IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0032 / 2016
(On Appeal From Court of Appeal No: AAU 0056 / 2013)

BETWEEN : **BIJENDRA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court
Hon. Mr. Justice Priyantha Jayawardena, Judge of the Supreme Court

Counsel : **Mr. M. Yunus for the Petitioner**
Ms. P.K. Madanavosa for the Respondent

Date of Hearing: **7 April 2017**

Date of Judgment: **20 April 2017**

JUDGMENT

Marsoof, J

[1] The Petitioner has applied for special leave to appeal against the judgment of the Court of Appeal (Prematilaka JA, A. Fernando JA and P. Fernando JA) dated 30th September 2016, by which the Petitioner's appeal against his conviction for rape contrary to section 207(1) and (2)(a) of the Crimes Decree of 2009, was dismissed.

[2] The Petitioner had in his letter dated 4th October 2016 raised one ground of appeal against conviction and one ground of appeal against sentence, but by his amended petition dated 10th March 2017, he moved for permission to base his application for special leave to appeal against conviction and sentence on two different grounds, which were as follows:-

> (i) The learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof by using the phrase "fanciful doubt" resulting in miscarriage of justice; and
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> (ii) The learned Trial Judge erred in exercising his sentencing discretion to the extent that he:
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> (a) punished the Petitioner by adding 7 years as an aggravating feature which was excessive; and
> (b) failed to give more reduction for his mitigating factors.

[3] Since the Respondent had no objection to the amendment sought by the Petitioner, the learned Counsel for the Petitioner was permitted to support his application for special leave to appeal at the hearing before this Court on the said amended grounds.

[4] It is significant to note that both grounds urged by the learned Counsel for the Petitioner before this Court had previously been considered by the Court of Appeal in its impugned judgment dated 30th September 2016. Ground (i), which was the only ground urged before this Court against the conviction, was identical in all respects to ground (iii) taken up before and considered by the Court of Appeal, and ground (ii), which was the only ground urged against the sentence, was identical in all respects with ground (iv) taken up before and considered by the Court of Appeal in its impugned judgment.

Material factual background

[5] It may be convenient to set out in brief the material factual background before examining the submissions of learned Counsel in some detail.

[6] The Petitioner was charged on a representative count that the Petitioner "on the 28th of November 2010 at Nassinu in the Central Division, had carnal knowledge of" Ms. P [actual name withheld for preserving privacy] "without her consent" contrary to section 207(1) and [2](a) of the Crimes Decree No.44 of 2009. At the time of the alleged offence, Ms. P, was an unmarried young lady 24 years of age.

[7] After a trial lasting three days that commenced before the High Court of Fiji at Suva on 8th April 2013, at which five witnesses including the complainant Ms. P, had testified for the prosecution while the Petitioner was the only witness to testify for the defence, the assessors were of the unanimous opinion that the Petitioner was guilty as charged.

[8] The learned Trial Judge [P.K.Madigan J], who concurred with the said opinion of the assessors having directing himself on his own summing up, pronounced judgment finding the Petitioner guilty of rape, and sentenced the Petitioner on 11th April 2013, to 13 years' imprisonment with a non-parole period of 11 years.

[9] Though the Petitioner's application for leave to appeal against conviction and sentence was initially refused by a Single Judge of the Court of Appeal (Chandra RJA) by his Ruling dated 26th November 2014, the Petitioner moved that his application for leave to appeal be determined by the full Court in terms of section 35(3) of the Court of Appeal Act, on certain amended grounds of appeal. The Court of Appeal, by its impugned judgment dated 30th September 2016, unanimously held that the appeal should stand dismissed and that the conviction and sentence be affirmed.

Proof beyond reasonable doubt

[10] In his amended petition, ground (i) upon which the Petitioner has sought special leave to appeal against his conviction is whether the learned Trial Judge erred in law and in fact when he misdirected the assessors in respect of the standard of proof when he used the phrase "*fanciful doubt*" in conjunction with the worlds "proof beyond reasonable doubt", resulting in a miscarriage of justice.

[11] It is noteworthy that in the course of his summing-up, more specifically in paragraph [7] thereof, the learned Trial Judge had directed the assessors in the following manner:-

> "It is most important that I remind you of what I said to you when you were being sworn in. The burden of proving the case against this accused is on the prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused and you will find him not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. The accused does not have to prove anything to you."

