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

CRIMINAL APPEAL NO. AAU 0067 of 2015
(High Court No. HAC 0122 of 2013)

BETWEEN	:	**SEVANAIA SIGABANA**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	**Prematilaka, JA** **Fernando, JA** **Nawana, JA**
Counsel	:	**Mr S Waqainabete for the Appellant** **Ms S Tivao for the Respondent**
Date of Hearing	:	**20 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.

Fernando, JA

[2] I agree that the appeal be dismissed on the basis of the reasons set out in the Judgment.

Nawana, JA

Introduction

[3] The accused-appellant (appellant) appeals against his conviction dated 28 May 2015 by the High Court of Suva on charges of rape and indecent assault punishable under Section 207 and 212 of the Crimes Act, 2009. The conviction on each charge was consequent to the appellant being found guilty by three assessors in terms of their unanimous opinion after trial.

[4] The offences were alleged to have been committed on an eighteen-year-old girl in a domestic environment. The appellant, in terms of the relationship to the victim, was the complainant's stepfather.

[5] The name of the complainant is suppressed and referred to as LA for purposes of reference in this judgment.

[6] The learned trial judge in convicting the appellant had agreed with the unanimous opinion of the assessors.

[7] The learned trial judge, thereupon, sentenced the appellant to terms of imprisonment of ten years and three years in respect of each charge of rape and indecent assault respectively. The appellant was ordered to serve the two terms concurrently with a non-parole period of eight years.

Appellant's appeal

[8] The appellant sought leave to appeal against the conviction within an enlarged time. The grounds of appeal were:

> *(i) The learned trial judge erred in law and in fact when he had misdirected the assessors on the issue of recent complaint in light of the fact that the circumstances of the case do not contain a recent complaint, thereby causing prejudice to the appellant;*

(ii) *The learned trial judge had erred in law and in fact when he misdirected the assessors by telling them to consider the evidence of the appellant looking into the washroom whilst the complainant was using the washroom when considering the charge of indecent assault; and.*

(iii) *The learned trial judge had erred in fact when he misstated the evidence for count 2 that the appellant had admitted to 'fondling the witness' thereby causing prejudice to the appellant.*

[9] A single justice of appeal granted leave to appeal in respect of each ground as they appeared arguable.

Case for the prosecution

[10] The case for the prosecution case consisted only of the evidence of the complainant-LA. Her evidence was that she was living in a house in Lomaivuna with the mother, two siblings and the appellant-stepfather. LA said that she was awakened by the feeling of a finger being inserted into her vagina when she was asleep on 06 April 2013. She felt the pain of the finger's insertion and saw that it was the appellant who had invaded her sexually in the thick of that night. LA said that she did not scream or raise her voice in fear of her mother and the two siblings being beaten up by the appellant. LA, however, complained of the incident to the mother in the following morning.

[11] Complainant-LA further said that, between 07 April - 18 May 2013, when she was playing with her mobile telephone on her parents' bed, the appellant sat beside her and put his tongue forcefully into the mouth after kissing her against her will. Testifying further, LA said that the appellant-stepfather peeped into the washroom at a time when she was using it. The date of the alleged incident was, however, not specified.

[12] The complainant was subjected to lengthy cross-examination by the learned counsel for the appellant. However, a precise defence does not appear to have been suggested. The cross-examination, instead, reveals the confirmation of the complainant's position as stated in evidence-in-chief.

[13] The appellant did not contest that there was a case for him to answer. Accordingly, the defence was called for. The appellant gave evidence on oath on his own behalf and called his wife in support of his testimony. The appellant's wife was LA's mother.

Case for the appellant

[14] The appellant, in his evidence, stated that he was at home with the wife, Venina, and the children after returning from work and that he went to sleep around 10.00 p.m. on 06 April 2013. He denied the allegation that he had inserted his finger into LA's vagina as LA testified to, in court. He said that he wanted to look after children including the complainant whom he considered as his own daughter. The appellant said that he was falsely implicated as he was disciplining them in the hope of making the children good citizens.

[15] The appellant also denied peeping into the washroom when the complainant was inside. It was the appellant's position that, after learning someone was inside, he turned back and went away. The appellant admitted that he beat-up the children but said that it was because he wanted to discipline them.

[16] The appellant's wife, Venina, in her evidence in appellant's defence, said that she was married with the appellant for ten years. The appellant was the stepfather to her children from her previous marriage.

[17] Venina said that she could recall the date of 06 April 2013 as she, along with family members, retired to bed around 10.00 p.m. in the night. She said that if anyone were to walk in the night, she could hear as the floor of her house was made of timber. Venina said that the complainant did not tell her about any incident involving her husband the following morning. It was her position that the complainant complained of the incident to her only after three days.

[18] Venina said that she could not believe the allegation against the appellant. She said that the complainant's relationship with the appellant was estranged as the appellant used to discipline LA as she was found to have eloped three times. It was her position that the complainant, at times, did not listen to the parents, which resulted in beating at the hands of the appellant.

[19] Under cross-examination, Venina was assertive that she did not believe the allegations made against the appellant. She admitted that the appellant used to beat her as well.

Consideration of the first ground of appeal

[20] Learned counsel for the appellant, in support of his first ground of appeal, submitted that there was no recent complaint; and, therefore, the learned trial judge had misdirected himself in law and fact in directing the assessors on the issue of recent complaint causing prejudice to the appellant. Adverting to the evidence of the complainant's mother, who was called as a witness in defence of the appellant, the learned counsel submitted that the complaint to the mother was belated by three days, a factor, which did not qualify the complaint to be treated as recent.

[21] Learned counsel invited the attention of court to paragraph 30 of the summing-up of the learned trial judge.

[22] Paragraph 30 extensively dealt with various tests for the evaluation of the testimonial creditworthiness of a witness. The learned trial judge, having dealt with the evidential test of consistency, explained painstakingly as to how the evidence should be assessed when the evidence is confronted with an element of delay. This was how the learned judge explained the test:

> *"Belatedness*
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> *That is where there is delay in making the allegation of the alleged act by the accused to a relation, friend, and a person in authority or to police on the first available opportunity after the alleged incident. If there is a delay that may give room to make-up a story which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay in making the allegation, then you have to consider her evidence to satisfy yourself whether there was an acceptable reason offered for the delay by the witness. If the explanation offered by the witness is acceptable to you, then you can ignore the delay in making the allegation as a factor which would make evidence unreliable.*

It must be clearly emphasized here that even if there is a recent statement or a prompt complaint, that fact should not be taken as a factor which would corroborate her evidence. It merely shows that she is consistent in her narration of the alleged incident to that person and later in court in her evidence. That factor could only enhance her credibility as a witness."

[23] The law has been clearly stated by the Supreme Court in the case of **Anand Abhay Raj v. the State**; FJSC 12; CAV0003 of 2014; 20 August 2014 by drawing a distinction between between the concepts of corroboration and consistency in considering the evidence on recent complaint. The Supreme Court held that the evidence of recent complaint could not be made use of to corroborate the complaint of a sexual offence. It, at its best, could be taken into account in assessing consistency, inconsistency and the conduct of the complainant: **R v. Whitehead** [1929] 1 KB 99; **Basant Singh and Others v. the State**; Crim. App. 12 of 1989; **Jones v the Queen** [1997] 191 CLR 439; **Vasu v. the State**; Crim. App. AAU00112006S, 24 November 2006.

[24] The learned trial judge, in this case, had not dealt with the complaint of the complainant on the basis of it being recent. On the contrary, the learned trial judge had been quite conscious of the fact that the complaint to the mother was belated. The learned trial judge had, therefore, dealt with the issue by directing the assessors to consider the credibility of the complainant and reliability of her version in the context of belatedness. I am of the view that the learned trial judge was right in his approach.

[25] Learned counsel for the appellant, in my view, was not correct in his endeavor to interpret the above part of the summing-up as a reference to the evidence on recent complaint when, in fact, there was no recent complaint or evidence on it, as disclosed by the facts of the case. The learned trial judge, instead, directed the assessors on the issue of the belatedness of the complaint of AL as surfaced on the basis of her evidence.

[26] I, therefore, do not see merit in the first ground of appeal. I, accordingly, reject the first ground of appeal.

Consideration of the second ground of appeal

[27] The complaint on behalf of the appellant was that the learned trial judge, in his directions, had included the appellant's alleged conduct of peeping into the washroom when the complainant was inside it. Learned counsel referred to paragraph 23 of the summing-up, which summed-up the evidence on the issue, which was to the following effect:

> *"So, elements of the offence in count (1) are the accused penetrated the vagina of [LA] with his finger to some extent, which means that the insertion of the finger fully into the vagina is not necessary. Such penetration should have taken place without the consent of [LA]. In count (2), if the accused kissed the mouth of [LA] with his tongue or had stared at [LA] when she used the washroom then it becomes sexual assault."*
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> (Underlined for emphasis)

[28] It is wrong in principle for the learned trial judge to have referred to an item of evidence unrelated to the charge. The effect of referring to evidence relating to an act where there was no charge has to be considered on the basis of the broader principle whether such reference had outweighed the prejudice to the appellant.

[29] It is not permissible in law to pronounce an illegality without examining the matter in context. The issue has to be determined by considering the probative value of the evidence referred to; and, the possible prejudice to the appellant. The cases in point are **Boardman v. DPP** (HL) [1974] 3 All ER 887; and, **Pfennig v. R** [1994-95] 127 ALR 99.

[30] Upon consideration of the uncontradictory evidence in regard to the acts of kissing by the appellant and inserting his tongue into the mouth of the complainant, I am of the view that there was sufficient evidence to prove the charge of indecent assault beyond a reasonable doubt. In light of the explanation by the appellant that he turned back after noticing that the complainant was inside the washroom, I am certain that the assessors did have evidence before them other than the impugned reference by the learned trial judge to find the appellant guilty of the charge of indecent assault.

[31] Applying the test of measuring the probative value as opposed to the prejudice to the appellant, I am of the view that there was no room for the appellant to have been prejudiced by the learned trial judge's erroneous reference to the item of evidence of peeping into the washroom by the appellant.

[32] Learned counsel, in support of the second ground of appeal, also advanced the proposition that the charge of indecent assault required the application of physical force.

[33] Section 212 (1) of the Crimes Act, 2009, is plain and simple as it serves to make out the offence of 'Indecent Assault' by stating that a person commits a summary offence if he or she unlawfully and indecently assaults any other person. The consent given or obtained from a person below the age of 16 years of age would not operate as a defence.

[34] In my view, there is no requirement to have an element of application of force to constitute the offence of indecent assault. The word 'assault' used to explain the offence under the section does not presuppose application of force. Instead, any wrongful conduct, which is indecent when an ordinary man describes it to be so, having regard to the prevailing average standards of morality could make out the offence of indecent assault.

[35] In that regard, decisions in the cases of **Beal v. Kelly** [1951] 35 Cr. App. R. 28 and **Fairclough v. Whipp** [1951] 35 Cr. App. R.138 would be instructive where it was held that in order to substantiate a charge of indecent assault, the presence of evidence as to a hostile act towards the complainant accompanied by an act indecency would be sufficient. I adopt the same principle and hold that there is no need to have the application of force physical or otherwise to constitute the offence of indecent assault.

Consideration of the third ground of appeal

[36] Learned counsel for the appellant, in support of the third ground of appeal, submitted that the trial judge in paragraph 46 of the summing-up had misstated the appellant's version in response to the complainant's evidence on the charge of indecent assault.

[37] This was how the learned trial judge had put the matter to the assessors:

> *"In relation to the allegation that the accused was staring at [LA] when she was using the washroom, the accused admitted having peeped into the washroom. However, he sought to provide an explanation to his act. According to him, he did not know that she was there. But, [LA] maintained that he saw her going into the washroom and followed her. Later, he was staring at her and did not go away when she saw him. Even on the other allegation of kissing, the accused [said] he fondled the witness."*
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> (Underlined for emphasis)

[38] I have considered the evidence both of the complainant and the appellant. I find no evidence of an act of fondling the complainant by the appellant. I am satisfied that the learned trial judge had misstated a fact when he dealt with the charge of indecent assault, as complained of, by the learned counsel for the appellant.

[39] Upon consideration of the totality of evidence of the complainant, it appears that the evidence on the charge on indecent assault had continued to remain uncontradicted in spite of cross-examination on behalf of the appellant. I am, therefore, of the view that the evidence was sufficient to prove the charge of indecent assault beyond reasonable doubt in the circumstances of this case. The misstatement by the learned trial judge as to an alleged conduct by the appellant of fondling the complainant, in my view, was not capable of affecting the minds of the assessors so as to bring unsupportable opinions, which alone could have caused prejudice to the appellant. Only such a situation would have persuaded an appellate court to intervene in the matter in the interest of justice. In my view, that is not the case here.

[40] In the circumstances, I am not satisfied that there was miscarriage, the effect of which, must certainly have displaced the opinions of the assessors and the judgment of the learned trial judge.

[41] I, therefore, find no basis to consider the third ground of appeal as being valid to impugn the conviction. I, accordingly, reject the third ground of appeal.

Orders of Court:

1. Appeal dismissed.

2. Conviction on Counts (1) and (2) affirmed;

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL