IN THE COURT OF APPEAL FIJI
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No. AAU 0021 of 2012
(High Court Case No: HAC 081 of 2011)

BETWEEN	:	**LAISENIA KATO VIBOTO**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **Basnayake JA** **Temo JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Mr. M. Korovou for the Respondent**
Date of Hearing	:	**7 February 2017**
Date of Judgment	:	**23 February 2017**

JUDGMENT

Calanchini P

[1] I agree that the appeal should be dismissed.

Basnayake JA

[2] The appellant was charged in the High Court at Lautoka for the offence of rape contrary to section 207 (1) (2) (b) of the Crimes Decree No.44 of 2009. After trial the appellant was convicted by the learned High Court Judge, concurring with the unanimous opinions of the assessors. The appellant was sentenced to nine years imprisonment with a non parole

period of eight years. The appellant appealed against the conviction and the sentence (pg. 29 of the record of the High Court (RHC). In an amended leave to appeal application (filed by the Legal Aid Commission (pgs. 21 to 23 of RHC)) the appeal was confined to conviction on the following two grounds;

1. The learned trial Judge erred in law and in fact when he failed to direct the assessors on the use of recent complaint evidence and also the two statements made to two different doctors upon examination to assess the credibility of the complainant.

2. The learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the answers contained in the caution interview and the weight to be attached to the disputed confession.

[3] A single Judge of the Court of Appeal on 2 June 2014 granted leave only on ground 2 (pgs. 1 to 4 of RHC). The appellant did not file an appeal with fresh grounds before the hearing. At the hearing of this appeal, the learned counsel appearing for the appellant moved orally to grant leave on both grounds of appeal. The learned counsel for the respondent made no objection to this application. Hence the court granted leave to appeal with regard to ground 1 as well acting in terms of section 35 (3) of the Court of Appeal Act. The learned counsel for the respondent submitted to court that written submissions were made only with regard to the ground on which leave was granted. With regard to ground one he submitted that he is relying on the submissions filed in court earlier at the leave application. Written submissions were not filed on behalf of the appellant in the Court of Appeal. At the hearing the learned counsel for the appellant and the respondent made oral submissions.

Submissions of the learned counsel for the appellant

Ground one

[4] The learned counsel submitted that the complaint with regard to rape is belated. The complainant made two different statements to two different doctors who examined her. The learned counsel submitted that there is no consistency in the evidence of the complainant.

The learned Judge has failed in the summing up to address the assessors with regard to the inconsistency of her evidence. The inconsistency affects her credibility. The learned counsel submitted that the learned Judge has not made any reference to the two different stories. He drew the attention of court to paragraph 78 of the summing up (pgs 63 and 64 of the RHC). The relevant portion of the paragraph reads thus;

> *"The defence also alleged that there was a delay in reporting the case of rape even though the allegation of assault was promptly reported....Evidence of the victim revealed she was ashamed of what has happened to her therefore felt uncomfortable in reporting the rape incident at the first opportunity. It is for you to consider whether you accept that explanation and whether it is in consistence with the conduct of a woman in the position of the victim".*

[5] The submission of the learned counsel is that the complainant made two contradictory statements, one on 9 March 2011 and the other on 10 March 2011. The complainant in her evidence reveals that she was ashamed on the first day. For this reason she refrained from divulging the truth. First she had complained of assault. The doctor who examined her on 9 March 2011 going by the story revealed to her, examined the visible injuries which were found on the face and the body. Her genital area was not examined. It was done on the following day with the new revelation that the appellant had inserted an object into her vagina which caused lacerations and bleeding.

[6] The learned Judge had in the summing up addressed the issues involving delay in reporting the case of rape (Paragraph 78). Making two statements or complaints, one on the assault and the other on rape in fact touches on the credibility of the complainant. The learned Judge in the following paragraphs relating to evaluation of evidence addresses this issue.

[7] I will reproduce below parts of the summing up with regard to the directions given on the consistency, delay, spontaneity and motive as follows:-

> *"In assessing evidence of witnesses you need to consider a series of tests. They are for example:*

(a) Consistency: That is whether a witness has been saying the story on the same lines without variations and differences. You must see whether a witness is shown to have given a different version elsewhere. If so, whether what the witness has told court contradicts with her earlier version. You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time.

