

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

CRIMINAL APPEAL NO: AAU 004 OF 2015  
(High Court Criminal Case No: HAC 099/2013 [Suva])  
(Magistrate's Court at Nasinu Criminal Case No: 273/13)

BETWEEN : SAKIUSA TOKALAU *Appellant*

AND : THE STATE *Respondent*

Coram : Prematilaka JA  
Fernando JA  
Nawana JA

Counsel : Ms. S. Nasedra for the Appellant  
Mr. Y. Prasad for the Respondent

Date of Hearing : 11 February 2019

Date of Judgment : 7 March 2019

JUDGMENT

Prematilaka JA

[1] I have read in draft the judgment of Fernando JA and agree with the reasons and conclusions therein.

**Fernando JA**

- [2] The Appellant had appealed against his conviction for the offence of rape.
- [3] The Appellant had been charged in the High Court at Suva on one count of rape, and three counts of sexual assault.

- [4] The count of rape reads as follows:

*"Statement of Offence*

*Rape: Contrary to 207(1) and (2) (b) of the Crimes Decree No 44 of 2009.*

*Particulars of Offence*

*Sakiusa Tokalau, on the 15<sup>th</sup> day of February 2012, at Nadawa in the Central Division, penetrated the vagina of XXXX, with his finger, without her consent."*

- [5] The three counts of sexual assault charged the Appellant for unlawfully and indecently assaulting the victim XXXX, by touching her breasts, kissing her neck and fondling her breasts between the periods of 15<sup>th</sup> of February 2012 to 31<sup>st</sup> January 2013.
- [6] The victim was born on 3rd May 1998 and had been at the age between 13-15 years when the incidents the Appellant had been charged with, took place.
- [7] All three Assessors had found the Appellant guilty of the three counts of sexual assault and not guilty of the count of rape. The learned Trial Judge while accepting the opinion of the Assessors on the counts of sexual assault had rejected their opinion on the charge of rape and convicted the Appellant of all the charges. The learned trial Judge had sentenced the Appellant in respect of the charges for a total period of 12 years and 6 months, fixing non-parole period of 10 years.
- [8] The Appellant had sought the leave of a single Judge of this Court to appeal against conviction on the following grounds:

- i. *"The Learned Trial Judge erred in law when he did not properly consider the consistency of the Appellant's evidence in relation to all counts of charge more particularly on the count of rape from the record of his interview to the evidence he said in the trial which makes him a very credible witness thus resulted in miscarriage of justice.*
- ii. *The Learned Trial Judge erred in law and in fact when he did not direct the assessors on the lateness of report to the police." (verbatim)*

[9] The Learned single Judge of this Court had refused leave on both grounds on the basis that they are unarguable, by his Ruling of 17<sup>th</sup> October 2017.

[10] The Appellant did not file any submissions on his appeal to the full Court and informed this Court that he is relying on his submissions made when seeking leave from the single Judge. This is in fact a renewal of his application for leave to appeal to the Full Court of Appeal pursuant to section 35(3) of the Fiji Court of Appeal Act. At the hearing before us we decided to grant leave to appeal and proceeded to hear the appeal

#### Evidence in Brief

[11] The victim XXXX testifying before the Trial Court had stated that her father had died in 2009 and she lived with her mother, brother and 4 sisters in her maternal parents' house. She was the second eldest in the family and was studying in Form 3 at the time of the incident. The Appellant who was her mother's boyfriend also lived with them since 2011. One night in the month of February 2012, after the Appellant's birthday party (which was on the 15<sup>th</sup>), she had been sleeping, when the Appellant had come beside her bed and had started to lick her, touched her breasts and had pulled down her pants. She had felt something big and round in her vagina, which was painful, but had stated that she did not feel it was any object like a stick. According to her, the Appellant caused it. She had stayed up all night crying. She had not screamed because she was scared that the appellant might hit her. The Appellant had run away on hearing noises from her mother's room. She had not told her mother about it, as she knew that her mother liked the Appellant and was happy with him. She had later told her grandmother about the whole incident and that is how the matter came to be reported to the police. At first, the grandmother had told her to think about her sisters.

According to the victim there had been other instances where by the Appellant had touched her breasts and bit her neck. She had stated, "*I didn't like*" what he was doing but had pretended as if nothing happened. She had asked a friend to come and stay in the house so that she would not be alone. It had been suggested to the victim in cross-examination that when the Appellant kissed her, she had also kissed him and that she did not scream because she consented to the Appellant kissing her and touching her and thus a willing participant and that was also the reason that she had not reported the matter to her mother. The victim had denied these suggestions. The suggestion that victim had made up the version of the Appellant removing her panty was because she had been upset with her mother for taking away the victim's mobile phone, was refuted by the victim.

- [12] The Medical Report of the victim dated 7 February 2013 tendered before the Trial Court as part of 'Agreed Facts' has recorded that the hymen of the victim was lacerated. The history as related by the victim to the doctor who had examined her, is as follows: "*Patient alleged that on the night of her step-father's birthday sometime in 2012, while she was sleeping inside the room, her stepfather started touching her, kissing her and inserted his finger inside the vagina, then sometime in December 2012, her stepfather did the same thing again twice.*" (verbatim)
- [13] The defence was one of consent to the acts of sexual assault that took place after the party and prior to that; and a denial of the rape count. The Appellant who is a fisherman and was about 40 years of age at the time of offending, testifying before the Trial Court had stated that on the 15<sup>th</sup> of February 2012, after his birthday party he had dinner and had gone to the room of the victim. He had stated "*After that I kissed her. Then we kissed. She kissed me. While kissing I sucked her breasts and neck. I didn't touch. I realized what I did was wrong and went away. This was the second time such an incident had taken place and the victim's reaction was nothing. There had been no other similar incidents thereafter.*" (emphasis added). The Appellant had denied the allegation of rape. The Appellant under cross-examination by the Prosecutor had said, that he had been living with the family of the victim since 2011 and was a father figure to the children laying down rules for them, restricting their movements and holding a position of authority over them. He had admitted kissing the victim prior to the night of the party.

- [14] The Appellant in his caution interview statement dated 22 February 2013, produced before the Trial Court as part of '*Agreed Facts*' had stated that he admits having on the night after the party "*kissed and touched her breasts, stomach and her neck and bitten her breasts and neck*" but denied having raped her. He had stated that it was her manner and life style of wearing shorts and a vest that tempted him.
- [15] The defence of consent to the acts of sexual assault raised by the Appellant has been categorically denied by the victim and it is clear from her evidence referred to at paragraph 11 above, that there was no consent on her part to any one of the acts of sexual assault. It is also clear that any assumed consent on her part is vitiated due to her expressed fear of bodily harm at the hands of the Appellant and the authority the Appellant admittedly exercised over her and her siblings. Further, the very circumstances the victim was placed, namely her father having passed away, her mother being happy with the Appellant and the fact that he was like a father figure to the family would indicate that any suggestion of consent could not have been freely and voluntarily given and the Appellant was well aware of it. This is also borne out from her testimony that her grandmother had asked her to think about her sisters when she first complained to the grandmother.
- [16] In my view it is misconceived to state as argued in ground (i), that the consistency of the Appellant's evidence with that of his caution interview statement makes the Appellant, a necessarily credible witness. The learned Trial Judge was very much conscious of this, as evidenced from his Summing Up and his Judgment. The learned Trial Judge in his Summing Up had summarized all the relevant evidence including what the Appellant said in his caution interview and what he said in his evidence before the Court. Both are self-serving statements in which the Appellant denies the allegation of rape while admitting the other acts of sexual assault. The Trial Judge being the final arbiter of facts, the Assessors' assumed acceptance of the Appellant's denial of the rape count is immaterial.
- [17] The Learned Trial Judge in his Judgment in convicting the Appellant had stated: "The evidence of the girl was convincing, honest and compelling. I believed her evidence as she gave it and I was impressed with her reluctance to embellish it in any way. The

circumstantial evidence of the penetration being by the accused's finger is irresistible and I therefore reject the opinion of the assessors on count one and find him guilty of the charge of rape. There was no evidence that the complainant had any negative feelings towards the accused which might lead her to make up her story." I am however reluctant to agree with the Trial Judge that the circumstantial evidence of the penetration being *'by the accused's finger'* is *'irresistible'*, although sufficient to corroborate the victim's allegation as to the actus reus of rape. It is to be noted that the Medical Report had been accepted as an 'Agreed Fact', without any challenge or seeking any clarification. However the learned Trial Judge's stated reasoning above for believing the victim's testimony, and that the victim had no negative feelings towards the Appellant to fabricate the rape charge against him, are in my view sufficient to uphold the conviction against the Appellant. The Appellant's testimony before the Trial Court that he *"realized what he did was wrong and went away"* after the incident on the night after the party; and that *"No other similar incidents after that night"* are facts that have a bearing on the charge of rape; when taken together with the rest of his evidence and that of the victim. The Appellant had not attributed any reason for the young victim to fabricate the rape charge against him.

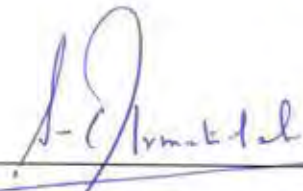
- [18] As regards ground (ii), the matter of recent complaint only goes to the issue of credibility and consistency of the complaint. In the case of **Raj -v- State** [2014] FJSC 12; CAV 3 of 2014, 20 August 2014 the Supreme Court said citing, **Basant Singh & Others -v- The State** Crim. App. 12 of 1989; **Jones -v- The Queen** (1977) 191 CLR 439; and **Vasu -v- The State** [2006] FJCA 69; AAU 11U of 2006S, 24 November 2006: *"Recent complaint is relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter that went to her credibility and reliability as a witness."* The very circumstances the victim was placed in, and referred to earlier, explain the reason on her part in not reporting the matter earlier. Further, this was not a point raised at the trial nor a matter on which a re-direction had been sought, when the learned Trial Judge at the conclusion of the trial had asked Counsel if they wished to add or change anything that he had said about the law.
- [19] In view of what has been stated above, I have no hesitation in affirming the conviction and dismissing this appeal.

Nawana JA

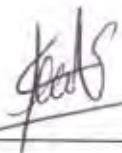
[20] I agree with the reasons and conclusions of Fernando JA.


Orders of the Court:

- (i) *Appeal against conviction dismissed.*
- (ii) *Conviction and sentence affirmed.*

  
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Hon. Mr. Justice C Prematilaka  
JUSTICE OF APPEAL



  
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Hon. Mr. Justice A Fernando  
JUSTICE OF APPEAL

  
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Hon. Mr. Justice P Nawana  
JUSTICE OF APPEAL