IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO:AAU0140 of 2015
[High Court Case No: HAC157 of 2012]

BETWEEN : **MANOJ KUMAR**

Appellant

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr M Yunus for the Appellant
Mr L J Burney for the Respondent

Date of Hearing : 2 February 2017

Date of Ruling : 7 February 2017

RULING

[1] Following a trial in the High Court at Suva, the appellant was convicted of two counts of rape and sentenced to a total term of 12 years' imprisonment with a non-parole period of 10 years. This is a timely application for leave to appeal against both conviction and sentence pursuant to section 21(1) (b) and (c) of the Court of Appeal Act, Cap 12. The test for leave to appeal against conviction is whether the appeal is arguable (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013). The test for leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

[2] Both charges involved the same victim. The appellant is the victim's father-in-law. When the alleged incidents arose, the victim was living with her in-laws. The victim's evidence was that on 18 October 2010, the appellant took his wife to a medical clinic. After a while the appellant returned home without his wife. He offered to massage the

victim, saying she looked sick. He grabbed her by her hands and took her to his bedroom. He had sexual intercourse with her. She did not consent.

[3] The second incident arose ten days later, on 28 October 2010. At around 9 am, the appellant called his wife to come to his work place to assist him. She left home at about 11 am. Around 12.30 pm, the appellant came home alone. The victim was at home. The appellant's elderly father-in-law was also at home. The appellant accompanied his father-in-law to a neighbour's house. After a while, the appellant returned home alone and went and had his shower. The victim was in her bedroom. The appellant entered her bedroom and closed the door. He prevented the victim from leaving the room when she tried to leave. He pushed her on the bed and had sexual intercourse with her. The victim said she was in pain and in tears. Evidence was led from the victim's mother who said that on one occasion before the alleged incidents, the appellant brought the victim to her home and massaged the victim saying she was in pain.

[4] The appellant gave evidence. He said that at the time of the first alleged incident he was at his work place. On that day, he returned home at about 10 pm. On the date of the second alleged incident, he was in his office but returned home at about 2.45 pm to repair his vehicle with the assistance of his neighbour, Raj Dev. Raj Dev was called by the defence, but his evidence was that he did not meet the appellant on 28 October 2010. The appellant's son gave evidence. His evidence was that he was having matrimonial problems with the victim because she did not want to live with her in-laws but with her parents.

[5] The grounds of appeal are:

> Ground 1 – The Learned Trial Judge erred in law and in fact when he misdirected the assessors that 'it is desirable that you reach unanimous opinion; that is, an opinion on which you all agree however the final decision of facts rest with me' causing substantial miscarriage of justice to your appellant.
> Ground 2 – The Learned Trial Judge erred in law and in fact when he misdirected that assessors that 'demeanour in Court is not necessarily a clue to the truth of the witness's account' causing substantial prejudice to the appellant.

Ground 3 – The Learned Trial Judge erred in law and in fact by convicting your appellant for the offence despite no medical evidence to prove of the same.

Ground 4 – The Learned Judge has failed to direct the Assessors in respect of the defence of alibi, that the prosecution must disprove the defence of alibi and even if the assessors concluded that the defence was false, that does not by itself entitle them to convict the appellant.

Ground 5 – The Learned Trial Judge erred in law and in fact when he failed to direct the assessors what weight to be attached to prior inconsistent evidence of the complainant.

Ground 6 – The Learned Trial Judge erred in law and in fact when he misdirected the assessors on the burden of prove (sic) in respect of consent, when he said that; 'the prosecution does not have to prove that the complainant communicated her lack of consent by resisting the accused physically or by shouting at him'.

Ground 7 – The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence which conflicts with the provision of section 27 of the Prison and Correction Service Act 2006.

[6] **Role of the assessors**

The appellant's contention is that the trial judge misdirected on the role of the assessors when he informed them that the judge is the final finder of the facts. The impugned direction is contained in paragraph 6 of the summing-up. In support of his argument, counsel for the appellant cites the summing-up delivered in *State v Sadrugu* Criminal Case No HAC116.2011L (3 March 2015) where the trial judge informed the assessors of their role in deciding the facts as follows:

> Please bear in your mind that you and you alone are the judges of facts. Therefore, you will have to decide on facts and such decision on facts cannot be made by anyone else other than each one of you (paragraph 3).

[7] Counsel for the State submits that the direction that informs the assessors that the trial judge is the ultimate fact finder is correct and conforms to section 237(2) of the Criminal Procedure Decree 2009. I agree. Section 237(2) that states 'the judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors'. The summing-up delivered in *Sadrugu* which has no binding effect is not a useful authority. It has to be borne in mind that the role of the assessors is not the same as the jury. In Fiji, the statutory provision is clear. The verdict is given by the judge and not the assessors. Regardless of what the opinions of the assessors are, the ultimate decision as to guilt lies with the trial judge. As Keith JA observed in *Chandra v State*

unreported Criminal Petition No. CAV 21 of 2015; 10 December 2015, '[I] agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant' (at [36]). Ground one is unarguable.

[8] **Demeanour of witnesses**

The appellant's contention is that the trial judge misdirected by informing the assessors that the demeanour of witnesses in court is not necessarily a clue to the truth of witness's account. Counsel for the appellant submits that the demeanour of a witness is an important matter for the assessors to consider when evaluating a witness's credibility, citing *Natakuru v State* unreported Cr App No AAU0093/2006; 14 July 2006 as the authority.

[9] In the present case, the trial judge clearly informed the assessors that it was for them to decide whether a witness was telling the truth. He said that many factors may be considered in deciding what evidence is credible and reliable. He gave examples of how credibility is to be assessed in paragraphs [13]-[14] of the summing-up. At no stage, the trial judge suggested that demeanour was irrelevant when evaluating a witness's credibility. What the trial judge said to the assessors is that they should not evaluate credibility based on demeanour only. They should also consider the court environment that can be daunting for some witnesses and the nature of the evidence the witnesses had to give. In my judgment, the direction on the demeanour was perfectly correct. This ground is unarguable.

[10] **Lack of medical evidence**

I agree with counsel for the State that this ground of appeal is wholly misconceived. At trial, there was no medical evidence led. If there was an issue regarding the lack of medical evidence, then it should have been taken with the trial judge. The prosecution was not required to lead medical evidence to prove the charges of rape, and by not taking any issue at the trial, the appellant is barred from complaining on appeal.

[11] **Inadequate direction on Alibi**

The appellant's contention is that the direction on alibi was inadequate. Counsel for the appellant submits that when an accused raises an alibi as his defence, the trial judge

should inform the assessors that the prosecution must disapprove the alibi and that even if they conclude that the alibi was false, that does not itself entitled to convict the accused.

[12] In all criminal trials, the burden to prove guilt of an accused rests on the prosecution even when the accused has raised a legal defence. The essence of any direction on the defence of alibi must encapsulate that there is no burden on the appellant to prove it (*Rex v Anderson* [1991] Crim L R 361). The trial judge dealt with the defence of alibi in paragraphs [92]-[94] of the summing-up as follows:

> **[92]** The accused had relied on a specific defence called *alibi* in his answer to the two rape counts. What he says is that he was not at his home at the time the complainant says he committed acts of rape, but was at his work place. It is up to the prosecution to disprove the *alibi*, and not for the accused to prove. He is under no legal requirement to prove anything. He could have even remained silent. If you find his evidence; that he was at his work place, is credible, then you must find him not guilty of the two counts, as the prosecution had failed to prove identity of the rapist.
>
> **[93]** In that respect you have to consider the evidence of his neighbour Raj Dev in addition to that of the accused. He said on 28th October 2010, the accused did not come to his house. This evidence is in conflict with the complainant's evidence, if the neighbour she referred to in her evidence is in fact this witness 1.She did not mention any name of a neighbour. It is up to you to consider whether he is the neighbour that complainant referred to or not and also whether you accept his evidence which in conflict with the complainant on this point. His son is not a witness to his *alibi.*
>
> **[94]** Even if you reject his and his witness's evidence that does not mean the prosecution case is automatically proved. The prosecution must establish his identity and presence by their own evidence. Then only, if you find element of identity is established by the prosecution beyond reasonable doubt, in addition to other elements of the offence of rape in the two counts you can find the accused guilty to these two counts of rape. If you entertain any reasonable doubt about any of the elements then you must find the accused not guilty to both charges.

[13] In my judgment, the trial judge made it very clear to the assessors that even if they did not believe the appellant's evidence or his alibi, they could convict only if the prosecution had discharged the burden of proof beyond reasonable doubt. This ground is unarguable.

[14] **Inadequate direction on previous inconsistent statement**

The appellant's contention is that the trial judge had failed to direct on the weight to be given to the inconsistencies in the complainant's evidence. The trial judge dealt with the inconsistencies in quite detail in paragraphs [66]-[69] of the summing-up as follows:

> [66] There is another aspect; I would want to address you on the issue of consistency. You will recall that during cross examination, repeatedly she was asked whether she had mentioned that particular item of evidence which she placed before you, to police in making her statement. She admitted some of these incidents she said in her evidence are not in her statement. Her explanation is this is the first time she filed a report and it was the duty of the police to record everything important. She said she said it all, she had read the statement and found they were not there. There is no evidence of the police officer who recorded her statement before us.
>
> [67] You will also recall that the complainant has given evidence before us for three days and a great volume of evidence is placed before us. You might consider whether it is possible to record her response to all the questions raised by the accused in cross examination, when her statement is taken down by a police officer. If you think the explanation is acceptable and her evidence is consistent on material points, you may decide her evidence is credible on this aspect. If you do not accept her explanation you may decide against her evidence on this aspect and continue to consider her evidence for its truthfulness on other aspects.
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> [68] The third aspect to consider under consistency is whether the complainant's evidence is consistent with her own evidence during cross examination and also with her mother's evidence. Her mother said her daughter was massaged by the accused using coconut oil. The complainant did not mention of using any substance. The complainant did not mention that her mother accompanied her to retrieve her belongings. Her mother said she also went in. Whether these inconsistencies are significant ones which would render her truthfulness doubtful you will have to decide.

[15] Clearly, the trial judge left the inconsistencies for the assessors to consider when assessing the witness's credibility. There is no arguable error in the direction.

[16] **Misdirection on the burden of proof in respect of consent**

The appellant's contention is that the trial judge misdirected when he told the assessors that the prosecution does not have to prove that the complainant communicated her lack of consent by resisting the accused physically or by shouting at him.

[17] Lack of consent is no doubt an essential element of rape. Consent is defined by section 206 of the Crimes Decree 2009 as follows:

> (1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.
>
> (2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained —
> *(a)* by force; or
> *(b)* by threat or intimidation; or
> *(c)* by fear of bodily harm; or
> *(d)* by exercise of authority; or
> *(e)* by false and fraudulent representations about the nature or purpose of the act; or
> *(f)* by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[18] At trial, consent or lack of it was a non-issue. The appellant's defence was that the complainant had fabricated the allegations. The relationship between the complainant and the appellant was not in dispute. The appellant was her father-in-law and at the time of the alleged incidents she was living in his house. By age, relationship and culture, the appellant was an authority figure. The evidence of the complainant was that both incidents occurred when she was home alone with the appellant. On the first occasion, the appellant grabbed the complainant into his bedroom on the pretext of massaging her. On the second occasion, the appellant prevented the complainant from leaving her bedroom. The complainant said she was in pain and tears when the appellant had sexual intercourse with her. Given the evidence of the complainant, the trial judge was correct to inform the assessors that the prosecution does not have to prove that the complainant communicated her lack of consent by resisting the appellant physically or by shouting at him. This ground is unarguable.

[19] **Sentence**

As far as the ground of appeal against sentence is concerned, I am not convinced that fixing of a non-parole period in compliance with section 18(4) of the Sentencing and Penalties Decree 2009 can give rise to an appealable error in the exercise of the sentencing discretion. Recently, the Full Court said in *Singh v State* unreported Cr App No AAU009 of 2013; 30 September 2016 at [12]:

> Further it cannot be said that fixing a non-parole period is the only manner by which conditions for promotion and facilitation of rehabilitation can be established. Rehabilitation in my view is a part of the duties of the Correction Institute and should be afforded to all inmates. The fact that the non-parole period fixed is one year, does not offend section 18(4) of the Sentencing and Penalties Decree 2009. In my view a Sentencing Judge cannot be faulted for failure to spell out in his Sentencing Order the very wording of the Sentencing and Penalties Decree 2009 as to the purposes for which the sentence was imposed. (per A Fernando JA).

[20] In my judgment, the sentence appeal is unarguable.

[21] **Result**

Leave refused.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State