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

CRIMINAL APPEAL NO. AAU 077 OF 2017
(High Court No. HAC 0014 of 2016)

BETWEEN : **TAUSIA FUATA FABIANO**

Appellant

AND : **THE STATE**

Respondent

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

Counsel : **Mr M. Fesaitu for the Appellant**
Mr M. Vosawale for the Respondent

Date of Hearing : **09 November 2022**

Date of Judgment : **24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Gamalath, JA and agree with reasons and orders proposed.

Gamalath, JA

[2] The appellant was convicted of rape contrary to section 207(1) and 2(a) of the Crimes Act No 44 of 2009, in the High Court at Labasa on 20th of April 2017 and sentenced to 12 years and 6 months imprisonment with a non-parole period of 9 years. According to the particulars of the offence "on the 12th of March 2016, at Namawa Estate, at Vatudamu, Cakaudrove he had carnal knowledge of Doreen Thaggard without her consent". He was merely 20 years old when sentenced.

[3] He appealed against both the conviction and the sentence. Leave was granted only on the appeal against sentence.

[4] Appearing in person before the full Court the appellant is now seeking to canvass his conviction as well. He has submitted his hand written submissions which were prepared from the prison. His inability to argue his case was quite apparent and based on his hand written submissions the Court decided to consider his appeal against the conviction as well, since in the opinion of the Court such a course would serve the ends justice.

[5] Upon a close examination of the totality of evidence of the case, what becomes clear is that the case has its own peculiarity, in the sense, as the learned trial Judge also had highlighted in the summing up, the evidence of Doreen had been elicited with "extreme difficulty "for according to her mother's evidence at the trial and Doreen's behavior in court, due to Doreen's retarded mental development from birth, which could be compared to a child of about 7 years, it became difficult in understanding her evidence at the trial. However, on this issue, in order to assist the court, the prosecution had not sought the assistance of an expert who could have helped the court in determining the actual state of mental development of Doreen, provided that such expertise is at the disposal of the State.

[6] Based on the totality of evidence, the basic structure of the case is, that the appellant, a cane cutter, and Doreen who is his first cousin, his young brother along with his aunt, Doreen's family, all were living in Namawa Estate at the time relevant to this case. In the afternoon, on Saturday the 12 March 2016, the only persons at home were Doreen, the younger brother of the appellant and the appellant, who had returned home for lunch after firewood cutting in the estate. According to Doreen's evidence at the trial after he has had his lunch, the appellant called Doreen into the room and had sexual intercourse with her without her consent. On the other hand, according to the appellant's caution interview statement and his evidence at the trial the appellant states that whilst he was resting under the porch at home after lunch, he had been propositioned by Doreen who wanted him to accompany her into the bed room where she insisted on the appellant having sexual intercourse with her. Initially when he showed reluctance Doreen held him by his hand and led him into the bed room; she after having lain in the bed removed her skirt and wanted him to have sex with her. The appellant maintained in evidence that he had sexual intercourse with Doreen with consent.

[7] Doreen, in her evidence at the trial denied that she ever consented to having sexual intercourse with the appellant. A considerable amount of effort had been exerted to elicit the evidence relating to this crucial factor and since the case against the appellant revolves around the issue of consent, it is needed to be examined with a great degree of circumspection.

[8] The mother of the complainant Tewa Thaggard who is also the maternal aunt of the appellant, testifying at the trial stated that her daughter had studied only up to grade 8 in school. Mother made a special request of the trial court that when it comes for the complainant to be questioned in her testimony, the process should be simple with non-complicated questions so that her daughter would be able to answer with a proper sense of what she was speaking about. According to the mother, the complainant is capable of reading and writing words which are very simple and her mood swings are such that even in attending to matters of daily chores, Doreen's state of the mood would be the determining factor over the actual capacity to render a helping hand. The evidence of the

mother was that the behavior of Doreen could be equated to that of her grand-daughter who a 7 years old student is studying at class 2.

[9] During her evidence in chief there was a crucial question specifically asked from Doreen's mother to determine whether Doreen has the capacity to know right from wrong. The response of the witness was ambiguous in that she said "sometimes when I try to explain to her what is right she thinks she's right - you know as a parent - as a mother trying to explain to her, you know you not supposed to do that she'll go against me".

[10] Further, according to the mother's evidence, in relation to the issue of incident of rape, it was after about two weeks from the alleged incident, while the witness was getting ready to leave the house to attend a family function, Doreen started to cry and informed her that by leaving her at home with others the mother was exposing her to some unspecified vulnerability. While crying Doreen complained about some incident involving the appellant. Since the complainant was showing signs of being reluctant to tell her the full story the witness had referred the matter to the village community committee where Doreen was supposed to have complained to a relative about the incident involving the appellant. It is through the community committee that the complaint was referred to the police. The evidence of the relative who was supposed to have been told about the incident between Doreen and the appellant was not called in evidence at the trial making it impossible to know what may have transpired between Doreen and the person to whom the complaint may have been made prior to the matter being referred to the police.

[11] In the meanwhile Doreen's mother questioned the appellant who agreed to have sexual intercourse with Doreen, however it was consensual.

[12] Doreen's evidence at the trial was that it was not her but the appellant who called her into the bed room and forced her to lie down in the bed, removed her clothes, caress her and did her "the bad thing". While doing so the appellant ignored her protests and continued the bad thing. Doreen did not complain to the mother on the same day of the incident as she was nervous and frightened.

[13] Doreen's answers to cross examination require a close scrutiny for they are important to the issue of consent. Accordingly, both the appellant and Doreen were in the house while

the appellant was sitting under the porch. From where she was in the house , she walked up to the porch and took the appellant into the room and in the room she had lied down in the bed.(p.148)After having lied down in the bed Doreen took off her skirt. (p.148) Doreen said that while in the bed she took off her own clothes.(p149). Then the appellant also had taken off his clothes.(p.149) When asked why she did not run away while the appellant was taking off his clothes her answer was because by then she was already naked .(p149)

[14] Providing a rather ambiguous answer to the specific question whether Doreen stayed back in the room with the expectation of having sex with the appellant her answer was recorded as "Uh", whatever it may mean to the ordinary mind.

[15] A close examination of Doreen's evidence shows that she did not resist any thing that took place prior to reaching the point of sexual act. From the point of moving into the room with the appellant and up to the point of removing the clothes, Doreen did not show any signs of unwillingness to what was unfolding. However, her protest in evidence was about the suggestion that she wanted to have sex with the appellant and on that crucial issue she was consistent that even after removing her skirt by herself and by making herself naked while lying in the bed with the appellant, she was still not consenting to have sex with the appellant. When the specific question was put to the witness by the counsel for the appellant that "according to my client when you two were having sex you told him yes. I like it, because you agreed to have sex with the appellant?" Doreen answered "yes". (p150) At that point the learned trial Judge had observed that the witness was giving contradictory answers to the same question (p150) and according to the transcript of evidence whenever the specific question was put to her that she consented to having sex with the appellant, the answer, which for all purposes looked as if it was a readymade one, a prompt denial. Doreen agreed that the appellant had intercourse with her for about five minutes. Thereafter the appellant had had a shower while she had dressed up, went to the sitting room where she lay down in the sitting room. No prompt complaint was made to anyone about the incident. However she was consistent that she never wanted to have sex with the appellant. In re-examination, Doreen repeated the answer that she did not want to have sex with the appellant.

The evidence of the appellant

[16] The appellant giving evidence stated that it was Doreen who insisted on having sex with him and as such it was Doreen by taking the initial step invited him to go to the room and to be with her. At that time there was no one at home as her aunt and the brother had already left the house earlier. Doreen had persisted him to have sex with her for over 20 minutes. She had told her *"lako mai daru lai"*; *"let's have sex in the room"*. While he was showing reluctance Doreen had pulled him by his hand; he followed her and she laid in the bed and removed her skirt. She was not wearing a panty and the appellant had laid on her and had sex with Doreen who described the experience as nice. On comparison one can find that the appellant's evidence is compatible with his caution interview statement and he denied the fact that he raped her as alleged by the prosecution.

Evidence of bad character

[17] The prosecution, during the course of the trial led evidence that revealed details of another pending case against the appellant. Disregarding the prejudice that can be caused to the appellant this evidence had found its way into the main stream of evidence and although the learned trial Judge had later directed the assessors to disregard its prejudicial effect, I will be failing in my duties if a strong disapproval of admission of such evidence is not placed on record. In the caution interview on which the prosecution relied without any objection by the appellant's counsel one could find the material that reveals the details of the pending case against the appellant;

"Where are you staying at the moment? Labasa. Why are you residing at Labasa? I was banned to enter Vatudamu. Why were you banned from staying in Vatudamu? I had a case in Court.

Can you tell me what case you are talking about? I had an indecent assault on one of the ladies in the Evacuation Centre in February this year. (p.123 of the Court Record)

[18] Later, when the prosecutor was cross examining the appellant, the very same issue was highlighted, disregarding the degree of detriment that it could cause in the minds of the triers of facts. Referring to the restraining court order that prevents him from entering the area of his usual residence the counsel cross-examined the appellant ; Q/ In fact that is why

Doreen’s mother allowed you to stay with them even during your court case , isn’t it correct? (p173)

[19] In my opinion this string of evidence, which is intrinsically prejudicial, should never have been allowed to surface particularly in a case of this nature where the instant charges have a degree of cognate similarity to the charge that had been under consideration in the referred case.

[20] A word based on law on this matter; in order to ensure the cases are conducted within the rules of fair trial, every precaution must be taken at the pre-trial stage to eliminate the possibility of allowing the admission of illegal evidence. This is a bounded duty of every party to the trial mostly the duty of the prosecutor who has the duty cast upon himself to safeguard his case from being disintegrated due to illegalities that may have been allowed to infiltrate into the mainstream of evidence so fluidly, whether intentionally or inadvertently.

[21] However, in the summing up the learned trial Judge had directed the assessors to disregard the evidence that transpired pointing to the pending case against the appellant. The learned trial Judge directed that “you have heard a couple of references to his waiting for a Court case to be heard, but I am directing you now to put that information aside. Another case has nothing to do with this case and you must not regard Tausia in a bad light just because he might be involved in another case. We don’t know anything about that case and what happened to it at the end so we are all going to ignore it”. (p43)

[22] As can be seen it is the admission of the caution statement of the appellant as part of the prosecution case that had initially paved the way for the information regarding the pending case against the appellant to find its way into the main stream of evidence. Taking the path of caution at the pre-trial stage itself if necessary steps were taken to edit the statement on agreement, avoidance of mishaps of this nature could have been ensured effectively. As the learned editor, *Archbold* stated (1997 edition ;para4-208, p.422), “a statement made by a defendant may be “edited” to avoid prejudicing him and effort may be made to eliminate matters which are part of the evidence, but which is thought best the jury should not know. The best way for this to be done is for the evidence to appear unvarnished in the committal or transfer papers”. see, **R v. Weaver and Weaver** [1968]1Q.B.353,51Cr. App. R. 77.

C.A.; The learned editor further commenting on the issue had stated in para 4-281 (*supra*), that "Where a defendant has made a statement amounting to a confession both of the offence charged in the indictment and of other offences the portion of the statement relating to the other offences should not be put in evidence by the prosecution unless it is, or becomes, admissible under a particular rule of evidence; **R v. Knight and Thompson**, 31 Cr. App. R. 52 CCA.

[23] Regrettably, in the instant appeal the exact error that the law requires the prosecution to refrain from falling into had been allowed to happen twice, once by producing the appellant's unedited caution interview statement that has reference to an unconnected pending criminal case and secondly by referring to the pending case against the appellant in his cross-examination. Although the learned trail Judge in his summing up had made attempts to purge the error by his invitation to the assessors to disregard the detrimental evidence, in my view the degree of prejudice that such evidence may have caused in the mundane minds cannot be gauged objectively and it is difficult in the circumstances for one to argue that the negative impact against the appellant was completely erased from the minds of the assessors by the learned trial Judge's intervention, at the late stage, in the summing up.

