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

CRIMINAL APPEAL AAU 0057 OF 2012
(High Court HAC 0057 of 2011 [Lautoka])

BETWEEN : **LEPANI ROKOLABA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra JA**
A. Fernando JA
Temo JA

Counsel : **Mr S. Waqainabete for the Appellant**
Mr S. Babitu and Ms S. Kiran for the Respondent

Date of Hearing : **3 May 2017**

Date of Judgment : **26 May 2017**

JUDGMENT

Chandra JA

[1] The Appellant was charged with three counts of rape contrary to section 207(1)(2)(a) of the Crimes Act, 2009.

[2] The Appellant was found guilty on all three counts, was convicted and sentenced to a period of 15 years imprisonment with a non-parole period of 11 years.

[3] The Appellant filed an application for leave to appeal on 19th July 2012 against his conviction on the following grounds:

1. The Learned Trial Judge erred in law when he ruled that there was a case to answer in respect of Counts 1 and 2 even though the State had not adduced any evidence of carnal knowledge as required by section 207(2)(a) of the Crimes Act, 2009.

2. The Learned Trial Judge erred in law in convicting the Appellant for counts 1 and 2 when the evidence adduced did not support those Counts.

3. The Learned Trial Judge erred in law and in fact when he failed and/or neglected to direct the Assessors to the elements of rape offence mentioned in section 207(2)(a) of the Crimes Act 2009 for counts 1 and 2 and that the State has to prove that the Appellant's penis penetrated the vagina of the complainant.

4. The Learned Trial Judge erred in law and in fact in convicting the Appellant on all three Counts when the evidence adduced by the State was so unreliable.

[4] The Legal Aid Commission appearing on behalf of the Appellant had amended the grounds of appeal as follows:

Ground One:

The Learned Trial Judge erred in law when he ruled that there was a case to answer and subsequently convicted the Appellant in respect of Counts 1 and 2 even though the State had not adduced any evidence of carnal knowledge as required by section 207(2)(a) of the Crimes Act No.44 of 2009.

Ground Two:

The Learned Trial Judge erred in law and in fact when he failed to direct the Assessors on the inconsistency of evidence adduced by the State witnesses with regard to any complaint made by her to anyone to assess the credibility of the complainant.

[5] A single Judge of the court of Appeal considered the original grounds of appeal and granted leave to appeal on grounds 1 to 3 of the original grounds.

[6] Leave has been granted by the learned single Judge of the Court of Appeal in relation to the first two counts against the Appellant. The 2nd amended ground relates to the direction of the learned Trial Judge to the Assessors and would therefore be an additional ground that would be considered by this court.

Factual Background

[7] A voir dire inquiry was held during which the prosecution led the evidence of three Police Officers and the Appellant gave evidence on his behalf. In his caution interview statement the Appellant had confessed to the commission of raping the complainant on three occasions. The learned Trial Judge by his Ruling dated 27th June 2012 held that the statement made by the Appellant, was made voluntarily and the prosecution was allowed to produce the statement at the trial. The caution Interview statement was produced during the trial and marked through the Police witness, Paul.

The virtual complainant was the niece of the Appellant, who was the brother of her father. She in her evidence said that on the 24th of January 2011 when she was collecting seashells the Appellant had called her to massage his legs. She had come home and gone back to the beach and the Appellant had come there with a cane knife and taken her back home and asked her to massage his legs. She had done so and he had asked her to take off

her clothes. When she refused, the Appellant had removed her clothes, touched her vagina and lay on top of her kissing her mouth and touching her breast. She further said that the Appellant had poked her vagina and that he had used his hand. After that he had asked her to stand up and put her clothes on. When her grandmother came she had told her that the Appellant had raped her.

On the next day, the Appellant had asked the complainant to clean his house. After she had cleaned the house, the Appellant had come up to her and had wanted her to lie down which she refused. Then he had asked her to take off her clothes which too she refused. Then the Appellant had removed her clothes and got her to lie down. After that he had started touching her private part and thereafter had poked it. She had felt pain, he had been lying on top of her kissing her mouth and touching her breast. Thereafter he had asked her to get up and put on her clothes. When she saw her grandmother soon after, she had told her that the Appellant had raped her. On 6th February 2011 the Appellant had called her to come with him to look for pumpkins. He had asked her to come near a lemon tree and asked her to remove her clothes. When she refused he had removed her clothes and started touching her private part and poked it. After that he had laid on top of her, started kissing her and inserted his male organ into her vagina. She said that she had not given her consent. Then he had asked her to put on her clothes. She had been lying down there feeling weak. She had told this to her grandmother.

Defence Counsel cross-examined the complainant and to his first question whether the Appellant raped her she said yes. Thereafter the Counsel had questioned her regarding the incident that occurred on 6th February 2011.

The complainant's grandmother, gave evidence and stated that the complainant had told her on all three occasions what the Appellant had done to her but she had not taken any action on those as she said she was scared.

[8] At the close of the Prosecution case, Defence Counsel submitted that there was no case to answer as Counts 1 and 2 had not been proved. He also submitted that he was not

challenging the 3rd count. He further stated that he did not wish to comment on a lesser offence on the 1st and 2nd Counts.

[9] State Counsel had submitted that there was a case to answer. However, she admitted that there was no evidence that the girl was raped as stated in the 1st and 2nd count, and that in such a case the accused can be convicted for a lesser offence.

[10] The learned trial Judge stated considering the nature of evidence in Court that there was a case to be answered by the Accused and accordingly called for the defence.

[11] The Appellant chose to give evidence and in his evidence had stated that he had sex with the complainant but that it was consensual.

[12] After the summing up of the learned trial Judge, the Assessors came up with their verdict in the following manner:

> *Assessor No.1 stated that the Appellant was not guilty of Count 1 but guilty of indecent assault, and guilty on the 2nd and 3rd count.*
> *Assessor No.2 stated that the Appellant was guilty of the 1st and 3rd counts, not guilty of the 2nd count but guilty of indecent assault.*
> *Assessor No.3 stated that the Appellant was guilty of the 1st and 3rd counts, not guilty of the 2nd count but guilty of indecent assault.*

[13] The learned trial Judge by his Judgment dated 4th July 2012 found the Appellant guilty of all three counts and convicted him. Thereafter the Appellant was sentenced to 15 years imprisonment with a non-parole period of 11 years.

Consideration of the Appeal

[14] Ground1 of the grounds of appeal relates to the first two counts against the Appellant, on the basis that the learned trial Judge erred in law when he ruled that there was a case to

answer regarding counts 1 and 2 even though the State had not adduced any evidence of carnal knowledge as required by section 207(2)(a) of the Crimes Act.

[15] Section 207(2)(a) of the Crimes Act states as follows:

"A person rapes another person if-

(a)The person has carnal knowledge with or of the other person without the other person's consent; "

[16] Carnal knowledge involves penile penetration of vulva, vagina or anus. The victim was 16 years old then and in her evidence as regards the first occasion, she stated that the Appellant had poked her vagina, that he had used his hand, he had poked his hand on her vagina, and he was lying on top of her. Soon after when her grandmother had come she had told the grandmother that the Appellant had raped her inside his house.

[17] As regards the second occasion, the victim had stated that the Appellant having undressed her had started touching her private part and had poked it. When she had said that it was paining, he had laid on top of her and kissed her mouth and touched her breast. When she saw her grandmother coming there she had told the grandmother that the Appellant had raped her.

[18] From the evidence of the victim as stated by her in Court regarding the first two instances, it would appear that there was no evidence regarding penile penetration. On the first occasion she has said that the Appellant had poked her vagina using his hand and thereafter he had laid on top of her. On the second occasion, she stated that the Appellant had poked her private part and thereafter laid on top of her.

[19] It is perhaps because the victim had not specifically stated about penile penetration when giving evidence, thatDefence Counsel made an application to the Judge that there was no case to answer as far as Count 1 and 2 were concerned. State Counsel too, admitted that position.

[20] However, the learned trial Judge did not accept that position and stated that there was a case to answer and called for the defence.

[21] Section 293 of the Criminal Procedure Code:

> *"**293.**-(1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any arguments which the barrister and solicitor for the prosecution or the defence may desire to submit, record a finding of not guilty.*
>
> *(2) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons, committed the offence, shall inform each such accused person of his right to address the court, either personally or by his barrister and solicitor (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his barrister and solicitor (if any), to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof, the judge shall record the same. If such accused person says that he does not mean to give evidence or make an unsworn statement, or to adduce evidence, then the barrister and solicitor for the prosecution may sum up the case against such accused person. If such accused person says that he means to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon such accused person to enter upon his defence."*

[22] Section 293 has been subjected to interpretation in several cases. The test on case to answer is that there must be some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence. The credibility, reliability and weight of the evidence are matters for the assessors (**SisaKalisoqo v. State** Criminal Appeal No. 52 of 1984, **State v. MoseseTuisawau** Criminal Appeal No. 14 of 1990.)

[23] At the close of the prosecution case, the trial Judge has to decide considering the evidence available at that stage whether he should call for the defence. It is a discretion

conferred on the trial Judge to take that decision. If the Judge considers there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence which is the test for no case to answer, then he would call for the defence.

[24] Defence Counsel submitted that there was no case to answer regarding counts 1 and 2 according to the evidence available at that stage and State Counsel too admitted same. It was their view, but the learned trial Judge had exercised the discretion conferred on him by section 293 and taken the decision to call for the defence.

[25] It is to be noted that at the close of the prosecution case, as the voir dire inquiry had been held, the caution interview statement too was available as an item of evidence. In the caution interview statement, the Appellant had confessed to the commission of rape regarding the two occasions which were the basis of counts 1 and 2.

[26] In the evidence of the victim, she had stated that soon after the first two incidents she had told her grandmother on each occasion that the Appellant had raped her. The grandmother testified that the victim had complained to her but that she did not take any action as she was scared. These items of evidence together with the caution interview statement of the Appellant were matters that were relevant to arrive at the decision to call for the defence although the Defence Counsel and State Counsel had thought otherwise.

[27] In those circumstances, it cannot be said that the learned Trial Judge had erred in ruling that there was a case to answer in respect of counts 1 and 2. There was no issue as regards count 3 as there was sufficient evidence regarding same.

[28] The second ground of appeal is that the learned Trial Judge erred in law in convicting the Appellant on counts 1 and 2 when the evidence adduced did not support the Counts, while the 3rd ground is related to this ground as it is on that basis that the learned trial Judge failed to direct the Assessors on the elements of the offence of rape mentioned in section 207(2)(a) of the Crimes Decree.

[29] The learned Trial Judge in his summing up at paragraphs 11 to 14 dealt with the elements of the offence of rape in relation to Counts 1 and 2 of the information. This direction dealt with the aspects of carnal knowledge, what was meant by accused having carnal knowledge, and section 206 dealing with consent. In such circumstances, it cannot be said that there was a failure on the part of the learned trial Judge in directing the Assessors regarding the elements of rape in terms of section 207(2)(a).

[30] The majority verdict of the Assessors on count 1 was that the Appellant was guilty of rape, while their majority view on count 2 was that the Appellant was not guilty of rape but of indecent assault. They were unanimous in finding the Appellant guilty of count 3.

[31] In Fiji the Assessors are not the sole judges of fact. The judge is the sole judge of facts in respect of guilt and the assessors are there only to offer their opinions based on their view of the facts. – **SakiusaRokonabete v The State;** Criminal Appeal No.AAU0048/05.

[32] According to Section 237(3) :

> *"When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be – (a) written down; and (b) Pronounced in open Court".*

[33] The learned trial Judge, handed out a written judgment wherein he agreed with the majority verdict of the Assessors on Count 1, disagreed with their majority verdict on Count 2 and agreed with the unanimous verdict on Count 3.

[34] In his judgment the learned Trial Judge directed himself in accordance with the law and the evidence which he had discussed in his summing up. He had considered all the evidence led at the trial which included the admitted caution interview statement of the Appellant and the evidence given by the Appellant when called for his defenceand

arrived at the conclusion that the Prosecution had proved the case beyond reasonable doubt and proceeded to convict the Appellant.

[35] It is trite law that the ultimate arbiter in a High Court trial in Fiji is the trial Judge. Although trial in the High Court is with Assessors, the Assessors opinion is not binding on the Judge and as stated above it is the trial Judge who is the final arbiter of facts.

[36] The trial Judge is entitled under the law to disagree with the opinion of the Assessors, but in such an event as set out in section 237(3) he must give reasons in a written judgment. The learned trial Judge in his judgment has given his reasons in coming to a different conclusion specially regarding Count 2 and convicted the Appellant.

[37] There was sufficient material in the case which justified the conclusion arrived at by the learned trial Judge to convict the Appellant and therefore the second and third grounds of appeal fail.

[38] In the amended grounds of appeal filed by the Legal Aid Commission, Ground One encapsulated grounds 1 to 3 of the original grounds of appeal, which have been dealt above.

[39] The second ground of appeal in the amended grounds is on the basis of inconsistent evidence of the State witnesses with regard to any complaint made by her to anyone to assess the credibility of the complainant.

[40] Counsel for the Appellant in his written submission refers to paragraph 32 of the summing up in basing his argument on this ground.

[41] Paragraph 32 of the summing up is as follows:

> *"32.The 3rd witness was Milika Adilonaua (Senior) the grandmother of the Complainant and the mother of the Accused. She was living with her husband at the Accused person's place. She said that her granddaughter had complained to her that the Accused had sex with her on 3 occasions. Further she said that Milika complained to her on the same day it happened to her. When the defence Counsel asked she said she didn't complain to anyone about these incidents."*

[42] The victim, Milika (Junior) in her evidence stated that she complained to her grandmother, Milika (Senior) on all three occasions soon after she was raped by the Appellant. The grandmother had told her that she was scared.

[43] Milika (Senior) in her evidence in Court had stated that the victim had told her three times, and she had told the victim that this has caused lot of conflicts in the family. That she did not tell anyone because she was scared. Scared because they were in a settlement and it was far from the village and that the Appellant would do something to them.

[44] The learned trial Judge was referring to the evidence of the Grandmother of the victim in paragraph 32 and not to the evidence of the victim. There is no inconsistency in the statements made by her as seen from the evidence she gave in Court and there was nothing for there to be a direction about inconsistent statements.

[45] Therefore there is no basis for this ground of appeal and there is no merit in it.

[46] In the above circumstances the appeal of the Appellant is dismissed and the conviction and sentence of the Appellant is affirmed.

A. Fernando JA

[47] I agree.

Temo JA

[48] I agree with the Judgment and reasoning of Chandra JA.

Orders of Court:

(1) The appeal of the Appellant is dismissed;

(2) The conviction and sentence of the Appellant is affirmed.

Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL