

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

**CRIMINAL APPEAL NO.AAU 29 of 2018**  
**[High Court Criminal Case No. HAC 27 of 2016]**

**BETWEEN** : **DANIEL BHURRAH**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. S. Raikanikoda for the appellant**  
: **Mr. R. Kumar for the Respondent**

**Date of Hearing** : **19 May 2020**

**Date of Ruling** : **22 May 2020**

**RULING**

[1] The appellant had been charged in the High Court of Labasa on the following counts of the Crimes Decree No.44 of 2009,

Count 1 - Indecent assault contrary to section 212 (1) of the Crimes Act 2009.

Count 2 - Sexual assault contrary to section 210 (1) (a) of the Crimes Act 2009.

Count 3 - Rape contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.

Alternative Count – Rape contrary to section 207 (1) and 2 (b) of the Crimes Act 2009.

- [2] After full trial, the assessors had expressed a unanimous opinion of guilty on the first three counts on 28 February 2018. The Learned High Court Judge in the judgment dated 01 March 2018 had agreed with the assessors and convicted the appellant of counts 1, 2 and 3 as charged. He was sentenced on 02 March 2018 as follows and all sentences were directed to run concurrently subject to a non-prole period of 08 years.

Count 1 – Indecent Assault – 6 months’ imprisonment.

Count 2 – Sexual Assault – 2 years’ imprisonment.

Count 3 – Rape – 12 years’ imprisonment.

- [3] The appellant by himself had signed a timely notice of appeal on 10 March 2018 against conviction (05 grounds) and sentence (02 grounds). Later, Raikanikoda & Associates had tendered written submissions dated 01 November 2019 on behalf of the Appellant. The State had tendered its written submissions on 20 December 2019.
- [4] At the hearing into leave to appeal, the appellant tendered to court Form 3 dated 19 March 2020 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence and it would be taken up by the Full Court in due course.
- [5] The evidence against the appellant in a nutshell is as follows.
- [6] On 14 May 2016, the victim aged 72, had been left alone at home by her family members who were attending a church service. She was living with her daughter and her family at the time. The victim’s daughter had become her carer after she had a stroke seven years ago. The appellant had been returning home from a drinking session when he noticed that the victim was sitting alone on the veranda of her home. He had gone and sat beside her. He was her nephew. He called her “Aunty”. He was also her neighbour and a frequent visitor to her home according to her daughter Ms. Gardenia Murphy. He knew about the victim’s physical and mental health and that she was alone at home. He exploited the situation, kissed her and touched her genitals. Later he sexually penetrated her genitals. The victim was vulnerable due to her age and illness. 14 year old Miss. Erica Molly had seen the appellant in the act of kissing her grandmother. Dr. Elizabeth Koroivuki had expressed an opinion that the

complainant did not have the mental capacity to give free and voluntary consent to the sexual acts due to dementia. She was about 72 years old when the appellant sexually molested her. The appellant was defended by counsel. He remained silent and did not call any witnesses.

- [6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The threshold test applicable is ‘**reasonable prospect of success**’ to determine whether leave to appeal should be granted (see **Caucu v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[7] **Grounds of appeal**

1. *There was substantial miscarriage of justice by reasons of the failure of the trial judge to fully canvas his mind the violation of the appellant’s constitutional right in the trial.*
2. *That the summing up was unbalanced and unfair in all circumstances of the case.*
3. *The learned trial judge erred when he failed to give adequate direction on the circumstantial evidence to make a conviction thus giving rise to a miscarriage of justice.*
4. *The learned trial judge erred in failing to direct the assessors the salient factors in regards to consensual elements despite her age and medical effort.*
5. *The learned trial judge erred in law and in fact by failing to direct the assessors that the prosecution had not discharged the burden of proving the elements of the offence and the benefit of doubt ought to be given to the appellant.*

### ***01<sup>st</sup> ground of appeal***

- [8] The appellant has not elaborated as to what constitutional right of him was violated during the trial. In the written submissions, a criticism has been levelled at the ‘current practice’ of not requiring corroboration in sexual offences and non-appearance of expert witnesses such as the doctors to give evidence on medical reports in court which according to the appellant had led to a miscarriage of justice.
- [9] While none of the above arguments is concerned with any constitutional rights of the appellant, it should be borne in mind that it is section 129 of the Criminal Procedure Act, 2009 that dispensed with the long held practice of insisting on corroboration of the testimony of victims of a sexual offences and in **Prasad v State** [2019] FJSC 3; CAV0024.2018 (25 April 2019) the Supreme Court reaffirmed section 129 stating *‘The requirement for corroboration in cases of a sexual nature was abolished by section 129 of the Criminal Procedure Decree 2009.’*
- [10] The appellant’s complaint of expert witnesses not being available in court to give evidence is of such a general nature that it is difficult to comprehend as to what his real grievance is. On the other hand one Dr. Elizabeth Koroivuki had given evidence at the trial as to the mental condition of the complainant at the time of the commission of offences. Therefore, the appellant’s submission is without any basis. If what he really complains about is the prosecution not having called a doctor to speak to the results of any medical examination conducted upon the complainant in relation to the alleged sexual acts, I cannot find from the summing up that there had been any such medical examination. In any event, calling witnesses necessary to prove its case beyond reasonable doubt is the prerogative of the prosecution [see **Gauna v State** [2015] FJCA 61 AAU 0071 of 2010 (28 May 2015)] and the defence is not precluded from calling any such witness as part of defence case.

### ***02<sup>nd</sup> ground of appeal***

- [11] Again, the appellant has not demonstrated why he calls the summing-up to have been unbalanced and unfair in all circumstances. At the trial the appellant had not disputed the acts of kissing, touching the complainant’s vagina and penetration of the vagina.

He had only denied penile penetration but not digital penetration. His position had been that he performed all the acts with the consent of the complainant. He had not given evidence or call witnesses on his behalf.

[12] Having described the elements of the charges faced by the appellant, the prosecution version and the defence position, the learned High Court Judge had asked the assessors to consider whether the complainant had consented or even if she had consented whether she had the mental capacity to freely and voluntarily give her consent to sexual acts. With regard to the charge of rape the learned trial judge had directed the assessor that the prosecution had to prove that the appellant knew that the complainant did not consent or was reckless as to whether she consented (see **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) for fault elements of rape which was affirmed in **Tukainiu v State** [2018] FJSC 19; CAV0006.2018 (30 August 2018).

[13] The learned trial judge had also clearly stated to the assessors the presumption of innocence and with whom the burden of proof lies in proving the case against the appellant beyond reasonable doubt and how they should evaluate the evidence only placed before them and base their decision on that evidence alone and not on speculation. He had placed before the assessors all the precautions needed in this case. He had also directed them not to draw any adverse inference from the silence of the appellant.

[14] Thus, in every sense the summing-up has maintained those essential qualities of objectivity, even-handedness and balance required to ensure a fair trial [see **Chand v State** [2017] FJCA 139; AAU112.2013 (30 November 2017) for a detailed analysis on this topic].

### ***03<sup>rd</sup> ground of appeal***

[15] The appellant's complaint is that the learned trial judge had not addressed the assessors on circumstantial evidence in the summing-up and it has no basis given the evidence led by the prosecution. The case against the appellant was based on

circumstantial evidence. If the appellant is referring to the evidence of the complainant's daughter and Dr. Elizabeth Koroivuki who had not seen any of the alleged sexual acts performed by the appellant, I think there was no need for any special directions on circumstantial evidence regarding their evidence. However, the learned trial judge had amply addressed the assessors on the evidence of Dr. Elizabeth Koroivuki in paragraphs 31- 33 of the summing-up.

***04<sup>th</sup> ground of appeal***

- [16] The appellant also criticises the summing-up on the basis that the learned High Court judge had not sufficiently addressed the 'consensual sex' aspect of the case *i.e.* the alleged consent on the part of the complainant. However, I find that in paragraph 19, 20, 22, 25, 26, 36, 37 and 38 the learned trial judge had specifically addressed the assessors on the matter of consent (or lack of it) relevant to all offences and particularly told the assessors that if the complainant had consented to the sexual acts as alleged by the appellant he would not be guilty of the charges. The Learned judge had given his mind to this aspect in paragraphs 9 of his judgment too.

***05<sup>th</sup> grounds of appeal***

- [17] The appellant alleges that the learned trial judge erred in law and in fact by failing to direct the assessors that the prosecution had not discharged the burden of proving the elements of the offence and the benefit of doubt ought to have been given to the appellant. Whether the prosecution had discharged its burden or not had to be decided by the assessors and not directed by the trial judge in one way or the other. Assessors' opinion on the guilt or otherwise of the appellant may or may have not accepted by the trial judge. However in paragraph 40 of the summing-up the learned trial judge had clearly directed the assessors that if they have a reasonable doubt as to the guilt of the appellant they must express an opinion of not guilty. In the judgment the learned trial judge had stated that he was sure of the appellant's guilt on 1-3 counts.

- [17] The learned High Court judge's summing up measures up to more than what was held to be required in the summing-up **R v Lawrance** [1981] 1 ALL ER 974 at 977 in that it

*'should also include a succinct but important summary of the evidence of facts as to which a decision is required, a correct but concise summary of the evidence and argument of both sides.'*

- [18] In **Tukainiu** the Court of Appeal also observed on counsels' criticism on the summing-up in appeal by stating that

*'[49] His Lordship the Chief Justice in Raj v The State CAV 0003 of 2014: 20 August 2014 [2014 FJSC 12] said*

*'The raising of direction matters in this way is a useful function and in following it, counsel assist in achieving a fair trial.'*

*[50] Time and again this Court too has emphasized the need of the counsel to raise any matters of omission or misdirection by way of redirections with the trial judge at the end of the summing up. This will not only help in achieving a fair trial but also alleviate the need of appeals being taken regularly to this Court based purely on such omissions or misdirection which could have been easily dealt with in the lower court saving valuable judicial time of the Court of Appeal for deserving appeals..*

- [19] In **Tuwai v State** [2016] FJSC 35; CAV0013.2015 (26 August 2016) on the same matter the Supreme Court declared

*'100. Before I go any further I must say that the trial judge had asked the parties if they needed any re-directions in the matter. The parties did not seek any re-directions on the grounds they allege that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate courts approach must be stringent.*

*101. Litigants must not wait for trial judges to make mistakes to find a point of appeal. The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point.*

*102. The petitioner has not given any reasons why any re-directions were not sought. His complaint now to this Court that he will suffer a miscarriage of justice is therefore unacceptable.'*

[20] Before parting with the aspect of merits of the appeal, I must place on record the sentiments expressed by Pathik J, in **Khan v State** [2009] FJCA 17; AAU0046.2008 (13 October 2009) and as far as this appeal is concerned I can only concur with them.

*'[18] (a) The grounds advanced by the appellant are completely without merit. In fact I find that this is a frivolous and vexatious application. Further the application is an abuse of the process of the court.*

*(b) ..... It is a case which I should have summarily dismissed.'*

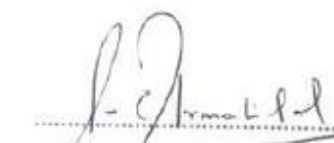
[21] There is no prospect of success in the appellant's appeal.

[22] Accordingly, leave to appeal against conviction should be refused.

### **Order**

1. Leave to appeal against conviction is refused.



  
Hon. Mr. Justice C. Prematilaka  
**JUSTICE OF APPEAL**