[24] Having regard to the evidence in the case in its totality, as the learned trial Judge also had acknowledged in the summing up, the case is based on three prosecution witnesses and the evidence of the appellant who admitted having had sexual intercourse with the complainant Doreen, in to whose perseverance the appellant had caved in, despite his knowledge on the state of mental abnormality of the complainant, a fact that he knew from his childhood as Doreen is his first cousin and as said in his evidence Doreen has a habit of repeating every word that her mother uttered, inferring a peculiarity that points to her mental state. (p.171 appellant's evidence at the trial).

One important factor with regard to the evidence of the initial fuss that Doreen is said to have made complaining against her mother for leaving her alone at home, Doreen's mother's evidence shows how Doreen seemed to have shown similar resentment towards her whenever the mother went out of the house leaving Doreen at home. The analysis of the mother's evidence shows the manner in which Doreen had protested whenever she

wanted to go to the market without Doreen. The significant relevance of that fact to the instant case is that according to the evidence of the mother, it was when she was about to leave the house alone to attend a family function, Doreen had started to make the fuss and talked about how the others harassed her in her absence. For all purposes it did not look as if it was a new reaction for Doreen has troubles with her mother leaving her at home alone except that there was a complaint about how she was treated by the appellant in her absence. For the purpose of the charge of rape, it indeed was a belated reaction made after a considerable time of about two weeks and as such the consequential impact of the perceivable delay could be construed as having a militating effect against the credibility of the complainant's version on the absence of consent. Furthermore, as the learned trial Judge also had reiterated several times, including in the summing up, within the testimony of Doreen there had been contradictions of considerable significance and it is a question of law to decide merely because of her stated under developed mental condition, the use of such infirmities to test the veracity of her evidence could be or should be dispensed with to the disadvantage of the man on the dock. I find that there had been no direction given in the summing up how should the triers of facts be considering either the belated complaint by Doreen or any of the contradictions that the learned trial Judge had also referred to in the summing up in determining the veracity of the evidence of Doreen. In a case where the issue of consent is pivotal in determining the culpability of the appellant, and the case is based on one's version against the other's and where Doreen's credibility as a witness is pivotal in determining the guilt of the appellant, such directions in line with the trite legal principles should have been clearly spelt out in determining whether the prosecution has discharged its burden. See **Prasad v. State** [2017] FJCA 112:AAU105 of 2013(14 September 2017)

Is Doreen incapable of giving consent?

[25] During the course of the trial it transpired that the prosecution was not equipped with expert evidence to clarify the level of mental development of Doreen, for the availability of such evidence would have been useful in determining the issue of consent *vis a vis* the complainant's mental capacity to make a rationale decision. In answering the cross examination Ms. Thaggard, the mother of Doreen agreed that her daughter was never

referred for any medical examination to decide on her development level as an adult. (p.136) It is quite understandable, for not every family has the capacity to attend to such matters without incurring difficulties. However, since the prosecution is based on the issue of consent, as a part of the investigation it would have been helpful on the basis of its direct relevancy to the main issue of consent that this issue had been clarified with the assistance coming from expertise on the subject, so that the case could have been presented with certainty. As it stands presently, the evidence of Doreen's mental development is solely based mainly on the evidence of Ms. Thaggard and the observation of her manner of giving evidence at the trial. The learned trial Judge, in dealing with this matter, expressed his own opinion to the assessors on the perceived troubles that Doreen showed in comprehending the questions put to her by the defense counsel. There is a clear area of uncertainty whether the prosecution case had been such that it was relying on the position Doreen was a person who was incapable of consenting due to her level of development of the mind and the failure on the part of the court to have the issue being clarified has left a perceivable gap in the prosecution case.

As the evidence bears testimony, although Doreen's level of mental development has not been clearly established by the prosecution with clear evidence, there is no room to doubt that Doreen showed signs of being a vulnerable witness who could have been protected by having recourse to the provisions of Part XX of the Criminal Procedure Act 2009 (Cap021A) - section 295 onwards. In this regard what is relevant to be stressed is that if these provisions are to be used in protecting a child witness, applying the force of the rules of *afortiori*, they should be used with equal force to deal with witnesses with special needs such as mentally disturbed or underdeveloped persons.

Another relevant matter that needs a special emphasis is the nature of the competency test that should have been carried out prior to eliciting the evidence of Doreen. Instead of following such procedure ,at the same time relying to a great extent that Doreen suffers from mental under-development which makes her thinks and acts as a child of 7 years, the learned trial Judge had failed to carry out a competency test prior to Doreen testifying at the trial. The procedure adopted by the learned Judge is in page 142 of the transcript;

"Prosecutor: My Lord our next witness is Ms Doreen Thaggard
Judge: Very well, is it your next evidence
Prosecutor: Yes My lord.
Judge: Doreen come here and sit down with mum. You are Doreen Thaggard, are you?
Doreen: Yes
Judge: So you know the court gets angry if you don't tell the truth to us today and you swear that you will tell the truth today."

One cannot help but ask the question whether this rather peculiar procedure would satisfy the competency test of a witness in the capacity of Doreen? The judge should have firstly carried out a proper inquiry to ascertain the level of the witnesses comprehensibility of the proceedings and I hold the view the test that would be required to be carried out in relation to a child should have been adopted to this witness who according to her mother had a mind that of a 7 years old child. In the absence of a proper competency test being carried out what is left is the testimony of a normal witness whose evidence has to be evaluated in the same way as any other witness's evidence. The age old wisdom coming from decisions of yester years would show that the common law principles relating to these issues had been approached with the amount of judicial circumspection that is compatible with the balance that is required to maintain in the cases of this nature, particularly the issue of consent in a rape case of an underdeveloped person had been under the judicial scrutiny.

[26] The law is that if the intercourse was with a person of weak intellect, incapable of distinguishing the right from the wrong, and the jury find that she or he was incapable of giving consent , or of exercising any judgement upon the matter , and that (though she or he made no resistance)the defendant had sexual intercourse by force, and *without consent* that is rape ; see *Archbold* 1997 para 20-28, pg 1697 under "person of weak intellect"; see **R v. Fletcher** (1859)Bell 63; and **R v. Ryan** (1846)2Cox 115. According to the learned editor, it had been later held that the mere fact of intercourse with an idiot girl, who was a fully developed woman ,who was capable of recognizing and describing the defendant, and who, notwithstanding her imbecile condition, might have strong instincts, was not sufficient evidence of rape to be left to a jury; **R. v. Fletcher** (1866) L.R. 1C.C.R.39. (emphasis added)

[27] In the case of **<u>Fletcher</u>**, (1866) L.R.1 C.C.R. 39 the prisoner was indicted for a rape upon a girl of weak intellect, incapable of distinguishing right from wrong and who was not shown to have offered any resistance. The Judge told the jury that if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl by force and against her will they ought to convict and also that, <u>if they should be of opinion that the girl was incapable of giving consent or of exercising any judgment upon the matter,</u> then, if they were satisfied upon the evidence that the prisoner had carnal knowledge of the girl , they ought to find him guilty, and stated that they considered that the girl was incapable of giving consent due to defective intellect then also they should find the accused guilty; Held that the conviction was right. (emphasis added)

In relation to this case, as the direction to the jury by the trial judge carries the quality of wisdom that pervades beyond its time, it would be interesting to examine it for persuasive purposes;

> *"Richard Fletcher was tried before the High Court in Liverpool on a charge of rape committed against one Jane Jones, who was 13 years at the time of the commission of the offence. It was proved at the trial that Jane Jones was a person with weak intellect, to be incapable of distinguishing right from wrong. Her mother stated in evidence that Jane was not allowed to go about by herself and that she was unable to distinguish the house in which she lived from that of any of the houses of neighbors. On the day in question Jane had left the house without her mother's knowledge. Fletcher met her and it was proved by witnesses who saw them that the prisoner had sexual intercourse with the girl; but she was not showing to have offered any resistance, though she exclaimed whilst Fletcher was in the act that he hurt her and on Fletcher rising from her and her getting up she made a start as if to run away. The girl Jane was called to give evidence.*
>
> *The judge asked certain questions in the hearing of the jury to ascertain if she possessed sufficient intelligence to be sworn. <u>The judge was satisfied that she did not have the intelligent capacity to understand the questions</u>.*
>
> *The counsel for Fletcher objected that the charge of rape was not made out as that Fletcher had carnal knowledge of the girl against her will. The judge told the jury that if they were satisfied upon the evidence that Fletcher had carnal knowledge of Jane by force and against her will they ought to convict Fletcher.*

> *Also that if the jury should be of opinion that Jane was incapable of giving consent or exercising judgement upon the matter, then if they were satisfied upon the evidence that Fletcher had carnal knowledge of the girl by force and without her consent, then the jury ought to find him guilty."*

It was, however afterwards held that the mere fact of intercourse with an idiot girl, who was a fully developed woman who was capable of recognizing and describing the defendant, and who, notwithstanding her imbecile condition, might have strong instincts, was not sufficient evidence of rape to be left to a jury. (emphasis added)

[28] By comparing and contrasting the case of Fletcher with the facts of the instant appeal, the prosecution's stance in the instant case does not convey the message that the complainant's inability to form a rational judgment on consent to the sexual act had been ever considered as a crucial issue in deciding on the culpability of the appellant. It was not urged that the complainant was an imbecile or a retarded person, incapable of consenting to the sexual act. Nor had there been any evidence led through an expert to establish the low level of mental capacity of the complainant, so that the issue of consent could have been withdrawn from the trial as it would have been immaterial to the issue of culpability of the appellant. Even the approach of the learned trial Judge had not indicated to the need to examine the case in line with the incapacity of the complainant to form a rational judgement about her actions.

[29] The appellant's position, as had been already discussed, was that Doreen was insisting on having sex and he had yielded into her request and as such consent should not be a moot point in the case. As against this position, the consistent position of the State had been that Doreen did not give consent to have sexual intercourse and therefore this transaction between the appellant and Doreen was based on non-consensual sexual activity, meaning rape. In that context, clearly the case was not presented on the basis that the low level of Doreen's development would have rendered Doreen incapable of giving the consent to have sex with the appellant. The case on the other hand is presented on the basis that the appellant is lying about Doreen's consent.

[30] Putting another way, by contrasting with **<u>Fletcher</u>** it becomes clear, that the prosecution did not seem to have built up the case on the basis that due to the mental status of Doreen, she could not have given consent to sexual intercourse and as such the issue of consent should have been non-existing insofar as the culpability of the appellant was concerned.

[31] In my understanding of the prosecution case, looming largely is this uncertainty in the manner of presenting it. Is this a case where the complainant is said to have been suffering from a degree of mental and intellectual disability whereby she is incapacitated in forming the necessary mental state to give consent to indulge in sex? Or is it the situation that the case should be considered as a one where her denial of the consent should be evaluated in the light of the usual determining factors whereby the testimonial trustworthiness of the complainant would be gauged by having regard to the traditional tests that are oft used in any court of law, commonly? The prosecution case has not been unfolded in line with *Fletcher* and if that be the case the inherent weaknesses that are discernible in the evidence of the complainant should have been evaluated by using the traditional tools such as the impact of the contradictions found in the testimony as the trial Judge himself has made references to , the impact of the belatedness in making the complaint, the conduct evidence of entering into usual tantrums that the mother's evidence referred to whenever she wished to leave the house without the complainant and the fact that the first time implication of the appellant with any incident had been when the mother was about to leave the complainant at home to attend a family function, matters as such that are directly relevant to determine the culpability of the appellant who is presumed to be innocent until proven guilty beyond reasonable doubt , particularly on the mooted point of consent. The appellant's position that Doreen was a willing party to sexual intercourse would not have gained any currency had the case been considered on the footing that the complainant was a person who was incapable of forming a mental state of consent which in deed is a complex subject in the context of sexual activities. In relation to the issue of consent what matters mostly is not the veneer of sympathy that is found in the judgement about the condition of the complainant but the evaluation of the evidence to determine if the presumption of innocence has been dispelled to satisfy the legal burden.

[32] Overlooking these crucial issues, the case for the prosecution had progressed on the basis that was akin to a run of the mill kind rape case wherein the question should have been asked if the case for the prosecution has been proved beyond any reasonable doubt in the light of the version of the appellant who stood firmly on the ground that the complainant was consenting to have sexual intercourse.

[33] Reiterating the point I am making, its inherently lopsided nature apart, if the prosecution case is based upon the usual underpinnings as described above, in such a scenario , the need to give directions on matters such as belatedness of the complainant and its impact on the credibility of the prosecution case, and how to evaluate the infirmities of Doreen's evidence in arriving at an assessment of the case against the appellant based on the standard level of proof in a criminal case should have been adequately dealt with in the summing up so that the task of assessors would have been within the acceptable legal bounds.

[34] In relation to the contradictions and prevarications found in the evidence of Doreen, the learned trial Judge had the following terse direction to the assessors;

"You will recall that in cross-examination Doreen was contradictory and it seemed to at least that she was having trouble understanding the defense counsel's questions".

This is an opinion expressed by the learned Trial Judge based on his subjective assessment of the situation and it follows his further comment that 'she said yes and no to the same questions.' These contradictory positions in her evidence, if one may examine closely, are directly referable to the crucial issue of consent. In the cross examination, when the question was put to Doreen in simple language that she took the appellant to the room, the answer was a clear 'yes' and there seemed to have had no confusion in Doreen's evidence on that point, although the learned trial Judge held a different view in the summing up (p.148).

> *"When you reach the room you lie down on the bed, is that correct - Yes.*
>
> *Then you take off your skirt is that correct – Yes.*

You agree with me that you first took off the clothes, okay, after you were taking off your clothes Tausia took off his clothes; when he was taking off his clothes you had the opportunity to run away?

Yes, but I was naked.

Witness, according to my client when you two were having sex you told him, yes I like it, is it true? Yes, you like it because you agreed to have sex with Tausia? Yes or no? - Yes."

Later on when she was questioned on the same matter in a straightforward manner, her answer was in the negative;

Doreen agreed that she had sex for 5 minutes and thereafter she put down her clothes and walked up to the sitting room where she lay down. (p150)

[35] I have highlighted the above proceeding for the reason, although the learned trial Judge had attributed the contradictory evidence of Doreen to the manner in which she was cross examined by the defense counsel, the record does not reflect any material to the effect that Doreen had difficulty in understanding the questions put to her by the counsel for the defense. The issue involved in the circumstances is in relation to the inferences that could be drawn from the evidence about the consent. If Doreen should be believed on the portions of her own evidence, what are the inferences that could be reasonably drawn with regard to the issue of consent is a matter on which the learned trial Judge should have given directions for the assessors' deliberations. The learned trial Judge has failed to direct the assessors along such lines and that in my view is a serious non- direction in the case.

[36] Turning to the judgement, the learned trial Judge has made an observation about the appellant, unsupported by evidence, when he said that he disbelieved the evidence of the appellant because of the fact that "he says that he resisted the lady's strenuous invitations to treat for 20 minutes before succumbing to her advances. This is a 19 years old man who on his own evidence had never had sex before. A young man's libido and sexual urges could never resist such an offer." In here the learned trial Judge's preconceived notions have become clear and the observation he made to disbelieve the fact that Doreen consented to the sexual act had been based on subjective observations unsupported by evidence. By

examining proceedings closely one can find that the learned trial Judge had been eager to elicit evidence that would support his own conclusions based on a degree of subjectivity. Referring to the evidence of Doreen one could find at page 143 of the proceedings how the Judge was prompting answers to Doreen, that must have had a lasting prejudicial impact in the minds of the assessors;

> *"Ms Doreen:* *Tausia rape me…he force me….*
>
> *Judge:* *He force you*
>
> *Ms Doreen:* *Yeah.*
>
> *Judge;* *He forced you to.*
>
> *Ms Doreen:* *Yeah he forced me yes.*
>
> *Judge:* ***Thoroughly forced you**."* (pg143)(emphasis added).

I am constrained to state that remarks of this nature, which are capable of causing prejudice in the minds of assessors should have been avoided, should the purpose of a trial be to ensure that its ends meet the goals of justice.

[37] The learned trial Judge acknowledged that the two diametrically opposing versions of the incident obviously caused the assessors some difficulty in that they were deliberating for an unusually lengthy time, yet they returned with a majority opinion of guilty of rape, clearly believing the victim but not the accused.

[38] It is interesting to note that one of the assessors had opined that the guilt of the appellant should be for "Defilement of mentally impaired person".

[39] In my view and as discussed above the non-directions and the mis-directions along with the overall tenuous nature of the prosecution evidence specifically on the contentious issue of consent render it unsafe for the conviction of the appellant to withstand the judicial scrutiny. Consequently, it is my view the appellant should be acquitted of the charge of Rape,

[40] This would now turn the subject to examine whether the available evidence is capable of finding the appellant guilty of the lesser offence of defilement of a mentally impaired person, as referred to in the summing up by the learned trial Judge , and opined by one of the assessors. In the summing up (para 30) the learned trial Judge directed the assessors as follows;

> *"In this case if you were to find Tausia not guilty of rape then it would be open to you to find him guilty of the lesser offence of defilement of a mentally impaired person. To find this offence proved you must find;*
>
> *(1) that the accused had sex with the victim*
> *(2) that the victim was mentally impaired*
> *(3) that the accused knew she was mentally impaired.*

[41] The evidence of the appellant was that Doreen was mentally abnormal and ever since his childhood he knew of her mental condition; (p171).

[42] Section 216 of the Criminal Act 2009,

> *"A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any intellectually impaired person under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the person was suffering from a mental sub-normality.*
> *Penalty imprisonment for 10 years."*

[43] The available evidence points to the fact that notwithstanding the knowledge on the impaired intellectual condition under which the complainant has been living the appellant had indulged in having sex with Doreen, satisfying the elements of the offence as stated above. The learned trial Judge's directions to the assessors to consider the lesser offence is justifiable in the light of the evidence available in this appeal. In the circumstances, I am of the opinion there is ample evidence to find the appellant guilty of the offence of defilement of intellectually impaired person as prescribed in s216 of the Crimes Act.

[44] Accordingly, acting under section 24(2) of the Court of Appeal Act & Rules (Chapter12), I find that based on the available evidence the learned High Court Judge could have found

the appellant guilty under section 216 of the Crimes Act and accordingly the appellant is convicted for that offence.

[45] I find the appellant has been in prison since 21st of April 2017 serving his 12 years and 6 months imprisonment with a minimum term of 9 years. In place of that sentence I impose a sentence of 5 years 7 months and 4 days on him starting from the day of conviction and in effect this means he should be released from prison on 25 November 2022, provided that he is not serving any other sentence of imprisonment.

Nawana, JA

[46] I agree with the reasons and conclusions reached by Gamalath JA.

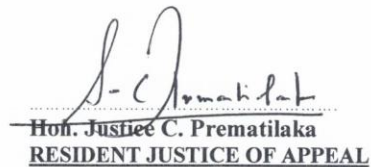
Orders of the Court

(1) Conviction for rape is quashed.

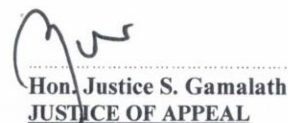
(2) Appellant is acquitted of rape.

(3) Appellant is convicted for defilement under s216 of the Crimes Act of intellectually impaired person.

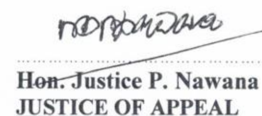
(4) The sentence of imprisonment of 5 years 7 months and 4 days is imposed. This in effect means that he will be released from prison on 25 November 2022.



Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice S. Gamalath
JUSTICE OF APPEAL



Hon. Justice P. Nawana
JUSTICE OF APPEAL