

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

**CRIMINAL APPEAL NO. AAU 103 of 2016**  
**[In the High Court at Lautoka Case No. HAC 144 of 2013]**

**BETWEEN** : **PRADEEP KUMAR**  
*Appellant*

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

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

**Counsel** : **Mr. M. Fesaitu for the Appellant**  
: **Ms. P. Madanavosa for the Respondent**

**Date of Hearing** : **06 May 2022**

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

**JUDGMENT**

**Gamalath, JA**

[1] I have read the judgment in draft form of Dayaratne JA and his conclusion and I am in agreement with both.

**Prematilaka, JA**

[2] I have also read in draft the judgment of Dayaratne, JA and agree with his reasons and orders proposed.

Application for leave to appeal and clarifications made in this court

- [3] The appellant is before this court upon a 'Renewal application for leave to appeal against the conviction' filed in terms of Section 35(3) of the Court of Appeal Act. His timely application for leave to appeal against the conviction and sentence was refused by the single judge by his ruling dated 30 August 2018. Fifteen grounds had been urged in the Notice of Appeal filed on 16 August 2016.
- [4] In the written submissions filed on behalf of the appellant (dated 29 March 2022) counsel for the appellant has specifically stated that the appellant is not pursuing the appeal in respect of sentence and the submissions are confined to Ground 2 as contained in the Notice of Appeal. The position that only Ground 2 was being relied upon was re-iterated by the learned counsel for the appellant at the hearing before us.
- [5] The appellant was not physically present and was connected through skype video conferencing to follow the proceedings of this court. Learned counsel for the appellant informed court that he has received instructions from the appellant not to pursue the leave to appeal application regarding sentence but had not been able to obtain his signature on the application for withdrawal of such appeal since the appellant is not present in court. He produced to court the application that had been prepared by him. In view of the submissions of learned counsel for the appellant, court specifically inquired from the appellant (translated by the court officer in Hindi) as to whether he understands the effect of the decision to withdraw the appeal regarding the sentence and whether he had given instructions to his counsel to do so. He answered in the affirmative. Accordingly it is clear to us that the appeal regarding sentence is not being canvassed before this court.

The application to withdraw the appeal in respect of sentence is therefore allowed.

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

- [6] In the High Court, the appellant was charged with four counts of rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. According to the Information filed against the appellant, the first count of rape happened between 1 March 2013 and 31 March 2013 whilst the acts of rape as described in the second to fourth counts took place on 26 May 2013 (three separate acts of rape committed at different times of the day). The assessors returned a unanimous opinion of guilty at the conclusion of the trial and the learned trial judge concurring with the said opinion convicted the appellant on all four counts of rape and later sentenced the appellant to 12 years imprisonment with a non-parole period of 8 years imprisonment.

### **Evidence led at the High Court trial**

- [7] Witnesses for the prosecution were the complainant, her mother and the doctor who had examined the complainant. The appellant gave evidence and also called his wife to testify on his behalf.
- [8] At the time the offences were committed, the complainant was 16 years old and was a high school student. Her father had died three months after her birth. The mother was having a relationship with another man and the complainant and her brother had not wanted to stay with them. The brother was living in a distant island but supported her education. The complainant was a cousin of the wife of the appellant and had come to live with them in December 2012, at the insistence of her brother. The appellant's house was in a remote village adjoining a forest.
- [9] The first incident of rape had taken place one night in the month of March 2013 when only the appellant, the complainant and the appellant's child were at home. The appellant had entered her room and threatened that she would be killed along with his wife and children and their bodies thrown in the jungle if she shouted. The appellant had then indulged in sexual intercourse with her. This had lasted around fifteen minutes. As a result she was in pain and she had started to bleed from the vagina. She had not reported the matter to anyone out of fear.

- [10] Thereafter, on 26 May the same year, the appellant had raped her thrice. On the day in question, only the appellant and the complainant had been at home. The first act of rape had taken place around 4 to 5 pm when the appellant had forcibly taken the complainant to his room and threatened her. That had lasted about 15 minutes. About an hour after the first incident, the appellant had, similar to the first instance, taken her to his room and raped her. The third time was at around 9.30 pm when the appellant had come to her room and committed rape on her. On all three occasions she had been threatened and as a result she did not resist. She had been warned that she would be dealt with if she were to tell anyone as to what had taken place. The complainant clearly stated that there was penile penetration of the vagina on all four occasions. She had categorically stated that she did not consent to sexual intercourse and that the appellant had committed all four acts by force.
- [11] She also testified to an incident where the appellant had informed her that her mother had made a complaint to the Police that she was having an affair with the appellant and the appellant had forcibly got the complainant to write a letter stating that it was a falsehood. The appellant had taken this letter. This document dated 21 March 2013 had been produced by the prosecution through the complainant as an exhibit (PE No.1). Consequent to this, a domestic violence restraining order (DVRO) had been obtained against her mother. She has stated that it was obtained at the behest of the appellant and his wife and that as a result she was not able to communicate with her mother.
- [12] The very next morning after the three acts of rape (27 May 2013), the complainant had left the house of the appellant in the pretext of going to school and had gone to the house of her mother. There she had narrated the 'whole story' to her mother. The mother had taken her to the Police Station where both she and the mother had made statements. She had been examined by a doctor thereafter (on 27 May 2013, the day after the three acts of rape).
- [13] The complainant was cross examined at length. It was suggested to her that she was uttering a falsehood since she hated the appellant for having openly expressed his displeasure of having the complainant in their house. She has vehemently rejected the suggestion.

- [14] Her mother was the next witness and she testified that the complainant had arrived at her residence on 27 May 2013 and started crying. Questioned as to why she was crying, the complainant had told her that she had been raped by the appellant and had later described the entirety of what had happened. Since the witness could not keep the complainant at her house for long in view of the DVRO, she had taken her to the Police Station. Statements had been recorded and the complainant had been produced before a doctor for examination. Her cross examination has been very brief. This witness belongs to the category of a 'recent complaint witness'
- [15] The doctor who had examined the complainant was the other witness for the prosecution. She submitted the medical report and explained that the hymen of the complainant was not intact, there was a laceration 2-3 cm inside the right vaginal wall, clotted blood was noted on the laceration with tenderness and mild erythema (redness) was noted around the laceration. The doctor had expressed the opinion that the injuries were a few hours or a day old and were consistent with forceful penetration of the vagina when dry.
- [16] The Appellant gave evidence at the trial and he denied that he had raped the complainant. He stated that he was opposed to the complainant staying at his house and that he repeatedly indicated this to his wife and the complainant was aware of it. As a result, the complainant had developed a hatred towards him. He further said that the complainant used his phone without his permission and he had slapped her for that and she had a grudge with him over that as well. He attributed these as being the reasons for her to falsely accuse him. He admitted that the DVRO against the mother of the complainant was obtained by his wife (page 187 of the court record) but denied that he had forced her to write the letter that was marked through the complainant.
- [17] The appellant's wife also gave evidence. She admitted that she was not at home on 26 May 2013. She had left home in the morning and returned the following day. She also admitted to being assaulted by the appellant prior to her leaving home that day. Questioned during examination in chief as to why the complainant would make a false allegation against the appellant, she attributed it to a property dispute the mother of the complainant had with her family in the year 2006.



[18] It is also important to note that there were several discrepancies in the defence version. The appellant said that his wife was at home on 26 May 2016. However in her evidence his wife said that she was not at home since she had left home in the morning (pages 200 -203 of the court record). Further, there were inconsistencies between them with regard to the letter that was produced through the complainant.

### **The ground of appeal**

[19] The only 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 and the assessors that there was no recent complaint by the complainant hence they had opportunity to do so and as such there was substantial miscarriage of justice’.*

[20] In the written submissions filed on behalf of the appellant in this court (at para 17 and 18), it has been stated that this was one of the grounds that was urged on behalf of the appellant at the leave to appeal stage before the single judge and the position taken up was that the learned trial judge had failed to make a direction to the assessors that there was *‘no recent complaint’*. However it has been submitted that the argument put forth now is that there was no direction made to the assessors *‘on how to assess the recent complaint evidence’*. He has admitted that there in fact was evidence of recent complaint pertaining to the incidents of 26 May 2013 (para 18 and 21 of the written submissions).

[21] Learned counsel for the appellant clarified this position at the commencement of his oral submissions before this court and invited court to consider the ground of appeal subject to that variation. This was inevitable since he could not have denied that the evidence of the complainant’s mother was ‘evidence of recent complaint’ in so far as counts 2, 3 and 4 were concerned. On the very next day, the complainant had confided in her mother as to what had happened to her. Both the complainant and the mother made statements to the police on that day and both have testified in court. Hence the requirements for her evidence to be treated as ‘recent complaint evidence’ have been met. Chief Justice Gates relying on **Kory White v The Queen**

[1999] 1 AC 210 in **Anand Abhay Raj v The State**, [2014] FJSC 12, CAV0003 of 2014 (20 August 2014) said '*Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint*'.

- [22] In view of the statutory provision contained in Section 129 of the Criminal Procedure Act 2009, there is no ambiguity or doubt that corroboration of the evidence of a complainant is not required to bring home a conviction in a case pertaining to a sexual offence. However, there had been some confusion with regard to the precise ambit of 'recent complaint evidence' due in particular, to the manner in which this issue had been dealt with by certain trial judges in their summing up.
- [23] As adverted to by me earlier, the evidence of the complainant's mother in this case fulfills the requirements to be categorized as recent complaint evidence. As such the next question that needs examination is as to what effect it has on the evidence of a complainant in a case of sexual assault. Here again, there ought not to be any ambiguity or doubt since this issue has come up for discussion often in the appellate courts in Fiji.
- [24] Having referred to many previous cases, Chief Justice Gates dealt with this issue in great detail in his judgment in **Anand Abhay Raj (supra)**. He said '*In any case evidence of recent complaint evidence was never capable of corroborating the complainant's account: R v Whitehead (1929) 1 KB. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: Basant Singh & Others v The State Crim App.12 of 1989; Jones v The Queen (1997) 191 CLR 3439; Vasu v The State Crim App. AAU0011/2006S, 24<sup>th</sup> November 2006*'.
- [25] Scott J in the case of **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) opines that '*a complaint in sexual cases is only recent if it is made at the first opportunity which reasonably presents itself ..... even in cases of sexual offences where evidence of recent complaint is admitted, the complaint is not evidence of its truth; it goes, rather, to consistency*'.

- [26] At the same time it is important to be mindful that the absence of recent complaint evidence does not by itself affect the reliability of a complainant or that absence of such evidence should be construed as establishing consent on the part of the complainant. Shameem J in the case of **The State v Waisea Volvola** Cr App HAA 106/2002S was very clear on this point when she said *'However, her silence could easily have been consistent with her shame at the incident, connected with cultural taboos in relation to discussing sexual matters with elders. To say that an absence of recent complaint confirms consent is an error of both fact and law'*.
- [27] It is therefore clear that whilst evidence of recent complaint is not to be considered as corroboration of the evidence of the complainant, it would be relevant to establish consistency of the complainant thereby adding weight to her credibility and reliability. I do not think this aspect requires any further elaboration.

#### **Summing up and judgment of the High Court Judge**

- [28] Since the crux of the submission of learned counsel for the appellant was that the learned High Court Judge has failed to direct the assessors and himself on how to assess the recent complaint evidence, I will now examine the summing up of the learned trial judge as well as his judgment.
- [29] It is necessary to bear in mind that in determining the adequacy of directions pertaining to a particular aspect (or whether they amount to misdirections or non-directions) contained in a summing up, it would not be advisable to analyze certain paragraphs in isolation. There can be instances where a particular paragraph taken on its own may give a meaning which is somewhat different to that when read together with a preceding or subsequent paragraph. Speight J in the Fiji Court of Appeal case of **Ajendra Kumar Singh v Reginam**, Criminal Appeal No. 46 of 1979 (10 June 1980) stated as follows; *'It has been said time and again that a summing up must be read as a whole and it is quite wrong to take one or two phrases in isolation and examine them away from their context'*.
- [30] Trial judges adopt different styles in making a summing up and giving directions. Whilst some may be very descriptive others may be concise. Provided it does not



contain an erroneous legal or factual statement or conclusion and so long as an accurate analysis of facts has been made, a judge may not be faulted only for lack of brevity.

- [31] The learned counsel for the appellant complained that the direction of the trial judge would have created an impression in the minds of the assessors that the recent complaint evidence had strengthened the prosecution case or that it amounted to corroboration of the evidence of the complainant. He complained of paragraph 90 of the summing up and paragraph 9 of the judgment.
- [32] Although it may be argued that a plain reading of paragraph 90 of the summing up would tend to give such impression, it is important to scrutinize the language that has been used in order to comprehend as to what the learned trial judge had intended to convey.
- [33] Before venturing to examine paragraph 90, I consider it appropriate to look at paragraph 81 in order to understand how the learned trial judge had approached the issue. It states as follows; *'Please remember, there is no rule for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant alone depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the complainant's evidence if you think that it is safe to look for such supporting evidence'*. Paragraph 82 stated that *'In evaluating complainant's evidence, you consider what she was talking about in her evidence is probable in the circumstances of this case'*.
- [34] Paragraph 90 of the summing up is as follows; *'Prosecution says that the complaint she made on the 27<sup>th</sup> of May 2013 to her mother and thereafter to police soon after the alleged second incidents strengthened the consistency of the version of prosecution. Poonam had told her mother that she was raped by the accused. Her mother gave evidence and said she received the complaint from Poonam on the 27<sup>th</sup> May, 2013'* (emphasis is mine).

- [35] It is clear from the above paragraph as to what the trial judge intended to impress upon. He does not say that it strengthened the prosecution case (meaning corroboration) but states *'strengthened the consistency'* and it is clear that he meant to say strengthening the version of the 'complainant' although he has used the word 'prosecution'. This is not an attempt on my part to read into what the learned trial judge has said but purely an exercise to give it context.
- [36] In fact, in paragraph 25 of the appellant's written submissions, learned counsel for the appellant himself has alluded to it. He has stated that *'The learned trial judge cannot be entirely faulted as it seems from paragraph 90 of the summing up [page 81 of the appeal record] that it seemed to have emerged from prosecution's position [assuming either the opening address or closing arguments] that the complainant made to her mother and thereafter to the police strengthened the consistency of the versions of the prosecution'* (emphasis is mine).
- [37] Again, it is important to look at Paragraph 92 of the summing up. It states as follows; *'Please remember, what she had told police is not evidence. You can consider her previous statements only to test the consistency and credibility of her evidence. It is up to you to decide what weight you should give to recent complaint evidence adduced by the Prosecution'* (emphasis is mine). The first two sentences here are not connected to the last sentence as the learned counsel for the appellant sought to interpret. Instead, the last sentence is clearly a direction in respect of the 'recent complaint evidence' whilst the first two sentences are a continuation of what has been said in the previous paragraph (para 91).
- [38] Paragraph 91 reads as; *'There is no dispute that Poonam had made a complaint to police on the 27<sup>th</sup>. Defence Counsel, however, highlighted certain inconsistencies in her previous statement to police with her evidence in court. You consider if alleged contradictions or omissions are material enough so as to discredit her'*.
- [39] The direction contained in that last sentence of paragraph 92 is not an inaccurate statement of the legal position regarding 'recent complaint evidence'.

- [40] Learned counsel for the appellant cited paragraph 9 of the judgment of the trial judge to buttress his submission that the trial judge had misdirected himself on this aspect. That reads as follows; '*Recent complaint evidence and distress evidence strengthened the consistency of the version of the prosecution*'. I do not consider it necessary to labour any further on this other than to re-iterate what I have already said.
- [41] The complainant very clearly explained why she did not complain about the first act of rape in March that year and the learned trial judge had directed the assessors as well as himself on this issue and how that should be approached. A perusal of the court proceedings demonstrates that the complainant has not been shaken by the intense cross-examination and the defence has not been able to assail or impugn her evidence (pages 163-176 of the court record).
- [42] A perusal of the trial judge's summing up and judgment in their entirety reveal that directions have accurately been given on all aspects and I do not find any error of law or fact in them.
- [43] As I have already commented on, at best, what the learned trial judge has said may have lacked brevity on how exactly the assessors ought to assess the recent complaint evidence. However, in view of the reasons outlined by me, I hold that the directions of the learned High Court Judge were adequate.
- [44] On the other hand, if counsel who appeared for the appellant at the trial was of the view that further directions were required, there was nothing to prevent him from requesting the learned trial judge to give further directions to the assessors at the end of the trial judge's summing up.
- [45] Such a step has not been taken 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 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 re-iterated such position in Anand Abhay Raj (supra).

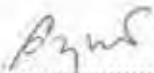
[46] In the said case Gates CJ went on to opine that *'The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats' hoping for an appeal point, when issues in directions should have been raised with the judge'*

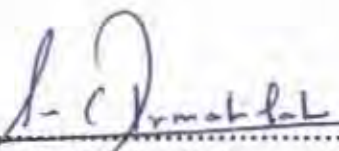
[47] For the reasons enumerated by me above, I see no merit in the ground of appeal. Considering the totality of the evidence led at the trial, there is no justification to set aside the conviction and sentence. I therefore refuse to grant leave to appeal. The appeal is dismissed.

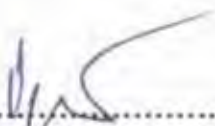
**The Orders of the Court:**

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



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

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

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