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

CRIMINAL APPEAL NO: AAU 158 OF 2014
(High Court Criminal Case No: HAC 043/ 2013[LABASA])
(Magistrate's Court at Labasa Criminal Case No: 336/13)

BETWEEN : **RAHUL RITESH CHAND**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Fernando JA

Counsel : **Mr. A. Sen for the Appellant**
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : **18 September 2018**

Date of Judgment : **4 October 2018**

JUDGMENT

Gamalath JA

[1] I have read in draft the judgment of Fernando JA and I agree with the reasons and the conclusions therein.

Prematilaka JA

[2] I agree with the reasons and conclusions of Fernando JA.

Fernando JA

[3] The Appellant had appealed against his conviction for rape contrary to section 207 (1) (2) (a) of the Crimes Act 2009 and a single Judge of this Court has granted him leave to appeal against conviction.

[4] The charge against the Appellant read as follows:

> "*Statement of Offence*
>
> *Rape: Contrary to section 207 (1) and (2) (a) of the Crimes Decree (now Act) No 44 of 2009.*
>
> *Particulars of Offence*
>
> *Rahul Ritesh Chand on the 17th of June 2013 at Vuniuto, Nasarawaqa, Bua in the Northern Division, had sexual intercourse with X (name withheld) without her consent."*

[5] According to the provisions in **section 207 (1) (2)(a) of the Crimes Act 2009** any person who rapes another person commits an indictable offence and is punishable with imprisonment for life. The provision of the section, relevant to this case, goes on to state a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. The term "consent" in 'sexual offences' have been defined in section 206 (1) to mean "consent freely and voluntarily given by a person with the necessary mental capacity to give consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent." Section 206 (2) states: "Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained –

a) by force: or

b) by threat or intimidation; or

c) by fear of bodily harm; or

d) by exercise of authority; or

e) by false and fraudulent representations about the nature or purpose of the act; or

f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."

[6] All three Assessors at the conclusion of the Trial had found the Appellant not guilty. But the learned Trial Judge had by his judgment dated 4th December 2014 convicted the Appellant of the offence of rape and sentenced him to 8 years imprisonment with a non-parole period of 6 years. In **Ram Dulare & others –v- R [1955] 5 FLR 1** the Court of Appeal referring to the case of **Joseph –v- the King [1948] AC 215** said: *"...[the assessors'] duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial Judge alone and...he is not bound to follow the opinion of the assessors.*" In **Sakiusa Rokonabete –v- The State [2006] Criminal appeal No AAU 0048/05** this Court said: "*In Fiji, the assessors are not the sole judges of fact. The Judge is the sole Judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts*" However according to **section 237(4) of the Criminal Procedure Act 2009**, where the trial Judge disagrees with the majority opinion of the assessors, he must give written reasons for differing from the opinion and those reasons must be pronounced in open court. It has been held that the reasons of the presiding trial Judge must be cogent and they should be clearly stated. They must be founded on the weight of the evidence and must reflect the Trial Judge's views as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. See the cases of **Ram Bali –v- Reginam [1960] 7 FLR 80; Ram Bali –v- The Queen Privy Council Appeal No 18 of 1961; Shiu Prasad –v- Reginam [1972] 18 FLR 70 and Setevano –v- State [1991] FJA 3.**

[7] The Appellant has filed 12 grounds of appeal against the conviction which as the learned Single Judge of this court had correctly stated overlaps and confusing. According to him

the gist of the appeal is that the trial Judge erred in law by not giving reasons for not agreeing with the assessors' opinion and the guilty verdict is unreasonable or cannot be supported having regard to the evidence.

[8] I have for the purposes of this appeal summarized the 12 grounds as follows:

a) Trial Judge's failure to give cogent and detailed reasons for disagreeing with the Assessors opinion in light of the evidence in the case and the necessary inferences that could be drawn from that evidence.
b) Trial Judge's failure to allow Counsel for the Appellant to cross-examine the complainant on the circumstances surrounding the commission of the purported offence, which was an integral part of the defence.
c) Trial Judge's failure to properly direct himself on the unchallenged evidence of the Appellant and his witnesses, especially Ashwini Lata, and failing to deal adequately with the medical evidence and the exhibits produced.
d) Trial Judge making a mistake as to the date the first complaint was made.
e) Trial Judge's failure to redirect himself in accordance with the defence submissions for redirection after completion of the Summing up.
f) Trial Judge's failure to comply with sections 141,142 and 237 of the Criminal Procedure Act.

[9] At the hearing before us the learned Counsel for the Appellant pursued only grounds (a) and (c) above.

Evidence in Brief:-

[10] The complainant is 22 years and a married woman with two small children aged 4 years and 7 months. The complainant in her examination-in-chief had said that on the day prior to the incident, namely on the 16th of June 2013 she had come to her husband's brother, Arun Kumar's house at about 8 am on the advice of her husband, Salen Chand as she had a dispute with her sister, Sangita Ram. Arun Kumar's house was about 100 meters

away from her house. She had stayed there till 8 a.m the following day. In the evening of the 16th some visitors had arrived and they were drinking grog till late and the Appellant was amongst them. Around 1 a.m on the 17th of June, the Appellant had come to the bed the complainant was sleeping, lifted the mosquito net and asked her "*will you give it to me to do it or not*?" At that time he had been pressing the top of her left chest very hard and threatened to kill her if she did not agree. According to the complainant due to the pressure applied on the chest she was finding it difficult to breathe. The Appellant had then come on top of her, criss-crossed her hands and pressed it on to her chest, bit her on the neck, lifted her skirt and penetrated her vagina with his penis. He had sex with her for about 5 minutes. The Appellant had put his hand over her mouth when she screamed. He had torn her panty, and the following day she had sewn it. The complainant had said that she did not consent to Rahul penetrating her vagina. She had stated: "*I don't know Rahul. I have not met him before. I have not met him in Tabia.*" After Rahul had gone, Arun had come and asked the complainant to have sex with him. In the morning around 8 a.m the complainant had gone back to her house. She had not told anyone about the incident but at 6 pm the complainant had informed her sister Sangita that the Appellant had raped her and she in turn had told Salen, her defacto husband. The complainant had told Salen to report the matter to the police and then she had gone with Salen to Lekutu police and lodged a complaint. She had been examined by a medical doctor on the 19th of June 2013.

[11] Under cross-examination the complainant had said that both she and her sister are married to Salen, she being the de facto partner of Salen and they all live in the same house, which is 50 footsteps from Arun Kumar's house. In cross-examination she had said: "*I know Rahul and I have known him for 3 years. Rahul lives in the neighbourhood. Rahul visits our house and we visit his house. Before Rahul wanted to marry me.*" The bed room in which she slept and where she was allegedly raped had no door. Arun and his wife Pinky sleep in the other bed room and their bedroom door is directly opposite to the bedroom in which she slept and is always open. She had said that she went to sleep at 10 pm. The Appellant had put his penis through the hole in her torn panty. After going home the following morning she had washed the panty and had stitched it. The complainant had denied that prior to the incident the Appellant had talked to her, that

they kissed each other and that the Appellant had sex with her again. She had said: "I am not mad to report all this."

[12] Both Sangita and Salen had confirmed in their testimony that the complainant had told them that Rahul had raped her, but stated that they know nothing more about the incident. According to Sangita the complainant had returned from Arun's house at 8 am and stayed in the *'Bure House'* (a traditional house outside the main house in which people normally rest) but complained to her about the rape at 6pm.

[13] The doctor who had examined the complainant two days after the incident had stated that that there was a purplish blue bruise on the top left breast which could possibly have been caused *"by assault, gripping force or pushing force on the muscle tissue."* The doctor had also found two bruises on the neck that were reddish in colour. The doctor had not been questioned as to what could possibly have caused those bruises on the neck. The doctor had stated that her vagina was normal and that she cannot conclude whether or not she was raped. In the medical report that was marked and produced as exhibit 7 it has been recorded in the background information given by the complainant to the doctor that she was raped by an Indian man from the same settlement. In the recorded history of the medical report as related by the complainant, it is written that the complainant had been sleeping and at 1 a.m and had been raped twice within 20 minutes by a man from the same village. There had been no vaginal lacerations or injuries noted in exhibit 7.

[14] The Appellant at the caution interview had refused to answer any questions put to him and said he will give his statement in court.

[15] The Appellant testifying before the court had said that he is 23 years of age and had known the complainant from about 10 years prior to the allegation against him of rape. He had said that he was in the habit of going to Arun Kumar's house often and on the 16th of June 2013 had gone there around 7 pm. Arun, his wife Ashwin Lata also known as Pinky, the complainant and a few other men were there. They drank grog and were

playing cards till about 2 - 2.30 a.m. The complainant had asked him to sleep in that house and had called him around 2.30 a.m in the morning and taken him to her room and asked him to sleep beside her. He had refused. She had come beside him and started to kiss him. She had put her hand into his pants and held his penis. He had got an erection. She had then removed her skirt and panty, held his penis, spread her legs and inserted his penis into her vagina and had sex with him. She had told him that her husband cannot satisfy her and that she liked it. He had ejaculated. The Appellant had told her that he would take her if she were to get pregnant. They had sex a second time. Thereafter he had been with her for a while and gone home. He had said that she did not scream. The Appellant had denied he grabbed her or pressed her chest. The complainant had asked him to come the next day also. Under cross-examination the Appellant had said that he did not pin the complainant down nor felt bad when Salen called him to question about it as he felt he had not done anything wrong.

[16] Ashwin Lata had corroborated the evidence of the Appellant about the men, including the Appellant, drinking grog and playing cards until about 2.30 am on the 17th of June 2013 in their house. The women had their dinner around 11 pm but the men continued with their drinking and playing cards. She states that the complainant had gone to sleep after dinner in the bedroom next to theirs, but does not specifically state the time. She states that she did not hear any scream around 1-1.30 in the morning. Ashwin had gone to sleep around 2.30 in the morning and had not heard anything from the bedroom in which the complainant slept. When she got up the following morning the complainant was around and had not told her about any incident in the night. She was normal and helped her to wash the dishes. Ashwin had said that the complainant left to her house only at 3pm, which is contrary to what the complainant and her sister Sangita had said.

[17] Two other defence witnesses who had been in the house of Arun on the night of the 16th of June 2013 had testified to the effect that they saw the Appellant in the house but had not heard any screaming that night.

[18] The Summing Up and the Judgment bears out as to why the learned Trial Judge had disagreed with and decided to disregard the opinion of the Assessors in convicting the Appellant. According to the learned Trial Judge:

a) The Appellant in his caution statement had, when confronted with the allegation of rape said: "I don't know anything", but in court he had admitted that he had consensual sex with the complainant. The learned Trial Judge had said in his Summing Up: "So we have here a person who told the police "he knew nothing about the allegation", but in court, he said, he knew about the allegation – two different versions to the police and the judicial authorities. What the above says about his character, is entirely a matter for you." In making this statement the learned Trial Judge had erroneously failed to mention that the Appellant had in his caution interview stated on 4 occasions that he will give his statement in court. Further at the commencement of the interview the police officer recording the Appellant's statement had cautioned the Appellant to the effect "You are not obliged to say anything unless you wish to do so..." One must not forget the fundamental right enshrined in **article 14 (2) (j) of the Bill of Rights in the Constitution of the Republic of Fiji** of an accused person's right "*to remain silent,...not to be compelled to give self-incriminating evidence and not to have adverse inference drawn from the exercise of that right.*"

b) According to the learned Trial Judge, if the complainant "really consented to sex, as the accused said, why complained to her sister at 6 pm on 17 June 2013. If she consented to sex with the accused at the material time, why lie to her sister at 6 pm on the day?" In making this statement the learned Trial Judge had not addressed his mind and that of the Assessors to the fact that, had she been alleged raped at 1a.m on the 17th of June at the house of Arun Kumar which was only 50 footsteps away from her sister's house, why she chose to remain in Arun's house till 8 a.m that morning (going by the complainant's evidence and if by the evidence of Arun's wife till 3 pm) and

also inform the sister only at 6 pm on the 17th. The complainant had not given any reason for this.

c) The learned Trial Judge had said referring to the medical evidence: "If there was consensual sex, why the need to press her left chest to such an extent that the mark was visible two days after the alleged incident?" In making the statement the learned Trial Judge had failed to mention that according to the medical report Exhibit 7 that there were no lacerations or injuries in the vagina. It is to be noted that this was if one were to rely on the complainant's evidence in the case of a woman who had been suddenly awakened in her sleep, was not consenting and ready for sex. According to the background information and history as recorded by the doctor as related to her by the complainant she had been "raped by an Indian man from the same settlement" and that he had "raped her twice within 20 minutes". This totally contradicts the complainant's evidence in examination chief where she had said that "I don't know Rahul. I have not met him before. I have not met him in Tabia"; and that the Appellant "did not have sex with me again".

[19] The learned Trial Judge in his judgment dated 4th December 2014 had stated that: "The decision of the three assessors was not perverse. It was open to them to reach such a decision on the evidence", but yet, had decided to disregard their opinion and reject it. The only reason set out in the judgment for disregarding the opinion of the assessors is that the complainant was a "credible witness" and from his "point of view, she was speaking the truth" and that he found the Appellant "not to be a credible witness". This reasoning in my view certainly does not satisfy the test laid down in several decided cases as referred to at paragraph 6 above that the reasons of the presiding trial Judge must be cogent and must be founded on the weight of the evidence and that the Trial Judge's views as to the credibility of witnesses should be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

[20] The only other issue to be determined in this case is whether the prosecution had proved beyond a reasonable doubt that the complainant did not consent to having sex with the Appellant and the Appellant knew that she was not consenting.

[21] The learned Trial Judge had not addressed his mind to the contradiction in the complainant's own evidence in her examination-in-chief and cross-examination about her knowledge of the Appellant as referred to at paragraphs 10 and 11 above and the contradiction of the complainant's evidence with that of the doctor on the same issue as referred to at paragraph 13 above. There is also a contradiction of the complainant's evidence and that of the doctor as to the number of times the Appellant had raped her that night as reflected in the same paragraph. The doctor's evidence that the complainant had told her that she had been raped twice during a period of 20 minutes corroborates the evidence of the Appellant that they had consensual sex twice that night, as referred to at paragraph 15 above. The complainant's evidence that she left the house of Arun to go to her house at 8 am on the 17th has been contradicted by Arun's wife who had said that she left their house only at 3 pm on the 17th. The fact that the complainant tried to deny that she knew the Appellant, that the Appellant had sex with her only once and the time the complainant left Arun's house after having been raped when her house was just 50 footsteps away are material contradictions that have a bearing on the issue of consent and should necessarily have been addressed by the learned Trial Judge before he convicted the Appellant.

[22] I am reluctant to disturb the findings of a Trial Judge on facts and credibility, but when there has been no evaluation or critical analysis of the evidence by the learned Trial Judge but a mere reliance only on the evidence of the complainant, it becomes necessary to intervene. The learned Trial Judge had failed to consider the version of the victim as regards the alleged incident of rape as described by her, as probable and can be relied upon without a reasonable doubt, vis-a vis the version of the Appellant as being reasonably possible. The reasons set out in the judgment by the learned Trial Judge as referred to at paragraphs 18 and 19 above, for convicting the Appellant are insufficient and unsatisfactory as he had overlooked certain facts and improbabilities.

[23] Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he overlooks facts or improbabilities. When evaluating or assessing evidence, it is imperative to evaluate all the evidence and not be selective in determining what evidence to consider. In the **South African case of S –v- Van der Meyden [1999] (1) SACR 447 (W) 450** it had been stated: "*What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false and unreliable, but none of it may simply be ignored*".

[24] I cannot close my mind to the well-known principle that the benefit of any doubt has to go in favour of the accused, especially when the overall picture arising from those doubts creates a reasonable doubt as to the guilt of an accused person.

[25] It was held in the **South African case of in S -v Van der Meyden [1999] (1) SACR 447 (W)** that: "*The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.*"

[26] In the **United States Supreme Court decision in Re Winship [1970] 397 US 358**, the court held that the reasonable doubt rule has constitutional force under the due process provisions of the United States Constitution. The same could be said in regard to **Article 15(1) of the Constitution of Fiji** which states that "*every person charged with an offence has the right to a fair trial before a court of law*" and under **Article 14(2) (a)** "*Every person charged with an offence has the right to be presumed innocent until proven guilty*

according to law". **Brennan J said in Re Winship**: "*Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.*"

[27] The **Supreme Court of India said in <u>B. N. Mutto & Another –v- Dr. T.K. Nandi</u> [1979] 1 SCC 361**: "*It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him.*"

[28] In the **South African case of <u>S –v- T</u> [2005] (2) SACR 318 (E)**:"*The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law....*"

[29] In the **Zimbabwe case of <u>S –v- Makanyanga</u> [1996] (2) ZLR 231** the court observed: "*A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of the criminal complainant, but the fact that such credence is given to the*

testimony does not mean that conviction must necessarily ensue. Similarly the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that the complainant be believed. It demands that a defence succeeds wherever it appears reasonably possible that it might be true."

[30] For the reasons set out above I have no hesitation in quashing the conviction and acquitting the Appellant forthwith.

Orders of the Court:

1. *Appeal allowed*
2. *Conviction quashed and Appellant acquitted forthwith.*

Hon Mr Justice S Gamalath
JUSTICE OF APPEAL

Hon Mr Justice C Prematilaka
JUSTICE OF APPEAL

Hon Mr Justice A Fernando
JUSTICE OF APPEAL