

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL NO. AAU 74 OF 2013**  
**(High Court HAC 173 of 2011)**

**BETWEEN** : **LEON MARSEU CONIBEER**

***Appellant***

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

***Respondent***

**Coram** : **Chandra RJA**

**Counsel** : **Mr A J Singh for the Appellant**  
**Mr V Perera for the Respondent**

**Date of Hearing** : **7 July 2014**

**Date of Ruling** : **4 December 2014**

**RULING**

1. The Appellant was charged with one count of attempted rape contrary to section 208 and one count of rape contrary to section 207(1),(2)(a) of the Crimes Decree No.44 of 2009 in the High Court of Lautoka.
2. The trial Judge overturned the verdict of not guilty by the Assessors on both counts and found the Appellant guilty of the count of rape and convicted him. Thereafter on 27<sup>th</sup> June 2013 the Appellant was sentenced to 7 years imprisonment with a non parole period of 5 years.

3. The complainant's evidence was that when she woke up on the morning at about 9.00 a.m. on 1<sup>st</sup> June 2011 she had grabbed a towel and gone to the wash room. She had seen a person covered with a pink blanket in front of her door trying to coming into her room. He had pushed her inside the room with force. She had fallen on the mattress and when the person pulled the blanket, she had identified him as the Appellant. He had tried to put her into bed, she had resisted and had struck her head on the wall. She had asked the Appellant to stop it, but had started kissing her all over her body and forcefully raped her. The Appellant had denied the allegation and had taken up the defence of alibi. He had stated in his evidence that he had rented out the room to the complainant and that she had failed to pay rentals and he had threatened her that he would lock her out and throw her belongings.
4. The Assessors had brought in a verdict of not guilty but the learned trial Judge rejecting their verdict relied on his summing up and convicted the Appellant. The Appellant was thereafter sentenced to 7 years imprisonment with a non-parole period of 5 years.
5. The Appellant in his notice of appeal against conviction and sentence set out the following grounds:

- “1. In overruling the unanimous opinion of the Assessors, the learned trial Judge misdirected himself in law by stating at paragraph 29 of his judgment that, “I am of the view that the Accused had failed to create a reasonable doubt in the prosecution case”, thereby causing a grave miscarriage of justice.”*
- 2. The learned trial Judge misdirected himself and the Assessors in paragraph 49 of the summing up by stating, “If the accused had raised a reasonable doubt then the benefit of that doubt should be given to him and he should be found not guilty”. Such a direction was erroneous causing a grave miscarriage of justice, at the time of the Judgment.”*
- 3. The learned trial Judge erred in law in failing to give adequate directions in law as regards the defence of Alibi.*

4. *The learned trial Judge misdirected himself and the Assessors in law in the last sentence of paragraph 44 of the summing up by stating "It is up to you to decide this whether the accused is lying about these recant". This was a misdirection in law causing a miscarriage of justice.*
5. *The learned trial Judge misdirected the Assessors and himself in law by not giving proper directions on the mens rea required for the offence of rape.*
6. *The learned trial Judge failed to direct himself and the Assessors in law and fact on how to use the medical evidence as the medical evidence did not implicate the accused and that it would be dangerous to convict when the complainant and the accused both gave evidence on oath.*

***Grounds of appeal against sentence:***

1. *The learned trial Judge erred in his sentencing requirement exercise when he failed to comply with sentencing requirement to consider mandated provisions of the sentence and penalties Decree 2009.*
  2. *The sentence imposed by the learned trial Judge was manifestly excessive having regard to the circumstances of the case.*
6. In terms of section 21(1) of the Court of Appeal Act (Cap.12) a person convicted of an offence after a trial in the High Court may appeal, to the Court of Appeal against his conviction on any ground of appeal which is a question of law alone; with the leave of the Court of Appeal (i) his conviction on any ground of appeal involving a question of fact alone or a question of mixed law and fact and (ii) the sentence passed on conviction unless the sentence is one fixed by law. A single Judge of the Court of Appeal may exercise the jurisdiction of the Court of Appeal to grant leave in terms of section 35(1) of the Court of Appeal Act(Cap.12).
7. Ground 1 is in relation to burden of proof. The burden is on the prosecution to prove the elements of the charge beyond reasonable doubt. There is no burden cast on the accused

to prove anything or exonerate himself. The use of the phrase “I am of the view that the accused had failed to create a reasonable doubt in the prosecution case” by the learned trial Judge would give the impression to the Assessors that a burden is cast on him to create a reasonable doubt. This ground can be considered as a misdirection and hence is a question of law which does not require leave.

8. Ground 2 is also argued on similar lines by the Appellant. But in this instance, if the entirety of the paragraph where the learned trial Judge has stated about the accused raising a reasonable doubt is taken into account it would not amount to a misdirection and therefore there is no merit in this ground.
9. The 3<sup>rd</sup> ground is as regards the defence of alibi raised by the Appellant. A perusal of the summing up of the learned trial judge shows that no directions had been given on the defence of alibi. There is a question of law in this ground as it is the duty of the learned trial Judge to direct on the defence of alibi taken up by the Appellant. This ground does not require leave.
10. The 4<sup>th</sup> ground is on the basis that the learned trial Judge misdirected himself when he stated in his summing up “It is up to you to decide this whether the Accused is lying about these receipts”. This was stated by the learned trial Judge in his summing up after summarizing the evidence of the accused and directed the Assessors to consider whether the Appellant was lying. The learned trial Judge has left it to the Assessors by this direction to consider whether the Appellant’s evidence could be accepted. I do not see any misdirection by the learned Judge. There is no merit in this ground.
11. The 5<sup>th</sup> ground raises the issues regarding the mental element of the offence. The Appellant takes up the position that no directions were given regarding *mens rea*. The

learned trial Judge in his summing up explained to them the elements of the offence adequately. The Appellant merely states in this ground that the learned trial Judge failed to give direction<sup>c</sup> regarding *mens rea*, but does not elaborate as to how the learned Judge failed to give directions. This ground is vaguely set out. Case law has been cited in the written submission without relating them to the issue raised. In the summing up the learned trial Judge has adequately directed the Assessors on the elements of the offence of rape including the mental element. This ground has no merit.

12. The 6<sup>th</sup> ground is in relation to medical evidence. It is the contention of the Appellant that the learned trial Judge was bound to give appropriate directions on the fact that there was no forensic evidence to implicate the accused. At the trial only the medical report had been produced and the prosecution had not led the evidence of the medical officer who had examined the complainant. The question posed by the Appellant is as to whether that alone would be sufficient to prove the guilt of the Appellant.
13. Section 129 of the Criminal Procedure Decree of 2009 provides that no corroboration is required and no warning relating to absence of corroboration is required in sexual offence cases. The complainant's evidence alone is sufficient to prove the charge of rape. The submission that in the absence of medical evidence implicating the Appellant that the learned trial Judge should have given a direction on corroboration has no merit as according to section 129 corroboration is not required.
14. As regards the two grounds taken up by the Appellant regarding sentence, the Appellant has not set out the basis on which the sentence imposed by the learned trial Judge is being challenged. The submission that the learned trial Judge failed to consider the objective seriousness of the matter and that the sentences are manifestly excessive are by themselves insufficient to show as to how the learned trial Judge had erred in imposing


the sentence. In those circumstances the grounds of appeal regarding sentence have no merit and leave is refused on those grounds.

15. As grounds 1 and 3 are questions of law, no leave is required. The other grounds have no merit and are refused.

***Orders of Court:***

1. Grounds 1 and 4 raise questions of law and leave is not required.
2. Leave to appeal is refused on the other grounds.



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**Hon. Mr Justice Chandra**  
**RESIDENT JUSTICE OF APPEAL**