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

CRIMINAL APPEAL NO. AAU 035 OF 2017
(High Court No. HAC 208 of 2013)

BETWEEN : **ATUNAISA GAUNAVOU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Gamalath, JA
Nawana, JA

Counsel : **Mr S. Waqainabete for the Appellant**
Ms P. Madanavosa for the Respondent

Date of Hearing : **08 November 2022**

Date of Judgment : **24 November 2022**

JUDGMENT

Prematilaka, RJA

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

Gamalath, JA

[2] The appellant faced trial in the High Court at Suva on four representative counts, the details of which states as follows;

COUNT ONE

Representative Count

Statement of Offence

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

Particulars of Offence

ATUNAISA GAUNAVOU between the 1st day of September and the 31st day of December 2012, at Nasinu in the Central Division, had carnal knowledge of ASENACA ADIKUILA ROKOVA without her consent.

COUNT TWO

Representative Count

Statement of Offence

***SEXUAL ASSAULT**: Contrary to section 210(1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence

ATUNAISA GAUNAVOU between the 1st day of September and the 31st day of December 2012, at Nasinu in the Central Division, unlawfully and indecently assaulted ASENACA ADIKUILA ROKOVA.

COUNT THREE

Representative Count

Statement of Offence

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

Particulars of Offence

ATUNAISA GAUNAVOU between the 1st day of January and the 31st day of January 2013, at Nasinu in the Central Division, had carnal knowledge of ASENACA ADIKUILA ROKOVA without her consent.

COUNT FOUR

Representative Count

Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210(1) (a) of the Crimes Decree No.44 of 2009.*

Particulars of Offence

ATUNAISA GAUNAVOU between the 1st day of January and the 31st day of January 2013, at Nasinu in the Central Division, unlawfully and indecently assaulted ASENACA ADIKUILA ROKOVA.

[3] At the conclusion of the trial the assessors were unanimous that the appellant is guilty as charged and accepting the opinion of the assessors the learned trial Judge convicted the appellant on all four counts and imposed a total sentence of 13 years imprisonment with a non-parole period of 12 years.

[4] The appellant filed a timely appeal that contained several grounds of appeal and the learned single Judge ruled that only the first ground has merit worthy of consideration in appeal and as such leave was granted to that ground;

> "*The learned Judge erred in law and in fact when he informed the assessors that a prima facie case was found at the end of the prosecution's case against the appellant thereby causing prejudice to the appellant".*

[5] The learned counsel for the appellant, relying only on the very same ground urged that the learned trial Judge's reference to a prima facie case to the assessors in his summing up had caused prejudice to the appellant and as such the conviction is bad in law.

[6] Before examining the ground closely for its merits, a brief statement of fact would be necessary for understanding the nature of evidence upon which the case was built;

> *"According to the complainant she was 13 years of age when the neighbor, the appellant called her into his house under the pretext of seeking her help to fold his clothes and when she entered his room, he had closed the door to the room from behind and after blocking her way, pressed her mouth with his hand so that she could not raise cries for help, undressed her, caressed her and after kissing her and fondling her breasts, had intercourse through vagina. After the act the appellant had threatened the complainant to keep the secret of what had happened between them. A little while later she went home and took a shower and found herself bleeding from vagina. Her fear of the appellant kept her from reporting the incident to anyone. A similar incident happened again in January 2013.On that occasion also the appellant had invited the complainant to his house to give her some thing. Fearing that the appellant may molest her again she had asked her younger brother to accompany her. At his house the appellant wanted the complainant to go inside his bed room to collect some clothes leaving the brother outside of the house. When she came out of the room she found her brother missing and on being inquired the appellant told her that the brother went back home and he pushed her into the room and ravaged her once again.*
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> *The complainant's mother Ilisapeci Valentine had noticed certain changes taking place in the complainant's body and referred the daughter for a medical examination on 25 March 2013 to find that the complainant was pregnant. It was found out through the complainant that the appellant had raped her twice and presently the complainant is a child parent.*
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> *Appellant testifying at the trial denied the accusation .On his behalf the evidence of one Watisoni Delai, through whose evidence nothing significant transpired except that he had seen the complainant and her siblings in the vicinity of the appellant's house.*

[7] The sole ground of appeal is based on what contains in paragraph 21 of the summing up in which the learned trial Judge had stated that;

Para 21 of the summing up;

> *"On 23 March 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 rape and sexual assault allegations against him. When a prima facie case was found against him at th end of the prosecution's case , wherein he was called upon to make his defence, he choose to give sworn evidence , in his defence* . He also called one witness. That was his right." (added emphasis).

[8] Learned counsel for the appellant relying on the decision in **Nemani Raqio v. The State** AAU 0061A of 2015 strongly urged that the fact that the learned trial judge referred to a prima facie case had caused a grave prejudice to the appellant for it had a negative influence on the objective deliberation on the case by the assessors.

[9] In **Raqio**, the decision was based on the pronouncement as found in **R v. Smith and Doe**, 85 Cr. App. R. 197 CA where Watkins LJ had held that;

> *"The question as to whether or not here is a sufficiency of evidence is one which is exclusively for the Judge, following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they convict because they think the judge's view is sufficient indication that the evidence is strong enough for that purpose."*

[10] Under the Criminal Procedure Code, 2009 (CAP017A) at the closure of the case for the prosecution, the trial Judge is required to follow the procedure laid down in section 231. In a general sense since these laws are public documents that can be accessed by anyone interested in knowing what contain in them there is no purpose in attaching any secrecy to them .It would therefore be rather presumptive to think that assessors or any other member with interest from the general public would not know how the law operates at the closure of the case for the prosecution in the High Court. In complicated cases where the issues are knotty it is the best that this procedure is carried out in the absence of the jury. Commenting on that the learned editor *Archbold* (1997), para 4-292, p.426, states as follows;

> *"Submissions of no case are made at the close of the case for the prosecution. Attempts have occasionally been made to renew such a submission during the course of the defense case. It is submitted that this should not be allowed. The Court of Appeal has said that in ruling upon such a submission the judge should ignore his own opinion of the weight or reliability of the evidence, these being matters solely for the jury. It follows therefore that the question whether a prima facie case made out by the prosecution has been rebutted by evidence called for the defence is solely a matter for the jury.*
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> *Submissions of no case should be made in the absence of the jury R v Falconer- Atlee, 58 Cr App R 348 CA One possible qualification to this principle is if the defence ask that the jury remain, in which case the judge should hear submissions in the absence of the jury as to why there should be a departure from normal procedure;* ***Crosdale v R*** *[1995] 2 All ER 500 PC. It is difficult to envisage a legitimate reason; an attempt by the defence to make an extra speech would not provide such a reason: ibid.*
>
> *If the submission of no case is rejected, there should be no comment to the jury* ***R v Smith*** *and Doe, 85 Cr App R 197, CA."*

[11] In the case of **Velu Pillay v Sidembram** 31 NLR p99 in the Sri Lanka Supreme Court held that 'prima facie' proof in effect means nothing more than sufficient proof – proof which should be accepted if there is nothing established to the contrary; but it must be what the law recognizes as proof, that is to say, it must be something which a prudent man in the circumstances of the particular case ought to act upon. In civil cases, where the lower standard of proof on a balance of probabilities prevails, a party may satisfy his burden by a prima facie case if the other party fails to disprove it. (1883) 11 QBD 440, (1886) 11 App 247; (1996) 2 Sri. LR. 101, 102, 103.

[12] In the case of **Smithwick v The National Coal Board** [1950] 2KB 335 at 352 it was held by citing Lord Macmillan in **Jones v. Great Western Railway Co** [1930] 144 LT 194, 202. "The dividing line between conjecture and inference is often a very difficult one to draw; but it is just the same as the line between some evidence and no evidence. One often gets cases where the facts proved in evidence – the primary facts – are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or equally

legitimately, refused to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say, if it is semi inference which no reasonable person could draw."

[13] The operation of the section 231 of the Criminal Procedure Code has to be viewed within the parameters as laid down by the aforesaid judgments.

[14] Commenting on this important issue of law in **Rex v. Jacobson and Lewy** – Burdens and Presumptions by Nigel Bridge – 12, Modern Law Review p273 at 277, says prima facie evidence in its more usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving its discharges of his onus.

[15] Therefore, the use of the word prima facie in my view should not be considered as inimical to the objective assessment that is required at the end of the prosecution's case to determine whether the defendant has a case to answer to protest his innocence.

The application of R v. Smith and Doe, 85 Cr App R 197, CA in a situation where the only ground of complain is based on the use of the word prima facie in the summing up

[16] The learned editor *Archbold* 1997 7-68 at 866 and 867 commenting on this issue states as follows;

> "*In R v. Smith and Doe, 85 Cr App R 197, CA, it was said to be improper for a judge in summing up to a jury to comment that when a submission had been made at the close of the prosecution case that there was no case to answer, if he had not though there was sufficient evidence of identification available to the jury, he would have withdrawn the case from them. Although the convictions were quashed, it was made clear that they would not have been, had this been the only ground of complaint."*

[17] This sound opinion of law is on all fours with the instant case where the appellant is seeking to assail the conviction based on the sole ground of appeal relating to the reference made

by the learned trial judge on the availability of prima facie evidence. Apply the legal principle this ground of appeal cannot succeed. The evidence in this case is strong and convincing that the 13 year old girl was a truthful witness and her evidence had not been impeached.

[18] In the circumstances the appeal is dismissed.

Nawana, JA

[19] I agree with the conclusions and reasons given by Gamalath J.

Orders of the Court

(1) Appeal dismissed.

(2) Conviction affirmed.

Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL