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

CRIMINAL APPEAL NO. AAU 0075 of 2014
(High Court No. HAC 014 of 2012)

BETWEEN : **TAITUSI GONEDAU**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Mr S Waqainabete for the Appellant**
Ms P Madanavosa for the Respondent

Date of Hearing : **12 September, 2019**

Date of Judgment : **3 October, 2019**

JUDGMENT

Prematilaka, JA

[1] I have read in draft the judgment of Nawana JA and agree that the appeal should be dismissed.

Fernando, JA

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

Nawana, JA

Introduction

[3] The appellant was charged before the High Court of Suva for having committed the offences of indecent assault and rape on Mrs KK (KK). The offences were punishable under Sections 212 (1); and, Sections 207 (1) read with (2) (a) of the Crimes Act, 2009. The name of the victim is anonymized and referred to as KK.

[4] The statements and the particulars of the offences, as submitted by the Director of Public Prosecutions (DPP) in the information dated 17 February 2012 were as follows:

INFORMATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS

TAITUSI GONEDAU is charged with the following offence:

Count 1

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Decree, 2009

Particulars of Offence

TAITUSI GONEDAU on the 3rd day of January, 2012 at Nabua in the Central Division, unlawfully and indecently assaulted **KK**.

Count 2

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Decree, 2009

Particulars of Offence

TAITUSI GONEDAU on the 4th day of January, 2012 at Nabua in the Central Division, unlawfully and indecently assaulted **KK** with his penis, without her consent.

Trial

[5] The offences were tried by the High Court with three assessors, where evidence for the prosecution was presented through KK, Woman Police Constable Shareen and Dr Unasi Tabua, who examined the victim on 05 January 2012.

[6] The appellant gave evidence on his own behalf and called his wife, Seini Gonedau, in defence.

[7] After trial, the assessors returned unanimous opinions of guilt against the appellant in respect of the charges of indecent assault and rape. The learned trial judge convicted the appellant after agreeing with the unanimous opinion of the assessors. The conviction was entered on 26 February 2013. The learned trial judge, in his sentencing ruling dated 05 March 2013, imposed a term of imprisonment of three years for the count of indecent assault; and, a nine-year term imprisonment for the count of rape. The two sentences were ordered to run concurrently with a non-parole period of seven years.

Appellant's application for leave to appeal

[8] The appellant did not appeal the conviction or the sentence within time. Instead, he preferred an application for leave to appeal against the conviction and the sentence followed by an application for enlargement of time supported by an affidavit sworn on 02 July 2015. The appellant also made an application for bail pending appeal, which was dismissed after hearing by a single justice of appeal on 28 October 2016.

Grounds of appeal

[9] The application for leave to appeal, accompanied by the application for enlargement of time, was founded on two grounds. They were:

> *(1) The learned trial judge erred in law when he failed to direct the assessors on the law with reference to recent complaint and how they should deal with the same, with reference to:*
>
> *(i) the evidence of the complainant which suggested that she had spoken to her aunt sometime after the alleged incident; and,*

(ii) the history relayed by the complainant to the Doctor as highlighted in paragraph 15 of the summing-up.

(2) The learned trial judge erred in law in failing to adequately address the assessors and himself on the law with reference to the allegation of indecent assault which was the precursor to the rape allegation despite accepting in his sentence that the appellant had hugged the complainant.

[10] The single Justice of Appeal, having allowed the application for enlargement of time, granted leave against the conviction only in respect of ground (1), which consisted of two parts as enumerated above, on 28 October 2016.

Issue in appeal

[11] The issue before this court in appeal is straightforward in that the appellant complains that the learned trial judge had failed to deal with the evidence on recent complaint in the learned judge's directions on how the assessors should deal with it. The complaint of the appellant is that the absence of necessary directions by the learned judge caused prejudice to him resulting in the conviction on two charges.

[12] The law on recent complaint has been succinctly considered in **Kumar v State** [2014] FJCA 151; AAU 126: 2013 (19 September 2014). The absence of directions by a trial judge on the issue, resulting in prejudice to an accused, was considered to be a matter to be dealt with by the Full Court. It was held that:

"In sexual cases, evidence of recent complaint is an exception to the rule against previous consistent statement only as evidence of the consistency of the complainant's conduct. In R v Islam [1998] Cr. App. R. 22 and R v NK [1999] Crim. LR 980, the English Court of Appeal stated the need to direct the jury on the evidential significance of a complaint in a sexual case. In the present case, the learned trial judge gave no directions on the significance of the recent complaint evidence. Whether the lack of direction on the significance of the recent complaint caused injustice to the appellant is a matter for the Full Court to consider."

[13] It is necessary to consider the evidence at trial in order to address the issue raised in appeal.

Evidence for the prosecution at the trial

[14] KK, the victim of offences of indecent assault and rape, as alleged in the information, was twenty-eight years of age. She was married as at 2012 and was living with her husband. Her married life was marred by frequent quarrels with the husband, which even stretched to have taken place at the church where she was performing the role as a worship leader.

[15] On 02 January 2012, KK became desolated as she felt afraid to go home and live with the husband in fear of physical harm. She called Seini Gonedau, her cousin-in-law, who was married to the appellant. The appellant was her cousin, who was a pastor at a church from whom KK used to receive counselling for her marital problems before. Seini invited KK to be with them in her hour of need on 02 January 2012.

[16] On the following day, both the appellant and wife-Seini had left home leaving the children with KK. The appellant, however, returned home early in the afternoon complaining of a headache and wanted KK to massage his head and shoulder.

[17] While massaging was afoot, the appellant made unwelcome advances towards KK and hugged her. Little later, as KK went to the kitchen to cook, the appellant followed her and forced her to touch his private parts having taken KK's hand inside the pants. The appellant kept on touching her breasts. KK's plea not to do such things were not heeded by the appellant. Instead, he even suggested to KK to elope with him.

[18] Later, in the early hours of the following day when the appellant's wife was still away from home, the appellant forcefully had sexual intercourse with KK stating that he did not want to be a pastor anymore and that he wanted to have sex with her. The victim left the appellant following morning stating that she had to look for a place to live. She proceeded to HART (Housing Assistance Relief Trust) and told her aunt there what had happened to her previous day. KK was advised to go to Valelevu Police Station and report, which she did.

[19] KK was vigorously cross-examined. She maintained the position as she testified to in the evidence-in-chief and firmly stated that the appellant did have non-consensual sex with her.

[20] Woman Police Constable Shareen's evidence was that she commenced investigations early morning on 05 January 2012 upon receipt of the complaint of rape from the victim-KK. Shareen stated that she had got to know of the victim telling the story of her being raped to another witness at HART, whose statement was also recorded. That witness, however, was later found to be unavailable, according to her evidence.

[21] Dr Unasi Tabua gave evidence on her examining of the victim. However, the doctor said that it was hard to find evidence of abuse as the victim was a married person. She said that the history of the complainant was documented after talking to her. The report was made available to court and the assessors in the course of the trial.

[22] The above represents in brief the evidence for the prosecution. The learned judge found a case for the appellant to answer. Defence was, accordingly, called for from the appellant. The appellant gave sworn evidence and called his wife, Seini, to testify in support of his defence. The defence was that of consent.

Appellant's evidence and defence of consent

[23] The appellant, in his evidence, was consistent with what KK said in regard to the background of KK's visit to his place after she became destitute. The appellant admitted that he had returned home with the complaint of a headache and that he got KK to massage the body to relieve the pain. It was the appellant's evidence that in the process of massaging, KK aroused him and made him kiss KK. The appellant said that, thereafter, KK consensually engaged in many kinds of sexual acts on him culminating in sexual intercourse. The appellant asserted that KK was the cause for climaxing in eventual consensual sexual conduct.

[24] Answering cross-examination, the appellant said that KK came to his place not for counselling but because she had no place to go on 02 January 2012. He denied the suggestion of raping KK on 04 January 2012.

[25] Seini Gonedau, the wife of the appellant, testifying for the defence said that she had been married to the appellant for eight years. They were having four children as of then. Her evidence was consistent on the background leading to KK's arrival in her place on 02 January 2012. She was in agreement with the fact of the appellant's returning home early on 03 January 2012. Seini said that the appellant had told her that KK had started everything although it subsequently had led to the allegation of rape. Seini asserted that KK had not complained to her on anything as she returned home on 03 January 2012 or thereafter.

Appellant's submissions at Appeal hearing

[26] At the hearing before Full Court, submissions of counsel were heard for and against the grounds of appeal urged by the appellant.

[27] Learned counsel for the appellant submitted that the prosecution should have called the aunt to whom the matters of indecent assault and rape were complained of by KK soon after the alleged incident. It was submitted that placing of the evidence of the aunt could have raised the credibility of the complainant and the reliability of the prosecution version. Learned counsel submitted that the absence of such evidence made the case to stand only on the evidence of the complainant.

[28] Adverting the attention of the Full Court to the proceedings of the court below, learned counsel submitted that there was no reference to the evidence of recent complaint in the summing-up although it was referred to in the sentencing ruling by the learned judge. The complaint of the learned counsel was that the evidence of recent complaint should have been dealt with by the learned judge in the summing-up; and, its absence had constituted an error of law causing prejudice to the appellant.

[29] Learned counsel for the state submitted that the complainant had relayed the acts of sexual invasion by the appellant to the aunt and to the doctor on first available opportunities, which were relied on by the prosecution to advance the complainant's consistency of her story but not to add corroboration. In her response, learned counsel for the state, further submitted that the learned judge had adequately dealt with the issue on the basis of the evidence that surfaced at the trial.

Trial Judge's summing-up

[30] Learned judge, in light of the evidence of KK relaying the complaint of sexual invasion by the appellant to the aunt and to the doctor, summed-up the case only as follows:

> *"The doctor, who examined [KK] at CWM produced her medical report. There were no medical findings that would help either the prosecution or the defence, but what is interesting about her evidence and the report [is] that she produces by consent is the history of the complaint relayed to the doctor by KK. She told a story to the doctor which was consistent with what she told us in her evidence."*

Conclusions of Full Court

[31] The learned trial judge, in my view, rightly referred to the effect of evidence of the medical doctor by stating that her evidence was not supportive of either the prosecution or the defence. The learned judge also highlighted that the recording of the related history of the complainant as she was examined by the doctor on 05 January 2012, within a very short period of time from the alleged occurrence, was relevant only to consider the theory of consistency in assessing the complainant's evidence.

[32] In dealing with sexual offences, especially those relating to the adult victims, it is absolutely necessary to consider evidence of recent complaint because its absence could ordinarily militate against the absence of consent on the part of the woman. Judicial 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 entails 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.

[33] The learned trial judge, as a matter of law, therefore, should have dealt further with the evidence on recent complaint; its need; its presence; or, absence with appropriate directions.

[34] In the context of facts of this case, there was evidence from KK that she disclosed the complaint of rape against the appellant when she met with the aunt sooner on the date of incident itself, that being 04 January 2012, and to the doctor when she was submitted for medical examination the next day.

[35] **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.

[36] 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.

[37] 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.

[38] In **Spooner v R** [2004] EWCA Crim. 1320, it was held that the degree of consistency that may arise from evidence of recent complaint would depend on facts of each case. It was further held:

> *"The decision in each case as to whether it is sufficiently consistent for it to be admisstble 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. ..."*

[39] Upon consideration of the evidence of the complainant; the appellant; and, his wife called in support of the defence of consent, 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 charges of indecent assault and rape on the basis of the credible testimony of KK. The learned judge's summing-up, although affected by the absence of directions on the recent complaint, was adequate enough for the assessors to find the appellant guilty as they did in this case.

[40] As submitted by the learned counsel for the state, the evidence of recent complaint to the aunt served only to show consistency of the complainant's assertion made soon after the acts of sexual invasion on the complainant. The absence of the aunt to testify at the trial on the point of having made a recent complaint, in my view, would not affect the credibility of the complainant and render her evidence less creditworthy.

[41] The learned trial judge, however, had not dealt with the issue. I am of the view that, even though the issue raised by the appellant had merit, 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. I am, in the circumstances, inclined to apply the proviso to Section 23 (1) of the Court of Appeal Act and determine this appeal, accordingly

[42] In the result, I conclude finding no basis to accept any of the parts of the first ground of appeal against the conviction. I reject the same on the basis of above analysis.

Orders

Orders of Court are:

(1) Appeal against the conviction dismissed; and,

(2) Conviction and the sentences on Counts (1) and (2) are affirmed.

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL