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

CRIMINAL APPEAL NO. AAU 0091 OF 2016
(High Court No. HAC 89 of 2013)

BETWEEN : GURJEET SINGH

Appellant

AND : THE STATE

Respondent

Coram : Prematilaka, RJA
Gamalath, JA
Bandara, JA

Counsel : Mr I. Khan for the Appellant

Mr S. Babitu for the Respondent

Date of Hearing : 06 September, 2022

Date of Judgment : 29 September, 2022

JUDGMENT

Prematilaka, JA

[1] I have read in draft the judgment of Gamalath, JA. I agree with his reasons and the order that the appeal should be dismissed.

Gamalath, JA

[2] The appellant was convicted on two counts preferred against him in the High Court at Lautoka. The particulars of the alleged offences were as follows;

First Count

Rape

Contrary to section 207(1)(2) of the Crimes Act (Decree) No. 44 of 2009.

Particulars of Crime

Gujarat Singh between 13th day of April 2013 and 14th day of April 2013 at Ba in the Western Division penetrated the vagina of Preetika Moreen Kumar with his penis without the consent of the said Preetika Moreen Kumar.

Second Count

Common Assault

Contrary to section 274(1) of the Crimes Act (Decree) 44 of 2009.

Particulars of Crime

Gujarat Singh between the 13th day of April 2013 and 14th day of April 2013 in the Western Division unlawfully assaulted Preetika Moreen Kumar by slapping the said Preetika Kumar on her face.

[3] At the conclusion of the trial the assessors opined unanimously that the appellant was not guilty of the rape charge but guilty of the offence of common assault. The learned High Court Judge while disagreeing with the not guilty opinion on the charge of rape agreed with the opinion of guilty on common assault and convicted the appellant for rape as well.

[4] The learned trial Judge, for the conviction on rape imposed a sentence of 7 years and 6 months for the common assault , both sentences to run concurrently, with a 5 years non-parole period.

[5] Being dissatisfied with the said conviction and sentence the appellant moved the Court of Appeal against the conviction on several grounds of appeal and grounds of appeal against the sentence. The learned Single Judge decided that there was no merit to the grounds of appeal and thus refused leave to proceed on any ground along with the ancillary application for bail pending appeal. That was on 31 May 2019.

[6] With the said ruling the appellant disagreed. As such he is presently seeking to renew his timely leave application reiterating the same grounds as in the leave stage, on several grounds of appeal, mostly relating to factual matters as transpired during the course of the trial through evidence, and according to the learned counsel for the appellant, amongst the grounds as formed in his application, the fourth ground of appeal is the one that forms the cornerstone of his appeal. The learned counsel for the appellant having acknowledged the fact that his grounds come within the ambit of sections 21(1) (b) of the Court of Appeal Act and Rules (Cap 12) where the prerequisite of obtaining the leave of the Court is mandatory for further processing of the grounds, places his emphasis on the main thrust that the victim's evidence about her being raped should be viewed with caution, for as a whole her testimonial trustworthiness is questionable on the premise that her copulation with the appellant in the night of the alleged incident had been with consent, for there had been a long standing romantic relationship between the two of them. Further, it was his contention that the learned trial Judge had failed to adequately deal with the several inconsistencies found in her evidence which would in its legal sense cast a reasonable doubt about the testimonial trustworthiness of her evidence. Before examining the sustainability of the grounds, attention should now be drawn to the facts of the case with a special focus on its salient features;

The Facts

[7] The case for the prosecution is based on straight forward facts in which, according to the evidence of the complainant Preetika, her boyfriend (ex), the appellant, had met with her in the company of some of his relatives and friends, at his flat in Yalalevu, in the evening of 13 April 2013. While they were socializing and partaking of liquor the complainant had started to speak grudgingly about the manner in which the appellant had treated her and seemingly in a disparaging manner about the appellant's wife who was then serving a jail term. Over this issue the appellant had slapped the complainant on her face causing the complainant to cry and in order to distance herself from the crowd the complainant moved into the bedroom of the appellant and remained there seated on the bed. While in the bedroom, the complainant heard the others who were in the house leaving the house to get more drinks. The appellant remained in the house. He then entered the room where the complainant was resting and tried to pacify her. While doing so, according to the evidence of the complainant, the appellant had pulled her by her shoulder and forcibly removed her clothes and forced her to lie in the bed and inserted his penis into her vagina against her will and without her consent. Although the complainant tried to push the appellant away, she was not successful as he was strong. The complainant said in evidence that "he was strong and I was struggling to push him away" .Around that time upon hearing the return of those who went out to buy drinks the appellant had left the room leaving the complainant in the bed.

The complainant had worn the clothes and walked into the place where the others were seated and shouted in anger while questioning the appellant as to why he forced sex on her. He had reacted by trying to slap her face again without success. In her evidence the complainant repeatedly maintained that she was deeply angry over what the appellant did

to her and kept on questioning him why he behaved in that way. In the evidence the complainant stated that since she was her ex- girlfriend, she had the right to refuse to allow him to have sex with him.

The complainant had asked the cousin of the appellant one Ashneel Dutt, who later gave evidence for the appellant at the trial, to take her to the police station to lodge a complaint against the assault. When they were going to the police station, the appellant had also opted to accompany them. The complainant in her evidence at the trial described this behavior of the appellant as "smart".

At the police station, on her request the police referred the complainant to be medically examined for injuries.

<u>The medical evidence</u>

[8] Dr. Siteri Sautaca, examined the victim on 14 April 2013 at around 4.25am at the Ba Mission Hospital. According to her findings there was bruising on "right lower periorbital region, the periorbital region would be the region around the eye" and upon vaginal examination there was an abrasion noted at the base of the "intrators", abrasion is a process whereby the skin has been worn off or teared off usually as a result of friction and base of the intrators is what we see in the opening of the vagina so it is what we see when a female lies on her back and is exposed, the part that we see that is the intrators (evidence of the doctor at page 267). The Doctor had not seen any active bleeding injuries on the complainant.

In relation to the abrasion, the doctor opined that it may have been possible as a result of 'forceful penetration of penis into the vagina' (page 268).

In cross examination of the medical officer, the defense sought to establish that the injuries found in the vagina was as a result of having consensual, nevertheless aggressive sex, which is not tantamount to rape. (see p.270). The doctor accepted that as a possibility, in the sense if the sexual intimacy was consensual yet aggressive (page 270). When questioned about the injury that was observed closed to the eye area the doctor opined that that must have been as a result of "punching or slapping" (p.269) The medical evidence was that there was no visible swelling on the right cheek (p.270), and on being probed further into the issue of injuries to the genital area the doctor's evidence was that one possibility may be as a result of the injured area coming into contact with a "bearing inserted in to the penis", and while wearing such an object if someone indulged in having aggressive sexual contact that may cause the injury described in his findings.(p.270)

Answering further in the cross examination the doctor further stated that;

> *"Q. I assume it does not happen in Fiji but as far as a male species is concerned there is a surgery whereby they insert bearings in penis and as a doctor which you were, if one has this inserted by way of surgery, would it be possible through aggressive sex this abrasion could arise, would it be possible?*

> *A. Depending on the location where the bearing is.*
>
> *Q. Yes, the bearing is located on the top part of the penis near the foreskin area, top part of the foreskin, would it be possible?*
>
> *A. Unlikely, because where the injuries it's at the base of intrators, now had the injury been on the top part of the vagina, then we could say yes, there is possibility.*
>
> *Q. So if there is a bearing within the lower rank of the penis or the higher area of the penis that would make the difference of an abrasion arising on aggressive sex?*
>
> *A. On the location of where the injuries is yes sir.*
>
> *Q. In this nature, this kind of abrasion like you suggested is possible even if the sex is aggressive and consensual, is it possible?*
>
> *A. On the location of where the injury is yes sir." (p271)*

As it evinces from the proceedings at the trial , the line of cross examination was for the purpose of eliciting from the doctor, the evidence that would be used to support the case for the defense in which the appellant sought to maintain that he indulged in having sexual intercourse with the complainant with consent and the injuries were as a result of the nodule that he wears in his penis , which could cause the injuries in the genital area of the partner if the indulgence has been with force. In support of his evidence he called a medical doctor Dr Goundar who testified to the effect that he found a marble like object inserted into the foreskin of the penis of the appellant. However, the examination on the appellant had been carried out a few days before he testified at the trial.

[9] The prosecution relied on the evidence of the police investigating officer WDC 305 Miriama Nadumu, who was working at Ba Police Station in 2003. The officer had recorded the statement of the complainant in the early hours of 14 April 2013 and referred the victim for a medical examination. On 16 April 2003, the officer recorded the statement of the appellant.

[10] Through the evidence of the officer the prosecution presented to Court the entirety of the interview of the appellant, (prosecution exhibit No. 2 page 273), which in its content presents an exculpatory statement. According to the statement, the complainant who was his ex-girlfriend sent him a text message asking him to pick her from Ba Sanatan in Sarava. After picking the complainant they proceeded to his house, where a drinking spree started. Bitu and one Ashneel also joined them.

After a while, the complainant had a bath and invited the appellant into his bedroom where she wanted him to have sex with her. Whilst the copulation was in progress Ashneel came into the house causing an abrupt ending to the copulation over which the complainant had become angry. According to the appellant, the complainant had uttered "don't stop now honey, give me more". The complainant being angry started to swear at

the appellant. The appellant requested her to lower her voice lest that the neighbors may hear the complainant's abuse. Thereafter he had ordered the complainant to leave his house. At no stage he had slapped her as claimed by the complainant.

The appellant denied any knowledge as to how the complainant ended up having injuries to the face. About the vaginal injuries found with the complainant, the appellant maintained that it was as a result of the penile nodules, penile marble, he had been wearing in his penis. He maintained he wears a marble in the penis which he got inserted while in the USA.

The defense

The appellant testified at the trial. (p286). His was an assertion of having consensual intercourse with the appellant, as already discussed. It is compatible with his cautioned interview statement. He described how he met the complainant who called him to inform that she was coming to Ba to meet him in the evening of 13 April 2013. Having met the complainant they went to his house where they were engaged in a drinking spree. All along the complainant had been affectionately caressing the appellant in the presence of others, who at one point wanted to go out to buy more drinks. As they left the house the complainant had gone into the bed room of the appellant and wanted to have sex with him for which he had agreed.

[11] Several witnesses were called to testify on behalf of the appellant. One Wallamma Ram, the mother in law of the appellant stated in her evidence that on an unspecified date the complainant visited her at home and while crying had told her that she wished to withdraw the complaint against the appellant. The complainant had given a letter to that effect. Answering the cross examination the witness admitted that she has had no knowledge about the incident relating to the instant case.

[12] Ashneel Dutt the cousin of the appellant also testified. Importantly, the witness was narrating his part of the story for the first time, while testifying after several years from the incident on 10 November 2020 .Until he testified at the trial he has made no statement to the police describing what he knew about the incident and as such the traditional methods of assessing his credibility as a witness is non-available. Subject to that infirmity, which indeed is serious, he was trying to present a picture in which the appellant and the complainant were engaged in having consensual sexual intimacy which he had seen clearly through the open door to the appellant's room while standing in the kitchen into which he went to pick some food. Obviously, given his affinity to the appellant he is a witness who has an interest of his own to serve. As a whole one can see that his evidence was tailor-made to suit the appellant's defense that the complainant was an untrustworthy witness, for she had consensual sex with his cousin, the appellant, which was seen by him. The issue in dealing with the evidence of witnesses of this nature revolves around the fact whether the evidence was tainted with some degree of partiality towards the party that has sought the assistance of the witness. In his judgement the learned trial Judge had correctly analyzed Ashneel's evidence (see para 35. p.94 the Judgement) and held as a preliminary observation that he was not an independent witness on the one hand because of his relationship to the appellant, which the appellant did not

want to reveal for obvious reasons, and on the other hand Ashneel was also a drinking partner at the appellant's house in the night in question.

Although this may be seen as a digression, since its importance I wish to state that witnesses with certain ulterior motives tend to resort to falsehood or to embellish the truth with exaggerations so that the aims that they wish to achieve could be reached at despite its moral or ethical propriety. In dealing with such situations where a court is required to make the preliminary determination with regard to the independent nature of the evidence of a witness and to determine whether the evidence is tainted with any impropriety, certain guiding principles are laid down in the English Common law decisions, which in my view has a universal application.

In common law it is a settled legal position that evidence of witnesses tainted by improper motives should be considered with caution. See *Archbold*, 1997 16-17 p.1498. In **R v. Beck**, 74 Cr. App. R. 221 Ackner LJ giving the judgement of the Court of Appeal referred to

> *"the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witnesses' evidence may be tainted by an improper motive." ..."the strength of that advice ... varying according to the facts of the case*. (at p.228) *"What is not clear is whether this obligation extended to a witness with an improper motive other than the one deriving from the witnesses own involvement in the case being tried, or some related offence, and his desire to avoid liability or the incrimination of himself or others he might naturally wish to protect, or to shift the blame elsewhere. Did it extend to motives such as jealousy, spite, levelling of an old score, hope of financial advantage? It seems the answer is probably "yes". (supra* p.1498).

Drawing attention to another analogous situation, "In cases where witnesses called for the prosecution bears potential ulterior motives for giving evidence against the accused it is important that the potential fallibility and ulterior motives of that witness should be put squarely before the jury"; *Archbold*, 1997, para 4-404a, at p.469. see **Chan Wai-keung v R** [1995] 2 Cr.App.R.194 P.C. By the extension of logic involved, what is applicable to a prosecution witness should be equally applicable to a witness for the accused who bears a special interest to secure for the accused. Applying the dicta as referred to above to the instant appeal, it is obvious that the evidence of Ashneel Dutt, the defense witness who is the cousin of the appellant, should be viewed with caution for its natural propensity to be biased towards the appellant. In the trial, dealing with this witnesses evidence correctly the learned trial Judge, in the summing up had rightly highlighted the inherent weakness found in the evidence of Ashneel Dutt and his expressed reservation on the truthfulness of the evidence of the witness that the appellant and the complainant were engaged in consensual sex in his gaze is an accurate observation.

[13] As already stated one medical practitioner Dr Kanakas Goundar testified for the appellant and stated that at the behest of the counsel for the appellant he examined the penis of the

appellant to find a nodule, an inserted projection, under its foreskin, which in his opinion is a device the men used to stimulate women while engaged in having sex.

[14] Thus I have discussed the sum-total of the evidence as presented in the trial with having reference to its salient features.

The Summing Up

[15] Upon a careful perusal of the summing up with a particular emphasis being attached to the analysis of evidence as made by the learned trial Judge, one can find a balanced, unbiased and dispassionate narration of evidence by the learned trial Judge and I find the summing up taken as a whole is unblemished. The unanimous opinion of the assessors was that the appellant while the appellant was guilty of Common Assault he was not guilty of the charge of Rape. With the opinion the learned trial Judge disagreed.

The Judgment

[16] Having analyzed the evidence and having considered the reasons adduced in the summing up the learned trial Judge refused to be guided by the not guilty opinion of the assessors on the count of Rape. He convicted the appellant as charged in the indictment on the two counts of rape and common assault and a cumulative sentence of seven years imprisonment was imposed on 5 July 2016.

The ground of appeal

[17] The main ground of appeal – the 4th Ground:
"That the learned trial judge erred in law and in fact in not directing himself when finding that the evidence of the complainant was not credible when he failed to consider that the evidence of the complainant was not credible when he failed to consider that there were several inconsistencies in her evidence in court, compared to the information that she gave police. Failure to direct himself on previous inconsistent statement in law of the complainant caused substantial miscarriage of justice". (sic)

[18] In support of the ground, at the very outset the learned counsel for the appellant made attempts to highlight several excerpts from the police information records of the statement of the complainant, which I found, were beyond the pale of evidence as adduced at the trial. To say the obvious least, this is not a practice known to the system of justice that we are accustomed to and thus is not to be encouraged. Even if the most scant attention has been paid to what was read out in seeking as purported supplement to the main ground on which the reliance has been sought to be placed, it is my view that the quoted excerpts serve as adding more support to the complainant's version of the incident , save that it has absolutely no prejudicial effect in my mind in deciding on the issues involved in this appeal, for it is the respect and regard to the age old principles of law that govern the resolution of the issues involved in an appeal of this nature in which paying attention to any extraneous material is not only disallowed in law but also an illegality. As such, in adhering to the age old principles of law, the counsel should desist from quoting from the statements made by witnesses to the police, so long as they form no part of the proceedings at the trial.

[19] Be that as it may, focus should pointedly and necessarily be on the issue of the manner of deliberating on the moot point as contained in the ground of appeal as spelt out in the summing up and in the judgment of the learned trial judge, who had dealt with it as follows:

Summing up

[20] The essential complaint of the appellant as contained in this ground is revolving around the manner in which a court of law should be dealing with contradictions as revealed through a testimony of a witness.

As is the trite law, contradictions, omissions are self-explanatory terms used for the purpose of determining the degree of testimonial trustworthiness of a particular witness and the exercise comes under judicial scrutiny subject to the kind of vetting of which the scope of human behavior and the power of recollection, for which in many judicial pronouncements allowance has been given with a flexibility that can be justified considering varying factors.

[21] Dealing with the subject succinctly the learned author Cross (Cross on Evidence 5th Edition page 257) states the following:

"Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction.

See; **Browne v Dunn** (1869) 6 R.67; **R v Hart** (1932) 23 Cr App Rep 202; **Dayman v Simpson** [1935] SASR 320; **R v Jawke** 1957 (2) SA 182 (emphasizing absence of any absolute rule); **Transport Ministry v Garry** [1973] 1 NZLR 120.

[22] Learned author further states that failure to do so may be held to imply acceptance of the evidence in chief. **O'Connell v Adams** [1973] Crim LR 313.

[23] In our own jurisdiction there is ample authority that deal with this age old principle of law and I find that the counsel for the appellant had cited them copiously in the written submissions. See **Swadesh Kumar Singh v. The State** (2006)FJCA 15 ; **Praveen Ram v.The State** ; [2012] FJSC 12;CAV 001OF 2011;9May 2012. As can be understood this is trite law that needs little elaboration.

[24] Applying the principles of law involved, attention should be drawn to the inconsistencies in the form of contradictions or omissions that are possible to be found having regard to the evidence of complainant and in fact if they are in existence what has been the manner in which they were dealt with by the learned trial Judge in the summing up.

[25] Although the counsel for the appellant places heavy reliance of this ground, there is nothing in the submissions to demonstrate the alleged inconsistency upon which he places reliance in furtherance of the appeal. In the circumstances I am constrained to ask what purpose would it serve if the principles of law upon which one relies is not referred

to the instances based on evidence where their applicability could become useful to secure one's interest in a particular manner and justice in general.

[26] Having perused the evidence for the prosecution in the case I am of the opinion that the truth is that there had been no significant impeachment of the evidence of the complainant at the trial and even on the matters of distantly resembling inconsistencies and infirmities, when at the end of the summing up the learned trial Judge inquired whether any redirection was required, the counsel for the appellant had remained silent implying the agreement with the adequacy of the summing up.

[27] In the circumstances I hold that there is no merit to the ground upon which the appellant places his main reliance.

[28] Having regard to the other grounds, I find neither are based on any issues of law or any issues of mixed law and facts which warrant judicial intervention.

[29] In the circumstances I find no merit to the appeal and as such it should be dismissed.

Bandara, JA

[30] I have read in draft the judgment of Gamalath JA and concur with the reasons and proposed orders therein.

Order of the Court

1. Application for leave to appeal refused.
2. Appeal against conviction dismissed.

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Jutice W. Bandara
JUSTICE OF APPEAL