

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

CRIMINAL APPEAL NO.AAU 0019 of 2014
(High Court Criminal Case No. HAC 004 of 2013)

BETWEEN : **THE STATE**

Appellant

AND : **LEPANI LIKUNITOGA**

Respondent

Coram : Chandra, JA
Gamalath, JA
Prematilaka, JA

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

Date of Hearing : 20 February 2018

Date of Judgment : 08 March 2018

JUDGMENT

Chandra, JA

[1] I agree with the reasoning and conclusions in the judgment of Prematilaka, JA.

Gamalath, JA

- [2] In this appeal, the main focus is on the fact that whether the Learned Trial Judge had acted correctly when he disagreed with the unanimous opinion of guilt that the assessors returned after trial.
- [3] Prematilaka J had referred to the legal authorities relevant to this subject and they are clearly elucidating as to the legal approach to be taken in disagreeing with the assessors' opinion.
- [4] The comment I wish to make in relation to this matter is slightly on a different issue. In the summing up of the Learned Trial Judge, he had extensively dealt with the evidence and left it for the consideration of the assessors.
- [5] However, in the Judgment where he disagreed with the assessors' opinion, he had expressed a great account of his own opinion on facts which he had never left with the assessors for their consideration.
- [6] It is true that the Judges are free to hold their own views on the facts. However, in my opinion it is incumbent on the Trial Judge to share those views with the assessors at the summing up and invite them to freely assess them in arriving at their own opinion eventually. They could either agree with the Trial Judge or could even disagree with his opinion on facts. They are the judges of facts primarily and it is well within their domain to either accept the judges view on the facts and adopt them as their own in arriving at a proper conclusion or reject them *in toto* and to follow a course that their own conscience dictate.
- [7] If the Trial Judge had not shared his opinion on the facts with the assessors in the summing up, whether it is justifiable for him to reject their opinion subsequently, based on a new set of logic or reasons, which he had failed to share with the assessors in the summing up for their consideration is the question that needs probing into.

- [8] In my view, the Learned Trial Judge had seriously erred in this case by not placing before the assessors his views which are reflected in his judgment and in the circumstances, there is a serious error in the procedure adopted at the trial.
- [9] Therefore, I am in agreement with the conclusion of Prematilaka J that this appeal should be allowed.
- [10] Another issue is with regard to the intention involved in a case of Rape. Prematilaka J had referred to the decision of Tukainiu v. The State, Criminal Appeal No. AAU0086 of 2013, 16 September 2017, [2017] FJCA 118; I hold a view different to that of Prematilaka J, and disagree with the substratum in that decision with regard to the fault element of the offence of Rape is concerned. However, to be engaged in a lengthy discussion on that in this appeal will be a mere academic exercise, and thus is redundant.
- [11] Finally, I agree with the conclusions of the draft judgment of Prematilaka J, that this appeal should be allowed.

Prematilaka, JA

- [12] This appeal by the State had been preferred consequent to an acquittal of the Appellant on the sole count of rape under section 207 (1) and (2) of the Crimes Decree (now the Crimes Act, 2009).
- [13] The Information dated 12 February 2013 describes the particulars of the count as the Respondent having had carnal knowledge of P (name withheld) without her consent on 26 December 2012 at Suva in the Central Division.
- [14] After trial the assessors on 27 March 2014 expressed unanimous opinions that the Respondent was guilty of rape. The Learned High Court Judge disagreed with their opinions and acquitted the Respondent in his judgment on 28 March 2014.

Preliminary observations

- [15] The Appellant had sought leave to appeal against the acquittal on eight grounds of appeal in the application for leave to appeal dated 28 April 2014 June 2014 and the single Judge of the Court of Appeal had granted leave in respect of all the grounds on 12 June 2015. Both parties had filed written submissions with regard to the application for leave and the counsel for the Respondent informed Court at the hearing of the appeal that he would rely on the same submissions for the substantive appeal as well. A fresh set of written submissions on behalf the Appellant had been filed on 26 December 2017.

Grounds of Appeal

- [16] Therefore, the grounds of appeal that would be considered by this Court are as follows.

Ground 1

'The Trial Judge erred by not giving any, or any sufficiently cogent reasons for his reversal of the assessors' opinion.'

Ground 2

'The Trial Judge erred in fact and law in finding that the assessors' opinion seemed to be perverse.'

Ground 3

'The Trial Judge misdirected himself and or erred in fact and law when he found that the Victim's (V) evidence corroborated the "version" of the Defendant (D).'

Ground 4

'The Trial Judge erred in principle by purporting to make a finding that there was corroboration of the D's case ("version")'

Ground 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.'

Ground 6

'The Trial Judge did not direct himself (or the Assessors) in regard to recent complaint or evidence of distress.'

Ground 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 V did consent.'

Ground 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.'

Summary of evidence

- [17] The complainant had started drinking Rum at her sister-in-law's place at Nausori towards the night of 25 December 2012 with a few others and moved to Raiwaqa and continued drinking beer. Thereafter, all of them had come to Suva by taxi around 11.00 p.m. and entered the night club called Ritz where they had enjoyed and had

more beer. After Ritz was closed, they had started walking to go to another night club some distance away. The complainant and her boyfriend were walking together and the others had already gone ahead of them. While they were passing Flee Market around 4.00 a.m. on the following day, a security officer there had stopped and called them in. They had climbed over the gate and entered the premises. The security officer who is the Respondent had given them a carton to sit and he had gone to another place. 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. She had seen the boyfriend speaking to the Respondent on his way out. She had continued to sit on the carton. Then the Respondent had come and sat next to her and suggested to have sex. She had refused. Then, the Respondent had pushed her on to the ground, took out her pants and panty, got on top of her and removed her t-shirt too. He had removed his pants as well. Thereafter, the Respondent had touched her vagina, parted her legs and had sexual intercourse despite her shouting. According to her, she never consented to the act of sexual intercourse.

[18] Then, another security guard who was called by the prosecution as a witness had come and asked the complainant what she was doing there. She was wearing her pant when the other security guard came. The complainant had told the second security guard, Vitori Tabua that after her boyfriend had left the Respondent had come and wanted to have sex with her but when she refused he had removed her pants and had sexual intercourse with her against her consent. The Respondent had stood nearby and listened to the conversation. Thereafter, Vitori had suggested going to the police station but the Respondent had attempted to stop them from reporting the matter to the police. However, both the Complainant and Vitori had first gone to Market police station and then to Totogo police station. Later the Complainant had gone to CWM hospital and been examined by a doctor.

[19] It has been recorded *inter alia* under agreed facts that the Respondent had engaged in sexual intercourse with the complainant on 26 December 2012 and the dispute in issue was whether she had consented to having sexual intercourse with the Respondent.

[20] I would now proceed to consider the grounds of appeal.

Ground 1

'The Trial Judge erred by not giving any, or any sufficiently cogent reasons for his reversal of the assessors' opinion.'

Ground 2

'The Trial Judge erred in fact and law in finding that the assessors' opinion seemed to be perverse.'

[21] The State had coupled first and second grounds of appeal and made submissions.

[22] It is pertinent to quote some paragraphs from the judgment which I think is important to the complaint before this Court.

'I direct myself on my own summing up and on looking at the evidence in its entirety I find that I cannot agree with the guilty verdict of the assessors. I find the guilty verdict of the assessors appears to be perverse.'

'In the cross examination the victim admitted that she did not tell police that she had sex with her boyfriend. 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.'

'The victim had sex with her male companion inside the Flea Market before the incident. Her male companion was never seen after she had sex with him. It is a mystery up to know as to what happened to him. Victim admitted that she asked money from the accused after the incident. She confirmed this in her re-examination.'

'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.'

- [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 redirection.
- [27] Therefore, I find that the Learned Judge's finding in the judgment 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.
- [28] In terms of section 237 (2) of the Criminal Procedure Decree (now Criminal Procedure Act) the judge in giving judgment shall not be bound to conform to the opinions of the assessors. Section 237(4) compels the judge to give reasons for differing with the majority opinion of the assessors if he does not agree with the majority opinion. Section 299 (2) of the Criminal Procedure Code also contained similar provisions.
- [29] A large body of judicial decisions exists interpreting the scope of this legal framework. It appears that Courts over the years have attempted to find a basis to give effect to the legislative intention while not allowing the institution of assessors to go into oblivion and become totally redundant or insignificant. This balancing exercise seems to have evolved into looking for cogent reasons in the dissenting judgment to justify or set aside the trial judge's disagreement with assessors' opinion. I shall elaborate this further by referring to past authorities.
- [30] It has been held that the assessors have no power to convict but they offer opinions which the judge may or may not accept. Their function is said to be advisory only and the trial judge is not bound even by their unanimous opinions. In **Walili v State** Criminal Appeal No. AAU0055 of 2013: 26 May 2017 [2017] FJCA 55 the Court of

Appeal referring to several previous decisions¹ including two from the Supreme Court remarked

*'No accused could be convicted on the opinion of the assessors alone in Fiji.'
'Therefore, the trial Judge cannot under any circumstances abdicate or surrender to the assessors the responsibility cast on him by section 237 of the Criminal Procedure Decree of 2009.'*

- [31] A judge who fails to form and give effect to his own view of guilt or innocence after ascertaining the opinion of the assessors does not discharge his statutory duty (*vide* **Ram v Director of Public Prosecutions** Criminal Appeal No.CAV0001 of 1998S: 05 March 1999 [1999] FJSC 1).
- [32] On the other hand in **Mudaliar v State** Criminal Appeal No. CAV0001.2007: 17 October 2008 [2008] FJSC 25 the Supreme Court remarked

'..... assessors continue to play a vital role in the administration of justice in Fiji.'

'It would be contrary to all justice if a summing up containing serious errors could be largely ignored by the Court of Appeal provided that the trial judge, in his reasons for judgment, given after the assessors had expressed their opinions, happened to state the law correctly. Public confidence in the administration of criminal justice in this country would be diminished if assessors were relegated to such an inconsequential role.' (emphasis added)

- [33] In **Mataiasi Raduva and, John Heatley v. R.** Cr. App. No. 109 of 1985 the Court of Appeal had also remarked

'In matters of this sort, where credibility is in issue, we would like to say, from not inconsiderable experience on the bench in criminal proceedings, that the status of being a judge does not confer any advantage, in the field of assessing truthfulness, over any other man of the world. Indeed the contrary is sometimes suggested. That is why we have assessors or juries.' (emphasis added)

¹ **Prasad v The Queen** [1981] 1 A. E. R 319, **Noa Maya v State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30], **Ram v State** Criminal Appeal No. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12]

- [34] In Mataiasi the Court of Appeal set aside a conviction in which the unanimous opinions of the assessors was over-ridden by the trial judge and *inter alia* said

'Now there are cases from time to time in Fiji where a judge does convict in the face of contrary assessor opinion. These cases are rare and in our experience are one's where the evidence against an accused is so over-whelming and so affirmatively established that one can say that the assessors' conduct was perverse.' (emphasis added)

- [35] Therefore, while recognizing the trial judge's right to depart from the opinions of the assessors, the appellate courts have to deal with situations where the trial judge disagrees with the opinions of the assessors. The courts have devised some criteria to evaluate the correctness of the trial judge's decision as seen from the following judicial pronouncements.

- [36] The Court of Appeal said in Setevano v State Criminal Appeal No 0014U of 1989: 27 May 1991 [1991] FJCA 3 as follows

'It is clear that a Judge in Fiji is entitled in law to disagree with the majority opinions of the assessors, and even where they are unanimous, but his reasons for doing so must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.' (emphasis added)

- [37] In Ram v Director of Public Prosecutions Criminal Appeal No.CAV0001U of 1998S: 05 March 1999 [1999] FJSC 1 the Supreme Court referred to Setevano and said

'When a trial is held before a judge and assessors, the power to convict or acquit is vested in the judge after receiving the opinion of the assessors: Criminal Procedure Code, section 299. The judge is not bound by the opinion but he must take the opinion into account.'
'Although the Court of Appeal is bound to scrutinize carefully a judgment at variance with the opinion of a majority of assessors, the statute reposes in the judge the sole power to convict or acquit..... The

whole of the circumstances must be looked at and the reasons examined in the light they cast. In that way, the reasons are exposed to critical examination..... The judge must accept the assistance of the opinion of the majority of assessors on issues of fact but, at the end of the day, the sole responsibility for making the finding of fact rests on the judge alone.' (emphasis added)

- [38] In **Bali v Reginam** [1960] FJ Law Rp 17; [1960-1961] 7 FLR 80 (23 December 1960) the Fiji Court of Appeal remarked

'In discussing this particular matter, learned Counsel for the appellant cited the unreported decision of this Court in Ram Lal v The Queen (Criminal Appeal No. 3 of 1958), of which copies were furnished to the Court; and he relied in particular on the following passages in that judgment:—

"In order to justify a Court in differing from the unanimous opinion of the assessors who were in a favourable position to assess the reactions of a man of the class and race they would find the accused to be, there must be very good reasons reflected in the evidence before that Court."

"A trial Judge would require to find very good reasons indeed, reflected in the evidence, before being justified in differing from a unanimous opinion of the assessors on such a question of fact."

It will be observed that, in both of these passages, the Court was careful to limit its propositions to the particular sort of question which arose in that case, namely, the probable reactions to alleged provocation of a man of a particular class and race; and this present Court does not doubt that, on such a question, the judge ought not to differ from a unanimous opinion of assessors unless he can find—and can find "reflected in the evidence"—very good reasons for so doing. But it would be wrong to erect this into a general proposition applicable in all cases. In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations.' (emphasis added)

- [39] In **Narend Prasad v. Reginam** (1971) 17 F.L.R. 200 the Court of Appeal having quoted **Bali's** above passage of the Privy Council's judgment said at p.220

'The judgment of the Privy Council upheld the action of the trial Judge and sustained the conviction. We are of the opinion that the passages quoted from their judgment would apply with equal force to the case before this Court. We are satisfied that ample reasons did exist for the action of the learned trial Judge in differing from the opinion of the assessors, and that proper consideration had been given by him to all the factors involved'(emphasis added)

[40] In **Shiu Prasad v. Reginam** (1972) 18 F.L.R. 68 the Court of Appeal said

'if a Judge is to differ from the opinions of the assessors he must have cogent reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment' (emphasis added)

[41] In **Saukuru v Reginam** [1981] FJ Law Rp 21; [1981] 28 FLR 6 (27 November 1981) the Court of Appeal had the occasion to say

'..... but when a judge adopts what the Privy Council called a strong line and overrules unanimous assessors, we agree with the decided cases that his reasons must be cogent and his own approach to the relevant law should be impeccable.' (emphasis added)

[42] However, this exercise has to be in conformity with section 23 of the Court of Appeal Act. In terms of section 23, the Court of Appeal should set aside

- (i) The verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence or
- (ii) The judgment on the ground of a wrongful decision of any question of law or that on any ground that there was a miscarriage of justice

[43] Whether the appeal is against the conviction [section 23(1)(a)] or the acquittal [section 23(1)(b)], the criteria is the same. It appears that the grounds on which the Court of Appeal should interfere with the verdict of the assessors and the judgment as defined in section 237(5) are different. The verdict here appears to mean the opinion of the assessors. However, whether it is the verdict or the judgment, the Court of Appeal will have to examine not only the verdict and the judgment but also the evidence led at the trial, in allowing or dismissing the appeal. I have endeavored to do both in considering this appeal.

- [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.
- [45] Significantly, the Trial Judge had not stated in the judgment that he disbelieved the complainant on the issue of consent or at least there was a reasonable doubt specifically in that regard. The Judgment contains no assertion that the complainant's version of events was not credible or truthful. Without such an affirmative finding of fact it was not legally possible for the Judge to have disregarded with the assessors' opinion.
- [46] Therefore, in my view the Trial Judge's contention that the opinions of 'guilty' by the assessors appears to be perverse is not justified at all having regard to the totality of evidence. Thus, I also agree with the State that what the Judge had stated in the judgment as quoted above are not reasons that would stand successfully a critical and objective scrutiny and examination and therefore, could not in law disturb the opinion of the assessors. Therefore, broadly speaking, calling the assessors' opinion as perverse on flawed reasons amount to a wrong decision on a question of law. Thus, the impugned judgment should be set aside. Therefore, I allow the first and second grounds of appeal.

Ground 3

'The Trial Judge misdirected himself and or erred in fact and law when he found that the Victim's (V) evidence corroborated the "version" of the Defendant (D).'

Ground 4

'The Trial Judge erred in principle by purporting to make a finding that there was corroboration of the D's case ("version")'

Ground 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.'

[47] The State made submissions on the third, fourth and fifth grounds of appeal together as they all seem to revolve around the High Court Judge's finding in the judgment that the evidence of the complainant clearly corroborates the Respondent's version of consensual sex.

[48] The version of the Respondent is that he had observed the complainant and her boyfriend having sex and once it was over, he had heard the conversation between the complainant and her boyfriend that she was short of her bus fare. Then, he had offered them the option of him having sex with the complainant in return for the bus fare. The complainant and her boyfriend had engaged in a further discussion and the boy had asked the Respondent to take the lead and the girl would follow. Thereafter, he had gone and sat on the carton and the complainant had come and sat next to him. He had asked the complainant whether she was agreeable to have sex. She had consented and removed her garments and after some foreplay, he had engaged in sexual intercourse with her. After a couple of minutes the complainant had asked him to stop as she was tired and he had stopped the sexual activity. Thereafter, he had given her the bus fare and while they were walking towards the office they had met Vitori and on being questioned who the girl was the Respondent had argued with Vitori. The Complainant had left and the Respondent had seen Vitori talking to her while she was on her way out.

- [49] The Learned Trial Judge had treated the complainant's admission that she had asked for the bus fare after the act of forcible sexual intercourse as corroborating the Respondent's version of consensual sex. The Judge had, however, not addressed the assessors on the same lines in his summing-up but had said in the judgment as follows.

'Victim admitted that she asked money from the accused after the incident. She confirmed this in her re-examination.'

'The evidence of the victim clearly corroborates the defence version that she had sex with the accused for money.'

- [50] The following questions and answers reveal the exact opposite to what the Learned Judge had alluded to.

Q49- Is it true that the accused asked from two of you about the fare or to have sex for money - No

Q52- Is it true that the accused asked you about sex for money – No

- [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.

- [52] Secondly, what constitutes corroboration is set out by the Court of Appeal in Ali v State Criminal Appeal No. AAU 105 of 2008: 30 May 2013 [FJCA] 41 as follows

'As to what constitutes corroboration, the Court of Criminal Appeal in R v Baskerville [1916] 2 KB 658 at page 667 set out a definition which was adopted in Daniel Azad Wali –v- The State [2001] 1 FLR 192. This Court (quoting from the headnote) held that corroboration "is any evidence which comes from an independent source and which affects an accused person by connecting or tending to connect him or her with the crime in question. Further it must be evidence which implicates an accused person that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused person committed it."

[53] Thus, it is clear that the Learned Trial Judge has erred in treating a suggestion made but not admitted by the complainant as a piece of corroborative evidence as far as the Respondent's version is concerned. This is clearly a wrongful decision of the question of law as to what constitutes corroboration.

[54] Therefore, I allow third, fourth and fifth grounds of appeal too.

Ground 6

'The Trial Judge did not direct himself (or the Assessors) in regard to recent complaint or evidence of distress.'

[55] There is merit in this argument by the State. The Learned Judge has not made any reference in the summing-up to the evidence of Vitori in the context of whether his evidence could be treated as recent complaint evidence which goes to the consistency of the complainant's evidence. There is a mere narration of his evidence in summing-up but not even a passing reference had been made in the judgment.

[56] The legal position on recent complaint evidence was stated in **Raj v State** Petition for Leave to Appeal No. CAV0003 of 2014: 20 August 2014 [2014] FJSC 12

*'In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.'*

*'Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H*

'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.'

- [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.
- [58] Therefore, I allow the sixth ground of appeal too.

Ground 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 V did consent.'

Ground 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.'

- [59] The only references to the issue of consent in the summing-up is the Trial Judge's description of it as an element of the offence and the following paragraph

'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'

- [60] However, the Learned Judge seems to have firmly decided in the judgment that the complainant had consented to sexual intercourse with Respondent. The gist of the above grounds of appeal is that the Judge had misdirected himself as to what the consent means in a case of rape.

[61] It looks as if the Trial Judge had expected some outward physical signs of resistance on the complainant's body to be convinced of lack of consent. In the absence of such injuries he seemed to have believed the Respondent's 'sex for money' version of events and concluded that the complainant had consented to sexual intercourse. In the circumstances of this case it is unrealistic and unreasonable to expect any such visual injuries on the complainant's body or in the genitalia, for the complainant does not claim to have mounted any strong physical resistance and in any event she admittedly had already engaged in sexual intercourse with her boyfriend just before Respondent had allegedly raped her. One would only be naive to look for telltale signs of sexual abuse in these circumstances.

[62] Further, the Court of Appeal remarked in Tukainiu v The State Criminal Appeal No. AAU 0086 of 2013: 14 September 2017 [2017] FJCA 118

'Law does not require the woman to have resisted physically [see Olugboja [1982] QB 320 & (1981) 73 Cr App Rep 344]. Submission without physical resistance by the victim to an act of the accused shall not alone constitute consent (vide section 206 (1) of the Crimes Act, 2009).'

[63] In addition in Tukainiu the Court of Appeal *inter alia* observed on the elements of rape as follows

'Therefore, since section 207 (2) (a) (i.e. the law creating the offence of rape) does not specify a fault element for the physical element i.e. the act of penetration without the victim's consent (amounting to a circumstance), section 23(2) would become applicable and recklessness becomes the fault element for the physical element of rape. This is the same with section 207(2)(b) and 207(2)(c) as well,'

'Therefore, 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.'

'To put in simple terms, a person could be said to have a direct intention where it is his primary purpose (not the motive), aim or objective to achieve a particular result....A person could be said to have an 'oblique' intention where, although a particular result is not his primary purpose or objective, he appreciates, as a virtual certainty, that that result will occur as a consequence of his conduct.'

'A person is negligent if he is unaware of the risk in question but ought to have been aware of it or having foreseen it he does take steps to avoid it but those steps fall below the standard of conduct which would be expected of a reasonable person.'

'Recklessness is conscious taking of an unjustifiable risk. If an accused is aware of the risk and decides to take it, he is reckless...'

- [64] In the light of those observations, the Learned Judge's confinement of the fault element in the summing-up only to knowledge in relation to 'consent' is erroneous albeit he did not have the benefit of Tukainiu.
- [65] Therefore, the Learned Trial Judge's view on what consent is in relation to the offence of rape is a wrong decision on a question of law. I allow the seventh and eighth grounds of appeal as well.
- [66] In view of allowing the appeal the acquittal should be set aside. The only remaining question is whether to enter a judgment and verdict of conviction or in the interest of justice to order a new trial in terms of section 23(2) (b) of the Court of Appeal Act.
- [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.

The Orders of the Court are:

1. *Appeal is allowed.*
2. *Acquittal is set aside.*
3. *New trial is ordered.*



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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL