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

CRIMINAL APPEAL NO.AAU0074 of 2013
[High Court Criminal Case No.HAC173 of 2011)

BETWEEN	:	**LEON MARSEU CONIBEER**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **Lecamwasam JA** **Goundar JA**
Counsel	:	**Appellant in person** **Ms S Puamau for the Respondent**
Date of Hearing	:	**15 November 2017**
Date of Judgment	:	**30 November 2017**

JUDGMENT

Calanchini P:

[1] I have read the draft judgment of Goundar JA and agree with his reasoning and his conclusions. The appeal should be dismissed and the conviction affirmed.

Lecamwasam JA:

[2] I agree with the reasoning and conclusions of Goundar JA.

Goundar JA:

[3] This is an appeal against conviction only. The appellant was charged with one count of indecent assault and one count of rape. The charges involved two different victims. The appellant pleaded not guilty to the charges. He was tried in the High Court at Lautoka. The assessors gave unanimous opinion that the appellant was not guilty of both charges. The trial judge agreed with the assessors that the appellant was not guilty of the indecent assault charge, but he disagreed with their opinions on the charge of rape. In a written judgment delivered in an open court, the learned trial judge found the appellant guilty of rape as charged and sentenced him to 7 years' imprisonment with a non-parole period of 5 years.

Factual and procedural background

[4] The facts are that the complainant (KM), a young woman in her early twenties, was one of the tenants in premises owned by the appellant. Six tenants occupied separate rooms in the building. Two were males and four were females. KM had a bedroom to herself. Her monthly rent was $200.00 which she paid on a weekly pro rata basis. The tenants shared the living room, kitchen and bathroom. KM had known the appellant as her landlord for about five months before the date of the alleged incident. She said the appellant used to visit the tenants either weekly or fortnightly to collect the rent.

[5] The alleged incident occurred on 1 June 2011. KM's evidence was that on this day, she woke up at about 9 am and went to the bathroom which was adjacent to her bedroom. As she came out of her bedroom with her bath towel and before she could enter the bathroom, a man who had covered himself with a pink blanket, tried to enter her bedroom. He pushed her into her bedroom using force. She fell back on a mattress that was on the floor. When the man took off the blanket, she recognised him as her landlord, the appellant. He tried to pull her to her bed which was next to the wall and when she resisted, she hit her head against the wall. She told him to stop. He forcefully pulled her legs apart using his legs and penetrated her vagina for about 1 to 2 minutes. She said he smelt of alcohol. She knew he was drunk and she was scared of him. After the act, he lay on the bed. She went out of the bedroom and called her

boyfriend on his mobile from the bathroom. She told her boyfriend that the appellant came into her bedroom and did something.

[6] Her boyfriend's evidence was that when he received a phone call from KM, she sounded distressed and was crying. She could not speak on the phone and said she would send him a text message. She did in fact send him a text message from her mobile that read 'Leone raped me". Evidence was led that KM moved out of the flat in the afternoon of 1 June 2011 with the help of her boyfriend.

[7] The appellant gave evidence at the trial. His evidence was that on 1 June 2011, he went to his premises to sleep after attending a birthday party. He had consumed kava and alcohol earlier on in the night. He said that one of the female tenants, Lia allowed him to enter the premises when he knocked at the door at around 1 am. She also offered him a blanket and a pillow. He slept in the living room till 10.30 am or 11.30 am when he asked his cousin Joe, who was also a tenant, to unlock the gate so that he could leave. He left the flat shortly after. He denied the allegation of rape. He said the allegation of rape was fabricated by KM because she had owed him rent and he had threatened her with an eviction.

[8] Lia was the appellant's cousin as well as his tenant. Her evidence was that very early in the morning of the alleged incident, the appellant knocked at her bedroom door and requested for a blanket and a pillow from her. She gave him a pillow and a blanket in the living room and returned to her bedroom. She woke up at 6 am and made her breakfast and ironed her work clothes. She saw another male tenant, Savenaca (Save) having breakfast in the kitchen. She left the flat for work at 8 am. She did not see the appellant in the living room. She only saw her blanket and the pillow that she had given to the appellant earlier in the morning. She did not meet or see KM on that morning.

[9] Save's evidence was that on 1 June 2011, he woke up at around 7 am and read a magazine while he had his breakfast till about 9.30 am. While he was having his breakfast he saw Lia iron her clothes. He also saw the appellant asleep in the living room. Sometime after 7.30 am, the appellant got up and went to the toilet. He came

back and went back to sleep in the living room. At around 9.30 am, Save went back to his bedroom to sleep. He woke up at around 12.30 pm. When he got up, the appellant had left the flat.

[10] At trial, the appellant was represented by counsel of his choice. Initially, the appellant was also represented by counsel of his choice in this appeal. Subsequently, he withdrew his instructions from his counsel and elected to represent himself. His grounds of appeal in summary are:

(i) The trial judge shifted the burden of proof on the appellant to create a reasonable doubt.
(ii) The trial judge wrongly concluded that the appellant had lied in his evidence.
(iii) The trial judge did not direct himself on the defence of alibi.
(iv) The trial judge wrongly found that there was a contradiction in the evidence of Lia and Save to reject their evidence.
(v) The trial judge was wrong to permit the prosecutor to cross examine the appellant on the complainant's motive to fabricate the allegation of rape.
(vi) The trial judge misdirected on the recent complaint evidence.
(vii) The trial judge was wrong to accept the police explanation for recording two statements from the complainant.

Burden of proof and lies

[11] The question whether the burden of proof was shifted on the accused is a question of law alone. At the trial, the appellant led documentary evidence of receipt books and receipts to support his contention that the complainant had fabricated the rape allegation after he had threatened her with an eviction for non payment of rent. However, the probative value of the receipts was unclear. The appellant's evidence was that he issued the receipts to his cousin Joe who was also a tenant in the flat to dispense them to the tenants. In answering a clarification question from the learned trial judge as to how the appellant had possession of the original receipts, the appellant admitted the receipts were never given to the complainant. This evidence was consistent with the complainant's version that she never got any receipts from the appellant for payment of rent. Her evidence was that she never owed any rent to the appellant.

[12] In paragraph 29 of the judgment, the learned trial judge considered the receipts and the receipt books and concluded that the production of receipts was an afterthought invention to show that the complainant had a motive to "cry out rape" and falsely implicate the appellant. The learned trial judge further noted that the complainant was cross examined on her motive to fabricate the rape allegation for non payment of rent only after she was recalled for a further cross examination after it was discovered that the police had recorded two statements from her. The learned trial judge concluded his assessment of the receipts as follows:

> I am of the view that the accused had lied about these receipts. I am of the view that the accused had failed to create a reasonable doubt in the prosecution case.

[13] The appellant's contention is that the learned trial judge wrongly concluded that he had lied about the receipts and that he carried a burden to create a reasonable doubt in the prosecution case. I accept that comments such as 'lied about the receipts' and 'failed to create a reasonable doubt' are unwise phrases to use when assessing the evidence to determine the guilt of an accused. The receipts were led in evidence to establish a potential motive for the complainant to fabricate the rape accusation for non payment of rent. After the receipts had been admitted in evidence and upon the trial judge's clarification, the appellant admitted that the receipts were never handed to the complainant.

[14] There was an element of lack of frankness on behalf of the appellant regarding the receipts, but to label that lack of frankness a lie was unnecessary. The learned trial judge could have said that he preferred not to attach any weight to the receipts because on the appellant's own evidence, the receipts were never handed to the complainant. The complaint, however, is not so much about the appellant being found to have lied about the receipts, but it is about how the learned trial judge used that finding to conclude that the accused had failed to create a reasonable doubt in the prosecution case. The appellant submits that by doing that the learned trial judge erroneously shifted the burden of proof on the accused to prove his innocence.

[15] It is a settled law that, subject to any statutory exception, the legal burden to establish the guilt of an accused rests on the prosecution from the beginning to the end of a criminal trial. The most frequent citation of the case that confirmed this principle is the House of Lords decision in *Woolmington v The Director of Public Prosecutions* [1935] AC 462, where Viscount Sankey L.C said at 481:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the show of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, ..., the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

[16] When there is a question of an erroneous qualification of the onus of proof, an appellate court must have regard to the charge or direction as a whole, to determine if there is an error in the direction. When directing on the onus and standard of proof, no formula has to be followed slavishly. As Lord Goddard CJ said in *Rex v Kritz* [1950] 1 KB 82, 89:

> ...it is not the particular formula that matters: it is the effect of the summing up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence" that is enough. I should be very sorry if it were thought that these cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the accused's guilt. If that is done, that will be enough.

[17] In *Swadesh Kumar Singh v The State* unreported Cr App No CAV0007 of 2005S; 19 October 2006, the Supreme Court held that the trial judge's charge to the assessors that the defence, in respect of prosecution witnesses, only has to create a reasonable doubt, to be an erroneous qualification of the onus of proof. But the Court did not find the error to be significant for the following reasons at [67]:

> The judge, in other parts of his charge, directed the assessors quite properly as to the standard of proof and, having regard to the charge as a whole, the assessors might have regarded the statement that the defence was required to "create a reasonable doubt" as a slip of the tongue to be treated as having no significance.

[18] In paragraph 4 of his judgment, the learned trial judge said that he was directing himself in accordance with the law contained in the summing up. In the summing up, the learned trial judge gave the following direction on the onus of proof at [7]:

> On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.

[19] The learned trial judge returned to the onus of proof in the summing up after summarising the case for the accused at [49]-[50]:

> It is up to you to decide whether you could accept the evidence of the accused and witnesses called by the accused. The accused does not have to prove anything. 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.
>
> Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.

[20] Similarly, in his judgment, the learned trial judge, after analysing the evidence, said at [37]:

> The learned DPP has satisfied me the guilt of the accused beyond a reasonable doubt in respect of the 2nd count.

[21] It is clear when the summing up is read as a whole, the learned trial judge did not require the appellant to prove anything. The burden to prove guilt remained with the prosecution throughout the trial. Although the comments such as 'the accused had lied about the receipts' and 'the accused had failed to create a reasonable doubt in prosecution case' were unwise choice of words to use to analyse the evidence of the

accused, there is no doubt in mind, that in the appellant's case, his guilt was determined upon the evidence led by the prosecution.

[22] As regards a direction on lies, a direction is necessary where the prosecution relies upon lies told by an accused as probative of his guilt (*R v Lucas* [1981] QB 720, [1981] 73 Cr App R 159, [1981] 2 All ER 1008, [1981] 3 WLR 120). In the present case, the prosecution never relied upon lies to establish guilt. The question of lies arose from the evidence of the accused from the witness box. In *R v Barnett* [2002] 2 Cr App R 168, 173, the English Court of Appeal observed that in the great majority of the cases where the prosecution contend that an accused is telling lies in the witness box, a direction on lies is inappropriate.

[23] Similarly, in *R v Burge and Pegg* [1996] 1 Cr App R 163, the English Court of Appeal observed that in cases where an accused had given evidence, a *Lucas* lie direction is not always necessary and, if given where not necessary, merely adds complexity and will do more harm than good. Those observations equally applied to the present case because the learned trial judge did not rely upon lies to find the appellant guilty. The appellant was found guilty of rape because the learned trial judge believed the complainant's evidence as true. Grounds one and two are not made out.

Alibi

[24] The appellant's contention that he ran a defence of alibi at the trial is misconceived. A defence of alibi is available to an accused who says that he was not at the scene of the crime when it was committed. In the present case, there was no dispute that the appellant was inside the flat when the alleged crime was committed. The appellant's evidence was that he was asleep in the living room at the time when the rape allegedly took place in the complainant's bedroom. No alibi direction was required on the facts of this case.

[25] The appellant's defence was a complete denial of the offence and fabrication of the allegation of rape by the complainant because of non payment of rent. The complainant denied fabricating the rape allegation because of non payment of rent.

Her evidence was that she did not owe any rent to the appellant. The learned trial judge did not believe the appellant but believed the complainant. This finding was open on the evidence. This ground is not made out.

Contradiction in the evidence of the defence

[26] Lia's evidence was that when she was ironing her clothes sometime after waking up at 6 am and before leaving her home for work at 8 am, she saw Save having his breakfast in the kitchen, but she did not see the appellant in the living room. She only saw a blanket and a pillow in the living room. Save's evidence was that when Lia was ironing her clothes sometime around 7 am, the appellant was in the living room asleep. The learned trial judge said that there was a clear contradiction between these two versions. I agree with the learned trial judge's assessment of the evidence of Lia and Save. There could have been an explanation for the contradiction but none was sought at the trial. In the absence of any credible explanation, the learned trial judge was correct to conclude that there was contradiction between the two versions. This ground fails.

Cross examination of the appellant by the prosecutor

[27] When the appellant elected to give evidence, he opened himself to questions by the trial prosecutor. The appellant gave evidence of a potential motive of the complainant to fabricate the rape allegation against him. The complainant was cross examined at length regarding her motive to fabricate the allegation against the appellant because she had owed him rent and was warned of eviction. The complainant denied owing rent or fabricating the rape allegation. In these circumstances, the trial prosecutor was perfectly within his professional responsibility to cross examine the appellant and challenge the plausibility of his evidence that the complainant had fabricated the rape allegation because she had owed him money. This ground fails.

Recent complaint

[28] As a general rule, a prior consistent statement of a witness is inadmissible evidence. However, there are many exceptions to this rule. One of the exceptions to the rule is in sexual cases. In sexual cases, the evidence a recent complaint of the sexual assault made to another person by the complainant is allowed to show the consistency of the

conduct of the complainant and to negative consent (*Peniasi Senikarawa v The State* unreported Cr App No AAU0005 of 2004S; 24 march 2006). The relevance of the evidence was explained by the Supreme Court in *Anand Abhay Raj v The State* unreported Cr App No CAV0003 of 2014; 20 August 2014 at [38]:

> 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.

[29] At trial, the complainant gave evidence that she told her boyfriend that the appellant had raped her shortly after the alleged incident. The complainant's boyfriend gave evidence and confirmed that the complainant made a complaint to him that the appellant had raped her. In paragraph 38 of the summing up, the learned trial judge told the assessors that the evidence of the boyfriend cannot be used to prove the truth of the alleged rape but as evidence of the consistency of the complainant's conduct with the story she told in the witness box. The direction is correct in law. This ground fails.

Recording of two police statements from the complainant

[30] After the complainant had concluded her evidence and before the prosecution closed its case, it was discovered that the complainant had made two police statements and the second statement was not disclosed to the defence. Counsel for the appellant moved for a mistrial, which the learned trial judge refused. The learned trial judge quite correctly held that the remedy for the non-disclosure of police statement was a recall of the complainant for further cross examination and not a mistrial. Police witnesses offered an explanation for recording two statements from the complainant. After the complainant gave her initial statement, the police discovered mistakes in the recording of the statement by the officer concerned. The second statement was taken to correct the mistakes in the recording of the first statement.

[31] At trial, although the complainant was cross examined at length after she was recalled, no material inconsistency was established arising from her police statements. This ground fails.

[32] In addition to the above grounds of appeals, the appellant has filed detailed written submissions challenging the veracity of the complainant's evidence and the sufficiency of the evidence to sustain the conviction. The appellant was convicted because the learned trial judge believed the complainant's evidence that the appellant used force to have sexual intercourse with her. This finding was available on the evidence and there is no ground to interfere with that finding of the learned trial judge.

[33] For these reasons, I would affirm the rape conviction and dismiss the appeal. There is no appeal against sentence.

Order of the Court:

Appeal dismissed.

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Hon. Mr Justice W Calanchini
PRESIDENT, COURT OF APPEAL

.....
Hon. Mr Justice S Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Mr Justice D Goundar
JUSTICE OF APPEAL

Solicitors:
The Appellant in person
Office of the Director of Public Prosecutions for the Respondent