IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No. AAU 0098 of 2010
(On appeal from High Court No. HAC 116/2008)

BETWEEN	**:**	**KALIOVA VUKI BALEMAIRA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	Chandra JA Lecamwasam JA Temo JA
Counsel	**:**	Mr J. Rabuku for the Appellant Ms J. Cokanasiga for the Respondent
Date of Hearing	**:**	15 May 2013
Date of Judgment	**:**	30 May 2013

JUDGMENT

Lecamwasam, JA

[1] This is an appeal against the judgment of the High Court of Suva entered on 4th November 2010. The accused appellant was indicted with two counts of rape and one of larceny. There was no case to answer on the count of larceny. The assessors returned a

verdict of not guilty on the first count of rape and a unanimous verdict of guilty on the second count of rape. The appellant has appealed against the verdict in the second count.

[2] The facts in brief are that the complainant being a Netball player who represented Fiji at the World Cup Tournament in New Zealand, having returned to Fiji has had a party at the Villa in Pacific Harbour with three other girls of the team and four other boys including the appellant. The party had gone on until early hours of the following day, that is 20th November 2007 and when they retired to sleep, it is alleged that the appellant had entered the room where the complainant – victim was sleeping and had engaged in sex with her without her consent. According to the prosecution the alleged sexual act had taken place twice and therefore the prosecution has filed two counts of rape against the accused - appellant. As he was acquitted on the first count of rape, as far as possible I shall refrain from discussing anything pertaining to the outcome of the first count. The second count filed by the Director of Public Prosecution reads thus:

> *"Kaliova Vuki Balemaira, on the 20th of November 2007 at Navua, in the Central Division on an occasion after that which is referred to in Count 1, had unlawful carnal knowledge of a woman, namely MARJORIE PARR, without her consent".*

[3] According to the prosecution there had been two acts of rape. The appellant too admits the fact that he had two sessions of consensual sex. Therefore it is evident that the appellant does not deny the fact that he had sex twice with the victim but his position is that the victim consented to the above acts. Therefore the only issue before this court is whether there existed consent or not in the impugne act of sex. This relieves this court from embarking on a voyage of discovery as to penetration and other connected issues revolving around a charge of rape. We have a large volume of evidence relating to the incident, viz:

That the villa was owned by a father of a team mate, how the girls decided to go to the villa that night later to be joined by the appellant and three other boys, that they spend

that night more or less immersed in drinks with music and lively conversation in the house and by the pool side, what they did near the kitchen counter and in the sitting room, that one by one retired to sleep, that one of the boys namely, Chad left the house and later how the victim came out of the room complaining of alleged rape by the appellant, the arrival of police, examination by a doctor, making police statements, etc. hence I will mainly deal with the facts that reflect the existence of consent or otherwise. The appellant has advanced several grounds of appeal against his conviction and sentence in his leave to appeal application however leave was granted only on one ground of appeal viz:

> *"To appeal against conviction limited to the ground that the verdict is unreasonable or cannot be supported having regard to the evidence."*

[4] In the instant case prosecution alleges two sessions of sexual act. Even if one assumes that there was consent for the first act, as the second act is a subsequent distinct act, court has to find out whether there was consent in regard to the second act or not. One cannot presume continuity of consent for the second act as consent can be withdrawn at any time. Consent is an ongoing state of mind and is not irrevocable once given. Consent must be given at the time of the activity. In this case the victim says in evidence:

> *"...20th November 2007, after 12 am I went to sleep. I don't know what time I woke up. I was awakened by somebody pulling my legs. I could feel someone goading my dress. My first reaction was I was not quite sure what was happening to me. I then realized that I had no buttons on, I had no pants on. I heard a voice telling me to keep still and to keep quiet. I was turning my head. I think that moment I realized what was happening. I knew there was a man and no clothes on. I could feel his hand going up my top…I could feel his penis going inside of me.. I said to him, No. I have my periods, I am married and I have a son. He said I don't care I don't mind. He kept going. He was having intercourse with me. He put his penis in my vagina. He had intercourse this time… I did feel that he finished."*

[5] This is the point where he had ended the first act of intercourse. And thereafter the victim giving evidence about the second act states "then he pulled up my shoulders and turn me over, then I was faced down, he then tried to enter me from behind. I still told him I have my period…I felt him shift off to the side of my back. Then I remember moving my arm and my leg pushing him off. Then I was able to move him off… I got to the door and I realize that the door was locked. I unlock it and opened the door..."

[6] Therefore it is obvious that there had been two separate and distinct sexual acts. It is the second sexual act that is the crux of the issue in this case. Both sides in their evidence had admitted that there was a second occasion of penetration but the accused-appellant's position is that it was with consent of the victim. The accused at one stage in his submissions pointed out if there was no consent she could have shouted or raised cries. But I find in her evidence contained in pages 261 and 262 of the Case Record says at 261: *"I was partially froze and again in page 262 she states to court: "I thought if I scream I would be harmed"*. It is natural for a woman to be panic strickened and loss rational thinking and to get into a coherence under the above circumstances. Therefore the mere fact of the victim not screaming under the above circumstances, we cannot form an adverse inference. It is noteworthy that as soon as she was presented with the opportunity she came out of the room and informed the other girls about the occurrence in her room. She in no uncertain terms told the girls that it was the accused and no one else who committed the above offence. Regarding the second charge of rape evidence of the accused himself is important to consider. In page 340 of the Case Record when he was describing what happened, after the first round of sexual act he says: *"He fell off to sleep and woke up around 5.30 – 6 am when somebody knocked at the door to see that it was his friend, Chad Miller"*, and he further says: "*When Chad Miller knocked on the door, Marjorie (victim) told him not to open the door*". When I opened the door it was Chad Miller and he was standing at the door while the victim was in the room. According to the appellant this sequence of events had occurred between 5.30 and 6 am. Chad Miller giving evidence via Skype from Scotland, says: *"When he knocked on the door, and when the door was opened by Vuki (accused) that Chad could see the victim on*

the background and he says that it looked to him like she just finished putting on clothes. She was just putting her T-Shirt over her head. She did not seem surprised or shy when I was standing at the door". Thereby it appears that the appellant attempted to imply that his presence in the room was with the consent of the victim. Hence the evidence of Chad that the victim was not unduly surprised or feeling shy, the same was repeated by the accused. On that basis there appears to be no prima facie contradiction between the evidence of Chad and the accused and therefore evidence is convincing. However if the evidence is not further scrutinized one can fall into a misguided belief and acts on such evidence. The further scrutiny of Kevin Skibber's (defence witness) evidence sheds light on this point. He states thus in his evidence at page 383 (154) of the Case Record: The question was asked from the witness (Kevin) under cross examination:

"Q: *In fact the accused person had been drinking when Chad left?*

A: *As a matter of fact I cannot remember whether he was drinking when Chad left, but he was with us.*

Q: *This was out on the pool deck?*

A: *Yes."*

[7] According to Kevin when Chad left the house the accused was not in the room as he claimed to be but he was out on the pool deck with Kevin and others. The contradiction between the accounts of Kevi and Chad gives rise to a doubt as to whether Chad in fact witnessed such things as the victim getting dressed in her clothes and her seemingly unsurprised demeanor. Logically could not have witnessed what he claims to have witnessed as the accused was near the pool side and there was no necessity for Chad to go to the room where the victim was sleeping. On the other hand what the accused-appellant said about Chad knocking on the door also becomes a palpable lie in the light of Kevin's evidence.

At another point in his evidence Chad states that he had left the house around 6 – 6.30 am and at one stage the accused-appellant also attested to the same time frame. Nevertheless in page 372 (143) of the Case Record, last question:

"Q: Chad Miller left the house at 3.30 am?

A: It's correct."

This is the answer given by the accused-appellant himself. This can be more probable in view of the fact that when Chad's car broke on the way he had given a call to Kevin and asked his assistance to which he had gone with Isaac. If he had left the house at 6.30 am and if the car broke during day time there would not have been any necessity for him to give an urgent call to his friend at the Villa in Pacific Harbour therefore it is obvious that Chad would have left the house around 3.30 am. When contradictions of this nature are evident we cannot rely on the evidence given on behalf of the appellant before the High Court.

[8] Reverting to the two separate occasions of sexual intercourse between the accused and the victim. The High Court had already made a ruling on the first incident. Regarding the second incident, the post encountered behavior of the victim gives rise to a strong presumption in her favour. If had there been any consent on the part of the complainant, would it have prompted a speedy complaint regarding the above incident? Immediately after coming out of the room she had told her other team mates of the incident and without stopping at that she had wanted the other girls to inform the Police and going beyond this she also took it upon herself and informed her husband who was away in Australia. If it was a consensual sexual encounter would she have had reason to inform her husband who was away in Australia. Had there been consent present there would not have been any need for her to inform even her team mates who were in the villa. Her husband would not have known about the incident unless she herself had informed him. If she was a willing party, was there any need for her to fabricate the occurrence of the second incident. Now in this case, her grievance was so great and that not only had she informed the team mates and the husband but she had also used the option of informing the Police for them to take necessary legal action. Had there been any consent, I do not expect a person to raise a false alarm. Therefore the fact that she had made a prompt complaint at the earliest opportunity in itself proves that she could not have given her consent to the above act.

[9] In the course of the argument, the learned counsel who appeared for the appellant submitted to Court that after the first act of intercourse, halfway through the second act, she had realized that if a child is conceived there is a danger of that child having the physical appearance of a Fijian and therefore she wanted to get away from the act of intercourse. This argument was put forward initially at the argument stage but not mentioned even in their submissions. If that was the fear she had, she would not have allowed even the first act of intercourse, because the first act of intercourse also would have had the same effect.

[10] It is also implausible to assume the complainant would make a complaint against a person whom she had met for the first time and against whom she had no animosity or ill will. Had there been an iota of consent she would not have acted in the manner she had acted. She would have tried her best to conceal the fact from anyone, above all her husband. Therefore when we consider overall evidence, it is abundantly clear that the appellant had engaged in sex with the victim for the second time without the consent of the victim expressed or implied. The factors like the blood stains on the crochet area of the panty or failure of the doctor to observe a tampon in the vagina do not shed any light on the issue of consent.

[11] The learned High Court Judge had considered all materials and relevant matters in favour of and against both parties and has dealt with the summing up according to legal requirements. Hence the learned High Court Judge had acted very fairly. There were no valid or convincing grounds or necessity for the learned High Court Judge to intervene in order to overturn the assessor's decision. Therefore there is no merit in this appeal whatsoever and the appeal is dismissed.

Order of Court

Appeal Dismissed.

Chandra, JA

I agree with the reasons and conclusion reached by Lecamwasam JA.

Temo, JA

I agree with the reasons and conclusion reached by Lecamwasam JA.

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HON.MR. JUSTICE S. CHANDRA
JUSTICE OF APPEAL

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HON. MR. JUSTICE S. LECAMWASAM
JUSTICE OF APPEAL

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HON.MR. JUSTICE S. TEMO
JUSTICE OF APPEAL