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

**CRIMINAL APPEAL NO.AAU 165 of 2019**
**[In the High Court at Suva Case No. HAC 010 of 2019]**

**BETWEEN** : **JONE BEBE**

***Appellant***

**AND** : **STATE**

***Respondent***

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. M. Feasitu for the Appellant**
: **Mr. L. J. Burney for the Respondent**

**Date of Hearing** : **17 March 2021**

**Date of Ruling** : **18 March 2021**

# RULING

[1] The appellant had been indicted in the High Court of Suva on one count of assault with intent to commit rape contrary to section 209 of the Crimes Act, 2009 and another count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 committed on 01 January 2019 at Manu Village, Tailevu in the Eastern Division.

[2] The information read as follows:

> *'Count 1*
> *Statement of Offence*
>
> ***ASSAULT WITH INTENT TO COMMIT RAPE**: Contrary to section 209 of the Crimes Act, 2009.*

***Particulars of Office***

***JONE BEBE**, on the 1st day of January 2019, at Manu Village, Tailevu in the Eastern Division, assaulted **KL** with intent to commit rape.*

***Count 2***

***Statement of Offence***

***RAPE**: Contrary to section 207(1) and (2)(a) of the Crimes Act, 2009.*

***Particulars of Office***

***JONE BEBE**, on the 1st day of January 2019, at Manu Village, Tailevu in the Eastern Division, had carnal knowledge of **KL** without her consent.*

[3] After the summing-up on 07 November 2019 the assessors had unanimously opined that the appellant was guilty of both counts and in the judgment delivered on 12 November 2019 the learned trial judge had agreed with them and convicted the appellant as charged. On 18 November 2019 the appellant had been sentenced to 12 years of imprisonment with a non-parole period of 08 years.

[4] The appellant had filed a timely appeal only against conviction on 27 November 2019. The Legal Aid Commission had subsequently filed an amended notice of appeal against conviction and written submissions on 23 November 2020. The state had responded by its written submission tendered on 10 December 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellants could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (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) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Grounds of appeal urged on behalf of the appellant are as follows:

> ***Ground 1:*** *That the Learned Trial Judge erred in law and in facts having not adequately directed the assessors on the burden of proof given the conflicting versions on the issue of consent.*
>
> ***Ground 2:*** *That the Learned Judge had erred in law having not adequately directed the assessors on how to approach distress evidence.*

[7] The trial judge had summarised the evidence in the sentencing order as follows:

> *2. The facts of the case are that the complainant was 17 years of age and a single mother of an infant at the time of the offence. On the day of the incident she was washing some kitchen utensils beside her father's house when you approached her. You pulled her from her t-shirt to the nearby bush. You closed her mouth when she tried to scream. She was scared because you were drunk. She tried to resist, but failed because you were huge. Having pulled the complainant into the bush, you punched her in her face and bit her neck. Her head became numb; she fainted and fell to the ground. She did not agree to have sex with you and pleaded that she did not want to have sex as her daughter was still small. You did not listen to her. You laid on top of the complainant, inserted your penis into her vagina and had sexual intercourse with her, without her consent.*
>
> *3. The complainant had received a 3mm x 3mm bruise on her right temple region. There was haematoma on the neck both on right and left sides. Upon the examination of the genitalia, the doctor found a superficial laceration on the interior surface of major labia at 6 o'clock and 8 o'clock positions.*

[8] The judgment reveals the evidence of the complainant's father as follows:

> *'7. The Complainant informed her father Waisake everything that Jone had done to her. It was a complaint made promptly after the incident. At the time the complaint was received by Waisake, the Complainant looked weak and was just lying down. She never talked. Waisake in his evidence confirmed receiving the complaint from her daughter, but according to him, the complaint did not specify that she was raped. The Complainant's stressful condition coupled with cultural taboos existing in her society in talking sexual matters openly with parents may well have been the reason why she could not bring herself to describe everything exactly what Jone had done to her. Waisake's subsequent reaction manifested in his readiness to go and assault Jone and his determination to go to the police station the next day confirm that the complaint he received was something serious and that what the Complainant had told her father was true.'*

[9] The appellant's defence had been one of consent. He had given evidence and called another eye witness to the act of sexual intercourse to give evidence on his behalf.

***01st ground of appeal***

[10] The criticism forming the first ground of appeal is based on paragraph 60 and 61 of the summing-up:

> *60. You watched accused and his relative Mosese give evidence in Court. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt. Remember, the burden to prove the accused's guilt on each count lies with the Prosecution throughout the trial, and never shifts to the Defence.*
>
> *61. If you believe the complainant is telling you the truth that the accused punched her and penetrated her vagina with his penis without her consent you may express an opinion that the accused is guilty on each count. But if you do not believe the complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty.*

[11] The appellant argues that this being a case of the complainant's word against the appellant's word on the issue of consent, paragraphs 60 and 61 lack further directions in terms of **Gounder v State** [2015] FJCA 1; AAU0077 of 2011 (02 January 2015) and **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and **Liberato v The Queen** [1985] HCA 66; 159 CLR 507.

[12] ***Gounder*** was a case where there was a direct conflict in the evidence of the complainant and the accused on the issue of consent and the Court of Appeal stated that a judge must always put defences raised by the evidence to the jury emphasising that the overriding duty of the judge is to put the defence fairly and adequately to the jury and held that the trial judge had erred by not assisting the assessors on both law and facts. The Court thought that if assisted, the assessors would have come to a correct decision by acquitting the appellant on the charge of rape. In the course of the judgment the court remarked:

*'[44] Brennan and Deanne JJ in the Australian High Court case of* ***Liberato and Others v The Queen*** *[1985] HCA 66; (1985) 159 CLR 507 at 515 (minority) held, "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is common place for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving.* ***The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue****." (Emphasis added).*

*[45] The Court of Criminal Appeal of the Supreme Court of New South Wales in R v Li (supra) following the minority decision in Liberato, quashed the convictions and ordered a new trial on the ground of mis-directions. Dunford J held, "The issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth: They should have been directed:, the test was whether, taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence" (at 301). Hunt CJ in E (89 A Crim R 325) said, "A judge should not tell the jury that they must make a choice between the evidence led by the Crown and that given by the accused (Beserick (1993) 30 NSWLR 510 at 528; 66 A Crim R 419 at 435).*

*'[46] In the instant case, the learned Judge in the summing up, explaining the onus and burden of proof states that, "If, after considering all the evidence, you are sure that the defendant is guilty you must return a verdict of "guilty". If you are not sure, your verdict must be, "not guilty".* ***However the learned Judge has erred by not explaining the defence case to the Assessors. The defence is that the sexual act was done with the consent of Emma. Emma says that it was done without her consent. Should not the Judge explain and give an analysis of the evidence to the Assessors?***

[13] Therefore, it is clear that what had persuaded the Court of Appeal to set aside the conviction for rape was not necessarily the omission to tailor the directions on the exact lines proposed in ***Liberato*** but the overall lack of adequate directions on the defence of consent taken up by the accused in the light of the totality of evidence of the case. It does not appear that the Court of Appeal has made a prescription of the kind of direction to be given when the only issue is consent between the parties based

on ***Liberato.*** In the end the court convicted the accused for defilement and sentenced him accordingly.

[14] ***Prasad*** too was a case where the main question to be decided was whether the learned trial judge had been accurate in his directions to the assessors as throughout the trial the accused had been steadfast that the charge of rape had been ill-conceived for the reason that the alleged indulgence in the act of sexual intercourse with the victim was consensual. The Court thought that given the totality of evidence particularly on the most crucial issue of consent a superficial direction to the effect that *"if you are not fully satisfied, or not sure or in two minds to say that the complainant might have consented to have sex then that means you are in a doubt"* was insufficient. However, it appears that the Court recommended the following directions not necessarily for a 'word against word' situation on the issue of 'consent' but more as general guidelines:

> *'[44] In my opinion, trial judges dealing with evidence of a case should necessarily leave the assessors with the following directions:*
>
> *(i) that the onus of proving each ingredient of a charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.*
>
> *(ii) that in assessing the evidence, the totality of evidence should be taken into account as a whole to determine where the truth lies.*
>
> *(iii) that in situations where there is evidence adduced on behalf of an accused, it is incumbent on the assessors to examine such evidence carefully to decide, not necessarily whether they believe that evidence or not, but whether such evidence is capable of creating a reasonable doubt in their minds.*
>
> *(iv) that in other words, if they believe the evidence adduced on behalf of the defense, which means the prosecution has failed to prove the case beyond any reasonable doubt and hence the benefit of the doubt should enure in favor of the accused and he shall therefore be acquitted.*
>
> *(v) that on the other hand in the scenario of the assessors neither believe the evidence adduced on behalf of the accused nor they disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution's case and the benefit of doubt should then enure in favor of the accused and he should then be acquitted.*
>
> *(vi) that in a situation where the assessors totally disbelieve the evidence adduced on behalf of the accused, the assessors should still consider whether the prosecution's case can stand on its own*

> *merits. Which means whether the case has been proven beyond any reasonable doubt. In another word, the mere fact that the accused's version has been rejected for its veracity, it does not mean the case for the prosecution has been proven beyond any reasonable doubt.*
>
> *The aforementioned guidelines are based on trite legal principles. It is the bounded duty of a trial Judge to leave the assessors with such directions to facilitate their exercise as triers of facts.*

[15] In fact, it is the experience of this court that at least some trial judges do give directions similar to the ones set out under paragraph [44] (iv), (v) and (vi) of ***Prasad*** particularly in cases where the defence adduces evidence, I think, more out of abundance of caution than as a mandatory rule but needless to state that not every case would demand such directions. There is nothing wrong with such a direction and I would rather welcome it in appropriate situations. Similarly, the gist of ***Liberato*** guidelines *i.e. ". . . even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt"* is given by trial judges in 'word against word' situations. Therefore, observations in both ***Gounder*** (which cited ***Liberato)*** and ***Prasad*** have to be understood in the factual contexts of those cases and on a perusal of the entirety of the two judgments it is not difficult to understand why the Court of Appeal arrived at the decisions it came to in the end.

[16] In **Johnson v Western Australia** (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in ***Liberato*** as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a "reasonable doubt" on that issue.

[17] For that reason, it was held in **Anderson** (2001) 127 A Crim R 116 at 121 [26] that it is preferable that a ***Liberato*** direction be framed along the following lines **(i)** if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; **(ii)** if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and **(iii)** if you do not believe the accused's evidence (if you do not believe the accused's account in his

or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt? ***Prasad*** guidelines seem to be closely aligned with modified ***Liberato*** directions given in ***Anderson.***

[18] In any event in the subsequent decision in **De Silva v The Queen [2019]** HCA 48 (decided 13 December 2019) the majority in the High Court took up the position that a *"Liberato direction"* is used to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that *". . . the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt."* As a result, it was held that a "Liberato direction" need only be given in cases where the trial judge perceives a real risk that the jury might view their role in this way, regardless of whether the accused's version of events is on oath or in the form of answers given in a record of police interview.

[19] As stated in ***De Silva*** whether a Liberato direction is required will depend upon the issues and the conduct of the trial.

[20] In **Murray v The Queen** (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. Therefore it was said in ***De Silva*** that in light of ***Murray***, the occasions on which a jury will be invited to approach their task as involving a choice between prosecution and defence evidence should be few.

[21] Coming back to the summing-up, it appears that the statement at paragraph 60 that '*It is up to you to decide which version is to believe …….'* could have been avoided by the trial judge. However, the statement '*If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.'* is in line with modified Liberato directions under (i) and (iii) expressed in ***Anderson.*** What is

missing is a verbatim statement under modified Liberato direction (ii) stated in ***Anderson.***

[22] However, in my view the trial judge's directions '*Remember, the burden to prove the accused's guilt on each count lies with the Prosecution throughout the trial, and never shifts to the Defence'* and *'But if you do not believe the complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty'* in paragraph 60 and 61 respectively is adequate to cover modified Liberato direction (ii) as Wheeler JA observed in ***Johnson***, the expression "reasonable doubt" is apt to convey that a juror who is left in a state of uncertainty as to the evidence should not convict.

[23] This is particularly so in the light of the corroborative medical evidence which strongly militates against consensual sexual intercourse, recent complaint evidence and distress evidence led by the prosecution against the appellant.

[24] ***De Silva*** [35] and [36] also observed:

> *'……. Nor did defence counsel seek a Liberato direction. The failure of counsel to seek a direction is not determinative against successful challenge in a case in which the direction was required to avoid a perceptible risk of the miscarriage of justice. The absence of an application for a direction may, however, tend against finding that that risk was present.'*
>
> *'The summing-up made clear the necessity that the jury be satisfied beyond reasonable doubt of the complainant's reliability and credibility. The Court of Appeal did not err in concluding that, when the summing-up is read as a whole, the trial did not miscarry by reason of the omission of a Liberato direction.'*

[25] In addition, the appellant's complaint has to be considered in the light of the legal position in Fiji, that the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016). This unique legal position in Fiji clearly provides an additional layer of safeguard particularly to the accused. Therefore, any

perceived deficiency in the summing-up does not carry the same weight or have the same effect on the outcome of the trial in Fiji as in other jurisdictions where jurors are the sole judge of facts and the contents of the summing-up become so critical as far as the final outcome is concerned.

[26] In any event, as stated by Calanchini P in ***Gounder***, assuming that there was any lack of directions in the summing up as complained by the appellant it had been rectified by the substantive judgment by the trial judge setting out the evidence and independently analysing the issue of consent that supported the decision to enter a conviction against the appellant.

[27] Therefore, there is no reasonable prospect of success of this ground of appeal.

***02nd ground of appeal***

[28] The appellant complains that the trial judge had not given adequate directions on how to approach distress evidence by relying on **Soqonaivi v State** (Majority Judgment) [1998] FJCA 64; AAU0008U.97S (13 November 1998) where it was the case for the prosecution that the complainant's account of the events that occurred, particularly her evidence that the sexual intercourse had occurred without her consent and without his believing that she was consenting, was corroborated in two respects, namely, the independent evidence of the injuries that she suffered and of her distress observed after the event.

[29] The trial judge in ***Soqonaivi*** directed the assessors as follows on distressed evidence:

> *"The second item of evidence that is capable of amounting to corroboration is the distress of the complainant immediately after the incident. The complainant's mother gave evidence that she was asleep and heard the frig door open. Then she heard the complainant in her bedroom and the complainant was crying. That was shortly after the complainant got home from the accused's house. Significantly, the complainant was not crying in front of her mother. She was in her bedroom, on her own, and her mother, who had been woken by the frig door closing, happened to hear it. Mrs. Davis said that she then went into the complainant's room. She described the complainant as crying and shaking. Constable Kumar said that when he saw the complainant later the same morning she looked very sad and distressed. However, that was a considerable time after the incident. If you are satisfied that the complainant was genuinely distressed shortly after the alleged rape then that could be corroboration of her lack of consent. However, again you*

*must exercise some caution in using the evidence for that purpose. You must first exclude the possibility that she was distressed for some other reason that is consistent with the accused's explanation. For instance, remorse because she had participated in sexual intercourse with the accused or because he had assaulted her causing a painful injury."*

[30] While accepting that evidence of distress was capable of amounting to corroboration, the appellant's counsel in ***Soqonaivi*** had submitted that the trial judge's warning to the assessors that that evidence should be treated with caution was inadequate in that it should have been pointed out to the assessors other possible explanations for the complainant's distress such as the consumption of a substantial amount of alcohol by the appellant and the complainant. It had been submitted that the complainant's distress may have been the result of that consumption, and the trial judge should have put this possibility to the assessors.

[31] The Court of Appeal disagreed and stated that:

> *'We do not accept that submission. The Judge, in the direction we have set out, made it clear to the assessors that they must exercise caution in using the distress evidence as corroboration. They must exclude the possibility that she was distressed for some other reason consistent with the accused's explanation. He gave remorse as an example. We do not consider that there was any need for him to give other possible examples. We also note that there was no cross-examination of the complainant to support the possibility that her distress was caused as the result of the alcohol she had consumed.*
>
> *The Judge's direction on the distress evidence as corroboration was correct. That ground of appeal also cannot succeed.'*

[32] Coming back to the appellant's complaint, firstly, it has to be remembered that corroboration of the evidence of a complainant in sexual offence cases is no longer required in Fiji (vide section 129 of the Criminal Procedure Act, 2009). Secondly, the trial judge's directions at paragraph 25 of the summing-up were blameless on distress evidence in the light of ***Soqonaivi***:

> *'25. Evidence was led that the complainant looked distressed, that she was weak and just lying down shortly after the alleged incident. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the accused to the alleged offence. Before you use the*

*evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.'*

[33] The distressed demeanour of a complainant immediately after an alleged sexual offence or at the time that he or she makes a complaint to, for instance, a family member or to a police officer was formerly considered in the context of a requirement for corroboration. The corroboration previously required was that the offence had been committed and that the accused committed it. If there was no corroboration then it was a requirement to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. That requirement was abolished by Section 32 of the Criminal Justice and Public Order Act 1994 in UK.

[34] However distress can still amount to corroboration and so questions remain as to whether evidence of distress is admissible, if so what direction should be given to the jury as to how to approach such evidence and, if there is a misdirection or non-direction, whether it affects the safety of the conviction.

[35] The current judicial thinking on distress evidence was expressed by Morgan LCJ, Weir LJ and Stephens J in the Court of Appeal in Northern Ireland in **The Queen v BZ** [2017] NICA 2 where having examined **R v Redpath** (1962) 46 Cr App Rep 319, 106 Sol Jo 412, **R v Chauhan** (1981) 73 Cr App Rep 232, **R v Venn** [2002] EWCA Crim 236, **R v Romeo** [2003] EWCA Crim 2844; [2004] 1 Cr. App. R. 30; [2004] Crim. L.R. 302; Times, October 2, 2003, **R v AH** [2005] EWCA Crim 3341 and **R v Zala** [2014] EWCA Crim 2181, the Court stated the law as follows:

*'[43] Given that the weight of evidence as to distress will vary according to the circumstances of the case we consider that whether the evidence is admissible and if so whether a direction is needed and, if it is needed, then in what terms, depends much on the particular circumstances in any given case. In giving consideration to those questions a distinction can be drawn between the complainant's own evidence of distress and evidence from a witness, who may be independent, as to the distress 20 of the complainant. A distinction can also be drawn between evidence of distress at the time or shortly after the alleged offence and distress displayed years later when making a complaint. If the jury is sure that distress at the time is not feigned then the complainant's*

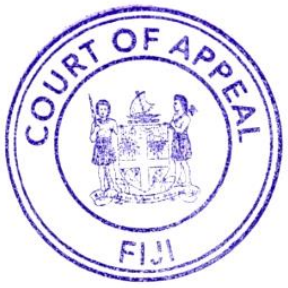
*appearance or state of mind could be considered by the jury to be consistent with the incident.*

*'[44] We consider that it is for the judge to look at the circumstances of each case and tailor the direction to the facts of the particular case emphasising to the jury the need, before they act on evidence of distress, to make sure that the distress is not feigned and drawing to their attention factors that may affect the weight to be given to the evidence.*

[36] Therefore, there is no reasonable prospect of success in the second ground of appeal too.

**Order**

1. Leave to appeal against conviction is refused.




.....

**Hon. Mr. Justice C. Prematilaka**
**JUSTICE OF APPEAL**