

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 0079 of 2016**  
**[In the High Court at Suva Case No.HAC.112 of 2013]**

**BETWEEN** : **PECELI TAUBULA SENIBUA**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Gamalath, JA**  
**Prematilaka, JA**  
**Dayaratne, JA**

**Counsel** : **Mr. G. O'Driscoll for the Appellant**  
: **Mr. S. Babitu for the Respondent**

**Date of Hearing** : **03 May 2022**

**Date of Ruling** : **26 May 2022**

**JUDGMENT**

**Gamalath, JA**

[1] I have read in draft the judgment of Dayaratne, J and agree with his reasons and conclusions.

**Prematilaka, JA**

[2] I have also read in draft the judgment of Dayaratne, J and agree with his reasons and conclusions thereof.

**Davaratne, JA**

**Charges against the Appellant in the High Court**

- [3] The Appellant was charged in the High Court with two counts of rape contrary to Section 207 (1) (2) (a) of the Crimes Act 2009. At the end of the prosecution case, an application of no case to answer was made on behalf of the Appellant regarding the second count. On the basis that no evidence has been led regarding the second count, the learned High Court Judge found the Appellant not guilty on that count pursuant to Section 231(1) of the Criminal Procedure Act 2009. At the conclusion of the trial the Assessors returned a unanimous opinion of guilty and the learned trial judge concurring with the said opinion of the Assessors, convicted the Appellant of the first count of rape and later sentenced him to 12 years and 9 months imprisonment with a non-parole period of 10 years imprisonment.

**Application for leave to appeal**

- [4] The Appellant filed a timely application for leave to appeal against the conviction and sentence setting out eight grounds of appeal against the conviction and three grounds of appeal against the sentence.
- [5] Having heard the said application for leave to appeal, the learned single judge had granted leave in respect of only one ground of appeal in respect of the conviction, namely ground 2 and refused to grant leave to appeal in respect of the sentence.

**Renewed notice of appeal**

- [6] The Appellant thereafter filed a 'renewed notice of appeal and application for leave to appeal against the conviction and sentence'. The said Notice (which bears the date stamp 17 March 2021 of the Court of Appeal), contained eight grounds of appeal in respect of the conviction and four grounds of appeal regarding the sentence.
- [7] I find that the grounds set out therein are not identical to the grounds that had been set out in the timely application for leave to appeal. I will not venture to examine

the differences here since it becomes unnecessary in view of the position taken up by the learned counsel for the Appellant at the hearing of this appeal as will be referred to hereinafter.

- [8] In the Written Submissions filed on behalf of the Appellant (which bears the date stamp 17 March 2021 of the Court of Appeal) submissions have been made only in respect of one ground of appeal, namely ground 2 as contained in the leave to appeal application in respect of the conviction on which the single judge granted leave. No submissions whatsoever have been made in respect of any of the grounds urged in respect of the sentence.

**Clarification regarding grounds of appeal**

- [9] In view of the above, at the hearing before us, clarification was sought from the learned counsel for the Appellant as to what his position was with regard to the grounds of appeal in respect of both conviction and sentence. He informed court that he was relying only on the ground of appeal in respect of which the single judge had granted leave, namely ground 2 as contained in the application for leave to appeal. He further stated that he was not canvassing the sentence. His position was that the sentence is of no consequence in the event this court decides to grant leave on ground 2 and allow the appeal. He further submitted that if the appeal is allowed, the case will either have to be sent back for re-trial or the appellant acquitted. In view of the submissions made by learned counsel for the Appellant, this court will not consider the application for leave regarding the sentence and treat it as abandoned.
- [10] On that premise, the learned counsel for the Appellant made brief oral submissions regarding the sole ground of appeal and said that he would be relying on the written submissions that had already been filed on behalf of the Appellant. Learned Counsel for the State also made brief oral submissions and said that he reiterates the submissions contained in his written submissions.
- [11] Before I deal with the ground of appeal and the submissions of counsel, I will briefly advert to the evidence that was led at the trial in the High Court.

### Evidence led at the High Court trial

- [12] The prosecution led the evidence of the complainant, her mother and the doctor who had examined the complainant. The Appellant gave evidence and also called another witness.
- [13] The complainant was 17 years old at the time of the incident (15 May 2013) and testified that she had gone to the family cassava plantation around 7.30 in the morning of the day in question. Around 9 am, whilst she was weeding, she had received a blow on her face and the cane knife she had was grabbed by squeezing her hand. She had been threatened that her neck would be 'chopped' if she shouted. The Appellant was a relative and she recognized him as the assailant. She had met him on the way to the cassava plantation that morning and in fact the Appellant had spoken to her. He had thereafter punched her thighs several times and as result she had fallen down. He then forcibly took off her skirt and undergarments and had sexual intercourse with her.
- [14] This encounter had lasted around two to three minutes. He had thereafter left the scene whilst she went home having cleaned herself at the nearby creek. Having gone home she had narrated the incident to her mother. Her grandfather had then telephoned the Police and she together with her mother had gone and made a statement to the Police. She had been examined by a doctor the same day. Since the Appellant had taken up the defence of alibi, in cross examination it was suggested to her that it was not the Appellant who had committed the act of rape but she categorically stated that it was him and that she clearly recognized him. As such there is no doubt about his identity.
- [15] The next witness was her mother who falls in to the category of a 'recent complaint witness'. In her evidence she explained that the complainant had narrated the incident to her upon reaching home soon after the incident. The complainant had told her that it was the Appellant who had raped her. The witness had noticed that the complainant had a black eye and redness of the thighs. This witness was not cross-examined by the defence.

- [16] The doctor who had examined the complainant in the afternoon of the same day testified thereafter. She confirmed that there were bruises near the eye and on the thigh. With regard to vaginal examination, she testified that there were no bruises but the hymen was not intact. There were just two questions put to her in cross-examination, answers to which had no impact on her evidence-in-chief.
- [17] The Appellant gave evidence and took up the defence of alibi. He admitted that he was related to the complainant and that he had met and spoken to the complainant that morning when she was on her way to the cassava plantation. He knew that the complainant was going to the plantation alone. His position was that after he met the complainant, he had gone to hunt for pigs with a few other males and that he was out the whole day with them and returned home only late in the evening.
- [18] He was cross-examined in detail with regard to the alleged episode of pig hunting and he admitted that all others who went with him were on horseback whilst he was on foot. During the journey there had been quite a distance between him and the others and they had later met at the top of the hill and dispersed in order to hunt the pigs.
- [19] The defence called another witness, a person who is said to have been associated with the Appellant and others in the alleged pig hunting expedition. He said that he along with the Appellant and others had gone pig hunting that day and that the Appellant had walked whilst they went on horseback. He maintained that the accused was with them till afternoon although there was a distance between the Appellant and the others during the journey since he was walking.

#### **The sole ground of appeal**

- [20] The sole ground of appeal to be considered by this court is as follows;

*That the learned trial judge erred in law and in fact in not directing himself when finding that the evidence of the complainant was credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave to the police and that she gave to the*

*medical doctor. Failure to direct himself on previous inconsistent statement in the law of the complainant caused substantial miscarriage of justice*'.

[21] In considering this ground, it is important to first pay attention to what the learned single judge, who considered the application for leave to appeal, had observed in his ruling. He states that *'the appellant has not set out the nature of the inconsistent statements that is being referred to in this ground of appeal and has when formulating the ground stated that details would be given when the case record is available'* (emphasis added).

[22] In deciding to grant leave he observes that *'in the summing up of the learned trial judge there is very little reference to inconsistent statements of the victim and therefore I would leave it to the full court to consider this ground when the entirety of evidence is available and I would grant leave on this ground'* (emphasis added).

[23] In this court, the Appellant has taken up the position that there were seven inconsistencies between the complainant's police statement and evidence given at the trial. These instances have been set out in his written submissions and it is therefore necessary to consider as to what these alleged inconsistencies are. They are as follows:

(i) the Complainant had said in her evidence that *'she met the Appellant on her way to the farm and the Appellant had also greeted her with good morning'* whereas in her statement to the police *'she did not mention that the Appellant greeted her good morning'*,

(ii) the complainant in her statement to the police *'had stated that the Appellant had kissed her, had lifted her top and fondled her breasts and touched her private parts'* but in her evidence *'did not mention anything about the alleged acts of the Appellant'*,

(iii) the complainant when asked as to what happened after the act of sexual intercourse had said in her evidence *'I could not shout because*

*he threatened me he was on top of me for 2 to 3 minutes after that I didn't know where he went to after a while I came down to the nearby creek I cleaned myself I went home. The whole thing that happened to me I told my mother'* whereas in the statement made to the police she had said that there was another act of rape after the first act.

- (iv) the complainant in her statement to the police had stated that after the alleged incident, *'the Appellant had zipped his pants and left for the village'* whereas in her evidence stated that *'He went away I did not know where he went to I was still lying there'*.
- (v) that the complainant in her statement to the police had stated that she looked for her panty and shorts but she could not locate but in her evidence she did not mention any thing about her panty and shorts.
- (vi) the complainant when asked about the cane knife had said that *'He took the cane knife and threatened me put on my neck he said if you shout I will chop your neck'* but in her statement to the police she had not said about the Appellant placing the knife on her neck.
- (vii) the complainant had said in her evidence that as soon as the penis was inserted in her vagina, she felt blood coming out but the doctor who examined her had stated that there were no bruises on the vagina.

[24] It is settled law that inconsistencies in evidence can take the form of a contradiction or an omission and that such contradiction or omission can be between a previous sworn statement and evidence at the trial or between a previous unsworn statement and the evidence given at the trial. Inconsistencies may be manifest in the testimony of a witness perse or interse the testimony of several witnesses.

[25] If such contradiction or omission is to be treated as an inconsistency, it is imperative that such position is put to the witness during cross examination. It is only then that the witness is afforded the opportunity of explaining the reasons for

such contradiction or omission and the assessors and the trial judge are in turn able to consider as to whether the explanation is acceptable. These aspects were dealt with in the cases of **Gyan Singh v R** (1963) 9 FLR p105 and **Jagdishwar Singh and another v R** (1962) 8 FLR p159.

[26] The learned state counsel in his written as well as oral submissions highlighted that out of the seven instances mentioned by the Appellant, only on one occasion has the complainant been cross-examined regarding such inconsistency. That is regarding her failure to say in the police statement that the dogs of the Appellant were present at the scene where she was raped. The question in cross examination was *'You also don't recall seeing any dogs with him?'* To which she replied *'the dogs were there'* and admitted that she had not stated that in her police statement (at page 246 of the court record).

[27] The learned state counsel further submitted that the rest of the instances that have been pointed out cannot be treated as inconsistencies. This was on the basis that they were never raised during the cross examination of the complainant and as such never highlighted as inconsistencies at the trial. It is important to bear in mind that throughout the trial the Appellant was represented by counsel who had the benefit of perusing the police statement as well as obtaining instructions from the Appellant.

[28] It is clear that the so called inconsistencies have for the first time been pointed out in the written submissions filed in this court and learned counsel for the Appellant agreed that it was so. The very purpose of cross-examination is to test the truthfulness and credibility of a witness and if that opportunity is not made use of, one cannot be heard to complain later.

[29] This court has on many occasions emphasized the importance of considering as to whether the witness has been afforded an opportunity of explaining the reasons for any inconsistencies.

[30] It is very rarely that one does not find inconsistencies in evidence given by witnesses and in the case of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat**



(1983) SCC 217, which has often been cited by this court, the Supreme Court of India explained in lucid terms, why inconsistencies or discrepancies as they may be called, occur and their effect. Thakkar J stated: *'We do not consider it appropriate or permissible to enter upon a reappraisal or reappraisal of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious'* and went on to identify them. He said *'The powers of observation differ from person to person. What one may notice another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder'. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events or fill up details from imagination on the spur of the moment'*.

Having said so, he held that *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important 'probabilities-factor' echoes in favour of the version narrated by the witnesses"* (at pages 222 and 223).

- [31] In **Koroitamana v The State** [2018] FJCA 89; AAU0119,2013 (5 June 2008) Suresh Chandra J opined; *"as stated in Abhaya Raj's case (supra) the exact manner in which the accused acted need not be stated by the victim who had been the subject of the offence. There may sometimes be minor variations in the manner in which the victim describes the incident, but the question is whether such variation affects the credibility of the witness"*.
- [32] The Supreme Court in the case of **Swadesh Kumar Singh v The State** [2006] FJSC 15 discussed in detail the consequences of inconsistencies between previous sworn statements and evidence given in court and went on to provide guidelines to ensure that trial judges deal adequately on matters pertaining to inconsistencies in

their summing up. Relying on this case as well as several other English authorities, the Supreme Court in **Praveen Ram v The State** [2012] FJSC 12; CAV0001.2011 (09 May 2012) dealt with the approach to be taken when inconsistencies exist between a statement given to the police and evidence given in court.

[33] The dicta in the above cases were relied upon by this Court in the cases of **Mohammed Nadim and another v The State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Krishna v The State** [2021] FJCA 51; AAU0028.2017(18 February 2021) and the impact of inconsistencies have been analyzed in great detail. The essence of these decisions is that the existence of contradictions or omissions by itself would not impeach the creditworthiness of a witness and that it would depend on how material they are. Another matter that has been stressed is the requirement on the part of trial judges to adequately direct assessors on the impact of inconsistencies in the summing up as well for themselves to be guided by these factors in arriving at a decision.

[34] In this case, court ought to take into consideration only one omission on the part of the complainant as discussed by me herein before (para 24 and 25) and that too is trivial in nature. It is of such insignificance that it neither affects the credibility of the complainant nor does it have any impact whatsoever on the weight of her evidence. Even if court were to consider all seven instances the Appellant has identified as being inconsistencies, they are of no consequence and certainly do not go to the root so as to render her evidence unreliable. In effect, they have no bearing on the prosecution's case.

[35] Another matter worthy of mention here is, as referred to earlier, 'evidence of recent complaint' (of the complainant's mother) was also led at the trial. Although recent complaint evidence is not to be treated as corroboration of the evidence of the complainant, it would be relevant to establish consistency of the complainant's conduct.

[36] The learned counsel for the Appellant submitted that the learned High Court Judge has not made adequate reference to the inconsistencies in his summing up. Although the learned High Court Judge has been somewhat economical in dealing

with the effect of inconsistencies in his summing up, he cannot be faulted for not labouring on this aspect since the alleged inconsistencies were never brought out at the trial. In any event the assessors and the trial judge had the benefit of observing the demeanor and deportment of the complainant and they have acted on her evidence.

[37] In paragraph 10 of the summing up it is stated that *'In assessing evidence of the witness, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in this case'* whilst paragraph 57 reads thus; *'If you consider the evidence given by the victim as reliable and credible, then you can consider whether you accept them as proven facts. It is permissible to draw an inference of the existence of another fact from the facts that you consider as proven. It is the process of drawing inference from the proven facts'*.

[38] The cumulative effect of the summing up and in particular what he has stated in paragraphs 9, 10, 11, 43 and 57 of his summing up (page 51, 52, 61 and 65 of the court record) can be treated as adequate directions on this aspect.

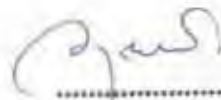
[39] It is also pertinent to note that if counsel who appeared for the Appellant considered it so vital, he could well have informed the trial judge of the necessity to further direct the assessors on the aspect of inconsistencies in evidence when upon the conclusion of his summing up, the trial judge had inquired from both counsel as to whether any further directions were necessary.

[40] No such request has been made by counsel for the Appellant and this omission on his part by itself would ordinarily be sufficient to disregard a ground such as the one raised in this case. Chief Justice Gates re-iterated such position in **Anand Abhay Raj v The State**, [2014] FJSC 12; CAV0003.2014 (20 August 2014) citing the cases of **Segran Murti v The State** Crim. App. No.CAV0016/2008 12 February 2009 and **Truong v The Queen** [2004] HCA 10, 2004 ALJR 473.

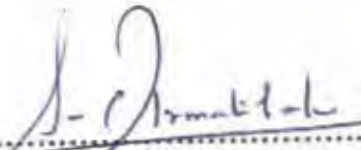
- [41] It was further held by Gates CJ in **Anand Abhay Raj (supra)** that *'The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats' hoping for an appeal point, when issues in directions should have been raised with the judge'*.
- [42] In view of the sole ground of appeal relied upon by the Appellant, it would not be necessary for this court to go into any matter other than the aspect as to whether there had been any error in law or in fact as a result of the purported failure on the part of the trial judge to direct himself on any inconsistencies in the evidence of the complainant.
- [43] Nevertheless, I have carefully perused the entirety of the evidence led at the trial. There is cogent and overwhelming evidence against the Appellant.
- [44] I am satisfied that the learned trial judge has in his summing up carefully evaluated the evidence and clearly outlined the applicable statutory provisions as well as the legal principles including the effect of the defence of alibi taken up by the Appellant. He has more than adequately directed the assessors in order for them to form a proper opinion. They have returned a unanimous opinion that the appellant was guilty of the offence. In his judgment, the learned High Court Judge has directed himself correctly in law and in fact in arriving at his decision to convict the appellant.
- [45] I am unable conclude that the learned trial judge erred in law or in fact as contended by the learned counsel for the Appellant. There has been no miscarriage of justice that warrants the setting aside of the conviction and sentence. I therefore refuse to grant leave to appeal. The appeal is dismissed.

**The Order of the Court:**

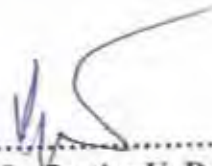
1. Leave to appeal refused.
2. Appeal dismissed.
3. Conviction and sentence affirmed.



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



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



.....  
**Hon. Mr. Justice V. Dayaratne**  
**JUSTICE OF APPEAL**