[12] In the above quoted direction to the assessors, the learned Trial Judge, having explained the applicable burden of proof on the prosecution to prove the guilt of the accused *beyond reasonable doubt*, he went on to stress that if there be any doubt, the benefit of that doubt must be given to the accused, but for finding the accused not guilty, the doubt must be "*a reasonable one however, not just some fanciful doubt.*"

[13] Learned Counsel for the Petitioner submitted that the said direction contained in paragraph 7 of the summing-up of the learned Trial Judge in regard to the burden of proof, amounted to a misdirection since it had the effect of confusing the assessors by inviting them to further analyse whether the doubt was not a "*fanciful doubt*". He stressed that in a case of alleged rape such as this, it was simply "her words against his words" and the conviction

of the Petitioner depended upon the acceptance of the testimony of the complainant Ms. P to the effect that the Petitioner had sexual intercourse with her *without her consent and against her will* while the Petitioner, testified that Ms. P had *consented to having sex with him*, which made it imperative for the learned Trial Judge to make a clear direction to the assessors what they were expected to do. Learned Counsel emphasised that as observed by King CJ in *R v Pahuja* (1987) 30 A Crim R 118 at 122, "to direct or invite a jury to subject a doubt which it entertains after deliberation upon the case, to a process of analysis or evaluation in order to determine whether it is reasonable, is an error of law".

[14] In fairness to learned Counsel for the Petitioner, it must be stated that he did not rely on the cases of *R v. Dam* (1986) SASR 422 and *Wilson, Tchorz and Young* (1986) 22 A Crim R 130, which had been very rightly distinguished by Prematilaka JA in paragraph 42 of his impugned judgment, with which A. Fernando JA and P. Fernando JA had concurred. In so distinguishing those two cases, Prematilaka JA observed as follows:–

> "I am of the view that the impugned direction in the present case cannot be equated with or is not similar to the disapproved direction in *Dam* and *Wilson*. Though the word 'fanciful' appears in all three, the comparison ends there, for the message conveyed by the use of the word 'fanciful' in *Dam* and *Wilson* on the one hand and in the case before us on the other hand are vastly different. The direction we are dealing with, in my mind, had not gone any further than merely warning the assessors against being influenced by fanciful or unreasonable possibilities or notions."

[15] The learned Counsel for the Respondent responded to the submissions of the learned Counsel for the Petitioner by stressing that the learned Trial Judge had made it clear by his summing-up that the prosecution must prove its case against the Petitioner beyond reasonable doubt, and the use of the phrase "fanciful doubt" did not cause any confusion in the minds of the assessors.

[16] I find that one of the earliest cases in which the burden of proof applicable in a criminal case was discussed was the decision in *Miller v Minister of Pensions* [1947] 2 All ER 372 in which Denning J, as he then was, did use the phrase "fanciful possibilities" in contrast to a "high degree of probability" in explaining the meaning of the concept of "proof beyond reasonable doubt" which is for long been the standard of proof required to convict an accused in a criminal case. The English Court in the King's Bench Division was in this case concerned with the standard of proof in respect of claims made under regulations governing pensions payable upon death of a member of the British Army. The court held that it had been settled that in respect of cases falling within one set of regulations, the standard of proof was as in criminal cases, "proof beyond reasonable doubt', and that in respect of cases falling within another set of regulations, the standard was one of "preponderance of probability" as in civil cases.

[17] Adverting to a regulation that attracted the standard of proof applicable to criminal cases, at page 373 of his judgment, Denning J observed:

> "....for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "Of course it is possible but not in the least probable", the case is proved beyond reasonable doubt; nothing short will suffice."

[18] What Denning J did in the above quoted passage was to explain that "the law would fail to protect the community if it permitted *fanciful possibilities* to deflect the course of justice", just as the Trial Judge in the instant case explained to the assessors in in his summing up, albeit in simpler language, that "If you have any doubt then that must be given to the accused, and you will find him not guilty - that doubt must be a *reasonable one* however, *not just some fanciful doubt*."

[19] Learned Counsel for the Respondent has invited the attention of court to the more recent decision of the Privy Council in *Brown & Isaac v. The State (Trinidad And Tobago)* [2003] UKPC 10, in which the trial judge had used the phrase "*fanciful doubt*" as did the Trial Judge in the instant case in contrast to the phrase a "*reasonable doubt*". Lord Hoffman, with whom Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Sir Denis Henry concurred, observed as follows in paragraphs 25 and 26 of his opinion:-

> "The judge gave the jury a full direction on the standard of proof. He said that the degree of proof required was "an onerous one". He said that before the jury could convict they had to be "convinced" that he was guilty. He said that they must be "satisfied so that they feel sure, certain in [their] minds". After all this he said that if after consideration of all the evidence they entertained a reasonable doubt – "*I do not mean a fanciful doubt*" - they were under a duty to acquit.
>
> The appellants say that the reference to a reasonable doubt, which was something other than a fanciful doubt, vitiated the effect of the summing up. This was based upon some remarks of Lord Goddard CJ in *R v Hepworth* [1955] 2 QB 600, 603. He said that references to a reasonable doubt, by contrast with a fanciful doubt, was in itself unhelpful because these expressions did not explain themselves. The jury needed more help and it was better to tell them that they must feel sure of the prisoner's guilt. Of course, the criminal standard of proof is not some point on a

mathematical scale of probability and it would not help the jury very much if it were. Any choice of words to convey the appropriate degree of persuasion is bound to have some element of approximation. But Lord Goddard in *Hepworth* emphasised that there was no set formula. It depended upon the summing up as a whole. Their Lordships think that this summing up adequately conveyed the appropriate standard."

[20] Having examined the summing-up of the learned Trial Judge in the instant case in its entirety, I am of the opinion that as in the case of *Brown & Isaac*, the summing up adequately conveyed the appropriate standard, and there could not have been any confusion in the minds of the assessors on account of the use of the phrase "*fanciful doubt*".

[21] I would go further, and say that the language used by the learned Trial Judge in the instant case was simpler than the language employed by Denning J in *Miller v Minister of Pensions, supra,* and the trial judge in *Brown & Isaac v. The State (Trinidad And Tobago), supra,* and the use of the phrase "*fanciful doubt*" by the Trial Judge in the instant case in the manner he did, could not have caused, by itself, any confusion in the minds of the assessors.

[22] It is necessary to mention that the learned Counsel for the Petitioner made some effort at the hearing before this Court to show that the confusion allegedly caused in the minds of the assessors by the use of the phrase "*fanciful doubt*" resulted in a finding by the assessors that the Petitioner had carnal knowledge of Ms. P, *without her consent*. He submitted that the absence of consent was an essential ingredient of the offence of rape in terms of section 207(1) read with section 207(2)(a) of the Crimes Decree, and that the assessors could not have reasonably concluded that Ms. P had not consented to having sexual intercourse with the Petitioner in the face of his testimony in court that she did consent to having sexual intercourse with him.

[23] It is noteworthy that this aspect of the matter was never taken up as a ground of appeal in the Petitioner's original petition of appeal which was dismissed by a Single Judge of the Court of Appeal by his Ruling dated 26th November 2014, nor was it specifically set up as a ground of appeal in his amended petition dismissed by the Court of Appeal in its impugned judgment dated 30th September 2013.

[24] As this Court observed in *Katonivualiku v State* [2003] FJSC 17; CAV0001.1999 (17 April 2003), it is trite law that "the Supreme Court is not a Count of criminal appeal or general review, nor is there an appeal to the Court as a matter of right and, whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal." This Court would usually not entertain matters that have not been specifically canvassed before the Court of Appeal.

[25] Furthermore, as was noted by this Court in *Dip Chand v. The State* [2012] FJSC 6; CAV0014.2010 (9 May 2012) "The Supreme Court has been even more stringent in considering application for special leave to appeal on the basis of grounds of appeal not taken up or argued in the Court of Appeal." In *Vaqewa v. The State* [2016] FJSC 12; CAV0016. 2015 (22 April 2016), this Court has held that it "would not entertain a fresh ground of appeal unless its significance upon the special leave criteria was compelling..."

[26] Ms. P was the first witness to testify in this case before the High Court, and her testimony was both comprehensive and convincing. Without going in to details, an examination of Ms. P's testimony clearly demonstrates that while she resided with her mother's sister (Aunt) in Nasinu in November 2010, she was persuaded by her Aunt to obtain the services of the Petitioner, who did "witchcraft things" for her, to cure her of her "skin problem, namely pimples (acne)".

[27] On their first visit to the Petitioner, he did a ritual and told her about her past and some personal details which convinced Ms. P of his supernatural powers. On their second visit to the Petitioner on Saturday, 27th November 2010, she was told that she had to undergo a certain process for this purpose for which her Aunt paid him $150, and after getting back home she was told by her Aunt that the Petitioner had told her that she was possessed by a spirit known as "Mohini Chukus", and the process to get rid of this spirit would include certain rituals and sleeping with the Petitioner that night. Ms. P has stated in her testimony-

> "I was shocked – how could she say that. I was like a daughter to her. My relationship with Aunty was neutral. My mother was in Lautoka"

[28] When Ms. P had objected to the suggestion of sleeping with the Petitioner, and quarreled with her Aunt in that regard, the latter had taken over her phone, prevented anyone, including her cousin from visiting her, locked up the house, and when the Petitioner arrived later in the night, pushed her into the room where the Petitioner had sexual intercourse with her several times in the early hours of Sunday, 28th November 2010 by force, against her will and without her consent. She was devastated and cried and slept the whole day. When she went to work the next day, Monday, 29th November 2010, she informed her boss what had happened, who along with other staff helped her to go to the Police.

[29] Dr. Moape N. Bavou, Obstentrician and Gynacologist of the Colonial War Memorial Hospital, Suva, who had examined Ms. P on 30th November 2010, testified in court and identified the medical report issued by him where the history of the patient is disclosed as "sexually assaulted by a witch doctor" and where it had been noted that Ms. P had "black eye bruises" as well as "ecchymosis – black blood on right arm." She also had "bruising on the posterior vaginal wall (lower edge of vagina") involving epidermis of the skin". According to Dr. Bavou, the ecchymosis was "caused by blunt object such as wood, finger, erect penis forcefully entering vagina". In his report, he had noted that there was bleeding

from bruising, and the patient's hymen was not intact. Most significantly, according to the report, the injuries were caused within 24 to 48 hours before the examination. Under cross-examination, Dr. Bavou had confirmed that the bleeding was not menstrual bleeding but was from the bruising itself.

[30] It is trite law that for the grant of special leave to appeal, the Petitioner should satisfy stringent threshold criteria as set out in section 7(2) of the Supreme Court Act. As this Court noted in paragraph 35 of its judgment in *Bulivou v The State* [2015] FJSC 6; CAV0001.2015 (24 April 2015), the parameters of section 7(2) of the Supreme Court are demarcated by the concepts of "general legal importance", "substantial question of principle" and "substantial and grave injustice", which were amply illustrated in the following *dictum* of Lord Sumner in *Ibrahim v Rex* [1914] A.C. 599 at page 614:-

> "Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists: *Riel v. Reg* (1885) 10 App. Case. 675; nor unless by "a disregard of the forms of legal process", or by some "violation of the principles of natural justice or otherwise, substantial and grave injustice has been done": In *re Abraham Mallory Dittet* (1887) 12 App. Case. 459."

[31] It is clear that ground (i) raised by the Petitioner against his conviction has failed to satisfy this Court of any of the aforesaid threshold criteria.

Failure to exercise sentencing discretion

[32] Ground (ii) raised by the Petitioner was against his sentence. He has sought special leave to appeal against his sentence on the basis that the learned Trial Judge erred in exercising his sentencing discretion to the extent that he:

(a) punished the Petitioner by adding 7 years as an aggravating feature which was excessive; and

(b) failed to give more reduction for his mitigating factors.

[33] As already noted, this ground of appeal had been canvassed by the Petitioner, in identical language, in the Court of appeal as ground (iv) and considered by the Court of Appeal in its impugned judgment. The Court of Appeal has dealt with the submissions made by the learned Counsel for the Petitioner in the Court of Appeal not only adequately, but comprehensively, in paragraphs 45 to 68 of its impugned judgment.

[34] It may be useful to set out, albeit briefly, the manner in which the learned Trial Judge had computed the sentence of 13 years imposed by him on the Petitioner in his order dated 11th April 2013. The learned trial judge noted at the outset that maximum sentence for rape was life imprisonment, and that the minimum was 7 years of imprisonment, and decided on a head sentence of 8 years of imprisonment, in the circumstances of the case. He then added

to the said head sentence 7 more years of imprisonment on account of aggravating factors, which was broken down into 3 years for the Petitioner's lack of remorse and the humiliation suffered by Ms. P by reason of additional acts of rape on the same occasion, and 4 years for the use of subterfuge and deceit by the Petitioner in his ploys to have sex with Ms. P. Although this brought the total sentence to 15 years of imprisonment, the learned Trial Judge deducted 2 years from this aggregate on account of mitigatory factors such as the family circumstances of the Petitioner and his previous clean record, to arrive at the aggregate sentence of 13 years of imprisonment imposed on the Petitioner, with a minimum term of 11 years before being eligible for parole.

[35] It is however, noteworthy that the Court of Appeal, as explained in its impugned judgment, had to make certain adjustments to the said computation of the learned Trial Judge.

[36] Most significantly, the Court of Appeal responded favourably to a submission made before that court by the learned Counsel for the Petitioner that since the Petitioner had been charged on one representative count, it was not proper to take into consideration any additional acts of rape on the basis of the principle enunciated in *R v Jones* [2004] VSCA at paragraph 13 that "the effect of a representative count is that the offender is convicted of only one incident of the alleged sexual act."

[37] On this basis, as seen from paragraph 47 of the impugned judgment of the Court of Appeal, set aside the decision of the Trial Judge to take into consideration as aggravating circumstances the "lack of remorse" on the part of the Petitioner and the humiliation suffered by the complainant Ms. P due to the "additional acts of rape", and on that account to add 3 years to the head sentence of 8 years fixed by him.

[38] The complaint of the Petitioner before this Court is that despite the said deduction of 3 years from the sentence of imprisonment imposed on him, the Court of Appeal has erred in concluding in paragraph 65 of its judgment that "there is no justifiable reason for this court to interfere with the overall sentence imposed by the learned High Court Judge". Learned Counsel for the Petitioner has submitted that even though the Justices of Appeal had held with the Petitioner and set aside the additional 3 years of imprisonment imposed on the Petitioner by the learned Trial Judge for lack of remorse and the uncharged additional acts of rape, the Court of Appeal has left his overall sentence imprisonment imposed by the learned Trial Judge to remain as 13 years of imprisonment.

[39] From an examination of the impugned judgment of the Court of Appeal, it is apparent that, noting as the Court of Appeal did in *Drotini v. The State* [2006] FJCA 26; Criminal Appeal No.AAU0001 of 2005S: 2006 (24 March 2006) that the "continuing frequency of such cases has resulted in a general increase in the levels of sentence ordered in rape cases by the courts in Fiji" and certain other judicial pronouncements that emphasized the seriousness of the offence of rape and the need to deter the perpetration of the offence, the

Court of Appeal decided as stated in paragraph 49 of its judgment, to increase the head sentence by one more year, bringing it to 9 years of imprisonment.

[40] Although the Court of Appeal had decided to set aside the 3 years of imprisonment added on the basis that there were additional acts of rape committed by the Petitioner on the same occasion, in paragraph 55 of the impugned judgment the Court decided to increase the 4 years added by the learned Trial Judge for aggravating circumstances of the subterfuge and deceit used by the Petitioner to induce Ms. P to have sex with him, by two more years of imprisonment. In paragraph 55 of the judgment of the Court of Appeal, Prematilaka JA, with whom the other two learned Justices of Appeal concurred, observed as follows:-

> "It is clear from the victim's evidence that the Appellant (Petitioner in the Supreme Court) had told her just before sexually abusing her that he was not possessed and but only faking. This evidence stands unchallenged. Therefore, it is clear that the Appellant knew all along that he was engaged in a false and fraudulent misrepresentation that he could cure her of her acute acne bothering her for a long time. The victim, a young girl of 24 would have been greatly stressed by the condition of acne. The Appellant had by subterfuge won her confidence initially using shrewd and calculated methods and then forced himself on her in a most cruel manner against her will. His conduct deserves the highest condemnation. Therefore, I believe that instead of 04 years, 06 years would be the reasonable addition in lieu of his reprehensible conduct.

[41] Adding 6 years for the aforesaid aggravating factors to the head sentence of 9 years of imprisonment, brought the total sentence to 15 years of imprisonment, and when 2 years were deducted from that for the mitigatory circumstances taken into consideration by the learned Trial Judge, which in the opinion of the Court of Appeal did not require variation, the overall sentence remained at 13 years of imprisonment. It was for these reasons, that the Court of Appeal ultimately arrived at the conclusion that the appeal should stand dismissed and the conviction and sentence be affirmed.

[42] Given the stringent threshold criteria applicable to the grant of special leave to appeal as already noted in paragraph 30 of this judgment, and the failure of the Petitioner to satisfy any of them, I see no basis to grant special leave to appeal on ground (ii) urged by the Petitioner.

Conclusions

[43] For all these reasons, I would refuse the Petitioner's application for special leave to appeal, and affirm the impugned judgment of the Court of Appeal dated 30th September 2016. Accordingly, the conviction of the Petitioner and the sentence imposed on him by the High Court, shall stand.

Aluwihare, J

[44] I have had the advantage of read in draft the judgment of Marsoof J, and I agree with his reasoning and conclusions.

Jayawardena, J

[45] I have perusing the judgment of Marsoof J in draft, and I entirely agree with his reasoning and conclusions.

Orders of Court

(1) Application for special leave to appeal is refused.

(2) The conviction and sentence of the Petitioner is affirmed.

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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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Hon. Mr. Justice Aluwihare Buwaneka
Judge of the Supreme Court

.....
Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Solicitors

The Legal Aid Commission for the Petitioner

The Office of the Director of Public Prosecutions for the Respondent