IN THE COURT OF APPEAL, FIJI
[Criminal Appellate Jurisdiction]

Criminal Appeal No: AAU 0074 of 2012
(High Court No. HAC 177 of 2011L)

BETWEEN	:	**EDWARD SHARMA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**S. Lecamwasam, JA** **A. Fernando, JA** **V. Perera, JA**
Counsel	:	**Ms. S. Vaniqi for the Appellant** **Mr. S. Babitu with Mr. A. Singh for the Respondent**
Date of Hearing	:	**12 September 2016**
Date of Ruling	:	**30 September 2016**

JUDGMENT

Lecamwasam, JA

1. I agree with the reasoning and conclusion of my brother A. Fernando, JA.

Anthony Fernando, JA

2. The Appellant has appealed against his conviction for rape contrary to Section 207(1) and 207(2) of the Crimes Decree and the sentence of 12 years imprisonment with a non-parole period of 10 years imposed on him.

3. He had been charged for penetrating the vagina of 10 year old CKK with his finger on the 28th of August 2011, at Navatu, Ba in the Western Division.

4. At the conclusion of his trial the three Assessors after 40 minutes of deliberation had returned a verdict of not guilty. The learned Trial Judge acting pursuant to section 237(4) of the Criminal Procedure Decree 2009 had exercised his discretion and rejected the verdict of the Assessors and found the Appellant guilty of the charge of rape.

5. Leave had been granted by a single Judge to appeal against his conviction and sentence.

Evidence in Brief:

6. CKK who was 11 years of age and a student of class 6 when she testified before the Court had stated that on the date of the incident set out in the charge she along with her parents and three siblings had gone to her aunt Udara Devi's (her mother's first cousin) house for dinner around 7.30 pm. The Appellant is the husband of her aunt. While there she had been watching cartoon movies on TV lying on a mattress in the living room. The Appellant and his 4 year old daughter were also lying on the same mattress. The Appellant's mother was also watching cartoon with them seated on a sofa. CKK's mother had been helping her aunt in the kitchen and her father had gone out of the house with the father's sister. While lying down on the mattress the Appellant had unzipped her pants, put his right hand inside her pants and "poked into her vagina". She had tried to pull his hands away but failed. While this was happening her mother had come into the living room, seen what was happening and called her outside the living room. On being questioned she had told her mother that the Appellant was poking his fingers into her vagina. When her father came back they had left the house of her aunt. On the next day her mother had told her father as to what had happened. Three days after the incident her mother had taken her to the Ba police station, from where she had been taken to the Ba Mission hospital. At the hospital she had been examined by a doctor. Under cross-examination she had denied the defence suggestion that nothing of that sort ever happened. She had admitted that she had not told her brother, or the Appellant's mother, or her father as to what had

happened. She had said that she did not know whether her mother had any problems with the Appellant. She had admitted that when her mother had questioned the Appellant about the incident he had denied it. The defence suggestion "You told the mother and police. They told the doctor what happened" had been accepted by CKK. This is an acceptance by the defence that CKK had in fact made a complaint against the Appellant soon after the incident. There had been no suggestion made by the defence that the complaint was made by CKK at the instigation by her mother. In giving a reason for the delay in going to the police CKK had said "Because my mom wanted to tell all my relatives first and they will tell what to do."

7. Ms. R. Sanjini, the mother of CKK, had said that on the day of the incident she along with her family had gone to the Appellant's house for dinner. She had been helping her cousin with the cooking, while her children were watching TV. At a certain stage she had gone to check on her children as she had not heard their voices and as she thought they had fallen asleep without having dinner. She had then seen CKK struggling and knew something was happening from her facial expression. Sanjini had then seen the Appellant's "hand coming out of my daughter's pants". There had been light in the room. She had then called CKK to come out of the sitting room and asked her what the Appellant had been doing. CKK had started to cry and told her that the Appellant had been doing some bad things to her. When asked as to what were the bad things, CKK had told her that the Appellant had been poking his finger into her private part, vagina. She had then taken CKK to the Appellant's wife and asked her to say what the Appellant was doing to her. The Appellant's wife had then brought CKK to the Appellant and questioned him about what CKK had told her, which he had denied. Sajini had then told the Appellant what she herself had seen and said that she was going to report the matter to the police. His response had been that whether she goes to "the police or any doctor they can't prove anything".After discussing the incident with her family members she had decided to report the matter to the police. CKK had thereafter been examined by a doctor at the Ba Mission hospital. She had informed the doctor as to what CKK had told her and later the doctor had spoken to CKK. It had been suggested to her that prior to the incident that she has had trouble with the Appellant which she had denied. Her response had been that if that was so they would not have gone to the Appellant's house for dinner.

8. Dr. M. Baleinamau, who examined CKK on being brought before him 4 days after the incident had said that that after getting the history from CKK's mother, he had questioned CKK, who had told him what had happened. CKK had told him that she felt the Appellant's fingers penetrating her vagina repeatedly. The doctor's vaginal examination of CKK had revealed that her hymen was not intact, and that there was no discharge, no abrasions, no bruises and no bleeding. According to him the ruptured hymen was consistent with the history of penetrative sexual assault. According to the doctor the absence of bruises and abrasions could be explained as any injuries in the area of the vagina could have healed in about 3-5 days. He had specifically said that "if someone put a finger into the vagina before 5 days it would have healed the time I examined the child patient."

9. The Appellant testifying before the Court had said that on the day of the incident at the time as narrated by CKK he had been watching news on TV lying on a mattress in the middle of the sitting room with his 4 year old daughter and CKK. He had denied that he poked his fingers into her vagina. In answer to the specific question put to him in examination-in chief as to whether CKK's mother had complained to him about what he had done to CKK his answer had been a definite no. But later on he had said that CKK's mother had told him that she had seen the Appellant putting his hands into CKK's pants. He had then told CKK's mother to go with him to the police and to get a medical check-up done.He had not at this stage specifically denied that he had put his hands into CKK's pants.When the Appellant had been questioned about his relationship he had with CKK's mother, he had said that they were not in good terms as she had been a tenant of his some time back and he had to ask her to leave the house as she was entertaining men in the house during her husband's absence. However the Appellant in his caution interview which was admitted without objection, had in answer to the question "Then why CKK told her mother that you were touching her vagina" said, "I don't know". Further if there was ill- feeling between the Appellant and the mother of CKK it is difficult to conceive that she would have gone to his house for dinner with her family and helped out in the kitchen. He had admitted both in his testimony before the Court and charged statement that his wife had spoken to him about CKK's complaint against him.

10. The mother of the Appellant testifying before the Court had said that CKK had come to their house on the date of the incident at around 7 pm with the other members of her family. At a certain stage the Appellant, his daughter and CKK were lying on a mattress in the sitting room watching cartoon film on TV.CKK's mother had been in the kitchen. Her testimony does not help the Appellant's defence as she does not deny seeing the Appellant putting his hands into CKK's pants. Although she had tried to make out at a certain stage of her testimony that she saw everywhere and everything, she had also admitted that she could not see the mattress in which CKK was lying despite being a palm away from the mattress as she cannot see without her glasses and that she was not wearing her glasses at that time.

11. The Appellant's wife testifying before the Court had stated that on the date of the incident her cousin sister (i.e. CKK's mother), her husband and their 4 children had come to their house at about 7 pm. Her cousin sister had been helping her with the cooking while the children had been in the sitting room. After having helped them with the cooking the Appellant had gone to the sitting room. She had thereafter stated that CKK's mother had come and told her that the Appellant had been touching CKK. She had then gone to her husband and "sternly asked him", "did you do such a thing or not" to which the Appellant had replied in the negative. Since CKK's mother had insisted that the Appellant had done it, the Appellant had asked her to report the matter to the police. She had also spoken about the Appellant asking CKK's mother to leave his house which she was renting from him in view of the bad company she kept.

12. I make the following observations from the above uncontradicted testimonies of the witnesses, namely, despite the belated complaint to the police; CKK had complained about the incident moments after the incident, CKK's mother had complained to her cousin against the Appellant soon after CKK had told her what the Appellant had done to her, CKK's mother had accused the Appellant soon after the incident and that the Appellant's wife had questioned the Appellant sternly about CKK's complaint. These circumstances although not corroborative of CKK's story indicates consistency and that the allegation made against the Appellant was unlikely to have been fabricated by CKK's mother who had gone to the Appellant's house for dinner that night. However CKK's story about the Appellant putting his hand into her vagina is

somewhat corroborated by CKK's mother who had seen the Appellant's hand coming out of her daughter CKK's pants.

13. The Appellant had filed 9 grounds of appeal against conviction and one ground against his sentence. His grounds of appeal against conviction which were mainly on factual issues were summarised by Counsel for the Appellant as follows.

    i. That the learned Trial Judge did not give cogent reasons as to why he over-ruled the unanimous not guilty opinion of the three Assessors, in the light of the entirety of the evidence presented at the trial.

    ii. That the learned Trial Judge had misdirected himself by holding that the evidence of the complainant had been independently corroborated by the Medical Practitioner who examined the victim, in that there were no discharge, abrasion, bruises or bleeding seen at the time of the examination as per the doctor's testimony.

    iii. That the learned Trial Judge had not adequately considered the defence case, in particular the evidence of the mother of the Appellant, who was present at the time of the incident and thus given the benefit of the doubt arising from the prosecution evidence to the Appellant.

14. His ground of appeal against sentence is that the learned Trial Judge had erred by taking into consideration the Victim Impact Report in sentencing the Appellant without giving an opportunity to the Appellant to challenge or rebut the contents of such report.

15. In relation to ground (i) of appeal it is necessary to make reference to the relevant provisions of the law pertaining to trials before the High Court with Assessors. Section 203(1) of the Criminal Procedure Decree 2009 states:

> "Trials before the High Court shall be by a judge sitting with assessors as provided in this Part."

16. Section 237 provides for the delivery of opinions by Assessors as follows:

"237(1) - When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) Notwithstanding the provisions of section 142(1) and subject to sub-section (2), where the judge'ssumming up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment (other than the decision of the court which shall be written down) to be given, or for any such judgment (if given)—

(a) to be written down; or

(b) to follow any of the procedure laid down in section 141; or

(c) to contain or include any of the matters prescribed by section 142.

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be—

(a) written down; and

(b) pronounced in open court.

(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes.

(6) If the accused person is convicted, the judge shall proceed to pass sentence according to law.

(7) Nothing in this section shall be read as prohibiting the assessors, or any of them, from— (a) retiring to consider their opinions if they wish: or

(b) from consultation with one another during any retirement or at any time during the trial." (Underlining by me).

Section 237(4) makes it clear that when the Trial Judge disagrees with the majority opinion of the Assessors he shall give reasons in writing as to why he differs with their opinion.

17. The learned Trial Judge had in his judgment not only made reference to the above provisions in the Criminal Procedure Decree 2009 but had had made reference to the cases of **Joseph v The King** (Privy Council) (1948) Appeal case 215; **Ram Dulare & Others v R** (1955) 5 FLR 1 and **Sakiusa Rokonabete v The State** Criminal appeal No. AAU0048/05, which expound the above provisions of the Criminal Procedure Decree. He had thereafter gone on to itemize in detail the evidence available against the Appellant and concluded: "Considering the evidence of the Complainant, her demeanour and the way she gave evidence I have no doubt that she is telling the truth". In setting out the reasons for accepting CKK's evidence the learned Trial Judge had said "Complainant CKK gave evidence and described how the Accused unzipped, unbuttoned her pants and inserted the hand into the pants and penetrated the vagina. Considering her evidence she has clearly described with detail account what happened and how it happened. Seeing the physical possibility there is no doubt created in the minds of the court of the way it happened." He had gone on to state "Considering all materials before the Court this court rejects the verdict of the assessors and find the Accused guilty to the charge of Rape." In my view he has thus given cogent reasons as to why he over-ruled the unanimous not guilty opinion of the three Assessors.

18. On the issue of medical evidence what the learned Trial Judge had said was: "The evidence of the Complainant is independently corroborated by the Medical Practitioner who had examined the girl. He is of the view the hymen of the small girl was missing and not intact and that the history given to him was consistent with his clinical findings." The doctor had categorically stated that he would not have expected to see any bruises and abrasions as he had examined the victim 3 to 5 days after the incident. The doctor had also answered in the affirmative the question that was put to him under cross examination that if there is no injury nothing would have happened. Thus the statement of the learned Trial Judge that the evidence of the complainant is independently corroborated by the Medical Practitioner, may be an overstatement; for at its best it only amounts to corroboration as to the fact that there had been penetration.

19. According to section 129 of the Criminal Procedure Decree 2009 "Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted and in any such case the Judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration". However where there is corroboration it adds strength to the Prosecution case and can be commented upon by the Judge. In this case even if one were to leave out the doctor's evidence, the evidence of CKK is somewhat corroborated by her mother.

20. As regards the ground of appeal "that the learned Trial Judge had not adequately considered the defence case, in particular the evidence of the mother of the Appellant, who was present at the time of the incident and thus given the benefit of the doubt arising from the prosecution evidence to the Appellant", it is to be noted from the judgment that the learned Judge had said: "The Accused gave evidence and called his mother and wife to give evidence on his behalf. Accused denied the incident. The mother said she didn't see anything. The wife also corroborated the version of the Accused". In view of the nature of the defence evidence in this case which has been referred to at paragraphs 9, 10 and 11 above the learned Judge's acceptance of the complainant's evidence as truthful, and the Learned Judge's finding that "the Prosecution had proved the case beyond reasonable doubt", there was nothing more for the learned Trial Judge to consider in the defence case.

21. There had been evidence to the effect that the Appellant had asked CKK's mother to accompany him with CKK to have a medical check-up done no sooner he was accused of the offence by CKK's mother, as stated at paragraphs 9 and 11. It was the contention of the Appellant that this aspect of the defence is not covered in the Summing Up or in the Judgment. I am of the view that in the light of CKK's evidence and that of her mother which the learned Trial Judge had believed and accepted there is no merit in this argument.

22. In answer to the ground of appeal on sentence it is correct as argued by Counsel for the Appellant that the Victim Impact Report had been filed on the 2nd of August 2012 at 3.55pm. The Appellant's contention before us was that Court should have given sufficient time to cross-examine the victim's mother in relation to the Victim Impact

Report. The Victim Impact Report consisted of 4 short sentences and therefore I am of the view that both the Appellant and his Counsel had sufficient time to familiarise themselves with it. On the 3rd of August 2012 when the case was taken up for hearing the recorded proceedings are as follows verbatim:

"BEFORE THE HON. MR JUSTICE S. THURAIRAJA
ON FRIDAY THE 3RD DAY OF AUGUST, 2012 AT 9.30 AM
Ms. P. Low: For State
Ms. Vokanavanua: For Accused
Ms. Vokanavanua: I am filing my Written Submissions. I have already Filed the DVRO application and victim report Rape.
Court to Accused: Do you wish to file evidence in mitigation?
Accused: My Counsel says everything is written in mitigation. I am not giving evidence.
Court: Are you calling any witness on your behalf?
Accused: No
Court: Do you wish to submit any further matters.
Accused: No.
SC: I have filed my submission.

In view that the Appellant himself who had been represented at the hearing had informed the Trial Court that he had no further matters to submit when he was questioned whether he had anything to say in regard to the Victim Impact Report, I see no merit in the ground of appeal against sentence.

23. For the reasons stated herein I have no hesitation in dismissing the Appellant's appeal, both against conviction and sentence.

V.Perera, JA

24. I agree with the reasoning and conclusion of my brother A. Fernando, JA.

The Order of the Court:

Appeal against Conviction and Sentence is dismissed.

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Perera
JUSTICE OF APPEAL