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

Criminal Appeal No. AAU 003 of 2014
(High Court Case No. HAC 107 of 2011)

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| BETWEEN | : | ABDUL RASHID |
| | | *Appellant* |
| AND | : | THE STATE |
| | | *Respondent* |
| Coram | : | Gamalath, JA<br>Prematilaka, JA<br>Nawana, JA |
| Counsel | : | Mr. J. Singh for the Appellant<br>Ms. E. Rice for the Respondent |
| Date of Hearing | : | 11 February 2020 |
| Date of Ruling | : | 27 February 2020 |

# JUDGMENT

**Gamalath, JA**

[1] In this appeal, the appellant is seeking to canvass the conviction at the High Court of Suva on two counts of Rape for which he has been imprisoned for periods of 16 years and 13 years, both sentences to run concurrently with a non-parole period of 14 year

imprisonment. The appellant's out of time notice of appeal before the learned Single Judge contained 5 grounds of appeal against the conviction and 2 grounds against the sentence. However, the learned Single Judge, having granted the extension of time to appeal, granted leave to appeal against the conviction only for the 4th ground of appeal and refused leave to appeal against the sentence. The 4th ground of appeal read as follows;

> *"That the learned Judge erred in law and fact when at para 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the Appellant at trial."*

In his ruling, learned Single Judge held that the ground 4 "deserved to be considered for it had been sufficiently particularised and succinctly explained in the Appellant's submissions".

[2] On 11 February 2020 this appeal was taken up for hearing before us. At the outset counsel for the appellant informed the Court that the appellant is now relying on the following three grounds, a clear deviation from the Ground 4 for which leave had already been granted:-

> "(i) That the learned Judge erred in law and fact when at para 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all, the defence being advanced by the appellant at trial.
>
> (i) That the learned trial Judge erred in law and fact when he failed to establish the elements of the offence of rape to find the appellant guilty as charged.
>
> (ii) That the Honourable Trial Judge erred in law as directions given to the assessors in paragraph 8 of the summing up do not accurately reflect the

effect of alleging with a specimen count a separate much later single offence in count 2 of the indictment, (sic)".

[3] On comparison, it is clear that out of the aforementioned three grounds of appeal only the Ground 1 bears a close resemblance to the ground for which leave was granted by the learned Single Judge. (See Ground 4 of the original ground of appeal) In the circumstances, in considering Ground 1 for its merits, it does not pose a great procedural difficulty for this Court.

[4] As regards the other two grounds, they are contextually new in nature and clearly fashioned in a way that carries no affinity to the ground for which leave had been granted by the single judge. Counsel for the appellant also conceded that fact in his submissions. On the issue of relying on completely new grounds of appeal, I find this to be a fairly common occurrence in this Court, in the sense on numerous occasions, expanding the scope of the appeals, wholly new grounds are combined with the grounds for which leave has already been obtained. As for me quite often this becomes a rather burdensome issue to decide as to what should be done in dealing with the new grounds, for as it is common knowledge that this Court, devoid of being vested with inherent powers as such, has to act within the statutory powers laid down in the Court of Appeal Act and Rules (Cap 12) and as defined by the decided relevant authorities. In entertaining completely new grounds of appeal, our operational sphere is trammelled by the limitations laid down by provisions of the Court of Appeal Act and Rules (Cap 12). The relevant provisions of the statute, in their plain reading dictates the strict adherence to them. The relevant Rules as contained in the Act are clear that they have been set out as mandatory provisions.

[5] In relation to the new two grounds, the Court was served with them only in the morning of the day of the hearing. According to this session's calendar, the appeal had been originally fixed for hearing on 5 February 2020. On that day when the matter was taken up for hearing the counsel appearing for the appellant informed the Court he needed time to be ready for the arguments for it was only on a few days ago that he was retained to appear for

the appellant. He further submitted that since the appellant is imprisoned he needs time to visit his client in prison for instructions and craved the indulgence of the Court for time till Tuesday, the 11th February 2020 to argue the appeal. Having consulted the State, the Court allowed his application on the understanding that he will be arguing the appeal based on the ground for which leave had been granted by the learned Single Judge.

However, on Monday the 10th February 2020, this Court received the submissions on behalf of the appellant in which we find the new grounds of appeal, the emergence of them has been after a period exceeding 4 years from the leave hearing. Even in the written submissions filed on behalf of the appellant, all what I find is that there is scant compliance with the provisions of the provisions of the Court of Appeal Act and Rules (Cap 12) and exacerbating the gravity of the situation, no attempt was made by the counsel to obtain leave to proceed on the new grounds and in the circumstances the new two grounds should be rejected *in limine*. Further, I wish to place on record that the State has also strongly taken up the issue of leave in responding to the new grounds proposed by the appellant.

The Facts:

[6] The complainant, A.S.S (name withheld) stated in her evidence that the appellant, who posed himself as a person possessed with special healing powers similar to that of witchcraft had offered his services to heal her mother, who was suffering from a prolonged backache and pain in the leg. This had happened somewhere in 2005 when the complainant's family was introduced to the appellant by a person who they had befriended. On being treated for the health issues of the complainant's mother, there had been a considerable improvement of her health and with the passage of time it appears that the appellant had won the confidence of the whole family.

[7] Somewhere in 2005, the appellant informed the family that the complainant had been under a bad spell due to food contamination caused by witchery and he could cure her by performing exorcism, a special power that he claimed to be possessing.

[8] The parents of the complainant had been convinced by what the appellant had said. In order to dispel the affliction, the appellant wanted them to perform a ritual of lighting 14 cigarettes at Suva Point, a place that was away from home. Exactly on 9 February 2009, leaving the appellant and the complainant at home presumably to treat the complainant, the family had gone to Suva Point to perform the ritual. While both of them were alone at home, the appellant who was said to be acting under a demonic force had called up the complainant close to himself and pushed her down on the ground, took her clothes off and raped her by inserting his penis into her vagina.

[9] When this happened, the complainant was still a school girl studying in Year 8. The appellant in the guise of treating the complainant, had been sexually abusing her for a long period that spanned in to a few years between 2005 and 2011. The appellant frightened the complainant to keep a secret of what was going on between the two of them. He frightened the complainant by saying that if she divulged the secret to any one, he would make her mother sick again and could even kill her by using his powers. The incidents of rape had been happening in the early hours of the day, when the parents were sent away to light the cigarettes to perform the ritual.

[10] Finally on 20 March 2011, while the parents were away at 3am to light the cigarettes, the appellant had sexually abused her , First he had sprinkled some broken glace over her body and then he raped her. The complainant had been consistent that she never consented to the sexual advances the appellant made. On the last occasion, when the continuing rough handling by the appellant became unbearable any longer the complainant reported the matter to her mother. At that time she was 19 years old.

[11] Explaining the manner in which the appellant raped the complainant, she said that "he closed my mouth with hand, held my hand tightly; forcefully pushing me on the floor, holding hand and put penis inside me". Her evidence has been that she did not have full understanding of what the appellant was doing to her. At times she felt as that she was becoming unconscious, and it had taken a long while for her to realize what had been

going on between the two of them. At the trial the complainant denied the suggestion made by the counsel for the appellant that this was a fabrication to avoid settling a loan that the complainant's father had taken from the appellant.

[12] The mother of the complainant one Jasim Lata, in her evidence described how the appellant had extracted money from their family under the pretext of buying some material; tabua, tanoa and masi, to cover the expenses of the exorcism he was purportedly performing to cure the witness's ailment. The appellant had made the family believe that someone had performed black magic on the complainant whilst she was at school and he undertook to cure her by performing exorcism. The witness questioned her daughter as to why she did not report the sexual abuse to them before. The complainant had told her that it was the fear of the appellant who threatened to kill the whole family by using witchcraft that prevented the complainant from complaining against the appellant. The appellant had taken almost $150,000 from the complainant's family to perform the witchcraft. When the complainant first complained to the witness, she had seen injuries on her legs, supposedly caused by the appellant and the witness had described them as "shocking to see".

[13] The medical evidence of the complainant came through one Dr James Fong who submitted the Medico Legal Report (MLR) prepared by another witness who was unavailable to testify at the trial; according to the MLR, the complainant's hymen was not intact.

[14] The appellant testifying in the trial stated that the complainant's family had fabricated the allegation to avoid settling a loan they had taken from him.

[15] At the conclusion the trial, the assessors unanimously opined that the appellant was guilty as charged and the learned trial Judge agreed with the opinion.

The Grounds of Appeal

[16] I shall now deal with the Ground (which is similar to the one for which leave has been granted):

> "that the learned trial Judge erred in law and fact when at para 13 of the summing up he failed to advise the assessors that another option available for them to consider was the Accused did not have sex with the complainant at all the defence being advanced by the appellant at trial".

[17] The appellant has taken a consistent position at the trial that he never had sex with the complainant. The line of cross examination of the prosecution witnesses had been compatible with his evidence in the trial that he never had sex with the complainant. Accordingly the prosecution case was a fabrication.

[18] The learned trial Judge in dealing with the two competing versions stated in the summing up as follows:

> "para [11]; *Now every element in this crime is in dispute because the accused is saying that he has been falsely accused of these crimes. He says that he never had sexual intercourse with Artika let alone raped her"*
>
> *Again, in para [12] the learned trial Judge referring to the position taken by the appellant stated that "Because he says that he did not rape her the issue of consent is not relevant".*

[19] In the summing up from paragraphs [20] to [22] the learned trial Judge had extensively dealt with the defence evidence and directed that even if they disbelieve the evidence of the appellant, it is the duty of the prosecution to prove the case to the assessors so that they feel "sure" of the guilt of the appellant.

[20] Counsel for the appellant heavily relied on the learned Single Judge's ruling on the Ground 4 (the equivalent to ground 1 of the present appeal) in substantiating his contention. The

relevant part of the learned Single Judge's ruling which is meant to be a critique of the summing up reads as follows;

> *"In paragraph 13, the learned Judge appears to assume that sexual intercourse did take place and informs the assessors that the issue for them to consider is consent. They are not asked to determine whether, as a fact, any act of sexual intercourse took place between the Appellant and the Complainant in respect of either count 1 or count 2.There is no reference in the summing up, apart from in paragraph 11, that the assessors should consider the evidence in the context of the defence case that sexual intercourse never took place. I am satisfied that this ground raises an issue that has sufficient merit to allow the application for an extension of time"*

[21] In relation to the critique above, by the plain reading of paragraph [13] of the summing up, is it correct to state that the learned Judge had misdirected him-self by employing the language that he used in directing the assessors on the issue of the appellant having sexual intercourse with the complainant? What the learned Trial Judge had stated in para [13] of the summing up is as follows;

> *"The prosecution says that Artika didn't consent but she was made to submit by force and by intimidation of evil spirits which she thought were present in the room. So if you believe Artika and you think she was raped in 2005 and again on March 2011, you will find the accused guilty, but if you think that she wasn't raped in that it did happen but she was consenting then you will find him not guilty of the two offences."*

[22] Going by the language of the learned trial Judge I am unable find anything that suggests the fact that the learned trial Judge was acting under the assumption that sexual intercourse between the appellant and the victim appeared to have taken place. When paragraph [13] is read along with the rest of the paragraphs, particularly with paragraph

11 of the summing up, I do not find any basis to believe that the learned single Judge had been correct in the criticism he was seeking to make against the summing up. To my understanding what the learned trial Judge had endeavoured to do was firstly to lay before the assessors the defence of denial of having sex with the complainant, which, if believed, would have qualified him for a complete exoneration. [See para 11]. The obverse position that is possible having regard to the evidence was that the appellant in fact did have sexual intercourse with the complainant, however if the assessors believed that it was with the consent of the complainant, that would also entitle the appellant to be exonerated from the rape charges. Having said that, the trial Judge went on to state the nature of the evidence that should be considered in convicting the appellant. The Judge was correct in saying that only if they believe the version given by the complainant about the forcible sexual intercourse that the appellant was said to have had with the complainant they should find him guilty as charged. In my view the analysis of the evidence relating to the alleged rape incidents have been objectively carried out by the trial Judge. By inviting the assessors to examine whether the sexual intercourse took place with consent, the trial Judge had done the appellant, not a disservice but a service which is justifiable in the eye of the law.

[23] In relation to the manner in which a trial Judge should be dealing with the facts of a case, in the case of **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006) it had been decided that:

> *"[13] When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; R v Lawrence [1982] AC 510. It should be an orderly, objective and balanced analysis of the case; R v Fotu [1995] 3 NZLR 129".*

[24] In **The Queen v Raymon** [1956] NZL R (p 527 at 537):

> "We think it proper to add that no infrequently in this Court a Judge's summing up is microscopically analysed in order to find some expression of phrase or some treatment of the evidence upon which to found an appeal against conviction. It must be but seldom that a summing up is without any imperfections, but it is not the function of this Court to consider weather this or that phrase was the best which might having chosen (R v. Immer, R v. Davies. (1917)13 Cr. App. R. 22, 25), or whether more or less stress should have been put on particular parts of the evidence but to determine broadly and generally whether in the summing up the case was fairly put before the jury and if the summing up has done that and all relevant issues have been left for decision by the jury, no objection can be taken to it."
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> Also see Ravi Nand and Another v Reginam [1964] 10 FLR p.37 '...it has been frequently pointed out that the trial judge is under no obligation to explain in detail the case for the defence provided that his summing up as a whole is fair.

[25] It is trite law that in considering the summing up the need is to take a holistic view of its contents and to determine whether there has been any misdirection or non-direction, the effect of which could have an impact on the final outcome of the trial.

[26] In this case, the learned trial Judge had duly carried out his duties in the summing up and there is nothing perceivably objectionable to the approach he has taken in analysing the facts of the case. In view of the above, I hold that the ground of appeal is untenable.

[27] The appeal is dismissed.

**Prematilaka, JA**

[28] I have read in draft the judgment of Gamalath, JA and agree with the reasons and conclusions.

**Nawana, JA**

[29] I agree with the reasons, conclusions and orders proposed by Gamalath, JA.

***The Orders of the Court:***

1. Appeal against conviction dismissed
2. Conviction affirmed.

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**Hon. Justice S. Gamalath**
**JUSTICE OF APPEAL**


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**Hon. Justice C. Prematilaka**
**JUSTICE OF APPEAL**

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**Hon. Justice P. Nawana**
**JUSTICE OF APPEAL**