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

CRIMINAL APPEAL NO. AAU 0060 of 2015
(High Court No. HAC 211 of 2013)

BETWEEN : **KINIVUWAI DELAILAGI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**
Fernando, JA
Nawana, JA

Counsel : **Mr S Waqainabete for the Appellant**
Ms E Rice for the Respondent

Date of Hearing : **19 September, 2019**
Date of Judgment : **3 October, 2019**

JUDGMENT

Prematilaka, JA

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

Fernando, JA

[2] I agree that the appeal should be dismissed.

Nawana, JA

Introduction

[3] This is an appeal by the accused-appellant (appellant) consequent to his conviction by the High Court of Suva on a single charge of rape punishable under Section 207 (1) read with Section 207 (2) (a) of the Crimes Act. The charge and the conviction thereon were sequel to the appellant allegedly having carnal knowledge on a young girl aged little below eighteen years without her consent on 04 March 2013.

[4] The victim is anonymized and her name is denoted by TL for the ease of reference in this judgment.

The offence and the conviction

[5] Section 207 of the Crimes Act, which criminalizes non-consensual carnal knowledge, defines the offence of rape as follows:

> *"207 (1) Any person who rapes another person commits an indictable offence.*
>
> *(2) A person rapes another person if:*
>
> *(a) the person has carnal knowledge with or of the other person without the other person's consent; or*
>
> *(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*
> *(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*
>
> *(3) for this section, a child under the age of 13 years is incapable of giving consent."*

[6] The conviction was entered by the learned Judge of the High Court after three assessors found the appellant guilty of the charge on 13 May 2015 by their unanimous opinion. The appellant was sentenced to a term of ten years and six-months imprisonment with a non-parole period of nine years with effect from 15 May 2015.

Appellant's Appeal

[7] The appellant preferred an appeal on 21 May 2015 alleging that the learned High Court Judge had failed to consider the evidence suggestive of consent on the part of the victim of the alleged act of rape and that the sentence was harsh and excessive.

[8] The appellant's appeal was formalized with an amended notice of appeal dated 05 May 2017 against the conviction filed by the Legal Aid Commission. Three grounds were relied upon by the appellant. They were:

> *(i) The learned trial judge erred in law and fact when he did not direct the assessors to disregard the hearsay evidence of the history that was relayed to the doctor, which caused prejudice to the appellant;*
>
> *(ii) The learned trial judge erred in law when he failed to give adequate directions to the assessors on how to approach PW-2's evidence that the complainant had told her that the appellant had forced her on the bed and had sex with her;*
>
> *(iii) The learned trial judge erred in law and fact when he misdirected himself and the assessors in paragraph 39 of the summing-up in implying that the witness Torika had said that the appellant was at home when she had returned home from work at 5-6 p.m. on the day of the incident.*

[9] Leave was granted by a single Justice of Appeal in respect of grounds (i) and (ii) holding that they were arguable; but, not on ground (iii) on the basis that is was not arguable.

Appeal Hearing

[10] At the hearing before Full Court, learned counsel for the appellant made submissions in support of the two grounds of appeal. Learned counsel submitted that the learned trial judge, in paragraph 27 of the summing-up, had referred to the history of TL being raped by the appellant as recounted before the doctor. The complaint of the appellant was that, that part of her evidence had constituted hearsay because the complainant-TL had not testified in court as having given the history on that basis to the doctor in the course of her testimony.

[11] The criticism of the learned counsel was that the reference by the learned trial judge to an item of evidence forming hearsay had caused prejudice to the appellant as the assessors could have been persuaded to act on inadmissible evidence to form their opinions of guilt against the appellant.

[12] Learned counsel for the appellant, in support of the second ground of appeal, submitted that the learned trial judge had not considered in his summing-up as to how the evidence of the complainant's mother should be dealt with. The learned counsel's complaint stemmed from the failure on the part of the learned trial judge to deal with the recent complaint evidence in inviting the assessors to consider the evidence of the complainant's mother.

[13] Learned counsel for the state, in response, submitted that the evidence of the history, as recounted by the complainant-TL, was relied on by the prosecution not to establish an element of offence or to advance the theory of corroboration. Corroboration, in any event, is no longer a requirement to support a charge on sexual offence as provided for under Section 129 of the Criminal Procedure Act, 2009. Learned counsel, instead, submitted that the history of the complainant, as recorded by the doctor and the evidence of the complainant's mother, were relied on, only to advance the theory of consistency of the version of the complainant-TL.

Evidence at the trial

[14] It would be necessary to consider the evidence as presented at the trial in order to appreciate learned counsel's submissions.

[15] At the trial, the prosecution presented the evidence of the complainant-TL, her mother, Doctor Elvira Ongbit and the Detective Corporal Vinod Chand. The appellant gave evidence on his own behalf and called no other witnesses.

Complainant's evidence

[16] Evidence of the complainant-TL revealed that she was a girl of seventeen years and eight months in age as at 04 March 2013, born on 22 April 1995. TL, who had two younger sisters and a brother, was living with her grandfather as her mother was living

in a separate house in Tacirua Heights with the appellant in a *de facto* relationship from about 2012.

[17] On 04 March 2013, TL arrived in the house, where the appellant was living in, to collect a bag of clothes of hers. Her mother was not there in the house as she was away at work. TL had breakfast at the invitation of the appellant. After a while, the appellant requested that his neck and the shoulder be massaged, which TL obliged to. The appellant, little thereafter, had left stating that he was going to Cunningham. TL then took a rest lying on a bed in one of the three rooms of the house.

[18] TL, however, was awakened by the arrival of the appellant little later. The appellant, having come inside the room occupied by TL, got hold of her hands and said that he was going to kiss her. Her attempt to stand-up and run outside was foiled by the appellant. The appellant pushed her to lie down on the bed forcefully. The appellant, thereafter, took off her clothing and started kissing and touching her genitalia. After lying on the top of TL, the appellant then had sexual intercourse forcefully on her until he ejaculated. The complainant was threatened not to reveal the incident to anyone.

[19] Feeling distressed, TL dressed herself up, took her bag and left the appellant's house for her aunt's place in Nakasi. But she did not reveal the incident as she had apprehended fear of harm due to the threat by the appellant. TL continued to remain silent on the incident until her mother came in search of her after reporting to police that she was missing. TL recounted her telling the incident to the mother on her meeting whereupon a complaint was lodged at police.

[20] The complainant recounted in her evidence under oath that she was examined by the doctor on 30 April 2013 and admitted signing a medical report, where the history of her being raped by the appellant was recorded.

[21] In cross-examination, the appellant took-up the position that the incident, as complained of by TL, had never happened. The appellant further put to TL that if the incident had happened in the way that she had testified to, the complainant-TL should have reported the matter to any of the police stations in Valelevu, Tacirua Heights, or Nakasi. This position was denied by TL.

Complainant's Mother's Evidence

[22] Ms Torika Roko, the mother of the complainant in her evidence stated that TL did not wait for her on 04 March 2013 as she was usually used to do when Roko returned home. On enquiry, she did not find an answer from the appellant who was at home in Tacirua Heights when she returned home. She had, thereafter, reported the fact of TL's missing to police.

[23] Answering cross examination, Roko confirmed that she had met with TL around 27 March 2013 and she had lodged the complaint of TL being raped by the appellant only on 29 April 2013, after a month of her meeting. Roko confirmed in her evidence that TL had told her about the forceful sexual intercourse by the appellant on her on 04 March 2013. Roko said that when she met TL she (TL) was in a *de facto* relationship with a young man.

Medical Evidence

[24] Dr Elvira Ongbit, in her testimony, said that she had examined TL on 30 April 2013 after recording the related history as recounted by her. TL was still found to be little depressed. The doctor found healed lacerations at various positions on the hymen. The medical report, the doctor had prepared, was made available to court as an agreed fact on 27.05.14 by the prosecution where the related history, as recounted by TL, was recorded.

Appellant's defence

[25] Upon being called for defence, the appellant testified on his own behalf. The appellant admitted that he was alone at his home in Tacirua Heights when the complainant-TL visited his home on 04 March 2013. The appellant further admitted getting the complainant to massage his neck and shoulder to relieve a pain that he was said to have been suffering from. It was, however, the position of the appellant that he left thereafter for Cunningham and returned only late in the night. He denied having sexual intercourse on the complainant as testified to by the complainant.

[26] The appellant denied his being present at home when his *de facto* wife Ms Toko returned home around 6.00 pm on 04 March 2013 and her making enquiries about the complainant. It is to be noted that this position was not advocated when Ms Toko was giving evidence and it is in stark contrast to the prosecution evidence on the point, which was not, in any event, sought to be contradicted.

Consideration of the 1st Ground of Appeal: complaint on hearsay

[27] I have considered the contents of the summing-up of the learned trial judge with a view to appreciating learned counsel's submissions on the first ground in support of appeal of the appellant against the conviction. I find that the learned trial judge had dealt with the relevant issue as follows in terms of paragraph 27 of the summing-up:

> *"Dr Elvira Ongbit, who medically examined the alleged [victim-TL] gave evidence next. The medical report of the victim was produced in court. She is a qualified medical doctor. [TL] was examined by her on 30 April2013. According to the history related to her by the victim, her stepfather forcefully had sexual intercourse with her on 04 March 2013."*

[28] The above contains a summation of what transpired in evidence in relation to the complainant-TL being examined by Dr Ongbit on 30 April 2013 with her related history being documented. The medical report and its contents were not contentious as the report was agreed upon by the prosecution and the defence by means of a memorandum entitled 'Agreed Facts' dated 27 May 2014 in preparation for the trial against the appellant.

[29] In determining an item of evidence of being hearsay or not, it is necessary to consider the purpose for which it is tendered. In **Subramaniam v. Public Prosecutor** [1956] 1 WLR 965 at 969, it was held that:

> *"Evidence of a statement made to a witness ... may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."*

[30] Evidence of the complainant-TL was that she was examined by the doctor and signed the medical report, which contained the matters relayed to the doctor as well as the observations and the conclusions of the doctor on 30 April 2013.

[31] The effect of admitting the contents of the medical report by the appellant without any exception is such that the contents become evidence unless disputed in a subsequent oral testimony. The failure by the prosecution to elicit a matter recorded in the medical report in the course of the oral testimony of the complainant-TL, in my view, would not render it inadmissible on the basis of hearsay when both the medical doctor, who recorded the matter; and, the examinee, TL in this instance, came before court and testified.

[32] On the other hand, the prosecution did not rely on the evidence of history being narrated to the doctor to establish its truth but to establish that such a statement was made to the doctor when the opportunity was accorded. The truth of the statement made in the form of the history of the complainant prior to the medical examination was sought to be established by the prosecution through the best evidence of the complainant-TL herself. The prosecution, going by the transcript of evidence, had not chosen secondary evidence such as the history recorded by the doctor to establish its case. In that light, the learned counsel's submission that this item of evidence had offended the hearsay rule is not entitled to succeed because that item of evidence was not used to establish its truth.

[33] However, it would be relevant to consider the need to give necessary directions by a trial judge whenever an item of evidence appears to be hearsay. In **N v. HM Advocate** [2003] SLT 761 at 768, it was observed that whenever hearsay evidence goes before the jury, fairness requires that the trial judge should give an explicit direction about the dangers inherent in such evidence. It was held in that case:

> *"... [The trial judge] should remind the jury that they have not had the opportunity to assess the credibility and reliability of the maker of the statement at first hand. He should point out that the truth of the statement has not been tested by cross-examination. If the statement was not made under oath or affirmation, he should comment on that too. The trial judge should direct the jury that they must assess the weight of such evidence with care. It there are any*

dangers in the hearsay evidence that are special to the facts of the case, for example the age or the state of mind of the maker of the statement, or any interest in the outcome or any improper motive on his part, or any other factor bearing on his credibility and reliability, the trial judge should give explicit directions on that point, too."

[34] The item of evidence, against which the learned counsel complains of in this case, does not fall into the broader situations referred to above. Instead, the two witnesses namely, the doctor and the examinee, were present in court and they both had testified on the medical report, which was a document agreed upon in contemplation of the trial between the prosecution and the defence.

[35] The item of evidence is alleged to have become hearsay in consequence of a lapse on the part of the learned counsel to elicit from TL as to whether she had given the history of being raped by the appellant to the doctor as recorded in the medical report. In *stricto sensu* this particular item of evidence, in the circumstances of this case, does not, in my view, qualify to be excluded as hearsay because the witnesses were available in court to test the veracity of the matter in issue and, in fact, testified.

[36] However, if the appellant had felt that the matter had required further elucidation, it was open for the appellant, who was well represented by counsel to raise the issue at the time when the relevant evidence was presented; or, should have invited court to make further directions on the issue. Learned counsel, who represented the appellant at the trial did not choose any of the two rendering the matter incapable of being considered at this stage for determination of this appeal on the ground of its incongruity.

[37] I would, therefore, reject the first ground of appeal for the reasons set out above.

Consideration of the second ground of appeal: Evidence of recent complaint

[38] I will now proceed to consider the second ground of appeal. It relates to the recent complaint evidence as the single Justice of Appeal encapsulated it in light of the reference to the learned trial judge's failure to deal with the complainant's mother's evidence.

[39] I would propose to consider my own formulation in **Gonedau v. State**; Court of Appeal; AAU 0075 of 2014; Court of Appeal Minutes of 03 October 2019, where I observed that, in dealing with sexual offences, especially those relating to the adult victims, it is absolutely necessary to consider the evidence of recent complaint because its absence could ordinarily militate against the absence of consent on the part of the woman.

[40] Reliance on the evidence of recent complaint would frustrate complaints belatedly made for vested, vexatious or frivolous reasons. When the law is made clear on the need of finding a recent complaint, the abuse of process of the criminal justice system, which entail penal consequences with restrictions on personal freedoms, could be discouraged, curtailed or prevented. However, the judge addressing assessors should remind that a false allegation of a sexual offence could still be accompanied by a fabricated recent complaint in order to support the allegation.

[41] The facts of this case, however, do not represent an adult rape. Instead, as facts showed, this was a case where an act of forcible intercourse was committed on a child whose age was between seventeen and eighteen years, in a domestic environment by the stepfather. A timely complaint, therefore, could not have been reasonably expected given the attendant circumstances associated with social stigma and psychological trauma.

[42] In this regard Shameem J in **State v. Waisea Volavola** Cr. App. HAA 106/2002S in dealing with the complaint and the issue of the complaint being 'recent' said:

> *"However, her silence could easily have been consistent with her shame at the incident, connected with the cultural taboos in relation to discussing sexual matters with elders. To say that an absence of recent complaint confirms consent is an error both of facts and law. On the facts of this case, there was nothing to suggest that her silence meant consent to the sexual intercourse."*

[43] Chief Justice Gates in **Anand Abhay Raj v. State** [2014] FJSC 12; CAV 0003.2014 (20 August 2014) dealt with the issue of the complaint and it not being recent. His Lordship Chief Justice Gates said:

> *"This might explain the lack of explicit forthrightness by the complainant on the extent of the molestation when speaking to her relatives, as against the opportunity to put the story to the doctor when she was not overshadowed by those taboos. Certainly, it was open to regard the report to the doctor as a recent complaint in view of the fear with which she was observed preventing her from telling the full story, and the fear of which she testified. Strict dicta to the contrary in* ***Peniasi Senikarawa v. The State*** *Crim. App. AAU0005/2004S 24th March 2006 may have been setting too inflexible a rule. A complainant's explanation as to why a report was not made immediately, or in its fullest detail, is to be expected. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it."*

[44] The learned trial judge, as a matter of law, should have dealt with the evidence on recent complaint; its need; its presence; its absence; and, reasons for its absence with appropriate directions.

[45] In the context of facts of this case, there was evidence from TL that she disclosed the complaint of rape against the appellant when she met with the mother, though belatedly in late March 2013, and to the doctor next when she was submitted for medical examination.

[46] **Kory White v. Queen** [1999] AC 210, is an authority to advance the proposition that evidence of recent complaint should be adduced to establish the consistency of the position of the complainant and negate the consent. It may be prudent to place the evidence of the complainant and that of the person to whom the complaint was made as and when the alleged sexual conduct occurred because such evidence emanating from both would usually dispel any doubt as to consent. Of course, securing the evidence on the point from a second person in court, other than from the complainant herself, may not understandably be always possible. This must not then adversely affect the complainant's evidence on the point.

Trial Judge's Role

[47] There is, therefore, a duty cast on the judge to address the issue of recent complaint as a matter of law and leave the matter to be deliberated on by assessors upon

consideration of evidence at the trial. This is a duty, which a judge cannot afford to breach. Any breach would, in my view, affect the accused's right to a fair trial and deny the protection of the law, which should always be accorded by the judge under whose superintendence the criminal trial is conducted.

[48] The resultant position would be that the assessors, in assessing the evidence of the complainant, could consider the evidence of the complainant and her contemporaneous complaint to add credit to her version. The assessors should, of course, be cautioned that evidence on recent complaint shows only the consistency but it would not serve as corroboration of the complainant's version to add an additional weight to the complaint to enhance credibility.

[49] The necessary directions must be on the basis that the evidence of recent complaint would not constitute corroboration of the complainant's evidence (**R v. Whitehead** [1929] 1 KB 99). Instead, it would be a matter to consider the complainant's conduct, consistency or inconsistency, which ultimately enables the assessment of the credibility of the complainant and reliability of her story as considered in **Jones v. Queen** [1997] 191 CLR 439; and, **Basant v. State** Crim. App. 12 of 1989.

[50] Degree of consistency, as was held in In **Spooner v. R** [2004] EWCA Crim. 1320, in relation to evidence of recent complaint would depend on facts of each case. In Spooner, it was held:

> *"The decision in each case as to whether it is sufficiently consistent for it to be admissible must depend on the facts. It is not in our judgment necessary that the complaint discloses the ingredients of the offence; it, however, usually be necessary that the complaint discloses evidence of material and relevant unlawful sexual conduct on the part of the defendant which could support the credibility of the complaint. It is not, therefore, usually be necessary that the complaint describes the full extent of the unlawful sexual conduct alleged by the complainant in the witness box, provided it is capable of supporting the credibility of the complainant's evidence given at the trial. ..."*

[51] Upon consideration of the evidence of the complainant-TL; her mother; and, the appellant in support of the defence, I am of the view that the failure on the part of the learned judge to deal with the issue of recent complaint could not have caused any

prejudice to the appellant as complained in this appeal. There was consistent evidence to support the charge of rape on the basis of the credible testimony of TL. The learned judge's summing-up, although affected by the absence of directions on the recent complaint, was adequate for the assessors to find the appellant guilty as they did in this case.

[52] The absence of recent complaint evidence, for which reasons could be understood, in my view, would not affect the credibility of the complainant and render her evidence less creditworthy.

[53] If the appellant's position that he was prejudiced by the absence of required directions by the learned trial judge, it was open for him through his counsel to request the judge for further directions. Chief Justice Gates, upholding the authority in the case of **Abdul Khair Mohamed Islam** [1997] 1 Cr. App. R. 22, as to the need to seek directions, redirections or fresh directions on an issue that surfaced in a criminal trial held in **Anand Abhay Raj v. State** (supra) that:

> *"The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge. We do not believe this was intended in this case."*

[54] I, therefore, consider the second ground of appeal having substance. I am, however, of the view that, even though the issue raised by the appellant had substance, no substantial miscarriage of justice had occasioned as the learned trial judge had considered the issue of consistency in relation to the doctor's evidence, whose evidence was placed with the documented history of complaint of the complainant in the medical report and tendered in evidence.

[55] I am, in the circumstances, inclined to apply the proviso to Section 23 (1) of the Court of Appeal Act, determine this appeal and dismiss the appeal, accordingly.

Orders of Court are:

(1) Conviction affirmed; and,

(2) Appeal dismissed.

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL