

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

CRIMINAL APPEAL NO. AAU0126 of 2013
(High Court HAC 97 of 2013)

BETWEEN : VIJAY KUMAR

Appellant

AND : THE STATE

Respondent

Coram : Chandra JA
Gamalath JA
Goundar JA

Counsel : Ms S. Nasedra for the Appellant
Mr M. D. Korovou for the Respondent

Date of Hearing : 9 May 2018

Date of Judgment : 1 June 2018

JUDGMENT

Chandra JA

- [1] The Appellant was charged with one count of rape contrary to section 207 (1)(2)(b) and (3) of the Crimes Act No. 44 of 2009.

- [2] After trial the Assessors returned with a majority opinion that the Appellant was guilty of rape and the learned trial Judge accepted the majority opinion of the Assessors and convicted him.

- [3] On 26th November 2013 the Appellant was sentenced to 11 years and 5 months imprisonment with a non-parole period of 10 years.

- [4] The Appellant applied for leave to appeal his conviction and sentence setting out 12 grounds of appeal by filing a timely appeal by himself.

- [5] The single judge of appeal granted leave for only two grounds of appeal which were taken up for hearing before the Full Court.

- [6] The two grounds of appeal are:
 - (i) The lack of directions on the significance of the recent complaint evidence.
 - (ii) The trial judge failed to consider the Appellant's good character in sentencing.

Factual Background

- [7] The incident complained of had occurred at night at the residence of the Appellant in the sitting room. The Appellant had been living with her grandparents. In her evidence she had stated that she had gone to sleep around 8 o'clock on a mattress in the sitting room with her grandmother and uncle. She had got up feeling someone inserting a finger into her vagina. She was sitting on her grandfather's lap when he put his finger into her vagina. She had started crying. She had pain in her vagina and had told her grandfather not to do it. The grandfather had told her not to cry. She had stopped crying and the

grandfather had made her wear her pants and put her to sleep. The TV had been on at that time, and her grandfather had switched off the TV after she went to sleep. She had told her grandmother about this incident when she woke up the following day. The grandmother had advised her to go and make a complaint to her head teacher who had called the police. She had made a statement to the police and thereafter she had been taken to Nadi hospital. She had been examined and the doctor who gave evidence stated that her hymen was torn, that there was swelling in the labia majora and that the injury could have been caused by penetration with something. At the trial, the complainant, her grandmother, the Doctor who had examined her and the Police Officer who investigated into the complaint gave evidence while the Appellant gave evidence on his behalf. The Appellant denied the allegation against him.

Consideration of the Grounds of Appeal **Ground against conviction**

- [8] The ground of appeal which was allowed by the single judge of appeal was regarding the manner in which the learned trial Judge had dealt with recent complaint. In allowing the ground of appeal, the learned single judge of appeal had stated in his ruling that:

*"[11] In sexual cases, evidence of recent complaint is admissible as an exception to the rule against previous consistent statement only as evidence of the consistency of the complainant's conduct. In **R v. Islam** [1998] 1 Cr. App. R 2 and **R v. NK** [1999] Crim. LR 980 the English Court of Appeal stated the need to direct the jury on the evidential significance of a complaint in a sexual case. In the present case, the learned trial judge gave no direction on the significance of the recent complaint evidence. Whether the lack of direction on the significance of the recent complaint caused injustice to the appellant is a matter for the Full Court to consider. As far as this application is concerned, the issue is arguable."*

- [9] It was the evidence of PW2, Madhur Lata who gave evidence relating to recent complaint. Regarding recent complaint the Respondent referred to the decision in **Senikarawa v. State** [2006] FJCA 25; AAU0005.2004S (24 March 2006) where it was stated:

“[14] Evidence of recent complaint may be adduced to show the consistency of the conduct of the complainant and to negative consent. Kory White v. R [1999] AC 210 requires that both the complainant and the named person to whom the complaint was made must testify as to the terms of the complaint. If the evidence of recent complaint is admitted then the jury should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial.

[15] The principle on which the evidence is admitted is to support and enhance the credibility of the complainant. The jury, in assessing the truth of the complainant’s evidence, may take into account evidence as to the consistency between that evidence and evidence of her contemporaneous complaint. It can be aid to her credit (Spooner v. R [2004] EWCA Crim. 1320, Eng. Court of Appeal.”

[10] In State v. Likunitoga [2018] FJCA 18; AAU0019.2014 (8 March 2018), the Court of Appeal stated:

“[56] The legal position on recent complaint evidence was stated in Raj v. State CAV0003 of 2014: 20 August 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.K.”

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.”

- [11] In Anand Abhay Raj v. State [2104] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court referring to recent complaint stated:

“[38] The complaint is not evidence of facts complained of, nor is 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.”

- [12] In the written submissions filed on behalf of the Appellant the following parts of the victim’s evidence were cited as far as evidence of recent complaint was concerned:

[page 89: copy record] at paragraph 3 has the victim stating during trial in her evidence;

“After that I went to sleep. In the morning I woke up then my grandmother asked what is this cloth doing here. That cloth my grandmother asked was my panty. Then I told her grandfather came and he left it there.”

At paragraph 10;

“...when I told this to my grandmother then my grandmother advised me to go and tell this to my head teacher that grandfather is doing this to me...”

- [13] It was submitted that the learned trial Judge had made reference in his summing up to ‘recent complaint’ only at paragraph 37 of his summing up when referring to the evidence of PW2 Madur Lata, who was the grandmother of the victim. That in doing so stated that it would corroborate the evidence of the victim.

- [14] To consider the effect of this submission it would be relevant to see the manner in which the learned trial Judge had dealt with the evidence of PW2, Madur Lata.

- [15] The learned trial Judge in his summing up having dealt with the evidence of the victim, dealt with the evidence of PW2 from paragraphs 35 to 37 and at paragraph 37 he stated:

“37. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the defence counsel. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it

corroborates the evidence of the victim AS regarding recent complaint.”(Emphasis added)

- [16] It is the last sentence in paragraph 37 of the learned trial Judge’s summing up that has been dealt with in the submission of the Appellant, as being the cause for complaint. The submission is that the learned trial Judge by stating so, has stated that the evidence of recent complaint as elicited in the evidence of PW2 corroborates the evidence of the victim. The question for consideration is whether that statement conveys that meaning. To my mind, the statement is qualified by the words, “the evidence of the victim AS regarding recent complaint”. This would suggest that what the learned trial Judge meant by that statement was that the evidence of PW2 corroborates the fact that the victim related her story to her (PW2) and not the position that it was corroborative of the fact that the victim was raped by the Appellant.
- [17] The construction that I have given to the manner in which the learned trial Judge has referred to recent complaint may not at first sight be discernible, and it should have been put to the Assessors in clearer language to avoid any confusion. It would then bring in the question as stated in **R v. Islam** (supra) whether the learned trial Judge had not adequately explained to the Assessors in his summing up the effect of recent complaint. In that respect it would seem that the directions by the learned trial Judge regarding recent complaint was inadequate.
- [18] Even if the summing up was inadequate on that matter, a further matter that can be considered in this regard is the manner in which the learned trial Judge dealt with the position that there was no requirement of corroboration in proving rape. At paragraph 53 of the summing up the learned trial Judge stated:

“53. Please remember, there is no rule for you to look for corroboration of the victim’s story to bring home an opinion of guilty in a rape case. The case stands or falls on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim’s evidence if you think that it is safe to look for such of the victim’s evidence as regards corroboration of the victim’s evidence if you think that it is safe to look for such supporting evidence.

Corroboration is, therefore, to have some independent evidence to support the victim's story of rape."

- [19] There is no reference to the evidence of PW2 in this paragraph when he referred to the need, if any, to look for independent evidence. This would support the position that when reference was made in relation to recent complaint what he would have meant to convey was, perhaps, consistency of the victim's evidence and not corroboration.
- [20] Further, in the above paragraph 53, the learned trial Judge's reference to the fact that the case would stand or fall on the testimony of the victim would show that what was conveyed to the Assessors was that the case of the prosecution depended on the evidence of the complainant. The Assessors brought in a unanimous verdict of guilt as they would have believed the complainant, which opinion, the learned trial judge accepted.
- [21] The complainant was 8 years old, therefore the issue of consent did not arise. The medical evidence confirmed that there was penetration. Therefore the guilt of the Appellant was adequately established through the evidence of the complainant and the medical evidence.
- [22] The Appellant was represented by Counsel at the trial. It is the duty of Counsel to bring to the notice of the learned trial Judge at the end of the summing up regarding matters that would require re-direction. This matter regarding recent complaint was a matter that the Defence Counsel should have sought re-direction. However, this does not take away the strength of the ground of appeal raised against conviction in this case.
- [22] Therefore, the conclusion that I reach as regards the ground of appeal against conviction is that though the summing up of the learned trial Judge was inadequate in some aspects relating to recent complaint, considering the entirety of the evidence, there was no prejudice caused to the Appellant to cause any miscarriage of justice. Therefore the ground of appeal against conviction fails.

Ground of appeal against sentence

- [23] The ground of appeal against sentence which was allowed by the single judge of appeal was that good character of the Appellant had not been taken into account when sentencing.
- [24] In **Kim Nam Bae v. The State** Criminal Appeal AAU0015 of 1998S, High Court Criminal case No.HAC 0002 of 1997L, the following principles were laid down regarding appeals against sentence:
Whether the trial Judge:
- (1) acted upon a wrong principle;
 - (2) Allowed extraneous or irrelevant matters to guide or affect him;
 - (3) Mistook the facts;
 - (4) Failed to take into account some relevant consideration.
- [25] Pursuant to section 4(2) of the Sentencing and Penalties Act 2009, the sentencing court must have regard to the good character of the accused, and in terms of Section 5(a), (b) and (c) of the said Act, in determining the character of an offender a court may consider (amongst other matters), the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender.
- [26] In the present case, in the submissions made on behalf of the Appellant for mitigation, it has been stated that the Appellant had three previous convictions for minor offences in the operational period in the year 2004 and that his last offence was 9 years earlier. The State in their sentencing submissions had not challenged that position but had merely stated that the Appellant had 7 previous convictions, without giving any details regarding such convictions.
- [27] In **Saqinavalu v. State** [2015] FJCA 168; AAU0093.2010 (3 December 2015) it was stated in relation to the consideration of good character in sentencing as follows:

"[15] ... the appellant's good character was not taken into account pursuant to section 5 of the Sentencing and Penalties Decree 2009. The appellant was unrepresented in the High Court. He did not present any meaningful mitigation on his behalf. Nevertheless, counsel for the State advised the learned judge that the appellant's convictions were all spent, the last one being in 1992. The appellant deserved some credit for his good character and the failure to take this factor into account as a mitigating factor was an error in the sentencing discretion."

- [28] The learned trial Judge has not considered the submissions made regarding sentencing referring to the fact that though the Appellant had previous convictions, that the last offending had been 9 years prior to the commission of the present offence. The appellant deserved some credit for same and the failure to take this factor into account as a mitigating factor was an error in the sentencing discretion.
- [29] The learned trial judge's failure to consider such a factor when sentencing him would be a situation where a relevant consideration had not been taken into account as set out in the principles in **Kim Nam Bae** (Supra) and thereby the learned trial Judge had erred. The Respondent concedes that there is merit in this ground and has invited this Court to act in terms of Section 23(3) of the Court of Appeal Act.
- [30] In view of the above reasoning, I would substitute a sentence of 11 years imprisonment with a non parole period of 9 years for the Appellant in place of the sentence of 11 years and 5 months with a non parole period of 10 years.

Gamalath JA

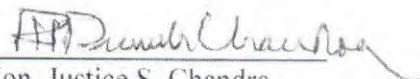
- [31] I agree with the reasoning and conclusions of Chandra JA.

Goundar JA

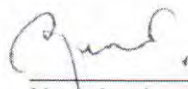
- [32] I have read in draft the judgment of Chandra JA and agree with his conclusions and his reasons.

Orders of Court:

- (1) *The appeal against conviction is dismissed.*
- (2) *The appeal against sentence is allowed. The Appellant's sentence is 11 years imprisonment with a non-parole period of 9 years, which sentence shall be with effect from 23 November 2013.*



Hon. Justice S. Chandra
JUSTICE OF APPEAL



Hon. Justice S. Gamalath
JUSTICE OF APPEAL



Hon. Justice D. Goundar
JUSTICE OF APPEAL