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

CRIMINAL APPEAL AAU 78 of 2012
(High Court HAC 344 of 2011)

BETWEEN : **LIVAI TAMANALEVU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Jayamanne JA
P. Fernando JA

Counsel : **Appellant in person**
Ms S Puamau for the Respondent

Date of Hearing : **11 May 2016**

Date of Judgment : **27 May 2016**

JUDGMENT

Calanchini P

[1] The Appellant was charged with two counts of indecent assault and two counts of rape. On the first count of indecent assault it was alleged that the Appellant between

1 and 31 January 2010 at Kuku, Bau had unlawfully and indecently assaulted Raijeli Katarina contrary to section 154(1) of the Penal Code Cap 17. On the second count of indecent assault it was alleged that the Appellant between 1 February and 14 May 2010 at Kuku, Bau, Tailevu had unlawfully and indecently assaulted Raijeli Katarina contrary to section 212(1) of the Crimes Decree 2009. On the first count of rape it was alleged that the Appellant on 15 May 2010 at Kuku, Bau, Tailevu had carnal knowledge of Raijeli Katarina without her consent contrary to section 207(1) and 207(2) (a) of the Crimes Decree 2009. On the second count of rape it was alleged that the Appellant between 1 August 2010 and 31 August 2011 at Kuku, Bau, Tailevu had carnal knowledge of Raijeli Katarina without her consent contrary to section 207(1) and section 207(2) (a) of the Crimes Decree 2009.

The trial

[2] The Appellant was represented by Counsel and pleaded not guilty to the charges. Following a trial lasting four days the assessors returned unanimous opinions of guilty on all four charges. In his judgment delivered on 20 August 2012 the learned trial Judge indicated his agreement with the opinions of the assessors and formally convicted the Appellant as charged. On 24 August 2012 the Appellant was sentenced to two and a half years imprisonment on each of the indecent assault convictions and 14 years imprisonment on each of the rape convictions. The sentences were ordered to be served concurrently with a non-parole term of 12 years imprisonment with effect from 24 August 2012.

Grounds of Appeal

[3] On 14 September 2012 the Appellant filed in person a timely notice of appeal against conviction and sentence under section 21(1) (a) – (c) and section 26 of the Court of Appeal Act Cap 12 (the Act). Amendments to the grounds of appeal were subsequently filed by the Appellant in person on 3 December 2012 and 18 March 2014.

[4] The Legal Aid Commission filed on 18 August 2015 written submissions on behalf of the Appellant repeating the grounds of appeal against conviction and sentence that previously had been put forward by the Appellant. It was submitted that those various grounds of appeal could be grouped conveniently into the following issues:

"a. Whether the lack of dock identification by the complainant and subsequent conviction is sustainable in law.

b. Whether there is an error of law by the failure of the learned trial Judge in addressing the assessors on the law regarding recent complaint.

c. Whether the directions of the learned trial Judge at paragraphs 27, 28 and 29 could be considered as unfair against the Appellant.

d. Whether the learned trial Judge considered "extraneous" matters when he sentenced the Appellant."

Application for leave

[5] The application for leave to appeal against conviction and sentence was heard by a Judge of the Court of Appeal on 26 August 2015. The Appellant was represented by Counsel. In his Ruling delivered on 30 September 2015 the learned Justice of Appeal considered both the grounds filed in person by the Appellant and the issues that were raised by Counsel. Leave to appeal against conviction and sentence was refused. The learned Judge concluded that none of the grounds of appeal against conviction raised an arguable point and none of the grounds against sentence raised an arguable error in the exercise of the sentencing discretion by the learned trial Judge.

Renewed application

[6] Pursuant to a letter dated 5 October 2015 the Appellant now seeks to renew his application for leave to appeal against conviction and sentence before this Court under section 35(3) of the Act. In a document dated 18 April 2016 the Appellant renewed his application for leave on the following "*fresh*" grounds:

"1. The trial judge erred in law in giving credit to the victim's evidence when the evidence was seriously conflicting each other by way of:

(i) Victim's initial statement to police on 19 August and her 2nd statement to police on 30 September 2011.

(ii) Statement to the doctor when medically examined.

2. There was serious doubt by reason of failure of the trial judge to adequately/sufficiently/properly analyse the belatedness of complaint to police and caution the assessors on the same.

3. *The learned trial judge erred for not having warned the assessors about the danger of relying on the evidence of the victim who had made previous inconsistent statements.*

4. *The trial judge erred by failing to draw his mind on the requirements statutory law under section 137 of the Criminal Procedure Decree to agree with the opinions of the assessors."*

[7] Although the Appellant has not referred to his application for leave to appeal sentence in this document, it is apparent from his letter dated 5 October 2015 that he does seek to renew that application as well.

Agreed facts

[8] It is convenient to refer at this stage to the Agreed Facts dated 28 June 2012 which was signed by both Counsel and the learned trial Judge and filed pursuant to section 135 of the Criminal Procedure Decree 2009. The effect of any admission of fact in such a document is that it constitutes sufficient proof of that fact. The following facts were admitted:

"1. That the victim Raijeli is the accused's niece.

2. *That the victim fell pregnant and came to live with the accused and his wife.*

3. *That the victim resided with the accused and his wife at their home in Kuku Village, Bau Road during the time of the alleged offending.*

4. *That the victim resided with the accused family until giving birth.*

5. *That the following documents are agreed and tended by consent:*

   a) *Caution Interview of Livai Tamanalevu*
   b) *Charge Statement of Livai Tamanalevu*
   c) *Medical report of Katarina Raijeli*
   d) *Birth certificate of Katarina Raijeli."*

Background facts

[9] The background facts derived from the evidence may be stated briefly. The complainant was born on 24 July 1994. In January 2010 when she went to stay with

the Appellant and his family she was about 15½ years old. At the time of the trial she was just over 18 years old. The complainant was the Appellant's niece by marriage. In 2009 the complainant was staying with one of her brother's in Nadi. In January 2010 it was discovered that the complainant was 4 – 5 months pregnant. At that time the Appellant and his wife offered to allow the complainant to stay with them and their daughter at Kuku village in Tailevu. The family in Nadi accepted the offer since the complainant's parents were in the United States. Shortly after the Appellant's family returned to Kuku village with the complainant in January 2010 the alleged offending started and continued until the complainant left the Appellant's home in August 2011. The baby was born in May 2010.

The allegations

[10] The complainant alleged that the Appellant indecently assaulted her on numerous occasions between January and May 2010. The complainant stated in her evidence that the Appellant fondled her breasts, touched her body and kissed her neck and mouth. This continued up till the time the complainant's baby was born on 16 May 2010. On the day before, i.e. 15 May 2010, the Appellant raped the complainant. The complainant alleged in her evidence that the Appellant raped her again a week after the birth and about once a week thereafter until she left in August 2011, all the time without her consent. The complainant stated that she had told her aunty on at least two occasions but she was not believed. The complainant did not tell her cousin, the Appellant's daughter. During her evidence the complainant stated that the Appellant had treated her like the "*house-girl.*" The complainant gave evidence that she had spoken to a neighbor about the incidents.

[11] Under cross examination the complainant stated that the offences were always committed when the Appellant's wife and daughter were away from the house. She admitted that the Appellant had hit her with a stick which the Appellant claimed in his caution interview was only once for disciplinary reasons.

[12] The Appellant's evidence and his defence was to the effect that these offences never occurred. He appeared to be claiming that they were made up by the complainant because he had asked her to do work round the house and because he was strict with her in relation to the company of boys. It also appeared to be suggested that because

he had hit her on one occasion with a stick, she had lied about the offences. It is not necessary at this stage to refer further to the evidence given at the trial.

Discussion on grounds of appeal

[13] The principal grounds of appeal against conviction are concerned with the directions or lack of directions given by the learned trial Judge on the evidence adduced at the trial. One ground relates to the evidence given by the complainant which is said to be inconsistent in itself and inconsistent with the medical report that was admitted into evidence by consent (per Agreed Facts). A second ground relates to two out of court statements made by the complainant to the police which are claimed to be inconsistent with the evidence given by the complainant at the trial. A third ground relates to what is termed recent complainant. The Appellant claims that the directions given by the learned Judge to the assessors and to himself were insufficient thereby resulting in an unfair trial and a miscarriage of justice.

Inconsistent evidence

[14] To the extent that there were inconsistencies in the complainant's evidence, it must not be forgotten that at the time when the offences commenced the complainant was 15½ years old and pregnant. She had been offered and accepted accommodation during her confinement and following the birth of her son. The trial was over two years later by which time the complainant had turned 18. It should not be surprising that her memory of the details of events that had occurred at a time when she was extremely vulnerable were inconsistent during the course of her evidence and cross-examination. Her evidence on the essential elements of the offences were entirely consistent throughout the trial. In my judgment there were no material inconsistencies in the complainant's evidence that would require comment by the learned Judge in his summing up.

[15] In relation to the medical report that was put into evidence, it is claimed that the inconsistency relates to the complainant telling the doctor that she was hit by rope having previously claimed that she was hit with a stick. The Appellant also asked the Court to note that in her cross-examination at one point she said was punched by the Appellant, causing a black eye and at another point, she was hit by the Appellant. Although these inconsistencies should have been identified by the trial Judge, none of

them go to the elements of the offences for which the Appellant was convicted. Apart from confirming that the Appellant appeared to have been assaulted before the medical examination took place, the medical report was of extremely limited probative value. At paragraph 26 and 31 of his summing up the learned Judge directed the assessors and himself that:

> *"26 As assessors and judges of fact, your decision in this case, will largely depend on how you decide on the credibility of the complainant as against the accused, as a witness. In other words, after observing the two give evidence from the witness box, and after watching their behaviour and general demeanour in the court room, and given your general experience as members of the community, who do you find as the more credible of the two witnesses. Your answer to this question will determine your answer to the questions posed in paragraph 8 hereof.*
>
> *31 You must look at all the evidence. You must consider the complainant's evidence. You must consider the accused's evidence. You must also consider all the other witnesses' evidence. After considering all the evidence the decision on whether or not to accept the complainant as a credible witness is a matter entirely for you."*

[16] There is no doubt that the inconsistencies related to credibility. It would have been appropriate, in the context of credibility for the learned Judge to have identified the inconsistencies in the evidence as to how the apparent injury to the complainant that the doctor had identified had been caused. Although not going to the elements of the offences, the issue was whether the prosecution had proved the guilt of the Appellant beyond reasonable doubt. In this case that depended almost entirely upon the assessors and the Judge believing and accepting the evidence of the complainant. That in turn depended upon, amongst other matters, whether the assessors and the Judge regarded the complainant as a credible witness. To that extent it can be said that there has been a miscarriage of justice. The ground succeeds on that ground.

Prior Statements

[17] The next ground relates to the evidence given by the complainant at the trial and to how that evidence is to be viewed in the context of the two out of court statements given to the police prior to the trial. The first statement was made on 19 August 2011

and the second on 30 September 2011. Neither statement was in evidence. It is apparent from the record (P.118-119) that the complainant was cross-examined as to the contents of these two statements. Neither the questions nor the answers in relation to those matters are accurately recorded. There are only the handwritten notes of the trial judge summarizing the answers which have been typed. From the record of the trial it is not possible to determine what allegations were specifically put to the complainant during her cross-examination.

[18] In his written submissions the inconsistency that the Appellant identified concerns the evidence given by the complainant at the trial to the effect that her aunt was out of the house selling food packs at the time the offences were committed. In her police statement made on 19 August 2011 the complainant stated that on one of the occasions when the Appellant raped her, her aunty was in Nausori shopping. In her statement on 30 September 2011 she makes reference to her aunty being out of the house.

[19] This court has recently affirmed the approach that should be adopted to an inconsistent out of court statement in **Sudhakar –v- The State** (AAU 105 of 2010; 5 December 2015) when it said at paragraph 14:

> *"When a witness in a criminal trial gives evidence that is materially inconsistent with (his) earlier statement or for that matter omitted a material fact in his earlier out of court statement, then the trial judge should direct the assessors to treat the witness's evidence with caution. The trial judge should also direct the assessors to consider whether any explanation given by the witness for the inconsistency or omission are genuine and whether the witness's evidence is true despite the inconsistency or omission (**Ram –v- The State**; CAV 1 of 2011; 9 May 2012 at [61]).*"

[20] In the present case there is no indication in the record that the complainant was cross-examined as to the inconsistency to which the Appellant referred in his submission. Certainly the Judge has given no direction at all on the issue of inconsistent out of court statements. To the extent that there was any inconsistency in relation to the issue raised by the Appellant, although not material to the elements, did go to credibility and a direction should have been given.

Recent complaint

[21] The next issue raised by the Appellant relates to recent complaint. In the submissions filed by the Appellant in person the Appellant claims that the learned Judge should have directed the assessors and himself as to the belatedness of the complainant's complaint to the police. In my judgment her situation at the time provided sufficient reason for her not filing a complaint. She had just given birth and there was no where else for a 16 year old with baby to go.

[22] In submissions by Counsel at the leave hearing the issue of recent complaint was raised on the basis that there was no proper direction given to the assessors concerning the evidence given by the Appellant's neighbour. This lady (PW3) gave evidence of conversations that took place between her and the complainant when the complainant was staying with the Appellant's family. Her evidence is on page 120 – 121 of the Record. The learned Judge summarized that evidence at paragraph 27 of his summing up. In her evidence the witness stated that:

> *"One day she came home crying. She told me Livai was touching her and she kept on crying _ _ _. She also told me they had sex _ _ _. We cried together. _ _ _"*

[23] In his summing up the learned Judge stated towards the end of paragraph 27:

> *"As assessors and judges of fact you must consider this evidence carefully. It does not prove the truth of what the complainant alleged against the accused, but it does tend to prove what was occupying the complainant's mind and her general demeanour at the time she confided in (the witness). _ _ _."*

[24] As the Supreme Court noted in **Raj –v- The State** (CAV 3 of 2014; 20 August 2014) recent complaint is relevant to the consistency, or inconsistency, in the complainant's conduct and as such was a matter that went to her credibility and reliability as a witness. If the evidence of the recent complaint is accepted it is the credibility and consistency of the complainant that is supported and not that the complainant's evidence was strengthened.

[25] In this case the directions given by the learned trial Judge did not sufficiently state the role of recent complaint evidence. Although the evidence given by the complainant,

if accepted as truthful and credible, established that the Appellant had committed the acts the subject of the complainant's accusations, it cannot be overlooked that the direction on recent complaint was inadequate and to that extent this ground succeeds.

Other grounds

[26] In my judgment it is not necessary to add anything further to the observations made by the learned Justice of Appeal in his leave Ruling concerning the issues relating to the no – case to answer Ruling, the composition of the assessors and the failure to analyse a vaginal swab. For the reasons stated those grounds all fail. The issue of dock identification was not raised by the Appellant in person at any stage. Identification was never an issue in this case.

Corroboration

[27] To the extent that the Appellant complained that the medical evidence did not corroborate the allegations of rape, it is sufficient to refer to section 129 of the Criminal Procedure Decree 2009 which provides:

> *"Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."*

Therefore this ground fails.

Section 237 of the Criminal Procedure Decree

[28] Finally the Appellant raises section 237 of the Criminal Procedure Decree as one of his ground of appeal against conviction. The Appellant submitted that the learned Judge erred when he failed to make an independent assessment of the evidence when he decided to agree with the opinions of the assessors and proceed to convict the Appellant. The Appellant relies on two authorities in support of his submission. They are **Mohammed –v- The State** (CAV 2 of 2013; 27 February 2014) and **Ram -v- The State** (CAV 1 of 2011; 9 May 2012).

[29] The starting point is, of course, section 237 of the Criminal Procedure Decree, the effect of which is that when the trial Judge agrees with the opinion of the assessors

and where the judge's summing up of the evidence is in writing and on record, it is not necessary for any judgment (other than the decision of the Court which shall be written down) to be given. If a judgment is given under those circumstances it need not be written down. What this means is that under section 237(3) of the Decree, where the trial Judge agrees with the opinions of the assessors he is not required to give reasons for doing so and if he does give reasons, he is not required to put them in writing. Section 237(5) provides that the summing up and the decision of the court are collectively regarded as the judgment of the Court.

[30] The Supreme Court decision of **Mohammed** (supra) did not impose, and nor could it impose, any requirement that was inconsistent with the provisions of section 237 of the Criminal Procedure Decree. The decision went no further than to indicate that an appeal court would be greatly assisted if reasons were given in a written judgment by the trial judge when he agreed with the opinions of the assessors. It also follows that the decision of the Supreme Court in **Ram** (supra) must be read in a manner that is consistent with the provisions of section 237 of the Criminal Procedure Decree.

[31] The judgment of the Court is at page 63 of the Record. In that judgment the learned Judge has indicated his agreement with the unanimous opinions of the assessors, has then proceeded to find the Appellant guilty as charged and has then convicted him accordingly. The judgment was delivered in August 2012 and although delivered after the decision in **Ram** (supra) (but before the decision of **Mohammed** supra) the learned Judge has complied with section 237 and as a result there is no error. The ground fails.

The proviso

[32] In so far as the Appellant has succeeded on the points raised by certain grounds of appeal against conviction, I have no hesitation in applying the proviso to section 23 of the Act on the basis that there has been no substantial miscarriage of justice. Had the full directions been given in the summing up, I have concluded that the evidence overwhelmingly supported the opinions of guilt beyond reasonable doubt and that the convictions would have remained undisturbed.

Appeal against sentence

[33] The appeal against sentence was not addressed by the Appellant in his written submissions nor before the Court. However in the submissions filed by the Legal Aid Commission on behalf of the Appellant at the leave stage, the issue of aggravating factors was raised as a ground for leave to appeal against sentence. It was submitted that the learned trial Judge had effectively considered the same matters as aggravating factors under two separate headings in paragraphs 8(i) and 8(ii) of the Sentencing decision.

[34] In assessing whether there has been an error in the exercise of the sentencing discretion it is necessary to go back and closely examine the wording of the particulars of the charges on which the Appellant had been convicted.

[35] The first count was a representative or specimen count for the period 1 – 31 January 2010 under the Penal Code. On 1 February 2010, the Penal Code was repealed by the Crimes Decree 2009. The second count was also a representative or specimen count for the period 1 February 2010 to 14 May 2010 under the Crimes Decree. It would appear that the first count was drafted as a representative charge based on the evidence of the complainant. The complainant alleged multiple instances of similar indecent assaults in the month of January 2010. The problems of charging an accused under the Penal Code in such a case were discussed by Shameem J in **Koro –v- the State** [2002] FJHC 161; HAA 48 of 2002; 2 October 2002. The learned Judge observed during the course of her judgment that:

> *"However, as a matter of practice, it seems good sense to adopt the New Zealand procedure of "specimen charges" where the incidents of offending are indistinguishable from each other and where it is open to the court to convict as long as it is satisfied beyond reasonable doubt that the accused on at least one occasion, in the period alleged, committed the act alleged."*

[36] It would appear that there was no provision in the Criminal Procedure Code that expressly sanctioned such an approach although it may be argued that section 122(f) of the same Code, with a liberal approach to its interpretation, may have permitted the practice. After 1 February 2010 the practice of charging by way of a representative charge in such circumstances was expressly permitted under section 70(3) of the

Criminal Procedure Decree. The significant point of this discussion is that when an accused is charged by way of a representative count he can only be convicted for one offence and he can only be sentenced in respect of that offence. Consequently aggravating factors can only be those that relate to the one offence for which he has been convicted. The fact that it was one conviction representative of a number of similar acts of misconduct cannot be regarded as an aggravating factor. The third count was one count of rape on a specific date. The fourth count was a representative count of rape between 1 August 2010 and 31 August 2011.

[37] The result of the judgment in effect is that the Appellant was convicted on three counts of representative charges and one count of a specific charge. In both paragraphs 8(i) and 8(ii) the learned judge has referred to the multiple instances of misconduct in relation to each conviction on the representative counts. To that extent there has been an error in the sentencing discretion. However, considering the evidence together with other relevant aggravating factors that were identified by the trial judge and applying the test that is set out in section 23(3) of the Court of Appeal Act, I do not think that a different sentence should have been passed.

[38] In conclusion I would grant leave to the appellant to appeal against conviction and sentence. For the reasons stated I would dismiss the appeals against conviction and sentence.

Jayamanne JA

[39] I agree that the appeals should be dismissed.

P. Fernando JA

[40] I also agree that the appeals should be dismissed.

Orders:

1. *Leave to appeal against conviction and sentence granted.*

2. *Appeals against conviction and sentence dismissed.*

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr Justice S. Jayamanne
JUSTICE OF APPEAL

Hon. Mr Justice P. Fernando
JUSTICE OF APPEAL