(b) You must remember that merely because there is a difference, a variation or a contradiction in the evidence on a particular point or points that would not make a witness a liar. You must consider the overall evidence of the witness, the demeanour, the way he/she faced the questions etc. in deciding on a witness's credibility. Equally you must consider whether a witness has omitted to do something and see whether such omission is material to affect the credibility and weight of the evidence. If the omission is so grave that, you may consider, could be even a contradiction so as to affect the credibility or weight of the evidence or both.

(b) In dealing with consistency you must see whether there is consistency per se and inter se that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that you must bear in mind that the evidence comes from human beings. They cannot have photographic or video-graphic memory. All inherent weaknesses that you and I suffer insofar as our memory is concerned, the memory of a witness also can be subject to the same inherent weaknesses.

(c) Belatedness: That is whether there is a delay in making a prompt complaint to an authority or to the police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication.

(d) Spontaneity is another factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that she/he is talking of, whether she/he has shown a spontaneous response that demanded at the occasion.

(e) Motive: That is whether there was some animosity or enmity or some other reason for a complaint to be made against the accused person and falsely implicate him.

You need to consider all these matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to evaluate the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence (pgs.50 & 51 of RHC).

[8] The learned Judge thereafter briefed the evidence of eye witnesses, the medical evidence, evidence and the admissions of the appellant. The learned Judge addressed the assessors with regard to the delay in reporting the case. The learned Judge explained the probable reason as to why the complainant did not report rape straightaway while reporting an assault. She had visible injuries. Her face was swollen. Was she in shock after the episode? There is no dispute that the appellant was known to the complainant from childhood. The complainant was in her sixties. The appellant used to call her "Nana" or grandmother. Was she confused? There was no allegation of implicating the appellant falsely. The learned Judge had placed all this evidence for the assessors to decide. There is no inconsistency or two different stories as alleged by the learned counsel for the appellant.

Ground Two

[9] The learned counsel for the appellant drew the attention of court to paragraphs 79, 80 and 81 of the summing up (pg. 64 of the RHC) which are as follows:

"79. The prosecution relied on the cautioned-interview and the charge statements. They, in fact, contain confessions. That is a statement admitting or acknowledging all facts necessary for conviction on an offence, which if true, would by themselves satisfy all elements of the offence. It could be made to a person in authority.

80. You must consider whether these confessions were made to police after the accused was assaulted or under threat of assault or under oppressive circumstances. If so, you can reject to act on the statements P-1 and P-2. Or, if you feel that there is at least a doubt as to their voluntariness, then again, you can reject to act upon them. If you decide to act on them you must be sure that those confessions were voluntarily made and therefore they could be acted upon.

81. Please remember, rejection of the confessions is not a reason for you either to accept or reject the evidence of the victim of the accused. Evidence of

the victim and the accused should be considered independent of the confessions (pg. 64 of RHC).

[10] The learned counsel submitted (pg. 5 at 9 of the RHC of the submissions of counsel in support of his application for leave to appeal against conviction) that the better way to direct the assessors is as follows;

> *"What weight you choose to give the interviews made by the accused is a matter entirely for you. If you consider themselves to be unreliable either because the police assaulted and ill treated the accused or because they themselves told lies to the police, then you may think that you cannot put much weight on them at all. If however you consider them to be a reliable record of what the accused said to the police, then you may think that they contain important statements of what allegedly occurred that day".*

[11] The learned counsel submitted that it is for the assessors to decide whether to accept or reject the confession. The learned counsel relied on the case of **Burns v The Queen** [1975] 132 CLR 258 at 261 where the court held that,

> *"It is clear and elementary law that once a confessional statement has been admitted into evidence its weight and probative value are matters for the jury. It is for the jury to determine whether the alleged confession was made and whether it was true in whole or in part. Unless the jury are satisfied that so much of a confession as tends to show the guilt of the accused was true they cannot treat it as proof of guilt".*

[12] Although the learned counsel does not mention it, for the sake of completion I will reproduce the following paragraph of the judgment of court in Burns (supra) which states thus,

> *"However a confessional statement may be only one piece of the evidence against the accused and the jury are entitled to consider all the relevant evidence together in deciding upon their verdict. The nature of the direction necessary to be given properly to instruct the jury as to the use of evidence of an alleged confession must depend on all the circumstances of the case.....In some cases it may be clear or undisputed that a confession was made and the crucial question may be whether it has any probative value: for example, it*

may be suggested that the confession has no weight because it was extracted by force or given under a mistake or because the accused when making it was ill in body or disturbed in mind. In a case such as the present, where the accused person alleges that the confession which he is said to have made is a complete concoction, a reasonable jury, once satisfied that the confession was made, might readily be satisfied also that it was true".

[13] The learned counsel also cited the case of **Vakacereivalu v State** [2015] FJCA 25 (27 February 2015) where the Court of Appeal held that, "It is settled law that the admissibility of a confession has to be decided by a trial judge having satisfied himself on its voluntariness. Thereafter, it is for the assessors to consider whether such confessions were in fact made by the accused and whether they are true".

[14] The learned counsel submitted that the learned Judge has erred in law and fact by failing to direct and guide the assessors on how to approach the matter and the weight to be attached to it causing a substantial miscarriage of justice. The complaint of the learned counsel is that the learned Judge has failed to direct the assessors with regard to the decision as to the voluntariness and the truth/falsehood attached to it.

Submission of the learned counsel for the respondent

[15] The learned counsel for the respondent submitted that the learned trial Judge had placed both the weight and the voluntariness for the assessors to consider. This is evident from paragraph 79 and 80 (pg. 64 of RHC) of the summing up. By the words "which if true" in paragraph 79, the learned Judge allows the assessors to weigh evidence. The learned Judge allows the assessors to decide the truth or falsity of the confession and to accept the confession only after satisfying themselves with regard to its voluntariness (para. 80). In **Noa Maya v The State** CAV 009 of 2015 (23 October 2015) the Supreme Court of Fiji (Justice Keith) held that the Judge should tell the assessors that even if they are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily. Keith J said, "After all what weight can be placed at all on a confession which may have been made as a result of ill treatment or oppression, or which may have been induced by a promise of some kind,

and which made the suspect confess when he might otherwise not have done so? (**Kean v State** (CAV 0015 of 2010 (12 August 2011), **Basto v R** [1954] 91 CLR 628 at 640, **R v Mushtaq** [2005] UKHL 25, **Ashwan Chand v The State** (AAU 0015 of 2012 (27 May 2016)).

[16] The learned counsel further submitted that the appellant in the cautioned interview statement has admitted to touching the victim's vagina and attempting to have sexual intercourse with her but not having had an erection. It was the submission of the learned counsel for the respondent that the learned Judge had in his summing up made no errors and to have this appeal dismissed.

The facts of the case

[17] Makereta, the step-mother of the accused said that on 09 March 2011, when she was in bed, she felt that someone was inside the room and found that it was Kato (the appellant) her stepson. She had seen him fully naked, and drunk, masturbating near her bed. The appellant had wanted to lie beside her. She had gone next door and told a neighbour what had happened. She had returned home around 2.00 p.m. and seen policemen coming looking for Kato. She had woken up Kato from the bed.

[18] The complainant said in her evidence that she was sitting down at the door cleaning dhal as Kato (the appellant) jumped and got hold of her hands, pushed her against the bed and took off her under garments. The accused had hit her when she started screaming and her face and ribs had felt numb and her head dizzy. When he took off her clothes, she had seen blood stains on her dress and felt something going inside and pressing against her. She said she was being raped but did not know whether it was by finger or by the penis.

[19] Her husband had come after about ½ -1 hour. She had told him the story. Then, they had gone to the Namaka Police Station and reported the incident. She had again gone to the Namaka Police Station the next day and given a statement. She had told the full story because there was a woman Police Officer present on that day with whom she felt comfortable. She said that she could not tell the full story on the first occasion to the doctor

but was able to tell the full story to the second doctor on the second day. She said that when she was at the Police Station, Namaka on 09 March 2011 Kato (the appellant) was brought in. She said that when she reported on 09 March 2011, she told about an assault by a Fijian boy and not about an alleged rape because she was ashamed.

[20] Her husband Prasad corroborated her. This witness had gone to the appellant's house with the police immediately after reporting the matter to the police and helped the police arrest him. The appellant was known to the complainant from his (appellant's) childhood. The appellant was in the habit of visiting his step mother Makereta when this incident occurred. Makereta was in the neighbourhood of complainant's.

[21] Dr Salman Hanifa said that she examined an Indian lady with a history of being beaten-up and punched in the face by a man. She saw bruises on the face, blackish discoloration under eye and facial swelling and multiple cuts and bleeding in the oral cavity. Dr Karalaini Saumiramira's findings recorded lacerations on the inner labia minora. She said that the labia minora was a soft surface interior to the labia majora closer to the vaginal passage. Lacerations by blunt trauma could be by penis, hand or any blunt object. She had done only a vaginal examination because the victim had been examined the day before by a doctor at Namaka.

[22] The appellant Vibote, 22 years while giving evidence said that on 8 March 2011 he attended a meeting at 8.00 p.m. in the church followed by a kava session which he joined. He had returned home around 8.30 – 9.00 am in the morning the next day (09 March 2011). He had gone to sleep after 9.00 am. Later he had heard the stepmother calling from the common room for him to wake up around 2.00 pm on 09 March 2011. He had realized that the police were present outside. The police had said that there was an allegation of assault against him and wanted him to accompany them to Namaka. They had handcuffed him and taken him to the house of Baru (the complainant's house) where the police vehicle was parked.

[23] When he reached the Police Station at Namaka, the wife of Baru was present at the police station. Baru was Prasad. He had asked 'nana' whether he really was the person who did that degrading act causing injuries. 'You are the one', she had stated to which the appellant had remarked, 'you must be mad'. He was transferred to Sabeto the next morning on 10 March 2011. Two officers had started asking him questions as to what he had done to the Indian lady. He was kept in the cell on 10 March 2011 until 6.45 pm. The Police had not offered him anything. They had punched him inside the cell (by one Semi). For about 20 minutes, he had kept on punching him in the cell. He did not know the names of the officers who witnessed the assault and said that one of them gave evidence.

[24] He said that he did not say anything when the interview was being conducted. Then, he had been taken inside and asked whether he really did do this thing. He had said 'No'. He had been told to take off his pants and a pen used to poke into his anus. He was being poked into by him and told that that was what they would want to be done to him. He had said 'yes' to Semi regarding the allegation because he could not take the punching from Semi anymore. This, he said, took place, during the interview from 7.00am – 9.00 pm on 10 March 2011. The appellant further said that he was being questioned in the Fijian language and the papers were given to place his signature on what they were typing.

[25] Answering cross-examination, the appellant said that certain things in the statement were indeed true. He said that answers given in Arvin's presence were not truthfully given as he still felt terrified. The appellant said that some of what he said in the statement was true and others untrue. He said that he did not admit the offence in the Magistrate's Court and also did not complain on 11/03 – 25/03/2011 about the assault by the police. Answering Question 103 at the interview, the accused said 'I am sorry what I had done'.

Analysis

[26] The confession in this case does not form the sole ground of conviction. The complainant's evidence too is contributory. The appellant was in his youth. The complainant was sixty two years of age. The complainant was known to the appellant as "nana", meaning

grandmother. The appellant was known to the complainant. She knew him as a child. The appellant used to visit Makereta, his stepmother. The complainant was in the neighbourhood. The appellant had come into the complainant's house by covering his face to hide himself. Having known the appellant for so long, this would not have prevented the complainant from identifying the appellant. Identity had never been an issue in this case. A complaint was made almost immediately after the incident and the appellant was arrested while sleeping at Makereta's house.

[27] The evidence of the stepmother and the medical evidence too add strength to this case. That is apart from the evidence relating to the investigation and the admissions of the appellant.

[28] The learned Judge had satisfactorily dealt with the matters raised by the learned counsel for the appellant in his summing up. He had referred the delay and the so called two stories for the assessors to decide, who unanimously found the appellant guilty as charged. Although referred to as two stories, both stories relate to one incident. As regards the weight and the voluntariness of the admissions made during the cautioned interview too, the learned Judge had adequately dealt with all the related issues.

[29] On a careful perusal of the summing up one could see that the learned Judge was conscious of all the legal principles laid down by the several authorities and the suggested formula of the learned counsel for the appellant with regard to how the assessors should be directed on the issue of weight and the voluntariness of the confession.

[30] I am of the view that the evidence in this case is overwhelming and this appeal is without merit. Hence this appeal stands dismissed.

Temo JA

[31] I agree with the reasons and the conclusion of Basnayake JA.

The Order of the Court:

Appeal is dismissed.

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Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL