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

Criminal Appeal No. AAU 034 of 2015
(High Court Case No. HAC 248 of 2013)

BETWEEN : **MUBARAK HUSSEIN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Ms. S. Nasedra for the Appellant**

Mr. Y. Prasad for the Respondent

Date of Hearing : **13 May 2019**

Date of Judgment : **6 June 2019**

JUDGMENT

Gamalath, JA

[1] I have read the draft judgment of Bandara, JA and I agree with his contents and the orders.

Prematilaka, JA

[2] I read in draft the judgment of Bandara, JA and agree with reasons and conclusion herein.

Bandara, JA

[3] Following a trial in the High Court of Suva, the Appellant was convicted of one count of burglary, one count of sexual assault and two counts of rape. He was sentenced to a total term of 16 years imprisonment with a non-parole period of 15 years.

[4] Consequently the Appellant had filed a timely application seeking leave to Appeal in terms of section 21 (1) of the court of Appeal Act Cap 21, advancing 4 grounds against the conviction and 2 grounds against the sentence. On the 17 March 2017 a single judge of the Court of Appeal refused leave for all grounds against the conviction and the sentence due to lack of merits.

[5] On the 9th May 2019, the appellant reviewed the application pursuant to section 35(3) of the Court of Appeal Act to be heard before the full court advancing three grounds of Appeal only against the conviction.

Factual Background

[6] The appellant (aged 49 years) and the complainant (aged 41 years) lived in the same neighborhood in the village, Nausori. The husband of the complainant (aged 55 years) knew the Appellant for a period of 20 years and claimed that he treated the appellant like a son. On the day of the incident (31st May 2013) the husband of the complainant had left for Nakasi leaving the complainant alone at home.

[7] On the way to Nakasi, the husband of the complainant met the Appellant in the neighbourhood, who inquired from the former where he was going and who was at home. The unsuspecting husband told the Appellant that, he was leaving for Nakasi and only his wife was at home alone.

[8] Soon after the husband left for Nakasi, the complainant had gone into their bedroom and lied down in the bed, having turned off the lights. At that point of time, a masked man

entered the complainant's bedroom, carrying a cane knife, and threatened her with it. The masked intruder then tied the complainant's hands and the legs with a piece of cloth and a tape. Thereafter, the intruder blindfolded her with a piece of cloth and taped the blindfold to her face. He then began to kiss her body including her breasts, licked her vagina and inserted his tongue into it. Then the intruder had sexual intercourse with the complainant, ejaculated inside her vagina and fled the scene.

[9] The complainant later freed herself with difficulty and reported the matter to her husband whereupon the latter returned home forthwith. The Police upon receipt of the first complaint, commenced investigations, arrested the Appellant and recorded his caution interview on the 1st and 2nd June 2013, wherein he confessed to the offence which was admitted at the trial consequent to a duly held voire dire inquiry.

[10] Undisputedly, the only admissible evidence to connect the Appellant with the crime, proving his identity as the culprit, consisted of his confessionary caution interview. The complainant had failed to identify the culprit sufficiently since he had masked himself whilst committing the offences.

[11] There is ample authority for the proposition that an accused may be convicted on his own confession alone; there is no law against it. The law is that if an accused makes a free and voluntary confession, which is direct and positive, and is properly proved, he could be convicted of any crime upon it.

[12] In **Khan v State** (CAV 0069 of 2007), (2013) FJCA, in has been held that *"It is well settled law that the accused may be convicted of any crime upon his confession alone."* However, as pointed out by Ridley, J in **Skys v R;** (8 Crim App. 233 at page 236) the necessity seldom, if ever arises as the court always examines the surrounding circumstances to ascertain if the confession is consistent with other facts which have been proved.

[13] Three Grounds of Appeal, only against the conviction, were urged before the full court, and now I turn to address them.

Ground One

"The learned Trial Judge erred in law and in fact when he misdirected the assessors on how to approach the evidence contained in the caution interview and charge statements of the Appellants thus prejudicing the Appellant".

[14] It has been held in **Maya v State** [2015] FJSC 30; CAV009.2015 (23 October 2015),

> *"...assessors should be directed by the judge in his summing up that if they are not satisfied that the confession was given voluntarily, in the sense that it was obtained without oppression, ill-treatment or inducements, or conclude that it may not have been given voluntarily, they should disregard it altogether".*

In the same judgment, it has been further held; *"In Fiji the judge may admit the confession into evidence after the voir dire, and yet subsequently at the conclusion of the trial proper he or she may arrive at a different opinion. ...The prosecution however bears the burden in the trial proper, as in the voir dire, of proving that the confession was voluntary, and must do so to the standard beyond reasonable doubt, as with all other elements of proof required to prove the charge".*

[15] In the light of the the above principles of law, the learned Trial Judge having heard all the evidence led on behalf of the prosecution and the Appellant, finding no evidence of oppression, assault ill-treatment or inducements carried out on the appellant, ruled the caution interview admissible. Further, the learned Trial Judge using economy of words has rightly left it for the assessors to determine the issue of acceptance or otherwise of the caution interview.

[16] When the totality of the directions in the summing up, in relation to the voluntariness of the caution interview is taken into consideration, the contention advanced on behalf of the Appellant, that the directions set out in paragraph 29 stating that "... *if you find the police witnesses as credible witnesses, and accept their evidence that the accused gave his*

*caution interview and charge statement voluntarily and you accept it as the truth, you may find the accused guilty as char*ged", cannot be taken as a misdirection.

[17] On the other hand, the learned Trial Judge's following directions to the assessors, set out in paragraphs 26 to 29, had adequately and comprehensively covered the issue of voluntariness of the caution interview.

> *"However, if you are satisfied beyond reasonable doubt ...however, before you can accept a confession, you must be satisfied beyond reasonable doubt that it was given voluntarily by its maker. The prosecution must be satisfied beyond reasonable doubt that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statement voluntarily that is, he gave his statements out of his own free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements will negate free will, and as judges of fat you are entitled to disregard them. However, if you are satisfied beyond reasonable doubt so that you are sure that the accused gave these statements voluntarily and that they are true, as judges of fact, you are entitled to disregard them. However, if you are satisfied beyond reasonable doubt, so that you are sure that the accused gave those statements voluntarily and that they are true, as Judges of fact you are entitled to rely on them for or against the accused. The acceptance or otherwise of his alleged confessions is entirely a matter for you".*

Having regard to the above, I am of the view that Ground One of the appeal is without merit.

Ground 2

"The learned trial Judge erred in law and in fact when he did not put the case of the Appellant to the assessors in a fair and balanced and objective manner".

[18] It has been broadly contended, that the entirety of the trial Judge's Summing Up, does not properly address the contentions that had been raised on behalf of the Appellant. It was further alleged that the learned trial judge had failed to mention in the summing up the pertinent points that were raised by the Appellant during the cross examination of prosecution witnesses.

[19] As amply reflected in the court record the Appellant's denial of all allegations has been fairly and adequately summed up by the learned trial Judge.

[20] In the course of the summing up (at paragraph 21 & 22), the learned trial Judge has fairly and adequately put before the assessors the appellant's contention of denial on all allegations and his claim that the confession was obtained through oppression and assault in the following manner.

> *"21. On 22nd March 2015 the first day of the trial proper the information was put to the accused... he pleaded not guilty to the charges. In other words he denied the allegations against him when a prima facie case was found against him at the end of the prosecution's case wherein he was called to make his defence, he choose to give sworn evidence and called the witness, in his defence. That was his right.*
>
> *22. This case was very simple. On oath he said never burgled the complainant's house. He said he never raped nor sexually assaulted the complainant. He said he was assaulted by police to admit the offences, when caution interviewed and formally charged by them. When cross examined, he said he was not at the crime scene, at the material time. Because of the above, he asks you, as assessors and judges of fact, to find him not guilty as charged and acquit him accordingly. That was the case for the defence".*

[21] In **Silatolu v The State** [2006] FJCA 13; AAU0024.2003S (10 March 2006), the Court of Appeal held at para 13 that;

> *"[13] When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; R v Lawrence [1982] AC 510. It should be an orderly, objective and balanced analysis of the case."*

[22] In **Tamaibeka v State** [1999] FJCA 1; AAU0015u.97s (8 January 1999), it was held that;

> *"A Judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of a summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be*

prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the Judge".

[23] The second ground of appeal advanced on behalf of the appellant that *'the learned trial judge did not put the case of the Appellant to the assessors in a fair and balanced and objective manner'* is contrary to the facts reflected in the record of the summing up and hence is not meritorious.

Third Ground of Appeal

"The Learned Trial Judge erred in law and in fact when he continuously intervened and interfered with the trial process disabling the Appellant from having a fair trial".

[24] It is a fundamental principle of law that an accused person is entitled to a fair trial. The most prominent treaty in relation to the declaration of the International Human Rights the Covenant on Civil and Political Rights states in its article 14(1) that "All persons shall be equal before the Courts and tribunals and further that in the determination of any criminal charge against him or of his rights and obligations in a suite of law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.

[25] In **Peter Michel v The Queen** (2009) UKPC 41 Privy Council, Appeal No. 0075 of 2008) Lord Brown, in relation to an accused person's right to a fair trial stated that:-

> *"But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudiced, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial".*

All departures from good practice render a trial unfair.

[26] In the judgment of the European Court of Human Rights in **CG v United Kingdom** (2002) 34 EHRR 31,789, a plainly implicit rule was set out stating by rejecting the complaint that the trial proceedings as a whole were unfair notwithstanding the court's finding that **the judicial interventions had been excessive and undesirable**. Court further held that; *"Ultimately the question is one of degree. Rarely will the impropriety be so extreme as to require a conviction however safe in other respects to be quashed for want of fairly conducted trial process".*

[27] In **R. v. Mulusi** [1973] J59 Crim. App.R378, Lawton LJ, in relation to a situation of summarizing an undesirable judicial intervention stated;

> *"Time and Time again the judge intervened, got an answer and then asked questions on that answer. The impression he must have given was that he was cross-examining on the evidence in chief as it was being given. It really was most unfortunate".*

[28] In Denning LJ's in his celebrated judgment in **Jones v National Coal Board** [1957] 2QB 55 stated that;

> *"A Judge's part ... is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; ... If he drops the mantle of a Judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacess spoke right when he said ... 'Patience and gravity of hearing is an essential part of justice'; and an over-speaking Judge is no well-tuned cymbal.*

[29] In **R v Hamilton** (CA 113, S.J 546 (1969) it has been held that; *"it is wrong for a Judge to descend into the arena and give impression of acting as advocate and often does more harm than good. Whether interventions can give ground for quashing a conviction is not only a matter of degree but also depends on what the intentions are directed to and what their effect may be."*

[30] On a perusal of the High Court proceedings, I find a large number of questions put to the complainant by the learned trial Judge which clearly give the impression that the Judge had assumed the role of an advocate.

[31] Upon perusal of the court record it is found that the examination-in-chief of the complainant commences at page 144 and ends at page 197 and a Counsel representing the State had appeared to conduct the prosecution. While the examination-in-chief was in progress the learned trial Judge had posed 86 questions to the complainant. Most of these questions pertained to cover prosecutorial functions.

[32] At the appeal hearing the learned Counsel for the Appellant specifically drew the attention of the full court to the following questions raised by the trial judge, intervening in the course of the examination-in-chief which consisted of the instructions given to the complainant as to the ingredients necessary to constitute the offence of rape. (pg. 158 of court proceedings).

"Ms Vavadakua (the prosecutor):	*What happened after that?*
Ms. W (complainant):	*He said "don't shout, don't shout! Then he said turn around. Then I didn't turn around. Then I didn't turn around. Then he pushed me.*
Ms Vavadakua:	*Witness, can you slow down?*
Judge:	*He told you not to shout?*
Ms. W :	*Don't shout. Don't shout.*
Judge:	*He told you not to shout?*
Ms W:	*Yeah he showed me the knife, put here. Don't shout, don't shout.*
Ms. Vavadakua:	*And then what happened?*
Ms W:	*My Lord, then he force me to turn around.*
Judge:	*So he force you to turn back.*
Ms W:	*Turn around*

Ms Vavadakua:	*Where were you at the time?*
Ms W:	*On the bed.*
Judge:	*Were you lying on the bed, on your back or on your stomach?*
Ms W:	*... Inaudible*
Judge:	*Hang on. Hang on. Witness just explain it to her. This is a rape case.* *Everything private to you has to come out in this courtroom. They adults, I'm an adult. Right, your private to you will be exposed to the courtroom. Element of rape is that penis going into your vagina without your consent and he knew that you are not consenting. So it's very private matters that ventilating in the courtroom. Plus, second element of rape, he put his tongue into your vagina. Very private matters without your consent. And he knew you are not consenting. Those issues will have to be tackled. You have to deal first come to use in a way we can understand. Right now you jumping from one position to another position. Enters the bedroom, so you going to connect us. A trial is like shooting a video camera slowly, showing the scene, Scene 1, scene 2, Scene 3, Scene 4. It is like shooting a video camera right. So you have to describe to us, to your counsel what happened. So what I have got here, a masked man suddenly entered the bedroom with a cane knife. It was a white mask from head to the knee. It was a long white cloth. I could see his eyes and nose. He told me not to shout. Showed me the knife. Over to you, Prosecution".*

[33] Up to the time the learned trial Judge gave the above instructions to the victim including the ingredients of the offence of rape, the witness had not told court anything about a sexual assault. What appears on the record is that the witness had started giving evidence

of a sexual assault after receiving a briefing from the trial judge on the ingredients required for the constitution of the offence of rape.

[34] This procedure is against all accepted norms of leading the evidence of a witness before a criminal court.

[35] It is also pertinent to note the remarks made by Lord Green M.R in **Yuill v Yuill** [1945] 1 ALL E.R.183 (C.A.).

> *"It is of course always proper for a Judge – and it is his duty to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstand a question put to him by counsel. If there are matters which the Judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put he can; of course take steps to see that deficiency is made good. It is I think generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must be borne in mind that the Judge does not know what is in the counsel's brief and has not the same facilities as counsel for an effective examination in chief or cross examination".*

[36] In **R.v. Darlyn** (1946) 88 C.C.C. 269; Brid JA stated;

> *"The nature and extent of a Judge's participation in the examination of a witness is no doubt a matter within his discretion which must be exercised judicially. ...I conceive it to be the function of the Judge to keep the scales of justice in even balance between the Crown and the accused. There can be no doubt in my opinion that a Judge has not only the right but also the duty to put questions to a witness in order to clarify an observe answer or to resolve possible misunderstanding of any question by a witness, even to remedy an omission of counsel by putting questions which the judge thinks ought to have been asked in order to bring out or explain relevant matters".*

[37] In **Browilland v The Queen** [1988] I R.C.S. 39, it has been held that:-

> *"Though the trial judge has a right and often a duty, if justice is in fact to be done, to question witnesses, interrupt them and if necessary to call them in order he must do so within certain limits and in such a way that justice is seen to be done. In the case at bar, the trial Judge went beyond the limits.*

...The Trial Judge gave the impression of assisting counsel for the prosecution. By his conduct trial judge raised some doubt as to his impartiality which only a new trial can erase".

[38] In **R v. Flulusi** (1973) 58 Crim. App R378, 382, it has been held;

"Of course it has been recognized always that it is wrong for a Judge to descend into the arena and give the impression of acting as advocate..."
"... the mere fact that a Judge intervenes excessively or inappropriately does not necessarily lead to a conviction being quashed. The decision for the Court is whether the nature and extent of the interventions have resulted in the applicant's trial becoming unfair".

[39] The ratio of the above judgments is that a judge has a right and where necessary a duty to ask questions, but also that there are certain definite limits on this right.

[40] In the course of the cross-examination the Appellant (who represented himself) had put his 13 questions to the complainant whereas the learned trial Judge had asked 86 questions.

[41] I wish to make specific reference to the following questions that were put to the complainant by the learned Trial Judge when the former was under cross-examination (page 189 of the court proceedings):-

*"**Judge:***	***What did he say to you?***
Witness:	*He said 'don't shout' my Lord*
Judge:	***He told you not to shout?***
Witness:	*He threatened me with a knife.*
Judge:	***You mean a person just walk into your bedroom with a cane knife and threatened yourself? So he told you not to shout. Then what did he do next?***
Witness:	*He told me to turn around my lord*
Judge:	***So you lay on your stomach?***
Witness:	*On the back my lord*
Judge:	***When you are lying on the bed you lying back***

Witness: *Yeah back*

Judge: ***And then when he told you to turn around to lie on your stomach straight down***

Witness: *Stomach face down he turn me*

Judge: ***Told me not to shout and to lie on my stomach. What did he do?***

Witness: *He twists my hand*

Judge: ***Twist what? He tied you? He tied your hand with what?***

Witness: *Black tape*

Judge: ***He tied your hands with a black type?***

Witness: *Black tape and a white cloth, My Lord.*

Judge: ***Why did he do this?***

Witness: *He kiss my vagina, My Lord.*

Judge: ***He kissed your vagina, what else?***

Witness: *Then he had sex with me, My Lord.*

Judge: ***What do you mean, Sex? Sex nowadays means a lot of things, what do you mean?***

Witness: *He penetrated my vagina, My Lord with his penis.*

Judge: ***And what happened after that? How long was it going for?Witness we are not here to prime to activities, but this kind of rape cases, all these things have to be brought up. We don't fill in the gaps, you works the... that's the nature of the proceedings. So he penetrated into your vagina with his penis. And how long was he penetrating your vagina for with his penis?***

Witness: *more than 5 minutes.*

Judge: ***Now witness at the time, what was your position. You being on your back or what?"***

[42] It is unfortunate that most of the questions put to the complainant by the learned trial Judge did not properly come from the counsel who appeared on behalf of the State, who was assigned with the task of leading the evidence of the complainant or from the appellant who defended himself.

[43] The above questions put by the learned Trial Judge to the complainant do not fall into the category of questions that would be put to a witness by a Judge in order to clear up a point that has been over looked or left obscure. Some of them are unnecessary judicial interruptions which could give the impression that the Judge had been partial towards the prosecution by assisting them. The learned trial Judge may not have intended to be impartial. However, his line of questioning of the complainant has compromised the salient principle; "*that not only must justice be done, it must also be seen to be done*". In an adversarial system the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of one party to the case.

[44] By adopting the above said line of questioning, the learned Trial Judge has gone beyond the limits of dropping the mantle of a Judge and assuming the role of an advocate. I am of the view that the nature and the extent of the interventions made by the learned trial Judge have resulted in the Appellant's trial becoming unfair which in the interest of justice warrants ordering of a new trial.

[45] In the above circumstances I hold that the 3rd ground of appeal is meritorious and the appeal based on the said ground should be allowed.

The Orders of the Court

1. Appeal is allowed.
2. Conviction is set aside.
3. New trial is ordered.
4. Appellant is remanded in custody and is to appear before the High Court within 14 days from the date of this judgment.

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Justice N. Bandara
JUSTICE OF APPEAL