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

CRIMINAL APPEAL NO.AAU 80 of 2016
[High Court Lautoka Criminal Case No. HAC 148 of 2013]

BETWEEN	:	**RATU LUKE SOVA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the appellant**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**22 May 2020**
Date of Ruling	:	**26 May 2020**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of rape contrary to section 207(1) and (2)(a) of the Crimes Decree No.44 of 2009. The particulars of the offence were that;

> *"Rate Luke Sova on the 20th day of June 2013 at Sigatoka in the Western Division inserted his penis into the vagina of Mereoni Kariniu without her consent"*

[2] After full trial, the assessors had expressed a unanimous opinion of guilty on the count of rape on 19 May 2016. The learned High Court judge in the judgment dated 23 May 2016 had agreed with the assessors and convicted the appellant of the count of rape. He was sentenced on 25 May 2016 to imprisonment of 10 years with a non-parole period of 05 years.

[3] The appellant by himself had signed a timely notice of appeal on 13 March 2018 against conviction (05 grounds) and sentence (no grounds). He had added 07 further grounds against conviction on 26 October 2016. Later, Legal Aid Commission had tendered an amended notice of appeal only against conviction along with written submissions on 04 July 2018 on behalf of the Appellant. The State had tendered its written submissions on 02 April 2020.

[4] The appellant had not yet tendered to court Form 3 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence.

[5] The evidence against the appellant and his position at the trial according to the judgment is as follows.

> *'4.The prosecution alleges that the victim met the accused at a carnival on the 20th of June 2013. She was introduced to the accused by one of her friends, namely Seini. The accused was with his friend Osea. After their introduction, four of them left the carnival and went for a walk along the tramline. Having walked for a while, Osea and Seini turned to the other side, leaving the victim and the accused alone. They then sat near a rain tree, where the victim wanted to sit and talk. She stated that she went with the accused to have a date. However, the accused wanted to go into the bush. He then pulled her from her hand and pushed her into the bush near the cemetery. They then sat on a tree trunk, where the accused tried to persuade the victim to have sexual intercourse. She refused it. However, the victim admitted that they kissed each other. She further stated that the accused kissed her in order to persuade her to have a sexual intercourse. She stated that the accused kissed her on her lips and she too kissed him back. She has participated in kissing. However she specifically stated in her evidence that she kept on telling him "no" to the request to have sexual intercourse, though she participated in kissing.*
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> *5.In contrast, the accused person denies the allegation. He did not dispute the events leading up to the conversation at the rain three. He stated that he politely asked the victim to have sexual intercourse at the rain tree, which she agreed. He stated that he asked three times, and she consented for all these three occasions. He then went to the bush and she followed him. They then had sexual intercourse.'*

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be

granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[7] **Grounds of appeal**

01st ground of appeal (a)

[8] The appellant complains that the trial judge had not adequately and properly directed the assessors on the inconsistency in the complainant's evidence regarding her statement to the police and the doctor. He relies on **Ram v. State** [2012] FJCA 12: CAV0001 of 2011 (09 May 2012). However, the appellant's written submissions have not elaborated as to what these inconsistencies were.

[9] The learned High Court judge in paragraphs 55. 56 and 57 has indeed directed the assessors on how to evaluate inconsistencies.

> *'55.Ladies and Gentlemen, you might recall that the learned counsel for the accused cross examined the victim about the omissions and inconsistencies in her statements made to the police and the history provided to the doctor with the evidence given in court. The learned counsel for the accused proposed you that the statement made by the victim to the police and to the doctor were in conflict with the evidence given by her in the court. The evidence of victim is what she told us in court on oaths. I now explain you the purpose of considering the previously made statement of the victim with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the victim is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.*
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> *56.It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not accept every detail to be the same from one account to the next.*
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> *57.If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to*

consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.'

[10] It appears that the learned trial judge had addressed what may be regarded as the inconsistencies of the complainant's evidence in paragraph 32 of the summing-up as follows.

> *'32. Mereoni stated during the cross examination that only half of the things were fresh in her mind when she made her statement to the police. She said that the statement was true. She said that she could now recall the event took place on that day, because she read her statement before giving evidence. She stated that it is not recorded in her statement that Luke pulled her into the bush, but it was the actual things happened on that night. She further said that she forgot to tell the police that he pulled her into the bush. Mereoni said that they had no conversation at the rain tree. She stated that the conversation took place only she was pulled in to the bush. She further stated that she sat on a trunk of a tree beside a tree in the bush and talked with Luke. That conversation was actually to convince her for sexual intercourse.*
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> *'33.....In respect of the medical certificate, she stated that what the doctor has stated in it is very different to the account that she told the doctor.*
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> *'50.On the same day Mereoni informed the doctor about what happened to her when she was medical examined by the doctor. The doctor has stated the background information under A (4) of the Medical Report and the history as related by the victim under D (10) of the Medical Report.*

[11] The doctor does not appear to have been called as a witness, for the summing-up has no reference to such evidence except the medical report in which event the history may be a piece of hearsay evidence (vide **Navaki v State** [2019] FJCA 194: AAU0087.2015 (3 October 2019).

[12] Thus, this ground of appeal has no merit.

01st ground of appeal (b)

[13] Regarding the issue of consent, the trial judge had addressed the assessors in paragraphs 21 and 22.

> *'19.The accused person has admitted in the agreed fact that he had a sexual intercourse with the victim. The prosecution alleges that the victim did not*

give her consent for the accused person to have a sexual intercourse with her. However, the accused person claims otherwise. Accordingly, the main dispute in this matter is the consent of the victim.

20. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven that the victim did not give her consent to the accused to insert his penis into her vagina.

'21. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.

22. If you are satisfied, that the accused had inserted his penis into the vagina of the victim and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that the victim was freely consenting for this alleged sexual intercourse. I must advice you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

[14] Although the trial judge had not directed the assessors, the prosecution could prove that the appellant was reckless as to whether she consented in proving the fault element of rape (see **Tukainiu v State** [2017] FJCA 118; AAU0086.2013 (14 September 2017) for fault elements of rape which was affirmed in **Tukainiu v State** [2018] FJSC 19; CAV0006.2018 (30 August 2018). It looks to me that from the appellant's conduct the fault element of recklessness may have been present in this case.

01st ground of appeal (c)

[15] The appellant also argues that the learned trial judge had not addressed on the medical evidence where the doctor had said that she was not sure whether the bleeding was from sexual assault or normal menstruation. However, the trial judge in paragraph 53 of the summing-up had brought this fact to the attention of the assessors.

'The Doctor in her medical report at D (15) made her observation about the bleedings. She has stated that the victim was supposed to have her menstruation and unsure of whether this bleeding was from sexual assault or a normal menstruation.

[16] The problem with the appellant's argument is section 129 of the Criminal Procedure Act, 2009 has now dispensed with the long held practice of insisting on corroboration of the testimony of victims of a sexual offences including medical evidence and in **Prasad v State** [2019] FJSC 3; CAV0024.2018 (25 April 2019) the Supreme Court reaffirmed section 129 stating *'The requirement for corroboration in cases of a sexual nature was abolished by section 129 of the Criminal Procedure Decree 2009.'*

02nd ground of appeal (a)

[17] The appellant seems to argue that there was no 'direct' evidence of lack of consent in that since the complainant had not said that she was pressured, fearful, threatened, intimidated or even compelled to have sexual intercourse with the appellant. The fallacy of a similar argument has been dealt with in the Ruling in **Nawaitabu v State** [2020] FJCA 54: AAU 007 of 2019 (15 May 2020) and I do not intend to repeat the same here. There had been clear direct evidence from the complainant she did not consent to have sexual intercourse though she had engaged in other acts of sexual intimacy.

[18] The learned trial judge had dealt with this issue in detail in the judgment as follows.

'6.Accordingly, the main dispute in this incident is whether the victim consented to the accused person to have sexual intercourse with her. If not, whether the accused person, honestly, though mistakenly believed that she was consenting to have sexual intercourse with him.

7.Section 206 (1) of the Crimes Decree states that;

> *"The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent"*

8.Accordingly, someone consents only if she agrees by choice and she has the freedom and capacity to make that choice. Consent may be given to one sort of sexual activity but not to another.

9.The victim must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The Fiji Court of Appeal in ***Balemaira v State [2013] FJCA 40; AAU098.2010 (30 May 2013)*** *found that the consent is an ongoing state of mind and is not irrevocable once given.*

10.Sexual Intercourse is normally a mutually agreed recreational and pleasurable act of two persons. Accordingly, the consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.

11.The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the version of a person against another's. Hence, in order to determine whether the victim gave the consent, it is important to consider how the victim and the accused behave before and after the alleged sexual intercourse.

12.Lord Lane CJ in ***R v Pigg [1982] 2 All ER 591)*** *has discussed the issue of recklessness and the mistaken but honest belief of the accused person that the victim was consenting, where his lordship held that:*

> *"so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.'*

02nd ground of appeal (b)

[19] This ground of appeal too is connected to the issue of consent. The appellant extends the issue of 'consent' to the complainant's failure to disclose her having been pushed into the bush by the appellant in her police statement. The trial judge had been quite alive to the issue and dealt with it as follows in the judgment.

'13.The victim stated in her evidence that she was pulled into the bush by the accused. The accused person claims otherwise. He stated that she came after him into the bush. The victim stated that she forgot to tell the police that she was pulled into the bush by the accused. The cousin of the victim, Kalesi stated in her evidence that the victim did not tell her that she was pulled into the bush by the accused person.

14.Hon. Chief Justice Gates in ***Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)*** *discussed the applicability of the recent complain in an allegation of rape, where his lordship held that;*

> *"In any case evidence of recent complaint was never capable of corroborating the complainant's account:* ***R v. Whitehead (1929) 1 KB 99****. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness:* ***Basant Singh & Others v. The State Crim. App. 12 of 1989; Jones v. The Queen [1997] HCA 12; (1997) 191 CLR 439; Vasu v. The State Crim. App. AAU0011/2006S, 24th November 2006"*****.....**
>
> *The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant"*

15.His lordship in ***Raj v States (supra)*** *has further discussed the nature and scope of the recent complain, where his lordship found that;*

> *"The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence"*

16.In view of the above judicial precedent, the victim is not necessarily required to inform the first person to whom she complains, the complete version of the account of the event took place. It is sufficient to relate the material and relevant information of alleged sexual conduct of the accused person. It is natural, that perhaps sometimes victims of such sexual assault might not be able to correctly recall or remember the exact events of the incident in their recent complaint due to the trauma or the shock caused by the alleged incident.

17.In this instant case, the victim has told her cousin on the following day that she met the accused at the carnival and then went for a walk. She has further told her that the accused forced her to have sexual intercourse with him. She has made her statement to the police on 22nd of June 2013, that was two days after the incident. Her cousin stated in her evidence that she found the victim was in shocked on the following morning.

18.Moreover, the Doctor in her medical report has stated two different versions of the alleged incident one under the heading of background information and other one under the heading of history as related by the victim. The victim in her evidence firmly stated that she did not inform such details to the doctor. The victim was medical examined by the doctor on the

following day of the incident, that was on 21st of June 2013. The prosecution tendered the medical report as an agreed fact. Having considered the two different versions as stated in the medical report, I accept the explanation given by the victim as she claims that she did not inform the doctor such details as recorded in the medical report.

19.In view of the above discussed judicial dicta as enunciated in ***Raj v State (supra)****, I find the commissions and inconsistencies found in the evidence of the cousin of the victim, the statement made by the victim to the police and the medical report, with the evidence of the victim have not discredited the reliability and credibility of the evidence of the victim. In considering the event that took place during this alleged incident, I find that the failure of the victim to state that the accused person pushed her into the bush is not materially significant.*

02nd ground of appeal (c)

[20] Under this ground of appeal the appellant argues that the fact that the appellant had to ask the complainant's consent three times is evidence of the fact that she had finally consented to have sexual intercourse.

[21] The learned judge had dealt with this argument as follows in the judgment.

`26. As I discussed above, one can consent to certain sexual activities but not for certain other activities. The mere fact that the victim came with the accused to a remote place and participated in kissing each other, do not automatically constitute that her consent to accompany him to the said place and kiss him extended to have sexual intercourse as well. It appears that the accused was aware of it as he has asked the victim three times to have sexual intercourse. According to the evidence given by the accused person, it seems that the accused was aware that she was not sure of her consent when he asked her first time. He admitted in his evidence that he had to convince her to have sexual intercourse. Accordingly, I am satisfied that the accused was aware of the possibility that she might not consenting. Regardless of that he continued with his act. Hence, I do not find the existence of any reasonable doubt whether the victim finally gave her consent. I accordingly find that the defence has not created any reasonable doubt about the case of the prosecution.

'I observed the manner and the demeanor of the victim when she gave evidence. She was straight and confident of what she was telling. She was not evasive. She admitted that she too participated in kissing. However she maintained her position that she still did not consent to have sexual intercourse with the accused person. If she wanted to make up the story in favour of her, she would have denied of taking part in kissing with the accused

person. I find that she was honest by disclosing that she took part in kissing but did not consent to have sexual intercourse with the accused person.

[22] In the circumstances, there is no reasonable prospect of success in the appellant's appeal.

[23] Accordingly, leave to appeal against conviction is refused.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL