IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0024 of 2017
(On Appeal from Court of Appeal No: AAU 0074 of 2013)

BETWEEN : LEON MARSEU CONIBEER

Petitioner

AND : THE STATE

Respondent

Coram : **Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Mr. T. Lee for Petitioner**
Mr. Y. Prasad for Respondent

Date of Hearing: **17 April 2018**

Date of Judgment: **26 April 2018**

JUDGMENT

Chandra J:

1. I agree with the reasons and conclusion in the judgment of Keith J.

Keith J:

Introduction

2. It goes without saying that, except in those cases where an enactment provides otherwise, the burden of proof in every criminal case lies on the prosecution. The defence does not have to prove anything. And as everyone knows, the standard of proof is proof beyond reasonable doubt, which means no more and no less than that the court has to be sure of the defendant's guilt before he can be convicted. In this case, when convicting the petitioner, the trial judge said that the petitioner "had failed to create a reasonable doubt in the prosecution case". One of the grounds of appeal is that the trial judge was thereby reversing the burden of proof.

3. The petitioner is Leon Marseu Conibeer. From now on I shall refer to him as the defendant. He was charged with one count of rape and one of indecent assault. The counts related to two different women. He was tried in the High Court in Lautoka. He pleaded not guilty to both counts. Each of the three assessors expressed the opinion that he was not guilty on both counts. The trial judge, De Silva J, agreed with the assessors that the defendant was not guilty on the count of indecent assault, but he disagreed with them on the count of rape. He found the defendant guilty on that count, and sentenced the defendant to 7 years' imprisonment with a non-parole period of 5 years.

4. The defendant's solicitors filed a notice of appeal against both the defendant's conviction and his sentence. The single judge, Chandra JA, took the view that leave to appeal was not required in respect of two of the grounds of appeal against conviction as they raised matters of law, but he refused leave to appeal in respect of the other grounds of appeal against conviction and in respect of the appeal against sentence. By the time the appeal was heard, however, the defendant had withdrawn instructions from his solicitors, and had filed amended grounds of appeal against his conviction. Those amended grounds said nothing about his sentence, and the appeal proceeded as an appeal against conviction only.

5. The Court of Appeal (Calanchini P, Lecamwasam JA and Goundar JA) considered all the grounds of appeal in the amended grounds, even though some of them had not been in the original grounds of appeal considered by the single judge. The principal judgment was that of Goundar JA. The appeal was dismissed, and the defendant now applies for special leave to appeal to the Supreme Court against his conviction. He drafted the petition himself, misdescribing it as a notice of appeal. The petition contained three grounds of appeal, all of which focused on the reasoning of the Court of Appeal. He is now represented by counsel instructed by the Legal Aid Commission, whose written submissions in support of the application for special leave to appeal maintain the attack on the approach of the trial judge and on the way in which the Court of Appeal upheld the conviction.

The facts

6. The two complainants were young women in their early twenties. They were both living in a flat owned by the defendant, and he was their landlord. There were other tenants in the flat, and each tenant had their own room, though they shared the living room, kitchen and washroom. The defendant used to visit the flat to collect the rent either weekly or fortnightly.

7. The complainant on the count of indecent assault (who I shall refer to as Miss X) spoke about an incident in the early hours of the morning on 1 June 2011. In view of the defendant's acquittal on that count, it should have been unnecessary to go into detail about it, but since it is being said on behalf of the defendant that his conviction on the rape is inconsistent with his acquittal on the indecent assault, something must be said about it. The evidence of Miss X was that she had been woken between 3.00 am and 4.00 am by a man calling from outside. The man said it was Leon, ie the defendant. She got up and let him in. She acknowledged in cross-examination that she had never had a clear view of him. Her evidence was that she had only heard his voice, and the trial judge assumed that she had meant by that that she had recognized it as the voice of the defendant. Her evidence, in short, was that the defendant wanted to have sex with her.

He managed to hug and kiss her before she had been able to push him off her. He smelt of alcohol and appeared drunk.

8. The account of the other complainant (who I shall refer to as Miss Y) was that at about 9.00 am on the same morning she opened her bedroom door to go to the washroom which was opposite her bedroom. As she did so, a man who had covered himself with a pink blanket pushed her back into her bedroom. She fell onto the mattress which was on the floor. When the man took off the blanket, Miss Y saw that it was the defendant. She tried to get away from him, but hit her head against the wall. He smelt of alcohol and she thought he was drunk. He pulled her legs apart with some force, and raped her. It lasted a minute or two. After it was over, while the defendant lay there, she picked up her clothes and her towel, and went into the washroom. There she called her boyfriend, and told him that the defendant had come into her bedroom and had done something. She did not tell him what the defendant had actually done because she was embarrassed.

9. Miss Y's boyfriend's evidence was that when he received the call from Miss Y, she was crying and distressed. She could not say anything more than that the defendant had done something, but said that she would send him a text. Indeed, she was to send him a text saying that the defendant had raped her. She moved out of her room that afternoon, and a few days later she told him about the rape in greater detail. The evidence of both Miss Y and her boyfriend was that the rape had been reported to the police six days after it had occurred. That was incorrect. It was accepted that the police had been informed of the allegation on 3 June, two days after the rape. A pink blanket was then recovered from Miss Y's room.

10. The defendant gave evidence. His account was broadly the same as he had given the police when he had been interviewed following his arrest. He had gone to the flat in the early hours of the morning in question to sleep off the effects of the kava and alcohol he had been drinking the evening before. One of the other tenants, Lia Dyer, who was also his cousin, had let him in when he had knocked on the door at about 1.00 am. She had offered him a blanket and a pillow. He had slept in the living room until 10.30 am or

11.30 am when he had asked another cousin of his, Joe, who was also one of the tenants, to unlock the gate. He left the flat shortly after that. He had had nothing to do with either of the complainants, and he claimed that Miss Y had made up her story because she had owed him rent and he had threatened to evict her.

11. Ms Dyer was called as a witness by the defence. She confirmed the defendant's evidence that she had let him into the flat in the early hours of the morning, and that she had given him a blanket and a pillow in the living room before she went back to her own bedroom. She did not see him the next morning. Her evidence was that she got up at 6.00 am, had breakfast, ironed her uniform for work, and left the flat at 8.00 am for work. The only person she saw in the flat that morning was another tenant, Savenaca Cavalevu, and he was having breakfast when she saw him. The effect of her evidence was that she had not seen the defendant in the living room that morning. She had only seen the blanket and the pillow she had given him earlier.

12. Mr Cavalevu was also called as a witness by the defence. His evidence was that he had got back to the flat from work at about 1.00 am on the morning in question. There had not been anyone in the living room then. He had woken up at about 7.00 am that morning, and had been reading a magazine until about 9.30 am while he had had his breakfast. He had seen the defendant asleep in the living room. At about or shortly after 7.30 am, the defendant had got up to go to the toilet. He had come back and then gone back to sleep in the living room where he remained until Mr Cavalevu had himself gone back to his own room to sleep between 9.30 am and 10.00 am. He had woken up at about 12.30 pm, by which time the defendant had gone.

The grounds of appeal

13. When properly analysed, the grounds of appeal have concentrated on two areas of the evidence (in addition to the claim that the trial judge reversed the burden of proof and some other miscellaneous points). The first relates to what the trial judge (and the Court of Appeal) thought was an inconsistency between the evidence of Ms Dyer and Mr

Cavalevu. The second relates to the defendant's claim that two receipt books and various receipts for rent supported his case that Miss Y had been behind with her rent. I must deal with each of these areas in turn.

The alleged inconsistency in the evidence of Ms Dyer and Mr Cavalevu

14. The trial judge said at para 33 of his judgment:

> "When you consider the evidence of Lia and Savenaca together, Lia says that, at the time she was ironing the clothes, Savenaca was having breakfast and accused was not at the sitting room. Only the blanket and pillow were there. But Savenaca says that at that time accused went to the toilet and came back and slept at the lounge. Thus there is clear contradiction between these two versions."

Mr Thomas Lee for the defendant contends that the trial judge was wrong to treat their evidence as inconsistent with each other, and that the Court of Appeal was wrong to come to the same conclusion.

15. I do not agree. The effect of Mr Cavalevu's evidence was that there was only a short time between 7.00 am and 9.30 am when the defendant was not sleeping in the living room. That was at about 7.30 am when the defendant went to the toilet. Ms Dyer's evidence, on the other hand, was that she had not seen the defendant at *any* time between 6.00 am and 8.00 am. The time when Ms Dyer and Mr Cavalevu had both been awake in the flat was between 7.00 am and 8.00 am. If the defendant had been sleeping in the living room in that hour (apart from his visit to the toilet), Ms Dyer would have seen him because Mr Lee accepted that it would have been in the living room that she would have been ironing her uniform. Yet she says she did not see him at all that morning. One or other of the two witnesses must have been wrong, and the judge was right to think that.

16. Since Miss Y says that she was raped at about 9.00 am – well after Ms Dyer had left the flat – Ms Dyer could not have helped either way on whether the defendant was asleep in the living room at the critical time. The crucial evidence was that of Mr Cavalevu. The effect of his evidence was that the defendant could not have raped the complainant at about 9.00 am since he was still asleep in the living room then. So the trial judge must have concluded either that Miss Y had got the time wrong, and that she had been raped a little later after Mr Cavalevu had returned to his bedroom, or that Mr Cavalevu had been wrong when he had said that that the defendant had been asleep in the living room until he, Mr Cavalevu, had returned to his bedroom at about 9.30 am. In my opinion, it was open to the trial judge to reach either conclusion. Indeed, if he accepted Ms Dyer's evidence about the defendant not having been in the living room while she had been there, that undermined Mr Cavalevu's evidence about the defendant having been there between 7.00 am and 9.30 am apart from the short time that he had gone to the toilet. The fact is that the trial judge's conclusion that the evidence of Ms Dyer and Mr Cavalevu about when the defendant had been in the living room was inconsistent with each other was unavoidable.

The receipt books and the receipts for rent

17. In the course of the trial, the defendant produced two receipt books and various receipts for rent in support of his case that Miss Y was in arrears with her rent. The receipts purported to be receipts for rent paid by Miss Y. The receipt books were the books from which they had been taken, and carbon copies of the particular receipts which were produced were in the two books. However, if the receipts really were what they purported to be, you would have expected them to have been in Miss Y's possession, not the defendant's. The defendant's explanation for them being in his possession was that he had given them to Joe to give to Miss Y, but Joe had not got round to doing that. Miss Y disputed that. She said that the defendant had never intended to give her the receipts at all. The only two occasions on which the defendant had given her receipts were for the security deposit she had paid when becoming the defendant's tenant and for the first week's rent.

18. With that in mind, I turn to the passage in para 29 of the trial judge's judgment which is criticized. It reads:

> "I personally observed the receipt books. The carbon copies of the receipts are the last in both books. A careful perusal of these books and the receipts revealed that these were made for the purpose of creating a reason for the [complainant] to falsely implicate the accused. It is more evident from the fact this position was taken up for the first time when the [complainant] was recalled to give evidence. I am of the view that the accused had lied about these receipts. I am also of the view that the accused had failed to create a reasonable doubt in the prosecution case."

There are four criticisms of the trial judge in this respect:

(i) There had been no basis for the trial judge to conclude that these documents had been brought into existence solely in order to prove that Miss Y had been behind with her rent.

(ii) There had been no basis for the trial judge to conclude that using the documents to prove that Miss Y had been behind with her rent had been an afterthought (as the Court of Appeal put it), ie something which the defendant had thought up later.

(iii) There had been no basis for the trial judge to conclude that the evidence which the defendant had given about the receipts had been lies.

(iv) Even if the trial judge had been entitled to conclude that the defendant had told lies about the receipts, he should not have used that finding as evidence of the defendant's guilt without giving himself a *Lucas* direction, ie a direction of the kind required by *R v Lucas* [1981] QB 720.

19. (i) *Recent fabrication*. The receipts and the receipt books were not included in the High Court record for the Court of Appeal. So the Court of Appeal did not see them. In view of the weight attached to them in the current grounds of appeal, we asked to be provided with them. We have now seen the original documents which the trial judge saw. There were 11 receipts in all. Six came from one receipt book, and five came from the other. All the receipts are numbered. The six from the first receipt book are numbers 67, 71, 75, 79, 90 and 97. Receipt 67 is dated 30 January 2011, and receipt 97 is dated 8 April 2011. The receipts which were issued between those six receipts can be seen from the carbon copies in the first receipt book. They are all receipts for rent issued to other tenants. So if these six receipts were created by the defendant for use at his trial, he had to have similarly created all the other receipts in the intervening period. That was never suggested to him at his trial. Indeed, it would hardly have been a feasible suggestion. In the circumstances, I fear that it was not open to the trial judge to conclude that the six receipts in the first receipt book had been brought into existence for the purpose of discrediting Miss Y at the trial. They were obviously contemporaneous with the payments of rent which they purported to acknowledge. And if the six receipts in the first receipt book had been contemporaneous, there was no basis for thinking that the five receipts in the second receipt book were not contemporaneous.

20. It is, I think, possible to see where the trial judge went wrong. He thought that the relevant receipts were the last in *both* the receipt books. That is true for the receipts which came from the second receipt book but not the first. Had he realized that the receipts which came from the first receipt book had not been the last in the book, and that there had been many receipts in the intervening period, he would not have reached the conclusion which he did.

21. Indeed, one can go further. The receipts show that Miss Y was indeed behind with her rent by 1 June 2011 when she was allegedly raped. She was up to date with her rent as at 25 February 2011 (receipt 79), but the next receipt issued to her (receipt 90 dated 31 March 2011) was for $50, ie one week's rent, even though five weeks had elapsed since receipt 79. Accordingly, receipt 90 recorded the fact that she was then four weeks in

arrears. All the subsequent receipts referred to what the balance of the outstanding rent was, and they show that by 27 May 2011, five days before Miss Y was allegedly raped, she was six weeks in arrears. That accords with the rent which the receipts purported to show she had paid in that time.

22. (ii) *An afterthought*. Miss Y was first cross-examined by the defendant's counsel on the first day of the trial. Her evidence was completed that day. At no stage had the receipt books or the receipts been put to her for her to comment on. Indeed, at no stage had it been put to her that she had been in arrears with her rent, or that the defendant had threatened to evict her for those arrears, or that this had been the reason why she had made up the story about having been raped.

23. Miss Y was recalled to give evidence on the fourth day of the trial. That was because the prosecution had failed to disclose to the defence an earlier witness statement which Miss Y had made, and the defence had applied for the assessors to be discharged and a new trial ordered. The trial judge had refused that application, but had given permission for Miss Y to be recalled. It was only then for the first time that the documents were put to her, and the suggestion made that she had lied about having been raped because the defendant had threatened her with eviction for arrears of rent. The fact that this allegation not been put to her when she had first been cross-examined could not have had anything to do with the earlier witness statement not having been disclosed previously because the trial judge had said, when ruling on the application for a new trial, that it had not contained anything new.

24. This, then, was the basis on which the trial judge thought that the allegation had been an afterthought. I do not think that this was a sufficient basis on which to reach that conclusion. There could have been any number of reasons why the suggestion was not made until Miss Y was recalled. Perhaps the defendant's counsel had thought that it was not a sufficiently strong reason for Miss Y to have made up a claim of rape. Perhaps the defendant instructed him in the intervening period to put the suggestion to Miss Y. Perhaps it was simply a matter of the defendant's counsel forgetting to put it when he

first cross-examined Miss Y. It is, of course, the case that you cannot draw inferences from primary facts if other inferences can be drawn from them. You can only draw an inference from primary facts if it is the only inference which can properly be drawn from them. Since there were other reasons for the allegation not having been put to Miss Y when she was initially cross-examined, I do not see how the trial judge could infer that it had to have been because in the intervening three days the defendant had decided to allege that Miss Y's motive for lying about him was to do with his threat to evict her for her arrears of rent.

25. (iii) *Lies*. It follows from what I have said that there was no basis for the trial judge to have found that the defendant had told lies about the receipts. In those circumstances, the question of whether the trial judge should have given himself a *Lucas* direction does not arise. It would only have arisen had it been open to the trial judge to make the finding which he did. As it was, Goundar JA noted that the trial judge did not have to go as far as he did about saying that the defendant had told lies about the receipts. It would have been sufficient for him not to attach any weight to them in view of the defendant's own evidence that they had not been given to Miss Y. But as Goundar JA went on to say, even if the trial judge had not been entitled to make the finding which he did, that still left the question of what use the trial judge made of that finding.

26. (iv) *The use to which the "lies" were put*. Immediately after making the finding, the trial judge added that the defendant "had failed to create a reasonable doubt in the prosecution case". The proximity of that statement to the finding that the defendant had told lies about the receipts very strongly suggests that one of the reasons why the trial judge found that the defendant had failed to create such a doubt was because of those lies. I shall come later on to what impact the erroneous finding which the trial judge made should have on the outcome of this application for leave to appeal, but the trial judge's use of language of that kind is the foundation for the contention that the judge reversed the burden of proof.

Reversing the burden of proof

27. What the trial judge said in para 29 of his judgment about the defendant having "failed to create a reasonable doubt in the prosecution case" was not the only time when he made a comment of that kind. He said something similar in para 34 of his judgment:

> "I am of the view that the evidence called by the defence does not create a reasonable doubt in the prosecution's case in respect of the [charge of rape]."

It is said that in these passages the trial judge reversed the burden of proof. The language which the trial judge used might suggest that it was initially for the defendant to raise a reasonable doubt about his guilt. Only if the defendant was able to do that would the burden of proving the defendant's guilt beyond a reasonable doubt shift to the prosecution.

28. It would, of course, be very surprising if a judge of the High Court was unaware of what every law student learns in their first week of studying criminal law, namely that unless there are statutory provisions providing otherwise, the burden of proof is on the prosecution at all times. It is for the prosecution to prove the defendant's guilt. It is not for the defence to prove anything. That means that it is not for the defence to raise any doubt about the prosecution's case, let alone any reasonable doubt. Is it likely that the trial judge either did not know that or had forgotten that? If that is inherently unlikely, what was he getting at in these two passages?

29. Unsurprisingly, the trial judge was well aware of where the burden of proof lay. In para 8 of his judgment, he said that he directed himself in accordance with the law as stated in his summing-up to the assessors, and in para 7 of his summing-up he had said:

> "On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts."

So what was the judge getting at in the two critical passages? What he must have been saying, I think, is that in the light of the rest of the evidence – in particular that of Miss Y, her distress on the phone to her boyfriend and what she said to him (which showed consistency in her account) – he was sure beyond a reasonable doubt that the defendant was guilty of rape, and that there had been nothing in the evidence called by the defence which had persuaded him that that was not the case. As Goundar JA said, a comment like "failed to create a reasonable doubt" is an unwise phrase to use when assessing the evidence to determine the guilt of a defendant, but in this case that did not mean that the trial judge had *required* the defendant to prove anything or to raise doubts about the prosecution's case.

Miscellaneous points

30. Two other arguments were deployed on behalf of the defendant. It is necessary for me to address them briefly.

31. *Miss X's evidence*. It will be recalled that Miss X's evidence was that it was she who had let the defendant into the flat on the morning in question, and that this had been between 3.00 am and 4.00 am. That was not what the defendant and Ms Dyer said. Their evidence was that Ms Dyer had let the defendant in. Although Ms Dyer was not able to say at what time that was, the defendant's evidence was that it had been at about 1.00 am. The criticism of the trial judge is that he did not pick up on that difference in the evidence. He certainly did not refer to it either in his summing-up to the assessors or in his judgment.

32. There are two reasons why this point cannot help the defendant. First, the trial judge was not required to deal with all the evidence either in his summing-up to the assessors or in his judgment. The fact that he did not mention it did not mean that he had overlooked it. It just meant that he had not thought that it was sufficiently relevant for it to have been expressly referred to. Secondly, Miss X's evidence was relevant only to the count on

which the defendant was acquitted. Any difference between her evidence and that of the other witnesses did not help on the count on which he was convicted.

33. *Inconsistency between the verdicts*. It is said that the verdict of not guilty on the charge of indecent assault was inconsistent with the verdict of guilty on the charge of rape. The defence relies on the reason why the defendant was acquitted of indecent assault. In his judgment, the trial judge said that he was not satisfied about the identification of the defendant as the man who attacked Miss X. That was a surprising conclusion for the trial judge to have reached – and a conclusion remarkably benevolent to the defendant – when one remembers that this was not a case of the identification by Miss X of a stranger but the recognition by Miss X of someone she knew, albeit only by his voice, especially as the man had previously said that it was Leon.

34. Again, there are two reasons why this argument takes the defendant nowhere. First, for a conviction to be set aside on the ground of inconsistency with the verdict on another count, there has to be no rational explanation for the trial judge to have distinguished between the two counts. They had to have stood and fallen together. There was no basis for saying that at all. Although this was not the basis on which the judge acquitted the defendant on one count and convicted him on the other, it would have been open to the judge to accept Miss Y's evidence and conclude that she had been raped while at the same time rejecting Miss X's evidence that she had been indecently assaulted.

35. Secondly, and more importantly, if the trial judge's reason for distinguishing between the two counts was faulty, it was his reason for acquitting the defendant of indecently assaulting Miss X where he fell into error, not for convicting him of raping Miss Y. The logical consequence of that inconsistency would have been to substitute a verdict of guilty on the count relating to Miss X rather than substituting a verdict of not guilty on the count relating to Miss Y. Of course, the court has no power to do that, but the defendant should not benefit from the unexpected windfall of his acquittal on the count relating to Miss X by having the verdict of guilty on the count relating to Miss Y set aside.

The application of the proviso

36. What remains to be determined, then, is whether, to use the words of the proviso to section 23(1) of the Court of Appeal Act (Cap 12), "no substantial miscarriage of justice has occurred" as a result of such reliance as the trial judge placed on his erroneous finding that the defendant had lied about the receipts. It is important to note that the trial judge did not say that he used the lies which he found the defendant had told about the receipts as evidence of the defendant's guilt or as undermining the defendant's credibility when it came to his evidence about the events of the morning in question. Its effect was merely not to raise a reasonable doubt in the trial judge's mind about the defendant's guilt, ie it had not caused the trial judge to change his mind about the evidence of Miss Y about what the defendant had done to her on the morning in question. Once the trial judge had been sure that she had been telling the truth about what had happened in her bedroom, the fact that he wrongly thought that the defendant had told lies on a peripheral matter could not have affected the verdict he would otherwise have reached. In the circumstances, I have concluded that no substantial miscarriage of justice occurred as a result of the trial judge's error, and that the defendant's conviction should be upheld.

Conclusion

37. This case has not raised any point of principle. It has focused on particular findings of fact which the judge made and how one should read some of the language he used. None of the circumstances set out in section 7(2) of the Supreme Court Act (Cap 13) apply, and in the circumstances I would refuse the defendant's application for special leave to appeal against his conviction.

Chitrasiri J:

38. I agree with the reasons and conclusions of Keith J.

Order:

(1) Application for special leave to appeal against conviction refused

(2) Conviction upheld

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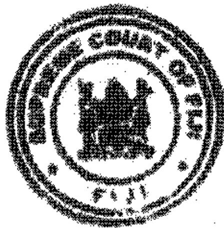
Hon. Mr. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT



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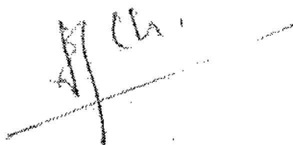
Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT



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Hon. Mr. Justice Kankani Chitrasiri
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