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

CRIMINAL APPEAL NO. AAU 149 of 2015
(High Court No. HAC 077 of 2013)

BETWEEN : **BHUPENDRA KUMAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**
Fernando, JA
Nawana, JA

Counsel : **Mr M Yunus for the Appellant**
Mr A Jack for the Respondent

Date of Hearing : **11 September, 2019**

Date of Judgment : **3 October, 2019**

JUDGMENT

Prematilaka, JA

[1] I have had the benefit of reading in draft the judgments of my brothers Fernando, JA and Nawana, JA and I agree with Fernando, JA that the appeal should be dismissed and conviction affirmed. However, I wish to give some reasons of my own for the decision to dismiss the appeal.

[2] Both my brother Judges have set out the facts relevant to the appeal and therefore, it is not necessary for me to state them in detail. Following a trial in the High Court at Labasa, the appellant was convicted of three counts of rape and one count of indecently insulting or annoying a boy under 13 years of age. He was sentenced to a total term of 11 years imprisonment with a non-parole period of 10 years. The learned High Court judge had summarised the facts as follows.

> *'15. ……. On 3 August 2013, the complainant (PW1) was aged 11 years 10 months old. The accused (DW1) was aged 44 years 4 months old. The complainant lived with his parents and family in Macuata. The accused lived with his wife and son nearby in Macuata. The accused worked as a driver for a government department. He is a related to the complainant through his wife.*
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> *16. On 3 August 2013, according to the prosecution, the accused came to the complainant's house and invited the complainant and his grandmother to his house. They went and stayed there until the evening. They slept in the accused's house that night. According to the prosecution, PW1, his grandmother, the accused and his wife (DW2) and their son slept together in the sitting room. According to the prosecution, the accused came to PW1 in the night, and told him to suck his penis. According to PW1, he then sucked DW1's penis (count no. 1).*
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> *17. On 5 September 2013, the accused took PW1 to Basoga in Labasa. They slept at his mother-in-law's house that night. According to the prosecution, the accused came to PW1 at night and asked him to suck his penis. PW1 said, he then sucked his penis (count no.2). The next day, they returned to their houses in Macuata. On 29 September 2013, the accused invited the complainant to his house. They went to this house. No-one was at his house at the time. At his house, he closed the windows and the doors.*

He then took his clothes off. According to the prosecution, he then asked PW1 to suck his penis. PW1 was disgusted and refused to do the same (count no. 3)

18. On 5 October 2013, according to the prosecution, the accused and the complainant met at a nearby bus stop. The bus they went to catch had already left. The two decided to walk to the accused's house. While walking along the road, the accused asked the complainant to suck his penis. The complainant refused. The accused told the complainant that he will force him to do the same. The complainant complied. They went into a nearby bush and the complainant sucked the accused's penis (count no. 4). Thereafter, they went to the accused's place.'

[3] In Fiji no conviction could be set aside based on the premise that that it is unsafe and unsatisfactory but only on any of the grounds set out in section 23 of the Court of Appeal Act which permits the Court of Appeal to allow an appeal

(i) If it thinks that the verdict should be set aside because it is unreasonable or cannot be supported having regard to the evidence or

(ii) If it thinks that the judgment should be set aside on the ground of a wrong decision of any question of law or on any ground involving a miscarriage of justice. Still, the proviso to section 23 empowers the court to dismiss the appeal even if the point raised in appeal might be decided in the appellant's favour but no substantial miscarriage of justice has occurred.

[4] In **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98 the court of Appeal followed **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 where the Court of Appeal had stated with regard to the approach the appellate court should adopt in an appeal in the light of section 23 of the Court of Appeal Act in the following words.

'Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in R v Cooper (1968) 53 Cr. App. R 82.

Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.'

[5] Section 23 of the Court of Appeal Act in Fiji is similar to Section 4(1) of the Criminal Appeal Act, 1907 in the U.K which gave the Court of Appeal the authority to quash convictions in the following terms

'if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any grounds there was a miscarriage of justice'

[6] This provision was understood in the UK to mean that an appellate court would intervene only if there was no evidence on which (if uncontradicted) a properly directed jury could convict. However, this test must be understood in Fiji subject to the legal position that unlike in the UK the decision on guilt or innocence of the accused is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict **(**vide **Prasad v The Queen** [1981] 1 A. E. R 319**,** **Noa Maya v. State** Criminal Petition No.CAV 009 of 2015: 23 October [2015 FJSC 30]**,** **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 and **Abourizk v State** AAU0054 of 2016:7 June 2019 [2019] FJCA 98).

Appellant's grounds of appeal

[7] The appellant's first complaint is that the trial Judge had failed to give sufficient weight to the defence case, in particular the evidence of the appellant's wife. I find the following paragraphs in the summing up dealing with the appellant's case.

> '*20. On 27 October 2015, the first day of the trial, the information was put to the accused in the presence of his counsel. He pleaded not guilty to all the counts. In other words, he denied the three rape and indecent insult allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to give sworn evidence and called his wife as his only witness. That was his right.*
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> *21. The accused's case was very simple. On oath, he denied all the allegations against him. He said, at no time whatsoever, did he insert his penis into the complainant's mouth. He said, he did not insert his penis into PW1's mouth as alleged. He also denied the indecent insult allegations. As to his alleged confession to the police, in Prosecution Exhibit No. 1(A) and 1(B), he said he was forced by the police to give the same, and as a result, you should place no weight or value on the same, and disregard it.*
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> *22. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged on all counts, and acquit him accordingly. That was the defence's case.*
>
> *28. On oath, the accused denied ever inserting his penis into the complainant's mouth at anytime whatsoever. He denied all the allegations against him*
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> *32. You must consider all the evidence together. You have heard the evidence of all the prosecution and defences' witnesses…….'*

[8] It is true that the trial Judge had not directed the assessors to the specific evidence of the appellant's wife which relates only to the incident on 03 August 2013 (count 01) and 29 September 2013 (count 03). Given that the entire evidence was taken (27 October) and summing up (29 October) was concluded within 02 days, the entire evidence, which was very short, would have been very fresh in the minds of the assessors. In addition, the trial Judge in his judgment has said that he had reviewed the evidence led at the trial which

certainly includes the appellant's wife's evidence as well. Therefore, I do not think that lack of details of the appellant's wife' evidence in the summing up would have weighed so heavily against the appellant as to constitute a miscarriage of justice and certainly not a substantial miscarriage of justice.

[9] The appellant's second and third grounds of appeal relate to the trial Judge having failed to refer to voluntariness and truthfulness of his caution interview. The Judge addressed the assessors on the caution interview as follows.

> *'29. PC 4278 Arvin Maharaj (PW2), a police officer, gave evidence in Court. He said, on 22 October 2013, he cautioned interviewed the accused at Dreketi Police Post. The interview started at 12.20pm and concluded at 3pm on the same day. He asked the accused 64 questions and the accused gave 64 answers. PW2 said, he was given his right to counsels, other rights, formally cautioned, and was given the standard meal and rest breaks. PW2 said WPC 3166 Selina was the witnessing officer. The allegations were put to the accused. According to PW2, from questions and answers 25 to 33, 53, 54, 57 and 59, the accused admitted that the complainant only sucked his penis once.*
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> *30. When considering the above evidence, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact - in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.*
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> *31. In this case, the accused said he gave those statements. However, he said, the police forced him to do so. He said, they threatened to lock him up in Seaqaqa Police Station cell if he did not confess. The caution interview officer, PW2 said, he and WPC Selina did not assault, threaten or made false promises to the accused during the interview, or while in*

their custody. PW2 said, the accused gave his police statements voluntarily. The accused said, he made no complaints to the police or the Magistrate Court, about any police misbehaviour. If you accept the accused's confession, it will support the prosecution's case, and as a result, you are entitled to find the accused guilty as charged on all counts. If otherwise, you will have to work on the other evidence to make a decision on whether or not the accused is guilty as charged. It is a matter entirely for you.'

[10] Having examined several previous authorities the Court of Appeal in **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51 stated as a general proposition on how to direct the assessors on a caution interview as follows.

'20 (iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.'

[11] However, the Court of Appeal in ***Volau*** also correctly stated (referring to **Prasad v The Queen** [1981] 1 A. E. R 319 and **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30]) that the likely effect of any misdirection, non-direction or irregularity on the aspects of making, voluntariness, probative value (*i.e.* truth) and weight (*i.e*. sufficiency) of a confessional statement upon the decision of the assessors should be judged in the light of the now well-established position in Fiji that the decision on guilt or innocence of an accused is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict.

[12] The Supreme Court had earlier remarked in **Boila v The State** CAV005 of 2006S: 25th February 2008 [2008] FJSC 35 *'The adequacy of a particular direction will necessarily depend on the circumstances of the case'.*

[13] Before ***Volau*** the Supreme Court in **Khan v State** CAV 009 of 2013: 17 April 2014 [2014 FJSC 6] where the Petitioner's counsel had argued that the directions on how to approach the answers in the caution interview were inadequate and there were no adequate directions on weight, said that *' There is no incantation which must be read here. The required guidance need not be formulaic.'*

[14] The Supreme Court reinforced these remarks recently in **Tuilaselase v State** CAV0025 of 2018: 25 April 2019 [2019] FJSC 2 where the complaint was that the trial judge had misdirected himself when he failed to give any direction to the assessors and to himself on the truth and weight of the caution statement, by stating as follows.

> *'26.The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient....'*
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> In paragraph 38 referred to by the Supreme Court in ***Tuilaselase*** in the summing up as given below has no specific reference to the aspect of 'truth' and or 'weight'.
>
> *".....However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of facts, you are entitled to rely on them for or against the accused".*

[15] What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (*see* ***Volau, Boila,*** **McGreevy v Director of Public Prosecutions** [1973] 1 WLR 276, **Kalisoqo v R** Criminal Appeal No. 52 of 1984) which the trial judge had given in the summing up.

[16] Therefore, there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would

not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant.

[17] In the light of the summing up and the legal position discussed above, I cannot find fault with the trial judge as he had adequately dealt with all aspects of voluntariness, truthfulness and weight to be attached to the appellant's caution interview. Therefore, I do not think that there is any merit in appeal grounds 02 and 03.

[18] The appellant's last complaint arises from the so called recent complaint evidence. The counsel for the appellant submits that the trial Judge has failed to address the assessors of the delay in the complaint against the appellant.

[19] Obviously, a belated complaint is the opposite of a recent complaint. The exact date of the complaint in this case is not in evidence. A teacher of the complainant had made the complaint to the police. The complainant had said that the appellant had asked him not to tell anyone and therefore, he had not complained to his parents or reported the incidents to the police. He also had thought that his parents would not believe him.

[20] Therefore, there is no question of the trial Judge directing the assessors on recent complaint evidence, for there is no evidence of such a complaint that could be regarded as a recent complaint. Thus, no recent complaint direction was needed in this case. As for the delay, the complainant had explained why he had not complained and his evidence was before the assessors. No serious challenge had been mounted to the complainant's evidence on the basis of the belated complaint. Arguably, even if the delay in reporting the matter to the police had been due to the complainant having been a willing partner, still it could not have been a defence as he was under 13 years and consent could not have been an exculpatory factor. Therefore, I see no merit in this ground of appeal too.

[21] The complainant had given clear evidence of the incidents that could sustain the four counts in the information. His evidence had withstood the rigour of cross-examination and come out unshaken. There is no improbability in his version of events. If believed, his evidence alone was quite sufficient to bring home convictions on all counts and the assessors and the trial Judge had believed him. They had seen the demeanour of all witnesses which is a considerable benefit the appellate court does not enjoy, particularly in a case such as this.

[22] The appellant had in his evidence admitted three out of four instances referred to by the complainant though he had rejected any sexual activities between the two on those occasions. His wife who is obviously not a disinterested witness, had said at the trial that on 03 August 2013 she saw nothing unusual because she was asleep. Evidence shows that there could have been ample opportunity for an act of oral intercourse to take place between the appellant and the complainant in that night.

[23] According to the appellant and his wife, the complainant was on very good terms with them and he had no reason to lie or falsely implicate the appellant. The complainant also had testified that the appellant *'is always very nice to me. When I say no to sucking his penis, his tone is raised a bit. He is very nice to me and when he asked me to suck his penis, I suck his penis.'*

[24] The appellant's caution interview contains an admission of his having performed one act of fellatio with the complainant. He had said that he made the caution interview under oppression. However, in his evidence at the *voir dire* inquiry under cross-examination, the appellant had said *'I gave my statements voluntarily.'*

[25] In all circumstances of the case and evidence available, I agree with the learned trial Judge when he said in the judgment

> *'6. On the evidence, I agree with the three assessors' verdict, and I accept their opinions. I accept the complainant's evidence and version of events. He was credible as a witness. The accused appeared evasive when answering questions. As a result, he was not credible as a witness. I reject his denials.'*

[26] I shall conclude by stating that on the totality of the evidence led at the trail, I cannot say that the opinion of the assessors and the verdict of the trial judge are unreasonable. Both can be supported having regard to the evidence. No miscarriage has happened in the course of the trial. Nor is there any wrong decision of any question of law. The appellant has not demonstrated any basis under section 23 of the Court of Appeal Act to allow his appeal.

[27] Accordingly, I agree with Fernando, JA that the appeal should stand dismissed.

Fernando, JA

[28] I have read the judgment in draft of my brother Judge Nawana JA, and with due respect wish to disagree with his decision to allow the appeal, quash the convictions and acquit the Appellant of all the charges.

[29] He has set out in detail the charges, the manner the case proceeded before the Trial Court up to the conviction of the accused and his sentencing, the application for leave to appeal sought from a Single Judge of this Court, the refusal by the Single Judge to grant leave on all the grounds raised, and the renewal of the Appellant's application on the same grounds urged before the single Judge against conviction, before the full Court. He has also set out the prosecution and defence evidence that was before the Trial Court.

[30] The evidence before the Trial Court was brief, namely that of the victim A. N, the police officers who recorded the caution statement and charged the Appellant, the proceedings pertaining to the voir dire and that of the Appellant and his wife. The evidence of both the prosecution and defence witnesses had been concluded in one day, namely on the 27th of October 2015 and the summing up had been two days thereafter, namely on the 29th of October 2015. Since my brother Judge had set out the evidence in his judgment, I do not intend to repeat it in my judgment.

[31] There had been a discrepancy between the evidence of the victim A. N. and the caution statement of the Appellant, admitted after a voir dire. The discrepancy was to the effect, that while the victim had testified as to three separate acts of rape and an act intended to

insult the modesty of A.N committed on four different dates; the Appellant had admitted in his caution statement only to one act of rape as set in count 1 on the date as stated in count 1. There had also been a discrepancy between the evidence of A.N. and the caution statement of the Appellant, even as to the place and time, the said act of rape took place. The Appellant testifying at the trial had denied even the said act of rape which he had admitted in his caution statement. In my view it is not unusual for an accused to exonerate himself as much as possible from the allegations made against him, and not a matter that should be specifically drawn to the attention of the Assessors by the Trial Judge.

[32] On the face of it, the prosecution had presented two contradictory versions in the prosecution case itself, namely that of the victim A.N. alleging three acts of rape and an act intended to insult his modesty and the caution statement of the Appellant in which he admits to only one act of rape. As stated earlier it is not unusual for an accused to go back on his caution statement to limit his liability to the minimum or exonerate himself.

[33] It is not uncommon for the prosecution to present the accused version also as part of the prosecution case to find some support for its case. In **Pearce** [1979] 69 Cr App R 365 it was said:

> *"The Court of Appeal could see no reason for casting doubt on the well-established practice, on the part of the prosecution, to admit in evidence all unwritten, and most written, statements made by an accused person to the police, whether they contain admissions or whether they contain denials of guilt… If it is a mixed statement, i.e. a statement containing both inculpatory and exculpatory parts…the whole statement is admissible*."

[34] It is probably for this reason that the learned Trial Judge had stated in his summing up: "…*If you accept the accused's confession it will support the prosecution case, and as result, you are entitled to find the accused guilty as charged on all counts. If otherwise, you will have to work on the other evidence to make a decision on whether or not the accused is guilty as charged*…" In making this statement the learned Trial Judge has directed the Assessors to look into the truthfulness of the confession. The very fact that the learned Trial Judge had said "*If otherwise*…", again goes to show he was dealing with

the truthfulness of the statement. The statement only means what it says, namely it will 'support' the prosecution case and not that it will 'prove' the accused guilty as charged on all counts.

[35] The learned Trial Judge had at paragraph 21 stated: "*As to his alleged confession to the police, in Prosecution Exhibit No 1(A) and 1(B), he said he was forced by the police to give the same, and as a result you should place no weight or value on the same, and disregard it*." Having said so the learned Trial Judge had at paragraph 29 of his summing up specifically asked the Assessors to consider whether the Appellant made the confession voluntarily, whether in fact the Appellant made the statements contained therein, and whether they are true. Thus no prejudice would have been caused to the Appellant in any way.

[36] The probability of the version of A.N. which goes to his credibility was a matter that had to be considered in the light of the evidence in this case. In this regard A.Ns version had to be considered along with that of the Appellant and his wife Sunila. The Appellant at the trial had testified to the effect that he had been with A.N. on three of the four occasions referred to in the charges.

[37] Sunila's evidence however is only in relation to the first count of rape, namely the one on the night of 03/08/2013. In my view the version of A.N is not so improbable as to make it incumbent upon the Trial Judge to give a special direction to the Assessors, on Sunila Devi's evidence as this was a short trial as stated at paragraph 3 above. Thus the evidence of both prosecution and defence witnesses who testified at the trial would have been very much fresh in the mind of the Assessors. Assessors in my view could have made up their own mind as regards this matter after seeing the demeanour and the manner the victim A.N testified before them, even without a specific direction by the Trial Judge. Even without the evidence of Sunila Devi, the Assessors could have decided on the probability or improbability of the version of the victim A.N, relying only on A. N's and the Appellant's evidence, that there were others sleeping in that room. It is noted that Sunila Devi is the wife of the Appellant.

[38] The learned Trial Judge had at the commencement of the summing up told the Assessors: *"On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves*." This, in my view was sufficient direction to the Assessors in regard to acceptance or rejection of Sunila Devi's evidence, taking into consideration as mentioned earlier, the short duration of the trial. An appellate court should be cautious in interfering with a finding of fact by the Assessors and the Trial Judge and should do so only where the evidence is so improbable as to make the verdict perverse.

[39] The question had arisen whether the failure of the learned Trial Judge to give a direction to the Assessors on divisibility of credibility in relation to the evidence of the Appellant in view of his denial while testifying at the trial of the single act of rape which was admitted in his caution statement had caused him prejudice. I am of the view giving such a direction would have caused the Appellant more prejudice as there would have been a likelihood that the Assessors would have rejected the Appellant's version while testifying at the trial, completely. As stated earlier accused do deny their caution statements often.

[40] The issue as to the failure on the part of the trial Judge to direct the Assessors in regard to the delay by about 2 ½ months in making the complaint as regards the first act of oral rape has to be viewed in relation to the age of the victim, who was only 11 years old, the fact that the Appellant was an elder 44 years old and a relation of him and the fact that the Appellant had told A.N. "not to tell anyone". It was after continuation of 3 sexual acts thereafter that A.N decided to report the incidents. The point made is, had it stopped after the first act, the matter may have never come to light. The very fact that A.N. complained to a teacher at the school he was attending indicates the embarrassment he was faced with after the initial act of oral rape. In fact A.N had stated while testifying that he did not complain to his parents because he thought they will not believe him as they were very close to the Appellant's family. Further the Appellant had been very nice to him. The issue of delay would have had some significance had there been evidence of a motive to fabricate a case against the Appellant. The Appellant had not alleged any motive to fabricate a case against him. In fact the Appellant testifying had said: "I treat him like a son. There is no

dispute between me and A.N. and his family. He has no ill feeling to me He has no reason to lie about the rape allegation against me". I am therefore of the view that the non-direction in this regard would not have caused a substantial miscarriage of justice.

[41] For the reasons set out above I am of the view that the appeal be dismissed and the convictions on all 4 counts be confirmed. Since the appeal on sentence was abandoned the sentences imposed by the learned Sentencing Judge should stand.

Nawana, JA

Introduction

[42] This is an appeal against a conviction by the High Court, Suva, where the accused-appellant (appellant) stood charged on four counts on the basis of the information presented by the Director of Public Prosecutions. The charges in the four counts were as follows:

First Count
Statement of Offence

RAPE : Contrary to section 207 (1) and (2) (c) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

BHUPENDRA KUMAR on the 3rd day of August 2013 at Dreketi, Macuata in the Northern Division penetrated the mouth of **A.N.** a 12-year-old boy with his penis.

Second Count
Statement of Offence

RAPE : Contrary to section 207 (1) and (2) (c) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

BHUPENDRA KUMAR on the 5th day of September 2013 at Basoga, Labasa in the Northern Division penetrated the mouth of **A.N.** a 12 year old boy with his penis.

Third Count
Statement of Offence

INDECENTLY INSULTING OR ANNOYING ANY PERSON: Contrary to section 213 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

BHUPENDRA KUMAR on the 29th day of September 2013 at Dreketi, Macuata in the Northern Division intended to insult the modesty of **A.N.** by showing and asking the said **A.N.** to suck his penis an act not liked by the said **A.N.**

Fourth Count
Statement of Offence

RAPE : Contrary to section 207 (1) and (2) (c) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

BHUPENDRA KUMAR on the 5th day of October 2013 at Dreketi, Macuata in the Northern Division penetrated the mouth of **A.N.** a 12-year old boy with his penis.

[43] The victim was a twelve-year old boy, whose name is anonymized and referred to as AN for purposes of reference in this judgment. The appellant was a relative of AN.

[44] The conviction against the appellant was pursuant to unanimous opinions of the assessors on 29 October 2015, after trial. The appellant was, thereupon, sentenced to an eleven-year term of imprisonment in respect of each count of rape; and, to a term of six month-imprisonment in respect of the single count of indecently insulting or annoying the victim.

[45] Each term of eleven-year imprisonment, imposed for the counts of rape, was ordered to run concurrent with each other; and, with the term of six month-imprisonment imposed for the count of indecent assault. The operative term, which was eleven years in length, began to run with effect from 30 October 2015, the date of the sentence. The appellant was further ordered to serve a minimum term of ten years before being eligible for parole.

Application for Leave to Appeal

[46] The appellant preferred a timely application for leave to appeal on five grounds against the conviction; and, one ground against the sentence, on 19 November 2016. The ground against the sentence was, however, abandoned before hearing into the leave to appeal application.

[47] The application for leave to appeal against the conviction was nevertheless pursued on four grounds of appeal at the hearing on 03 February 2017 before a single Justice of Appeal of the Court of Appeal. The fifth ground of appeal against the conviction was abandoned.

Grounds of Appeal

[48] The four grounds, upon which leave to appeal had been sought against the conviction, were as follows:

> *(i) The learned trial Judge erred in law and in fact when he failed to give adequate, sufficient weight to the evidence of the appellant and the defence witness;*
>
> *(ii) The learned trial Judge has erred in law and misdirected the assessors about the evidence contained in the caution interview of the appellant in respect of its truth and/or credibility and the weight to be given to the confessions;*
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> *(iii) The learned trial Judge erred in law and in fact when he failed to direct the assessors that prosecution bears the burden to prove beyond reasonable doubt that the confession was voluntarily obtained; and,*
>
> *(iv) The learned trial Judge erred in law and in fact when he failed to give any direction or guide the assessors in regard to early complaint in sexual offences causing substantial prejudice to the appellant.*

[49] After hearing submissions of the parties, the application for leave to appeal was refused by the single Justice of Appeal on 07 February 2017 on the basis that grounds urged for leave to appeal against the conviction were not arguable.

Renewed Application for Leave to Appeal

[50] (i).The appellant, having been dissatisfied with the decision of the single Justice of Appeal, has made this application to renew his plea for leave to appeal against the conviction and also against the sentence before the Full Court. The grounds against the conviction are same as those filed initially in the leave to appeal application, as noted above.

(ii).The renewal application dated 15 April 2017 made by the appellant from the Corrections Centre appears to have been made in terms of Section 35 (3) of the Court of Appeal Act, which enabled the appellant to have his application for leave to appeal determined by the Full Court after its refusal by the single Justice of Appeal.

[51] The ground against the sentence, which remained abandoned, was also urged in the renewed application for leave to appeal as follows:

> *"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 provisions of Section 27 of the Prison and Correction Service Act, 2006."*

Hearing before Full Court

[52] At the hearing before Full Court, learned counsel, however, abandoned the application for leave to appeal against the sentence and confined himself to the four grounds urged against the conviction.

[53] Learned counsel for the appellant made submissions in support of each ground of appeal specifically referring to inadequacies of the directions of the learned judge to the assessors and relied on the written-submissions as well.

[54] Learned counsel for the state made submissions in response and relied on the written submissions dated 02 September 2019. Learned counsel did not dispute the right of the appellant to seek a renewal in terms of Section 35 (3) of the Court of Appeal Act upon the application for leave to appeal being refused by a single Justice of Appeal. It was the position of the learned counsel that, whether leave was granted or not, the Court of Appeal was required to consider the matter as provided for under Section 23 (1) (a) of the Court of Appeal Act.

[55] Other than being reliant on the applicable provisions of the Court of Appeal Act, as noted above, the application for renewal of the plea for leave to appeal *per se* was not contested by the learned counsel for the state.

[56] It is necessary to consider the evidence presented at the trial and the contents of the summing-up of the learned judge for this court to conclude whether the conviction had been rightly entered according to the law and the facts of this case in light of counsel's submissions.

Evidence for the Prosecution at the Trial

[57] At the trial, the prosecution presented only the evidence of the victim, AN, and Police Constable Arwin Maharaj, who had recorded the statement of the appellant under caution. The statement was marked and produced at the trial as PE-1A and admitted into evidence.

Evidence of AN

[58] Evidence of AN was presented in relation to each act as referred to in the information from 03 August-05 October 2013. The following was the summary of evidence of AN:

> *(i) AN came to the house of the appellant, who was a relative of his, with his grandmother on 03 August 2013 and went to sleep in the night. He was sleeping with the grandmother and the appellant's son. The appellant and his wife were sleeping in the same sitting room. The appellant had got him to suck his penis after making AN to be on his knees around 9.30 p.m. while the grandmother, who was about 50 years of age, and the appellant's son were sleeping next to him. The appellant's wife was only twelve footsteps away from the point of the incident.*
>
> *(ii) The appellant took AN to Labasa with the permission of AN's mother on 05 September 2013. They had gone to an appellant's relative's place in Basoga where an old lady was occupying the house. While AN was sleeping, the appellant got him to suck the penis, which he had, unwillingly though, obliged.*
>
> *(iii) AN was taken to the appellant's house on 29 September 2013 when there was nobody and wanted him to suck his penis after closing all doors and windows. AN did not suck his penis this time.*

(iv) The appellant, after calling AN on a telephone, wanted him to come to the bus shelter on 05 October 2013. As the bust had left, the appellant and AN had walked up to the house of the appellant around 1.00 p.m. While walking, AN was taken inside a wayside bush where the appellant got him to suck the penis."

[59] It was not in dispute that AN had not told about the incident to anyone, at least in relation to the alleged incident on 03 August 2013, when he was sexually invaded by the appellant for the first time in the midst of many people around him sleeping in the sitting room of the appellant. The alleged acts of sexual assault were disclosed for the first time on or about 21 October 2013 to a teacher at the school where AN was attending. The circumstances that led to that revelation were not clear on evidence.

Evidence of the Police Interviewer

[60] The prosecution adduced the evidence of Police Constable, Arwin Maharaj, who had interviewed the appellant under caution and the statement recorded. Woman Police Constable, Selina, was witnessing the caution interview. The caution interview statement of the appellant was marked and produced as PE-1A at the trial. It contained following admissions incriminatory of the appellant:

Q28 : Did you approach him?
A : Yes, he asked me to suck my penis.

Q29 : Then what did you do?
A : I stood up and he took off my pants and started sucking my penis.

[61] Answering Q 59, the appellant stated that he had penetrated the mouth of AN only once and denied that he had sexually invaded AN on any other day as alleged by the prosecution. The appellant said that the single act of penetration took place on 03 August 2013 during the daytime under a guava tree contrary to the claim by the victim that the act took place around 9.30 in the night of that day in the sitting room of the appellant.

Defence Case

[62] At the close of the prosecution case, the defence was called for. The appellant did not contest that there was a case for the appellant to answer.

[63] The appellant gave evidence and denied each allegation of sexual assault on AN in relation to the dates of 03 August 2013; 05 September 2013; 29 September; and, 05 October 2013 that were referred to in the information and testified to by AN. Evidence of the appellant, therefore, was contrary to what he was alleged to have told the police interviewer under caution marked PE-1A.

[64] The appellant called his wife, Sunila Devi, in support of his defence. Sunila Devi's evidence was that AN, who was a distantly related nephew of hers, had come to her place with his grandmother on 03 August 2013. The appellant, the witness, their son, AN and his grandmother had slept in the sitting room in that night. Sunila Devi said that she had not seen or heard anything unusual. As she woke-up around 5.00 a.m. following morning, no complaint was made to that effect or even later.

Two Modes of Evidence in Prosecution case: Two Versions of Prosecution

[65] An examination of the case, as it was presented to court, shows that the prosecution had relied on two modes of evidence:

(i) Firstly, evidence of AN who had spoken of three instances of penile penetration of the mouth and one instance of sexual assault by the appellant as alleged in the information and testified to by AN; and,

(ii) Secondly, the caution interview statement of the appellant marked and produced as PE-1A where the appellant had accepted only one act of penetration and denied the other acts of sexual invasion.

Matters in Issue at Trial

[66] The effect of such evidence is that the case for the prosecution was made to be consisting of two different versions within the prosecution itself leaving the assessors, being the primary triers of fact, to determine which version that they should accept and act upon. This undeniably cast a duty on the learned trial judge to address the issue in his summing-

up in a manner that it is comprehended by assessors and consider that issue when their opinions are rendered for the learned judge to make his judgment.

[67] In addition to the *inter se* contradiction within the prosecution case, the issues before the assessors got compounded by the appellant's evidence as well. The appellant, as noted above, disputed the evidence of AN by asserting that he had not sexually invaded the person of AN resulting in a total denial of all four charges against him. This denial was in conflict with the confessional statement that the appellant was alleged to have made in the caution interview statement (PE-1A) admitting only one act of penetration during the daytime on 03 August 2013. The situation required the assessors to look at the making of the caution interview statement more closely to decide both on its voluntariness and the truthfulness after being rightly directed by the learned trial judge.

[68] The case as a whole, in the circumstances, involved issues of credibility in relation to AN and the appellant. It also involved issues of probability insofar as the version of AN is concerned when one considers the evidence of AN that he was raped by the appellant inside a sitting room which was occupied by the inmates of the house including Sunila Devi, the wife of the appellant around 9.30 p.m. on 03 August 2013. It is also important to consider the evidence of AN in order to measure-up his credibility and the probability of his story when he said that he did allow the appellant to penetrate his mouth when it could be noticed by an onlooker or passer-by but not when it was attempted in a closed-door house on 29 September 2013 when such act could have gone unnoticed.

[69] Moreover, the learned trial judge, in paragraphs 15-19 of the summing-up, had summarized the prosecution case only in relation to the evidence of AN when, in fact, the caution interview statement marked as PE-1A, too, was presented as part of the prosecution case, as noted above. This misstatement had the effect of affecting the trial and its outcome. The learned judge's reference that the evidence of the appellant in court constituted the defence case confirmed the fact that it (the caution interview statement) did not form part of the defence case. The caution interview statement could not, in any event, have formed the defence case in view of appellant's denial of making such a statement.

The above represents a brief account of factors that had surfaced on the face of the record in this case, which, in my opinion needs to be taken into account in the determination of the appeal before this court.

Consideration of the Appellant's Case in Appeal

[70] I would now consider the submissions of learned counsel for the appellant as follows:

Ground (i): Failure to give sufficient weight to defence case

[71] It was submitted that the learned trial judge had only made a passing reference to the evidence of the wife of the appellant, Ms Sunila Devi, who had testified in appellant's defence. It was contended that due weight should have been attached to the evidence of Sunila Devi as any wrongful conduct on the part of the appellant penetrating the mouth of the victim, as alleged by the prosecution, should have been seen by Sunila Devi; or, such a wrongful conduct could not have been perpetrated on the victim without being noticed by Sunila Devi as the offences were claimed to have been committed inside her sitting room where she was sleeping with few others including appellant's son around 9.30 in the night.

[72] Learned counsel further submitted that the evidence of Sunila Devi was so important to have been dealt with by the learned judge as her evidence had brought in the issues of improbability of the incident especially in relation to the penile penetration on 03 August 2013 as testified to by the victim.

[73] The learned trial judge in paragraph 20 of the summing-up referred only to the fact of wife, Sunila Devi, giving evidence for the appellant. The learned judge did not advert the attention of the assessors on the need to assess and evaluate Sunila Devi's evidence and attach weight, if any, to her evidence.

[74] It is clear on a perusal of the summing-up that the learned judge had not invited the assessors to consider the test of probability in relation to the evidence of AN, which was crucial to have been considered on the face of evidence of AN. It became even more crucial in light of the testimony of Sunila Devi in court that she had not heard or seen anything unusual in that night; and, nothing had been complained of in the least, until the matter was brought to the notice of police.

[75] In my view, it was still open for someone to assume for the incident to have occurred in the way AN had claimed to have happened. But, for a conviction to have been entered through a due judicial process in a trial, the assessors must have been told to take relevant matters into their account by giving necessary directions by the trial judge. That is a duty cast upon a judge, breach of which would render the opinions of assessors and the consequent judgment of court, unsafe and unsustainable.

[76] In **R v Lawrence** [1981] 1 All ER 974 at 977, Lord Halisman pronouncing on how directions to the jury, which is the counterpart under the English system, should be given, stated that:

> *"A direction to the jury should be custom-built to make the jury understand their task in relation to particular case. Of course, it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments of both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*

[77] The Fiji Court of Appeal in the case of **Wilisoni Dakunaivei Tamaibeka and Another v State** Criminal Appeal No AAU0015 of 1997S; 08 January 1999, having relied on the English case of **R v Clayton** [1948] 33 Cr. App. R. 22 at 29 laid down the principle as follows:

> *"The duty of a judge in any criminal trial, or, for the matter of that, in any civil trial, is adequately and properly performed if he gives the jury an adequate direction on the law, an adequate direction upon the regard they are to have to particular evidence on such matters ... and*

> *he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, of the real matters upon which the defence is based. He must give to the jury a fair picture of the defence but that does not mean to say that he is to paint in the details or to comment on every argument, which has been used or to remind them of the whole of the evidence…"*

[78] Moreover, in **R v Wilkes and Briant** [1965] VR 475, 479, the ruling of the Supreme Court of Victoria is on point, where it was held that:

> *'Important amongst the necessary safeguards is the established rule that it is the judge's duty to put the defence fairly to the jury. That rule cannot, save in quite special circumstances, be departed from, without serious risk of a miscarriage of justice*.'

Upon consideration of the summing-up in light of the two irreconcilable versions within the prosecution case itself; issues of probability and improbability; and, the absence of adequate directions on the defence case, I am of the view that the learned trial judge had not conformed, as matters of law, to the above principles, which have hardened as inviolable rules in a criminal trial in Fiji.

[79] In the result, I hold the above ground of appeal as having substance.

Grounds (ii) and (iii): Confessional Statement of the Appellant

[80] Learned counsel, having relied on his written-submissions, referred to the insufficiency of the directions to the assessors in relation to the confession of the appellant as the learned judge had only stated that if the confession was not accepted they would have to look for other evidence in order to find the appellant guilty of the offence. The complaint of the appellant on the point was that the directions did not address the issues of voluntariness and the truthfulness of the confession, which had led the assessors to act on the confession of the appellant without properly appreciating the law on the acceptability of a confession.

[81] It was submitted that the learned judge had not considered the failure on the part of the prosecution to lead the evidence of Woman Police Constable, Selina, against whom the

appellant had alleged that he was threatened and forced him to sign the caution interview statement.

[82] Fiji Court of Appeal in **Chand v State** [2016] FJCA 61; AAU0015.2002 [27 May 2016] following the English decision in the case of **Regina v Mushtaq** [2005] UKHL 25 considered the law in dealing with a confession being admitted into evidence. It was held that:

> *The law is clear that where a judge has ruled on a voir dire that a confession is admissible, the jury is fully entitled to consider all the circumstances surrounding the making of the confession to decide whether they should place any weight on it, and it is the duty of the trial judge to make this plain to them.*

[83] The confession, which was marked as PE-1A, contradicted the version of AN within the prosecution itself in that the appellant had admitted only one act of penetration during the daytime on 03 August 2013 under a guava tree. The rest of allegations was denied.

[84] The prosecution must have advised itself on what modes of evidence it relied on, before they were put in evidentiary form at trial. This essentially was an important prosecutorial judgment that had to be made after meticulously examining the material it had in its possession before or at the trial. That is because the presence of two or more versions within the prosecution case itself would make the prosecution case suffer in terms of its acceptability as the standard of proof set for a prosecution case is beyond reasonable doubt. Any doubt, by operation of the law, is required to be resolved in favour of an accused-person. And, any reasonable doubt is bound to arise when the prosecution itself is presenting two irreconcilable positions relating to the charges against the appellant.

[85] As noted above, the case got further compounded in view of the denial of allegations in the four charges and the contents of the caution interview statement by the appellant in his testimony before court. This, in my view, placed the learned judge in a situation where he was required to have given more pertinent directions addressing the issues of voluntariness of the confessional statement of the appellant; its weight, if it is accepted; and, the

credibility and trustworthiness of the victim and the appellant in their assertions in advancing their respective cases.

[86] The learned judge, in paragraph 31, instead, summed-up on the relevant issues only in the following manner:

> *...PW2 said, the accused gave his police statements voluntarily. The accused said, he made no complaints to the Police or Magistrate Court, about any police misbehavior. If you accept the accused's confession it will support the prosecution's case, and as a result, you are entitled to find the accused guilty as charged on all counts. If otherwise, you will have to work on the other evidence to make a decision on whether or not the accused is guilty as charged. It is a matter entirely for you.*
>
> [Underlined for emphasis]

[87] What the learned judge had said was that if the assessors accepted the appellant's confession it would support the prosecution case, which entitled them to find the appellant guilty on all counts. This is manifestly wrong and it was a misdirection. Any acceptance of the appellant's confessional contents would, on the contrary, have displaced the prosecution case because the appellant had admitted only one act of penetration only on 03 August 2013, that again under different circumstances quite contrary to what AN had testified to.

[88] A direction should, in fact, have been given to the contrary effect stating that if the assessors had accepted the caution interview statement, the appellant could have been found guilty only in respect of one count of rape as he had admitted only one act of penetration of the mouth of AN. That again is possible after giving directions on divisibility of credibility of the appellant in view of the appellant's denial of even the single act of penetration in his evidence before court.

[89] I am of the view that the misdirection by the learned trial judge had the effect of causing prejudice to the appellant rendering the sustainability of the conviction in serious issue. The sustainability of the conviction could also be called in question in view of the absence

of required direction on divisibility of credibility which surfaced on the face of the trial in view of conflicting assertions made by the appellant.

[90] Considering the grounds of appeal in (ii) and (iii), in a broader sense than that were couched by the appellant, I would consider them to have succeeded.

Ground (iv) : Recent Complaint

[91] Learned counsel submitted that the learned trial judge had not dealt with the issue of delay in making a complaint on the alleged conduct of the appellant sexually invading the person of the victim, which could have rendered the credibility of the victim questionable.

[92] In **R v Islam** [1998] Cr. App. R. 22 and **R v NK** [1999] Crim. LR 980, the English Court of Appeal underlined the necessity to direct the jury on the evidential significance of a recent complaint in a sexual case. In the present case, the learned trial judge gave no directions on the significance of the recent complaint evidence especially considering the opportunities for the boy of AN's age to complain at or about the occurrence of the alleged asexual invasions by the appellant.

[93] In my opinion, the significance of a recent complaint is a matter that should be left to be decided by the assessors initially after being fully directed by the learned judge. Failure to do so, in my view, would affect the validity of the opinions of the assessors and the resultant conviction by the learned judge.

[94] I consider this ground as having merit.

[95] In a case where the directions to the assessors at the end of a trial were found to be deficient, the ruling in the case of **Von Starck v The Queen** [2000] 1 WLR 1270 of the Privy Council at p1275 would, in my view, be very appropriate and instructive for the proper conduct of the proceedings. It was held:

> *"The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them."*

[96] The Fiji Court of Appeal in **Tamaibeka v Katonivualiku**; Crim. App. No.AAU0015 of 1997S; 08 January 1999, a similar view was taken holding that:

> *It is our view that in the present case the summing up lacks those essential qualities of objectivity evenhandedness and balance required to ensure a fair trial. In the light of that conclusion the conviction cannot stand. This is not a case for the exercise of the proviso to Rule 23(1) of the Court of Appeal Rules.*

[97] When I consider the overall effect of the conduct of the prosecution; the summing-up by the learned trial judge on the evidence; and, his directions on the law, I am not satisfied that the trial had reached the anticipated level of proof beyond reasonable doubt in relation to the charges in the information to uphold the conviction. I have been mindful of the fact that allegations of sexual assault on a boy below thirteen years of age are reflective of a grave crime. Nevertheless, the gravity of the crime alone cannot offend the inviolable principles of law concerning burden of proof beyond reasonable doubt in a properly conducted trial, to which an accused-person is unreservedly entitled.

[98] I have considered the provisions of Section 22 (3) of the Court of Appeal Act in order to explore the possibility of a retrial. I am not inclined to take that course of action given the time elapsed and in the interests of the alleged victim who by now had reached his youth.

[99] For the reasons set-out above, I would allow the application for renewal of the application for leave to appeal; grant leave to appeal on the four grounds urged; and, allow the appeal.

The Orders of the Court are (by majority):

1. Appeal is dismissed.
2. Conviction is affirmed.

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL