with the accused, at the material time, and that the accused knew, she was not consenting to sex, at the material time. If the complainant consented to sex at the material time, why the need to throw her on the floor, resulting in abrasions to the back of her left shoulder."*

- (20) Accordingly, the learned judge has accepted the evidence given by the complainant on the ground that she is a more credible witness than the appellant. By doing that, the learned judge has placed a burden on the appellant to satisfy the court that the evidence given by him in the



hearing is more credible than of the complainant's in order to defeat the case of the prosecution, which he failed to satisfy.

- (21) In the minority decision of Brennan J in Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) has succinctly discussed the appropriate approach for directing the jury in a case, where there is conflicting versions of evidence given by the prosecution witnesses and the evidence given by the defence witnesses. Brennan J held that:

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

- (22) Dunford J in R v Li (2003) 140 A Crim R 288, at 301, adopting the principle enunciated by Brennan J in the minority decision in Liberato (supra) held that:

*"Not only was it there in his last passage a reference to "a doubt based on reason" but in two instances, the judge has proposed to the jury the question which of the two cases is correct, what the complainant says or what the appellant says. This was also a material misdirection. The issue can never be*



*which of the cases is correct or who of the complainant and the accused is telling the truth: **Liberato v The Queen (1985) 159 CLR 507 at 515**. They should have been directed the test was whether taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence."*

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

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

- (24) The appellant is not obliged to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the appellant has decided to give evidence. Therefore, such evidence given by the appellant has to be taken into consideration, when determining the issues of facts of this case.

- (25) Lord Reading CJ in **Abramovitch (1914) 84 L.J.K.B 397** held that:

*"If an explanation has been 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 reasonably be true, although they are not convinced that it is true, the prisoner is entitle to be acquitted, inasmuch as the crown would then have failed to discharge the burden impose 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."*

- (26) Accordingly, the learned judge is required to direct the assessors that if they believe the evidence given by the appellant is true, then the appellant must be acquitted. If the assessors neither believe nor disbelieve the version of the appellant, yet, it creates a reasonable doubt in their mind about the prosecution's case, they must find the appellant is not guilty.
- (27) Even if the assessors and/or the judge reject the version of the appellant, that does not mean that the prosecution has established that the appellant is guilty for the offence. Still they have to satisfy that the prosecution has established, on its own evidence, beyond reasonable doubt, that the appellant has committed this offence as charged in the information.
- (28) According to the above discussed reasons, it is clear that the directions given by the learned judge in paragraphs twenty two and twenty six of the summing up are actually founded on misguided principles on the burden of proof in a criminal proceedings. However, I am mindful about the directions given by the learned judge in paragraphs four and thirty of the summing up, where his Lordship has specifically stated that the burden of proof that the accused is guilty beyond reasonable doubt lies on the prosecution and it will never shift to the accused at any stage of the trial. Irrespective of the above directions given in paragraphs four and thirty, the directions given in paragraphs twenty two and twenty six in order to evaluate the evidence given by the complainant against the evidence of the appellant, has created a confusion, thus making a material misdirection on the burden of proof.
- (29) In spite of the above misdirection on the burden of prove, the assessors in their majority opinion found the appellant is not guilty for the offence as charged. The learned judge in his judgment, dissenting with the majority opinions of the assessors, found the appellant guilty



for the offence and convicted him accordingly. The learned judge is the final adjudicator of facts and law of the matter. The assessors only provide him their opinion, which he could take into consideration in his judgment. (vide Noa Maya v State 2015, FJSC 30; CAV009.2015 (23 October 2015)). Hence, I now proceed to determine whether the learned judge in his judgment has misdirected himself on the issue of burden of prove.

- (30) In paragraph twelve of his Judgment, the learned judge has found the appellant is not a credible witness on the grounds of his evasiveness and the demeanour in giving evidence during the cross examination by the learned counsel for the prosecution. The learned judge then in paragraph thirteen found the complainant as a more credible witness than the appellant and accepted the evidence given by the complainant.
- (31) It is clear that the learned judge has found the appellant guilty by considering whose evidence is more credible. By doing that, the learned judge has misdirected himself with regard to the burden of proof, causing a miscarriage of justice.

### **Grounds Two and Three**

- (32) The second and third grounds of appeal are founded on the contention that the learned judge has not properly directed the assessors in the summing up about the evidence given by the second witness for the prosecution, specially regarding the events that have taken place after she met and encountered the complainant and the appellant near the gun site. Moreover, the appellant contends that the learned judge has failed to properly direct the assessors in the summing up about the evidence given by the complainant during the cross examination, where she has stated that she told her aunty about this incident after she was beaten up by the aunty with a stick. Therefore, for the convenience, I proceed to deal with the second and third grounds of appeal together.
- (33) The prosecution presented the evidence of five witnesses. They are the complainant, the aunty of the complainant, father of the complainant, the doctor who conducted the medical examination of the complainant and the police officer who conducted the caution interview of

the appellant. The medical report of the complainant and the caution interview of the appellant were tendered as the exhibits of the prosecution. The defence presented the evidence of the appellant and one Rusiate who is the son of the second witness of the prosecution and cousin of the complainant.

- (34) The complainant in her evidence explained about this incident. She has gone to the gun site to return the key to the appellant. He was in the 'bure'. He has offered to take her around the gun site. The appellant has then pulled her inside a cave. He has then pushed her down, injuring her left shoulder. The appellant has not said anything. She was scared and ashamed. He has pulled her wrap-around 'sulu'. The appellant then undressed himself and put his penis into her vagina. The appellant has had sexual intercourse with her for about five minutes. When he finished, she has heard that her aunty was calling her from outside of the cave. She came out from the cave. Her aunty was angry and hit her, asking what happened. She cried and only after she was hit by her aunt with a stick, she told her aunty about this incident.
- (35) The aunty of the complainant, in her evidence stated that the complainant looked shocked and guilty when she came out of the tunnel. She was crying and had scratches on her shoulder. When she asked what happened, the complainant did not answer initially. Hence, she had to beat the victim with a stick, then she told her about this incident.
- (36) The doctor in his evidence specifically stated that, according to his opinion, a penetration had most likely occurred, but not beyond reasonable doubt. Moreover, the doctor has stated in his evidence that he cannot be certain of what happened. If the examination was done a day after the incident, he would be certain of his medical conclusion.
- (37) Detective Sergeant Mikaele Koro, who is the interviewing officer of the caution interview of the appellant, explained in his evidence the manner and the way he recorded the interview of the appellant.



(38) The main contention of the appellant is that the learned judge has not directed the assessors the following evidence, that were given by the first and second witnesses for the prosecution, *inter alia*:

- i) The complainant was shocked and looked guilty when she came out of the tunnel,
- ii) When the aunty asked her what happened, she did not answer initially.
- iii) The complainant told her aunty about this incident, only after she was beaten up by the aunty with a stick.

(39) Archibold 2017 Paragraph 4-438 pg. 555 states that:

*"Brevity in summing up is a virtue, not a vice; there is no obligation to rehearse all the evidence or all the arguments; generally speaking, however, the longer a trial has lasted, the greater will be the jury's need for assistance in relation to the evidence; in a trial lasting several days or more it will generally be of assistance if the judge summarizes those factual matters that are not in dispute and, where there is a significant dispute as to material facts, identifies succinctly those pieces of evidence that are in conflict; but the summing up should never be a mere rehearsal of the evidence and appeals based merely on the failure of the judge to refer to a particular piece of evidence or a particular argument will find little favor in the Court of Appeal; R v Farr, 163 J.P.193, CA. Nevertheless, a judge cannot abandon his responsibility to marshal and arrange the facts, issues by issue, to counsel and their speeches, or to the jury and their notes; R v Amado-Taylor (2000) 2 Cr. App. r. 189, CA"*

(40) According to page ninety eight of the record of the proceedings in the High Court, it appears that the learned counsel for the appellant has raised these issues before the learned judge as re-directions. The record of the proceedings in the High Court states that the learned judge has accordingly re-directed the assessors. Therefore, it is clear that the learned judge has re-directed the assessors regarding the above discussed evidence.

Determination of Appeals by the Court of Appeal Pursuant to Section 23 (1) of the Court of Appeal Act

(41) Section 23 (1) (a) of the Court of Appeal Act stipulates that:

*"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 or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."*

(42) The proviso of Section 23 (1) of the Court of Appeal Act states that:

*"Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

(43) According to Section 23 (1) (a), it is clear that the Court of Appeal shall allow the appeal if the court thinks that the verdict is unreasonable or cannot be supported having regard to the evidence or that there had been a wrong decision of any question of law or on any ground there was a miscarriage of justice. It is clear from the proviso to section 23 (1) the duty of the Court of Appeal is to satisfy itself that there has been no substantial miscarriage of justice at the trial.

(44) Having considered Section 23 (1) of the Court of Appeal Act, I now proceed to evaluate the evidence adduced in the hearing, in order to determine whether the conviction entered by the learned judge is unreasonable or cannot be supported having regard to the totality of the evidence adduced in the hearing or there has been a miscarriage of justice.



- (45) In this case, the main disputed issue is whether the complainant gave her consent to the appellant to have sexual intercourse, which took place in private, inside the gun site cave. On this issue, the consent depends on the evidence given by the complainant against the evidence given by the appellant. Under such circumstances, it is necessary for the assessors and the trial judge to scrutinize the evidence given by the complainant with great care. (**vide R v Li ( supra), Goundar v State (supra)**).
- (46) While dissenting with the majority opinion of the assessors, the learned judge in paragraph eleven of his judgment has found that the healed abrasions that were found on the left shoulder of the complainant support the claim of the complainant that she did not consent to the appellant to have sexual intercourse with her.
- (47) The complainant in her evidence said that her left shoulder got injured when the appellant pushed her down inside the cave. The appellant and the complainant had no disagreement regarding the position that they had this sexual intercourse. The appellant came on top of her while she was lying on the ground of the cave. There is no evidence adduced by the prosecution that the complainant was lying on a cloth or any other material. Accordingly, it is clear that the complainant had this alleged sexual intercourse with the appellant while she was lying on the open ground inside the cave. According to the evidence given by the complainant, the appellant had this sexual intercourse with her for about five minutes.
- (48) The learned judge neither in the summing up directed the assessors nor in the judgment has directed himself about this evidence regarding the circumstances in which this alleged sexual intercourse took place. Under such circumstances, it is difficult to deny the possibility that such abrasions could have been sustained on the shoulder of the complainant, if she engaged in a consensual sexual intercourse with the appellant, in the same position on the ground of the tunnel. Hence, I find that the healed abrasions found on the left shoulder of the victim could neither support the version of the prosecution nor of the defence.
- (49) During the evidence-in-chief, the complainant had said that the appellant pulled her inside the cave. However, during the cross examination, she had stated that the appellant did not ask

her to follow him. He went into the cave and she followed him. This inconsistent nature of the evidence given by the complainant could undoubtedly create a reasonable doubt, whether the appellant pulled her inside the cave or she just followed him into the cave on her own volition, unless the complainant provides an explanation for this contradiction in her own evidence. The learned judge has neither directed the assessor in the summing up nor himself in the judgment regarding this inconsistent nature of the evidence given by the complainant.

(50) The complainant in her evidence has stated that she did not like what happened to her. According to her evidence, the appellant had not said anything to her nor she has said anything to the appellant during this alleged incident. However, changing her earlier position, the complainant has then said that she told the appellant that she did not want the appellant to do what he was going to do. Again she has said that neither she nor the appellant said anything. Consequent to this inconsistent nature of the evidence given by the complainant, there is a reasonable doubt whether she told the appellant that she did not like what he was doing or not. The learned judge has neither directed the assessor in the summing up nor himself in the judgment regarding this inconsistent nature of the evidence given by the complainant.

(51) Moreover, during the cross examination, the complainant has stated that she did not know that Rusiate was following her from behind, when she was going to the gun site. She has then said that she did not try to run and escape from the cave, as Rusiate was at the door. She has not sought assistance from him, as she suspected that he also wanted to have sex with her. According to the evidence given by the second witness for the prosecution, she had asked Rusiate about the complainant, when she was looking for the complainant around the area. Rusiate had then told her that the complainant is down there. The second witness for the prosecution has not specifically stated about the place or the location where she met Rusiate. Meanwhile, Rusiate, who was called to give evidence for the defence, has stated that he saw the complainant and the appellant walking into the cave. The appellant was walking in front of the complainant and she was following him. His version of events supports the evidence given by the complainant in cross examination, where she has stated that she just followed the appellant into the cave. Furthermore, Rusiate in his evidence has stated that he stayed in the



office which is about five metres away from the tunnel after the appellant and the complainant walked into the cave. Rusiate has then **heard that** the second witness for the prosecution was calling the complainant. He has then run towards the tunnel. Would it create a reasonable doubt whether Rusiate was standing at the door of the cave, preventing the complainant from escaping and also waiting to have sex with her, if all of this evidence was properly taken into consideration? The learned judge has neither directed the assessors in the summing up nor himself in the judgment about this evidence.

- (52) I now draw my attention to the admissions made by the appellant in his caution interview, which had been tendered in evidence as an exhibit by the prosecution.
- (53) The learned judge in paragraph twenty nine of the summing up has directed the assessors as follows:

*“If you accept that PW5 was a credible witness, then you will accept that the accused gives his alleged confession voluntarily, and use the same against him. In other words, by accepting the accused’s alleged confession, it will have the effect of strengthening the complainant’s evidence and the complainant’s credibility as a witness, and thereby find the accused guilty as charged. If you find the accused’s explanation was credible, then you will reject his alleged confession. You will have to work on the other evidence to make a decision in this case. It is a matter entirely for you”.*

- (54) According to the above passage in the summing up, I find that the learned judge has directed the assessors to consider only the voluntariness in making this alleged confession by the appellant. The issue of the voluntariness in making the caution interview by the appellant, is a matter relevant to the admissibility of the caution interview in evidence, which is an issue for the learned judge to decide upon a *voir dire* inquiry. The truthfulness and probative value of the contents of the caution interview is a matter for the assessors and the trial judge to decide in the substantive hearing.

- (55) The learned Judge in his judgment has not discussed about the truthfulness or the probative value of the contents of the caution interview made by the appellant. Furthermore, his Lordship has not stated in the judgment, that the evidence adduced in the hearing led him to change his earlier position, which he took in the *voir dire* ruling, regarding the voluntariness in making the caution interview.
- (56) Hon Chief Justice Gates in Lulu v State [2017] FJSC 19; CAV0035.2016 (21 July 2017) found that the direction suggested by Justice Keith in Maya v State [2015] FJSC 30; CAV009.2015 (23 October 2015) has no relevancy, if the trial judge remains of the conclusion that he reached in *voir dire* that the confession was made voluntarily. Where his Lordship Chief Justice held that:

*“In his judgment after receiving the unanimous opinions of the assessors of guilt, the trial judge came to the same conclusion. The judge had not changed his mind during the trial on the voluntariness of the petitioner in giving the caution interview. The direction as suggested in Noa Maya (supra) Keith J at para 23 following Mushtaq [2005] UKHC 25 is therefore not so relevant”.*

- (57) In this case, the learned judge has not changed his mind regarding his earlier conclusion on the issue of voluntariness in making the caution interview. Hence, the direction on voluntaries in the summing up has no relevance.
- (58) Prematilaka JA in Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) has discussed the appropriate direction to the assessors in respect of the confession made in the caution interview in an elaborative manner, where his Lordship found that:

*“How a trial Judge should direct the assessors as to a confessional statement or a caution interview has been discussed in a number of cases over the years. In Chand v State Criminal Appeal No. AAU 0015 of 2012: 27 May 2016 [2016 FJCA 61] the Court of Appeal discussed in great detail most of the issues pertaining to voluntariness, admissibility, weight or probative value and*



truthfulness of a confession or a caution interview and the nature of directions to the assessors. The Court in *Chand* had considered inter alia the decisions in *Khan v State Petition for Special Leave to Appeal No. CAV009 of 2013*: 17 April 2014 [2014 FJSC 6], *Burns v The Queen* [1975] HCA 21: [1975] 132 CLR 258, *Kean v State Criminal Appeal No. AAU 95 of 2008*: 13 November 2013 [2013 FJCA 117], *Kean v State Criminal Appeal No. CAV0015/2010*: 12 August 2011 [2011 FJSC 11], *Basto v R* [1954] HCA 78: [1954] 91 CLR 628 at 640 and 641, *Chan Wei Keung v The Queen* [1967] 2 WLR 552, *Wendo v The Queen* [1963] A.J.L.R. 77 (Aust.), *Prasad v The Queen* [1981] 1 A. E. R 319, *R. v Murray* [1951] 1 Q. B. 391, *R. v Cleary* [1963] 48 Cr. A. R. 116, *R. v Priestly* [1966] 50 Cr. A. R. 183, *R. v Bass* [1953] 1 Q.B. 680, *R. v. Sutherland and Johnstone* [1959] Crim. L. Rev. 440, *R. v Parkinson* [1964] Crim. L. Rev. 398, *R.v Fudge* [1964] 108 S. J. 900, *R. v Ward*, *The Times* 18/11/1964, *Sparks v The Queen* [1964] A. C. 964 and *Regina v. Mushtaq (Appellant)* [2005] UKHL 25.

The following principles could be deduced from the said decisions. (i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness. (ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial ('second bite at the cherry') but such evidence goes to the weight and value that the jury would attach to the confession (*Chan Wei Keung*, *Prasad* and *Murray*) inter alia on the premise that there might be cases in which the jury would conclude that a statement is involuntary according to the rule relating to inducement, but nonetheless it is manifestly true (*Wendo*)(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances

*surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them"*

- (59) The learned judge in his summing up has not directed the assessors to decide following issues; whether the appellant made this confession, the truthfulness, and what is the probative value of the contents of the confession.
- (60) In order to determine the truthfulness and the probative value of the contents of the caution interview, it is necessary to take into consideration all the evidence adduced in the hearing.
- (61) According to the answers given by the appellant pertaining to questions fifteen and eighteen of the caution interview, the appellant has called the complainant to come with him inside the gun tunnel site. While they were inside the gun tunnel, he has pulled the complainant in to one corner. However, the complainant in her evidence-in-chief has stated that she was pulled inside the cave by the appellant. During the cross examination, contradicting her earlier version given in evidence-in-chief, the complainant has stated that the appellant went into the cave and she followed him. Thereafter the appellant pushed her down to the floor. Accordingly it is clear that there are inconsistencies between the evidence given by the complainant with the confession made by the appellant in the caution interview, creating a reasonable doubt about the truthfulness of the contents of the confession.
- (62) Having considered the reasons discussed above, it is my considered **opinion** that if all these issues discussed above, pertaining to the evidence given by the complainant, were taken into proper consideration, together with all other evidence adduced during the course of the hearing, the verdict would have been favorable to the appellant. I accordingly find that the conviction entered against the appellant cannot be supported, having regarded the totality of evidence adduced in the hearing. Hence, I am satisfied that a substantial miscarriage of justice has occurred. I accordingly set aside the conviction and the sentence entered against the appellant for the offence of Rape.



- (63) In view of the above conclusion I find no reason to proceed and determine the grounds of appeal advanced by the respondent against the sentence. I accordingly dismiss the same.

**Alternative Count of Defilement of young person between 13 and 16 years of age**

- (64) Section 162 (1) (f) and (2) of the Criminal Procedure Act allows the court to convict an accused for a lesser or alternative offence, where it states that:

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

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

*ii) The court may record convictions for certain offences in accordance with sub-section (1) notwithstanding that no charge has been laid for the lesser or alternative offence in accordance with the provisions of this Decree.*

- (65) According to the evidence adduced during this hearing, the appellant and the complainant did not dispute about this alleged sexual intercourse. The complainant was thirteen years old at the time this sexual encounter took place. According to the evidence given by the appellant, he knew the complainant as she is related to him as a cousin.

- (66) Section 215 of the Crimes Act states that:

*i) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years,*

*Penalty — Imprisonment for 10 years.*

ii) *It shall be a sufficient defence to any charge under sub-section (1) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.*

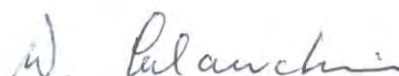
iii) *It is no defence to any charge under sub-section (1)(a) to prove that the person consented to the act.*

(67) In view of the evidence adduced in the hearing, I am satisfied that the appellant is guilty for the offence of defilement of young person between 13 and 16 years age. I accordingly find appellant guilty for the said offence of defilement of young person between 13 to 16 years age, contrary to Section 215 (1) of the Crimes Act and convict for the same.

(68) Taking into account the age of the victim, the age of appellant, and the fact that the appellant had been in prison for nearly three years and ten months, I am of the view that justice will be served by imposing a sentence of three (3) years. I accordingly sentence the appellant to three (3) years imprisonment for the offence of defilement of young person between 13 to 16 years age, contrary to Section 215 (1) of the Crimes Act, to be effective from 8th of November 2013.

**The Orders of the Court are:**

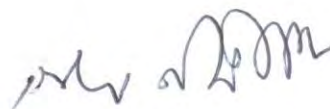
- i) The Appeal is allowed,
- ii) Conviction for the offence of Rape is quashed and sentence is set aside,
- iii) The Appellant is convicted for the offence of defilement of young person between 13 to 16 years age, contrary to Section 215 (1) of the Crimes Act,
- iv) The Appellant is sentenced to three (3) years imprisonment, with effect from 8th of November 2013.



**Hon. Mr. Justice W Calanchini**

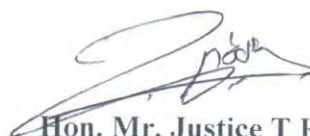
**PRESIDENT, COURT OF APPEAL**





Hon. Mr. Justice E Basnayake

JUSTICE OF APPEAL



Hon. Mr. Justice T Rajasinghe

JUSTICE OF APPEAL