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

CRIMINAL APPEAL NO. AAU 0017 of 2014
(High Court HAC 046 of 2012)

BETWEEN : **ALUSIO SUNIA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Fernando JA
Perera JA

Counsel : **Mr. M. Fasaitu for the Appellant**
Ms. J. Prasad for the Respondent

Date of Hearing : **13 February 2018**

Date of Judgment : **8 March 2018**

JUDGMENT

Gamalath JA

[1] The Appellant stood trial in the High Court of Labasa on the following three counts namely;

(1) Indecently insulting or annoying one A.M.V (name is suppressed), an incident allegedly occurred between 1 May, 2012 and 31 May, 2012 at Tunuloa; A charge under Section 213 (1) (a) of the Crimes Act 44 of 2009. The appellant pleaded guilty to the charge at the very outset of the trial.

(2) Indecent Assault, of A.M.V between 1 May, 2012 and 31 May, 2012 at the same place referred to above, an offence under Section 212 (1) of the Crimes Act 44 of 2009.

(3) Rape of A.M.V on 25 May, 2012 at Tunuloa, Contrary to Section 207 (1) and 4 (a) of the Crimes Act 44 of 2009.

[2] Following the trial the appellant was found guilty of committing the 2 and the 3 Counts. The High Court imposed the sentences as follows;

Count 1 – 6 months imprisonment
Count 2 – 2 years imprisonment
Count 3 - 12 years with a non- parole period of 10 years. All sentences are to run concurrently.

The Grounds of Appeal

[3] The appellant is presently seeking to impugn the decision to convict him on the charge of Rape based on the sole ground of appeal that "the learned Judge erred in law and in fact in failing to direct the assessors on an alternative verdict or lesser charge of "attempted rape" in respect of "the entirety of the evidence" adduced at the trial".

The scope of the "entirety of evidence" relevant to the ground of appeal

[4] I shall now be referring to the salient features contained in the evidential matrix of this appeal, which are helpful in assessing the sustainability of the sole ground of appeal.

[5] According to the evidence at the trial, the appellant is the maternal uncle of the victim A.M.V and A.M.V was barely 14 years old and a school girl when she fell pray to the alleged crimes. The commission of the alleged offences had been at 3 different occasions.

First incident was at the appellant's house, when she visited the appellant for some errand. At that instance the appellant had made an exposure of his penis to the victim and being frightened by this unexpected occurrence the victim had run back to her home. It is noteworthy that the appellant pleaded guilty to the charge based on this incident.

[6] The second incident was at her own home where she was lying on the ground afflicted with some sickness. According to the evidence of the victim, the appellant having approached her in her room wanted her to touch his penis. Thereafter, he had run his hands all over her body. In this regard there is a particular strand of evidence that needs to be highlighted for it has a direct relevance to the ground of appeal; in answering the cross examination relating to this particular point the victim had stated that whilst the appellant was touching her body, at one stage he interfered with her vagina digitally. Insofar as this particular strand of evidence is concerned the appellant, who elected to testify at the trial, had made a complete denial. In addition, even in his caution statement (that was admitted in evidence at the trial) there is a clear denial that he ever inserted his finger into the victim's vagina. In this regard, given its direct relevance to the sole ground of appeal, I wish to place a special emphasis that throughout the trial the appellant has been consistently taking up the position that neither digitally nor by inserting the penis, he ever interfered with the victim's vagina.

Harking back to the 2nd incident of his sexual advances towards the victim at her home, as already referred to above, the appellant's position had been that he did not

interfere with the victim's vagina. To the contrary he takes up the position persistently, that being dazed with lust he was merely gazing at her vagina and nothing proceeded beyond that point. This in brief, is the totality of evidence with regard to the second count in the indictment.

[7] Now I wish to turn to the alleged rape incident relating to the 3rd Count. As far as this matter is concerned it is the evidence of the victim that whilst she was returning home after school the appellant having accosted her at a desolated place where a "vunibaka" tree stands dragged her into the nearby bush; forced her to lie on the a grass verge; having laid on top of her inserted his penis in to her vagina.

As I have already emphasized earlier, taking up the inverse position the appellant is denying this accusation totally. Although he had admitted the fact of meeting the victim as described in her evidence, the picture that is sought to be portrayed by him is that what had occurred in the thick of the bush was a mutual encounter in which the victim had incited him to be intimate by placing his palm on her breast and getting him to fondle it.

The appellant maintains that being incited by the victim's proposition, he wanted to have sexual intercourse with her. Thus, having laid on top of her he made unsuccessful attempts to insert his penis into her vagina. This he failed to achieve due to flaccidity. Thus, what is arising out of his version is that the victim's accusation is nothing but a distortion of the truth and therefore he ought not to have been convicted for the offence of Rape.

[8] This in brief represents the totality of the most relevant portions of evidence applicable in deciding on the sustainability of the sole ground of appeal. As had already been stated earlier the appellant's caution statement as well as his evidence at the trial are clearly to the effect that at no stage he had had sexual intercourse with the victim or there was not even digital interference. This is diametrically opposed to the position taken up by the victim who had been categorical that the appellant on one occasion interfered with her digitally and on the other occasion had complete consummation of the sexual act. As can be appreciated in the presence of the existing two competing versions, it behooves on a Court of Law to seek the assistance through

other sources of evidence to come to a finality with regard to the question of where the truth lies.

For the said purpose the focus should now be on to the medical evidence relating to the victim as had been adduced by the prosecution.

The Medical Evidence

[9] Emosi Bainivalu, the medical doctor who examined the victim had found injuries to her vagina, which are compatible with injuries caused as a result of having sexual intercourse. He examined the victim on 25 July 2012; that was about 2 months after the alleged incident of rape. The victim had shown clear signs of having trauma at posterior (edge of vagina) and to the extended vaginal wall and some signs of abrasion and minimal laceration (on external part of vagina).

The Doctor went on to describe that *"with the relevant findings above, it can be concluded that the age of injury is about 3 months old, which may have resulted from a blunt object"*. Further, his evidence was that *"if the girl was not sexually interfered with there should not be any injury at the time of my examination. At the time of my examination I found some injuries on her vagina, which logically means she had been sexually interfered with. Something must have happened because of the injuries ..."*.

Further, describing the cause for the vaginal injuries the doctor had expressed his opinion that "to conclude, there may have been physical contact, but may be without the use of penis and vagina. Due to laceration found, the evidence of finger is high probability". With regard to the opinion expressed by the Doctor it is unfortunate that the reasons for this opinion as to how he had arrived at this conclusion had never been elicited either in the examination in chief or in the cross examination. Therefore, in the face of the vagueness of this opinion, the level of weight that could be attached to the assertion becomes rather uncertain.

In the light of the medical findings coupled with the evidence of the victim the appellant's assertion that he had at no stage interfered with the victim either by having sexual intercourse or by means of digital interference with the vagina would become untenable. Viewing this position through a purely a legalistic point of view, it is

entirely a matter within the purview of the triers of facts to determine the degree of evidential weight that could be attached to the evidence of the victim and to evaluate it in the backdrop of the nature of the medical evidence already referred to above. Anyhow, what is clearly undeniable with having reference to the medical evidence is that the victim's version of the events of the incident cannot be refuted as a mere fictitious accusation or rancorous fabrication. On that score it is not an inaccurate to conclude that in the light of the forensic medial evidence the appellant's assertion that he never interfered with the victim's vagina becomes improbable.

With that observation, I now wish to turn to the summing up of this case.

The Summing Up

[10] I find that the Learned Trial Judge had quite dispassionately and objectively analyzed the totality of the evidence and accurately explained to the assessors the role that is expected of them as the tries of facts. Guiding the assessors accurately as to the manner in which the medical evidence should be evaluated by the assessors, the Learned Trial Judge had stated that "how you use the medical report to support or otherwise the parties version of events is a matter entirely for you. If you find that the injuries found on the complainant, as found in the evidence of the medical report, supported her version of events, that then you will have to find her as a credible witness, and find the accused guilty as charged. If you find otherwise you will have to work on the other evidence to make a decision, in the case."

[11] It is trite law that "the judge should make it clear to the jury that they are not bound by the expert's opinion and that the issue is for them to decide". *Archbold* – 2005, para 10 -66, pg 1317. The Learned Trial Judge had correctly followed the age old guiding principles on this matter and had left the issues relating to the injuries found on the vagina of the victim to be considered *vis a vis* the charge of Rape.

The Conviction

[12] On 17 October 2013 the assessors returned a unanimous verdict of guilt of the appellant on both counts and the Learned Trial Judge sentenced the appellant accordingly. As for this appeal, what is important is that implicit in the verdict of the assessors is that they had believed the victim's version about the alleged incident of

rape, notwithstanding the medical evidence that is capable of creating a certain degree of doubt as to the exact causation of the injuries found in the vagina, namely whether it was as a result of insertion of the penis or as a result of the digital interference.

Further, another matter that becomes abundantly clear with having reference to the verdict is that the appellant's steadfast position that he neither digitally nor by the insertion of the penis interfered with the vagina of the victim had been disbelieved by the assessors.

The Ground of Appeal

[13] As could be understood from the sole ground of appeal, its pith and substance is that the learned Trial Judge had failed to direct the assessors that in the light of the entirety of evidence the assessors should have been directed to consider whether it is possible to conclude that the conviction for the 3rd Count should have been not to the charge of rape as preferred in the indictment but to the charge of attempted rape.

When to leave the alternative verdict for the consideration of the Assessors? Is there convincing evidence to direct the assessors on the charge of attempted rape?

The Fijian perspective

[14] According to the decisions in the Supreme Court and in the Court of Appeal it had been decided respectively that the duty casts upon a trial judge to direct assessors on alternative verdicts depends on the availability of evidence to substantiate such verdicts. **Ramu -v- The State** [2012] FJSC Criminal Appeal No. CAV001 of 2011, 9 May 2012, para 25 and **Turaga -v- State** [2000] FJCA Criminal Appeal No.AAU0004 and AAU0007 of 1998, 24 February para 36, **Prasad -v- Regina**, [1981] FLR 80, para 4. (*emphasis added*).

In other words in the absence of any convincing, cogent evidence upon which one can possibly rely on to substantiate any alternative verdict, in such instances there is no duty to be ascribed to a judge to direct the triers of facts along such lines.

[15] In the case of **Tej Deo -v- The State**, Criminal Appeal No CAV 0017 of 2008 (18th October 2010), the Supreme Court had observed that.

> *"The law requires the Trial Judge to direct the jury fully and correctly if on the evidence a defence is raised* (emphasis added).

[16] In the case of **Manaini -v- DPP** (1942) AC 1 on page 7, Viscount Simon LC decided that;

> *"The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defense) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it*". (emphasis added)

The law relating to this matter, therefore, is clear and unambiguous. The condition precedent to a direction to the assessors to consider the availability of an alternative charge depends on the existence of the material to do so. If such material is non existing, along with it disappears the need to burden the assessors with a defence unmaintainable with having reference to the totality of evidence.

The Common Law perspective with regard to when to leave alternative verdict to Assessors

In **R -v- Fairbanks**, 83 Cr. App. R. 251, CA, Mustill LJ, at pp. 255-256, gave examples of cases where it would be right not to leave the alternative offence to the jury:

> *"(a) Where the lesser verdict simply does not arise on the way in which the case has been presented to the Court; (b) where at one stage of the trial there was a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue.; (c) where the principal offence is so grave and the alternative so trifling, that the judge thinks it best not to distract the jury by forcing them to consider something which is remote from the real point of the case. eg. Where consideration of a further trivial offence would be an unnecessary complication.*
>
> *The right course will vary from one case to another, but the judge should always use his powers to ensure, so far as practicable, that the issues left to the jury fairly reflect the issues which arise on the*

evidence; per Mustill LJ in ***R -v- Maxwell****, 88 Cr. App. R. 173 at 176 CA."*

In **R -v- Kearney**, 88 Cr. App. R. 380, CA;

> *"The appellant and two other men committed an armed robbery at a jeweller's shop. Each of them was armed and during the robbery the owner of the shop was shot dead at close range. The appellant was subsequently found in possession of a revolver. He was charged, inter alia, with murder. At his trial it was submitted on his behalf that the death was accidental and that the jury could return a verdict of manslaughter; that even if, despite the appellant's denial, the jury found that the revolver was carried and fired by him, they must be satisfied that, at the moment he fired the gun, it was his intention to kill or cause really serious harm. The judge directed the jury to either convict the appellant of murder or acquit him. He was convicted of murder. On appeal that manslaughter should have been left to the jury as an alternative verdict.*
>
> ***Held****, dismissing the appeal, that the trial judge was entitled on the facts of the case to take the view that it would have introduced an unnecessary degree of complexity into the case to give the jury a direction as to the circumstances in which killing in the course of a criminal enterprise would amount to manslaughter; his decision to leave to them a simple choice between a verdict of guilty of murder and a verdict of not guilty did not amount to an error of law, nor did it cause unfairness so as to render a verdict of murder in any way unsafe or unsatisfactory."*

The inherent inconsistency in the line of defence

[17] The appellant's line of defense at the trial is clearly impregnated with inherent problems, directly attributable to its inconsistent positions. In describing the alleged rape incident it is his unequivocal position that it was consensual.

> *"I grabbed her hand; I told her to come to me; and take off her clothes; she laid down on the grass, Prosecution Witness 1 (the victim) then took off her pants and panty. I then laid beside her. She took my hand and put on her breast. I then lay on top of her. My penis was not erected. I stood up and went."* (emphasis added).

This is a clear indication that the victim was a willing partner who showed no signs of any resistance to the appellant's amorous advances at the material time. However, on examining the cross examination of the victim at the trial this line of defence is

clearly absent and it was not even proposed to the victim as a suggestion that she was a willing partner to indulge in the alleged sexual intimacy with the appellant.

In the circumstances it is quite clear that the line of defence the appellant is now seeking to evolve is a clear invention for the purpose of decreasing the criminal liability attributed to the offence of rape.

[18] As already stated another crucial issue involved in the line of defences that the victim was a willing partner to the sexual intimacy. In the context of the offence of rape this means that there was unequivocal consent coming from the victim to indulge in the sexual intimacy. Inasmuch as the offence of rape cannot be sustained where there has been evidence of any consensual sexual encounter, it is an equal impossibility to seek a conviction to an offence of attempted rape if the evidence is pointed to the direction that there was consensus between the appellant and the victim for the indulgence of the sexual intimacy. The presence of the element of consent even to a lesser degree that is capable of causing a reasonable suspicion would certainly debase the possibility of maintaining successfully both the offence of rape as well as its attempt.

[19] The ground of appeal upon which the appellant is relying to assail the conviction has been formulated by being oblivion to the nature of his own evidence at the trial in which he was unequivocal that the victim was a willing party to the sexual intimacy with him. If his version of the events at the trial should be believed as the accurate version of the story then the maintainability of an attempted rape charge would become simply an impossibility. In the light of above I am unable to find any merits to the ground of appeal under consideration.

[20] Further, this innate perplexity that exists in the appellant's evidence should be further evaluated in the light of the medical evidence referred to earlier.

The appellant, with the possible intent to extricate himself from any serious criminal liability has taken up the persistent position that he never interfered with the victim's vagina either digitally or by the insertion of his penis (I have already discussed this earlier). Even his caution statement is to the effect that he never interfered with the victim's vagina.

[21] However, the injuries described by the medical expert had clearly established the fact that the 14 years old girl had been sexually dealt with.

Whether it was as a result of the digital interference on the 2nd occasion relating to the 2nd count or whether it was as a result of the insertion of the penis on the 3 occasion is a pure matter of facts and the Learned Trial Judge, following a correct course had left the matters for the consideration of the assessors, who in turn had decided that the victim was in fact raped by the appellant on the 3rd occasion. On this issue the learned trial Judge had approached the issue in the most appropriate manner .To do it differently would be to usurp the powers of assessors.

Final Observation

[22] In the light of the matters discussed above it is clear that there is no merit to the sole ground of appeal raised to impugn the conviction of the appellant. Even if his line of defense has been accepted as being the truth, he would then be entitled, not to a complete exoneration from the criminal liability, but for a conviction for the Attempted Rape, for which the punishment is 10 years imprisonment. In concluding, I hold that there has been no substantial miscarriage of justice caused to the appellant in the trial.

Therefore on account of want of merit the appellant's ground of appeal should fail.

Fernando JA

[23] I agree with the conclusion reached by Justice Gamalath.

Perera JA

[24] I have read in draft the judgment of Gamalath JA. I agree with the reasons and the conclusion.

Order of the Court

The conviction is affirmed and the appeal is dismissed.

Hon. Mr Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr Justice A. Fernando
JUSTICE OF APPEAL

Hon. Mr Justice V. Perera
JUSTICE OF APPEAL