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

CRIMINAL APPEAL NO. AAU 151 OF 2016
(High Court No. HAC 057 of 2015)

BETWEEN : **IOWANE VAKADRANU**

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 : **01 November 2022**

Date of Judgment : **24 November 2022**

JUDGMENT

Prematilaka, RJA

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

Gamalath, JA

[2] The appeal, posing a rather intriguing question relating to consent in a case of rape, seeks to assail the conviction of Iowane Vakadranu, a 80 year old person at the time of the hearing of the appeal, who stood charged in the High Court on four counts of Rape under section 207(1) and (2)(a) of the Crimes Decree, No. 44 of 2009. According to the particulars of offences it was alleged that;

(1) between 1 October 2012 and 31 December 2013, at Labasa, he had carnal knowledge of Selai Tabua, without her consent.
(2) between 1 January 2014 and 31 August 2014 at Labasa he penetrated the mouth of Selai Tabua, with his penis, without her consent.
(3) between 30 September 2014 and 31 of August 2015, at Tailevu, had carnal knowledge of Selai Tabua, without her consent.

As can be seen, the above charges are based on offences allegedly committed against the person Selai Tabua while the 4th count deals with the commission of rape of one Siteri Tino, the particulars state that:

"between 1 September 2013 and 31 October 2013 at Labasa had carnal knowledge of Siteri Tino without her consent".

Recognizing the distinguishable characteristics in the case of Siteri Tino from the case of Selai Tabua, the learned counsel for the appellant Mr Fesaitu conceded that the conviction of Siteri Tino does not carry within its evidential structure any issue on the absence of consent and as such the evidence led by the prosecution at the trial had offered a case with

strength to substantiate its conviction, which was also based on a unanimous agreement of opinion of the assessors. Thus, while appreciating the forthright submission of Mr Fesaitu, the intriguing issue of consent relating to the offences said to have been committed against Selai Tabua required a close inspection to decide whether the evidence adduced by the prosecution had been sufficient to satisfy the legal burden based on the weight of evidence to establish the three charges of rape against the appellant .

[3] On a comparison between the evidence of the complainant Selai Tabua , the only witness upon which the prosecution relied in establishing the three charges against the appellant , and the evidence of the appellant, who in fact took the stand at the trial, it is discernible that they are consonant with and complement to each other , in the sense both have admitted in evidence that the acts as alleged in the respective charges had been resorted to with consent, for the religious conviction propagated through their church makes them verily believe that the indulgence in sex between them does not contain anything morally or ethically abominable. In relation to that aspect of the matter, suffice it to state that the courts of law do not act as instruments through which moral or ethical judgements are passed on any seemingly unconventional indoctrinations and as such the task of examining the evidence upon which the appellant was convicted, within the bounds of relevant laws is the primary task entrusted to this Court. In order for that task to be archived before taking a close view of the evidence, let me advert to the admitted facts at the trial which forms the clear factual underpinnings of the prosecution case.

[4] **<u>Admitted Facts</u>**

> *"1. It is agreed that Iowane Vakadranu [hereinafter the accused] was the Head Pastor of the Back to Eden Church Ministry between the 1st of March 2013 and the 31st of October, 2013. The Back to Eden Church Ministry is a breakaway from the Seventh Day Adventist Church. The accused started this church in 2007 in Veinuqa, Waidalice.*
>
> *2. It is agreed that the accused was born on the 16th of November 1942. He currently resides at Veinuqa Village, Namalata, Tailevu. He is originally form Dreketi Village, Qamea in Taveuni. He is married to Siteri Vakadranu for 20 years and they have four children. All his children are married.*

> 4. *It is agreed that the victim, Selai Tabua was born on 25th September 1994. She and her family are members of the Back to Eden Church Ministry between the 1st of March 2013 and the 31st of October 2013. She lives with her parents and her siblings at Veinuqa, Waidalice.*
>
> 5. *It is agreed that the victim Siteri Tino was born on 27th July 1993. Her family are members of the Back to Eden Church Ministry.*
>
> 6. *It is agreed that sometimes in October 2012, about 12 youths including the two alleged victims went and lived at Vucilevu, Vuniika, Labasa with the accused. They were to prepare themselves for spiritual development as they were going to spread the word of God. They lived at Vuniika, Labasa for about 2 years.*
>
> 7. *The two alleged victims lived at a tent with the other youths while the accused was renting at a house nearby. The accused was in Labasa with the youths while his wife lived in Wadalice.*
>
> 8. *Their daily programme at Vuniika, Labasa would start with waking up at 3.00am. They will have their morning devotions with the accused from 3.00 am to 4.00am. Then they have a thirty minutes morning walk. After the morning walk they are then delegated to their different chores. They have breakfast at 8.00am and they are to wait for their one on one interview session with the accused.*
>
> 9. *While staying at Vuniika, Labasa, eight of the youths withdrew from the church ministry and returned to Viti Levu while the others stayed back include the two alleged victims.*
>
> 10. *They returned to Veinuqa, Waidalice sometimes in 2014 together with the accused.*
>
> 11. *It is agreed that the accused was interviewed under caution by the police in the i-Taukei language on the28th November 2015.*
>
> 12. *It is agreed that the Accused was charged by the police on the 30th of November, 2015."*

[5] As already stated the prosecution case against the appellant taken as a whole revolves around the issue of "consent", be it actual or ostensible and if the evidence suggests that there had been consensual sex between, particularly the appellant and Selai Tabua, what would be the extent to which the conviction against the appellant could be supported is the main issue in this appeal.

[6] Recognizing the importance of this issue, the sole ground of appeal for which the leave has been granted reads as follows:

> *'The learned trial Judge erred in law and fact in convicting the appellant when the guilty verdict is not supported by the evidence in regard to the element of consent and appellant is reckless as to whether or not the complainants were consenting.'*

[7] Distinguishing the term consent in the context of sexual offences, Part 12, Section 206 of the Crimes Act 2009 (Cap 017A) states that the term 'consent' means -

> *"206. In this Part–*
>
> *(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.*
>
> *(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained–*
>
> *(a) by force; or*
>
> *(b) by threat or intimidation; or*
>
> *(c) by fear of bodily harm; or*
>
> *(d) by exercise of authority; or*
>
> *(e) by false and fraudulent representations about the nature or purpose of the act; or*
>
> *(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner."*

[8] In the backdrop of the evidence led in the trial, the specific issue that has attracted the judicial scrutiny in deciding on the culpability of the appellant has been to decide on whether the appellant had , by his action as the chief pastor of the church, transgressed the provisions of section 206(2) (2)(e); "that the consent is vitiated if obtained by false and fraudulent representations about the nature or purpose of the act" had been carried out, for if there has been unequivocal evidence that points to the fact that the consent had been obtained by means of deception that would then be satisfying the requirement to commit the offence of rape.

[9] In relation to that the evidence of the complainant Selai Tabua needs a close examination. In the evidence of Selai Tabua there is a clear assertion throughout her testimony, that her

consent to indulge in sex with the appellant had been consensual and she had been unequivocal about that fact repeatedly. Based on the religious believes upon which she seemed to have reposed her faith without any doubt or questioning, the witness has reaffirmed that she was a consented partner with a full understanding of the nature of the activity with the appellant when she indulged in having oral sex as well as vaginal sex with the appellant.

[10] Answering the cross-examination the witness was assertive that;

> *"Q. In all these incidents that you gave rise to the three counts of rape, did you consent?*
> *A. Yes.*
>
> *Q. Were you threatened?*
> *A. No.*
>
> *Q. Did he force you?*
> *A. No.*
>
> *Q. Were you under duress?*
> *A. No.*
>
> *Q. Do you still believe that the decision took in all the incidents was the right decision?*
> *A. Yes.*
>
> *Q. Do you have any regrets?*
> *A. No."*

[11] Referring to the parental attitude towards the sexual intimacy between the appellant and Selai Tabua, she stated that her father, who was an assistant pastor of the church, had shown no disapproval with what went on between the witness and the appellant.

[12] On the whole Selai Tabua's perception of the intimacy with the appellant was not an act of sexual intercourse or giving into the lust of flesh. She was affirmative in evidence that 'I have a clear conscience about it.' The appellant was the first person to have indulged in sexual contact with her. As the vaginal insertion started to give pain, she informed the appellant and he had immediately retrieved without ejaculation. At no stage the appellant

made attempts to reach the climax, suggesting more of a ritualistic performance or an initiation sanctioned by the belief of the church to which they belonged.

[13] Answering further to the cross-examination the witness Selai Tabua stated as follows:

> *"Q: How did you end up to the Police when everything was well?*
> *A: Everything that had happened, I don't know why it ended up in court. Everything that happened we agreed we give our consent. If we had not agreed, it would not have happened. This is what we choose.*
> *Q. Do you have a system of reconciliation in the church?*
> *A. Yes. If something wrong had happened there is a solution to solve it inside the church. Everything that had happened we reconciled and if ended up there. And I don't know why it ended up here.*
>
> *Q. Please confirm whether you have changed, or you still believe what you did was correct?*
> *A. I still agree with it. (Emphasis added)*

Answering the re-examination the witness reiterated her position that the sexual intercourse has nothing reprehensible and in order to find support to her religious conviction that the consent to have sex was compatible with the scriptures, she relied on the verse and chapter of "a Bible", whether it was from the standard version of King James Bible or any other writing is not clear having regard to the evidence as there had been no attempt made by the prosecution to obtain an accurate interpretation of what the witness quoted. According to her belief the quote was an authoritative justification for consensual sex with the appellant and it reads as follows:

> *"Q. It is because of what you were taught by your Pastor Sowane that made you think that his action of penetrating his penis into your vagina was correct?*
>
> *A. The work of God he taught me which made not regret was, to make it short, it is the teaching from the Bible verse 2 Corinthians Chapter 2 verses 14 and 15. What had happened based from the word of God, you correct understand. That is what I believe. It may look foolish to you. What I believe, that is correct in the eye of God. Iowane Vakadranu taught me this belief." In cross-examination I said, it was not sexual intercourse. Like I said I agree, I agree by consent."* (emphasis added).

[14] In the light of this unequivocal assertions supported by a quote from some scripture upon which the seemingly indubitable faith had been reposed, where does the case for the prosecution lead its course is a question that needs to be asked as an inevitability. No attempt had been taken to place on record that the quoted verse of the scripture is a distortion of the Biblical teachings nor was there any attempt on the part of the prosecution to show that the apparent strong indoctrination was as a result of a deception played on the witness by the appellant. The case is not to decide the extent to which one should be a moral crusader in relation to an episode involving sexual indulgence, but on an issue of the commission of the offence of rape, where the fact of consent to insert the penis into the vagina plays a pivotal role in determining the alleged culpability.

However, insofar as this crucial issue is concerned, the learned trial Judge seemed to have taken a rather conservative approach when he perceived the evidence under a different shade. He seemed to have entertained no reservation that the prosecution has proven the case beyond any reasonable doubt that the consent to have sexual intercourse with Selai Tabua had been obtained under the guise of a religious conviction, which contravenes the canonical teachings as found in the Holy Bible and thus is incapable of providing any justification, either legally or morally.

The case of the 2nd complainant Siteri Tino

[15] The fourth count against the appellant was in relation to Siteri Tino, another parishioner of the appellant's church, who was alleged to have been raped by the appellant between 1 September 2013 and 31 October 2013.

[16] Presenting a different complexion to the evidence of the complainant Selai Tabua's evidence against the appellant at the trial had been to the effect that the appellant's sexual advances towards her was devoid of consent and hence the need to examine the evidence in that light.

The church, "Back to Eden Missionary ", founded by the appellant had also convinced Siteri Tino that there was no worthwhile purpose in pursuing the conventional education and being indoctrinated to think in that line the complainant had dropped out of school and

seemed to have devoted her services to the ideals of the church. This happened in 2011, when she was 19 years old and she was appointed to the position of the youth leader of the church. In fact her mother was also a member of the congregation in which, as already stated earlier in evidence of Selai Tabua, the belief had been that there are "no sins, no death and no sickness.' It was a belief base created by the appellant. The appellant's teachings had convinced them that he was their doctor for sickness so that external medical assistance would not be sought whenever they find themselves affected with any sickness; he was their spouse – perhaps for conjugal purposes, and the teacher under whose wings any expansion of knowledge should be pursued, eschewing the traditional institutionalized education.

[17] Somewhere around 2012, the appellant had moved to Vanua Levu Labasa to establish a center of the church where a group of youths along with the complainant were given the "spiritual orientation" to become the messengers of the word of gospel. The target was to spread the message throughout the world. After a while, some of the members had returned to their parents leaving behind only four of them to be with the appellant, who used to conduct one-to-one guidance between the appellant and the remaining laities. The one to one sessions included the Bible reading and interviews and writing down verses. According to the witness, somewhere between 1 September 2013 and 31 October 2013, whilst the sessions were on the appellant ordered Siteri Tino to move into a room where she was ordered to remove her clothes, lie in a bed and after that the appellant had lied on her and inserted his penis into her vagina, without her consent. The complainant stated in evidence that due to the insertion it had caused pain to her. The incident was reported to the complainant's mother and then to the police.

[18] The stark difference between the evidence of Selai Tabua and Siteri Tino are recognizable with little difficulty as in the case of the 1st episode, the evidence of Selai Tabua was to the effect that the insertion of the penis into the vagina was with full and complete understanding and with consent wherein there was no room for remorse or regret ,whereas in the case of the complainant Siteri Tino, the complainant states that at no stage she gave her consent for the appellant to insert his penis into her vagina, making the case against the

appellant strong and convincing that the sexual intercourse is tantamount to rape. The lengthy cross-examination of the complainant had been of no use to discredit her evidence that the appellant inserted the penis without her consent.

[19] The learned counsel for the appellant, in his submissions and in keeping with the high tradition of the Bar accepted the fact that the case of 2nd complainant is based on strong evidence of the appellant indulging in having sex with the complainant without her consent.

The case for the defence

[20] The appellant elected to testify on his behalf and denied that the indulgence in having sex was an act of rape as prescribed in law. According to him, the alleged sexual activities were compatible with the teachings of "the Bible". Describing the purpose of his indulgence in sex with the complainants the appellant stated that;

> *"They are still young girls. They were prepared for a mission not to commit adultery so that they will learn the taste and will not go and do it outside but only me to do it."*

[21] "Because they are about to preach that it is not allowed to commit adultery. I advised not to do it outside because I am the only one who should do it because I am their leader and adviser."

"I did not ejaculate with Selai and Siteri because it will be against my belief. It was my intention not to ejaculate."

"I did the acts with consent. If anyone had refused, I would not have done it."

[22] Referring to his doctrine based on the Bible the appellant stated that it is found in verse 2 of the Bible - 2 Timoci 1:10 wherein the doctrine is that there was " no sins, no sickness and no death."

[23] Assuming the role of the apostle of the followers of his church, the appellant seemed to have indulged in having sex with the two girls for he had verily believed that that was a prescribed form of preparing the disciples to take the message of God to the world.

[24] This in effect had been the total evidence of the case at the trial.

The High Court Judge's approach

[25] As already discussed earlier, the issue of consent, with its intrinsic characteristics, which are particularly relevant to establish the charge of rape, plays the pivotal role in the instant case. Insofar as the evidence against the appellant at the trial is concerned, one complainant's evidence runs parallel to the evidence of the appellant in which the consent for indulgence in having sex had been admitted with no reservations. However, the other complainant's case is distinguishable for she was unequivocal in her evidence that there had been no consent given by her for the appellant to insert his penis into her vagina.

[26] However, in his summing up, following the references being made to the ingredients of the charge of Rape the learned trial Judge seemed not to have considered the distinguishing characteristics of the evidence between the two complainants and as such he had taken the approach that the ostensible consent of the 1st complainant has been vitiated by the deception exercised on her by the appellant who by using his pastoral powers indoctrinated Selai Tabua to submit herself to give consent for sex with him.

[27] In the summing up the learned trial Judge in analyzing the evidence in paragraphs 58 to 68 had dealt with the evidence of the complainants in a more of a generalized manner and had highlighted the fact that the issue of consent plays a center- stage position in deciding on the culpability of the appellant. Placing a special emphasis on the distinguishing character of the prosecution's assertion that the sexual intercourse with Selai had been non-consensual the evidence of Selai Tabua was analyzed in terms as follows;

> *"Selai said in her evidence that she gave her consent for the accused to insert his penis inside her vagina in Labasa and in Tailevu. She said that she gave her consent for the accused to perform the above acts that had given rise to the three counts of rape because she believed in her teachings. That is, the accused was preparing her admission where is required to spread the word of God to the world and she cannot preach something which she has not experienced. She said she was not threatened, nor forced and was not under duress. She said she still believes that the decision she took regarding all the incidents that is the two incidents of sexual intercourse and the sucking of the accused's penis in Labasa and the two incidents of sexual intercourse in Tailevu was the right decision and she has no regrets. Her father who is the assistant pastor also agreed. She is okay with everything that was done. She said she has*

> *a clear conscience about it. She and her family members are still members of the same church."*

[28] Having placed before the assessors both versions of the prosecution and the defense on consent, the learned trial Judge invited the assessors to consider the evidence of Selai Tabua in the following manner;

> *"When you deal with the three counts in relation to Selai, you should consider each count separately and decide whether the prosecution has proven beyond reasonable doubt that Selai did not freely and voluntarily consent for the accused to penetrate her vagina or the mouth as the case may be, and that the prosecution has proved beyond reasonable doubt either the accused knew or behaved that she was not consenting or the accused was reckless to whether not she was consenting."*

[29] Thereafter, making an unclear statement on the evidential burden involved in a criminal case, the learned trial Judge directed the assessors that;

> *"You must remember to assess the evidence for the prosecution and defense using the same yardstick but bearing in mind that always the prosecution should prove the case."*

What the learned trial Judge was trying to convey to the assessors by directing them to use the same yard stick in assessing the evidence of both the prosecution and defense is not clear having regard to the totality of the contents of the summing up. Since this nature of directions blurred with indistinguishable characteristics that can lead into confusions in the minds of lay persons drawn from society to assist in the judgmental process, it is desirable to avoid the use of phrases akin to this in the summing up. (however, this will not be a problem anymore since the system of having assessors is now non-existing).

The fundamental issue is whether the evidence of the appellant was capable of causing a reasonable doubt in the minds of the assessors with regard to the issue of consent. Especially in view of the fact that Selai, in evidence denied that the appellant engaged in having sex with her without her consent, would it be possible to impute criminal responsibility to the appellant for having committed rape on her based either on direct evidence or inferentially, is the fundamental question to be answered in the context of this case. That question seemed to have escaped the attention in the trial causing a miscarriage

as far as the case of Selai Tabua is concerned. There should have been clear and distinguishable directions on how to deal with the case of Selai Tabua as against that of Siteri Tino. This fundamental distinction seemed to have gone into oblivion due to the lack of objectivity with which the trial had progressed.

[30] In order to bring the issue relating to the matter of burden of proof, later on the learned trial Judge left the assessors with the following direction:

"Generally an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each offence;

(i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is not guilty.

(ii) Without necessarily believing him you may think, "Well, what he says might be true". If that is so, it means that there is reasonable doubt in your mind and therefore again your opinion must be "not guilty".

(iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has <u>proved all elements beyond reasonable doubt</u>. If you are sure that the prosecution has proved all the elements then your proper opinion would be that the accused is guilty of the offence.

[31] The manner of looking at the evidence *vis a vis* the above direction needs a modification in relation to the case of Selai Tabua, who had been insistent that she gave consent with no regret or remorse to the appellant to indulge in the sexual activity with her, for in her belief what took place was not sexual-intercourse, according to her religious parlance. In the light of such assertion could the prosecution still impute criminal liability upon the appellant is a fundamental issue that should have been left for the deliberation of the assessors. There is a deficiency in this area and as such the directions are fraught with errors to that extent. Nowhere in the summing up the learned trial Judge had explained what must have possibly

constituted the deception played on particularly Selai Tabua or having regard to her evidence whether there was any deception that was used in convincing her to give consent to sex with the appellant. Recalling that Selai denied that she was ever deceived, this issue should have been left for the assessors' deliberation and failure to do so has caused an irreparable miscarriage.

On the issue of deception in relation to consent

[32] The State, in his submissions before the Court, contended that the appellant's consent to have sexual intercourse had been obtained by means of "false and fraudulent representations about the nature or the purpose of the act" as set out in section 206 (2)(e) of the Crimes Act 2009 (CAP017A) and in order to establish the contention, a specific reference was made to the question and answer found in the cross examination of Selai Tabua (p176) in which the complainant had answered as follows;

> *"Q: Your pastor told you that the purpose was that you cannot go preaching without experiences. Is that correct?*
>
> *A: Yes."*

The issue of consent

[33] The issue of consent in the context of the offence of rape seemed to be a complex subject, particularly in the area of deception as an element of the offence. Under the Common Law "the only type of fraud which vitiate consent for the purpose of the law are frauds as to the nature of the act or as to the identity of the person doing the act"; *Archbold (1997, para 20-29, Intercourse by false pretenses, p.1698).*

In **R v. Flattery** (1877) 2QBD 410, the case summary was that the defendant pretended to be a doctor at a market stall in York. The complainant went to him, with her mother, as she suffered from fits. The defendant had sex with the complainant under the guise of carrying out an operation. Mellor J commented that "it is said that submission is equivalent to consent, and that here there was submission; but submission to what? Not to carnal connection". Held in the appeal that the defendant was guilty of rape as there had not been consent".

In **The King v. Williams** [1923]1K.B. 340, where the choirmaster pretending to be testing a girl's breathing powers with an instrument; the appellant who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretense that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, willfully and fraudulently induced by the appellant, that she was being medically and surgically treated by the appellant and not with any intention that he should have sexual intercourse with her. In the Court of Criminal Appeal, their Lordships adopting the directions to the jury by the Judge Branson J quoted the summing up as accurate direction on obtaining consent by deception:

> *"The law has laid it down that where a girl's consent is procured by the means which the girl says this prisoner adopted, that is to say, when she is persuaded that what is being done to her is not the ordinary act of sexual intercourse but is some medical or surgical operation in order to give her relief from some disability from which she is suffering , then that is rape although the actual thing that was done was done with her consent , because she never consented to the act of sexual intercourse. She was persuaded to consent to what he did because she thought it was not sexual intercourse and because she thought it was a surgical operation."*

[34] As already referred, section 206 (2)(e) of the Crimes Act 2009 (CAP 017A) reads as follows;

> *".....a person's consent to an act is not freely and voluntarily given if it is obtained..."*
>
> *(e) by false and fraudulent representation about the nature or purpose of the act…"*

[35] The evolvement of the law in the UK based on statutory changes has similar provisions to the Fiji Law that deals with deception in rape cases and the Sexual Offences Act 2003 , in section 75 (2)(a) it provides that ;

> *"Consent would be vitiated if obtained by the defendant intentionally deceived the complainant as to the nature and purpose of the relevant act".*

[36] On comparison one can find that in place of "false and fraudulent representation" as found in Fiji Law, the UK has used the word "deceived", perhaps in a more restrictive sense, and

in order to find the accurate definition of the term "deceived" one may be required to seek the ordinary meaning accorded to the word as found in the dictionary.

[37] Be that as it may, in the recent case of **R v. Jason Lawrence** [2020] EWCA Crim 971 , the Court of Appeal (Criminal Division) ,delved into the aspect of the meaning to be accorded to the statutory term ' deception', as contained in section 75 (2)(a) of the Sexual Offences Act.

[38] The factual basis of the case was "can a lie about fertility negate ostensible consent" in a rape case? In that case the prosecution alleged that the appellant falsely represented to the complainant that he had had a vasectomy. On that basis the complainant agreed to unprotected sexual intercourse when otherwise she would have insisted on his wearing a condom. On 31 July 2019, in the Crown Court at Nottingham, the jury convicted the appellant of two counts of rape, on that basis.

[39] In the submissions of the appellant Lawrence, the position taken up was that, a lie told about a person's fertility could not as a matter of law vitiate consent, even if relied upon by the complainant. In particular, he submitted amongst other things that "not all deceptions to an individual consenting to sexual intercourse are sufficient to negate consent".

[40] The counter argument by the prosecution was that there was a material distinction between the present case and **R v. B** [2007]1W.L.R.1567, [2006] EWCA Crim 2945, which concerned a failure to disclose that the accused was HIV positive, rather than as in the case of Lawrence a positive deception concerning fertility.

[41] In **Lawrence** the Judge ruled that if the jury accepted the evidence of the complainant, the appellant's deceit as to his fertility was capable of negating her consent to having sexual intercourse with him. One of the most important considerations that emerged out of the facts of **Lawrence** was "whether the appellant's deceit as to fertility was sufficiently closely connected to the act of sexual intercourse to be capable of negating the complainant's agreement to have sexual intercourse with him".

[42] In the appeal against the conviction of Lawrence both parties urged their respective positions and on behalf of Lawrence it was submitted that since the alleged deceit has no

close connection to the actual penetration , the case should be withdrawn from the jury on the basis that there was no case to answer. Further it was urged on behalf of Lawrence that there can be no practical difference between an expressed and implied deception. The appellant relied on the judgement in **R v. B** [2007]1W.L.R.1567, [2006] EWCA Crim 2945, where the appellant in question had not disclosed that he was HIV positive (although he did not represent that he did not have HIV). In that case the Court of Appeal, Criminal Division held that an agreement to all aspects of the sexual act that took place amounted to consent even where the defendant had failed to disclose to the complainant his HIV status and as a result had misled her about the nature of his ejaculation.

[43] In the case of **Lawrence** one can find an interesting legal discussion on the subject of consent by means of deception in cases involving rape. As a prelude their Lordships made reference to the case of **R (Monica) v. DPP** [2019] QB1019 [2018] EWHC 3508 (Admin) at [74]; In that case the facts were that a woman who was an environmental activist had an intimate relationship with a man she thought agreed with her ideological beliefs, but he was in fact an undercover police officer who had infiltrated her group. The claim was a challenge to the decision of the Director of Public Prosecutions not to prosecute the officer for a series of offences, including rape. Her case was that consent was obtained on the basis of deceit and that she would not have consented to an intimate relationship had she known what he was. The Court held the DPP's decision to be correct. (see **Lawrence** supra; para 23)

[44] In the discussion on **Lawrence** the Court said as follows;

> *"In the case of Lawrence, the jury concluded that the complainant relied on the appellant's deception regarding a vasectomy and that she would not have consented to unprotected sexual intercourse had she thought him to be fertile. However, the "but for" test is insufficient of itself to vitiate consent. There may be many circumstances in which a complainant is deceived about a matter which is central to her choice to have sexual intercourse. Monica (supra) was an example, but they can be multiplied: lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth are such examples. A bigamist does not commit rape or sexual assault upon his or her spouse despite the fundamental deception involved. The consent of the deceived second spouse, even if it would not have been forthcoming had the truth been known, does not vitiate consent for the*

purposes of sexual offending. Neither is the consent of a sex worker vitiated if the client never intends to pay".

[45] "The question is whether a lie as to fertility is so closely connected to the nature or purpose of sexual intercourse rather than the broad circumstances surrounding it that is capable of negating consent. Is it closely connected to the performance of the sexual act?" In our opinion, a lie about fertility is different from a lie about whether a condom is being worn during sex, different from engaging in intercourse not intending to withdraw having promised to do so and different from engaging in sexual activity having misrepresented one's gender. (emphasis added).

[46] In **R v. B** [2007] 1WLR. 1567 [2006] EWCA Crim. 2945, is a case where the accused failed to disclose that he was HIV positive prior to having sexual intercourse with the complainant. The transmission of the disease through sexual intercourse was not part of the performance of the sexual act but a consequence of it. In giving the judgment of the court the Vice President, Latham LJ, explained:

> *"18. Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defense to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.*
>
> *20. As has been indicated in an article by Professor Tempkin and Professor Ashworth, in the 2004 Criminal Law Review, page 328, the Sexual Offences Act 2003 does not expressly concern itself with the full range of deceptions other than those identified in section 76 of the Act, let alone implied deceptions. It notes that this leaves, as a matter of some uncertainty, the question of, for example, as it is put: "What if D deceives C into thinking that he is not HIV positive when he is?" …*
>
> *21. The consequence seems to us to be matter which requires debate, not in a court of law but as a matter of public and social policy, bearing in mind all the factors that are concerned including the questions of personal autonomy in delicate personal relationships. That does not mean that we in any way dissent from the view of the Law Commission that there would appear to be good reasons for considering the extent to which it would be right to criminalize*

sexual activity by those with sexually transmissible diseases who do not disclose that to their partners. But the extent to which such activity should result in charges such as rape, as opposed to tailormade charges of deception in relation to the particular sexual activity, seems to us to be a matter which is a matter properly for public debate.

22. *All we need to say is that, as a matter of law, the fact that the appellant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under section 74 in relation to the sexual activity in this case."*

[47] "In our view, in any event, it makes no difference to the issue of consent whether, as in this case, there was an express deception or, as in the case of **R v. B**, a failure to disclose. *The issue is whether the appellant's lie was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it.* For the reasons we have given, in our view in the present case it was not." (emphasis added).

[48] "Our conclusion, in respectful disagreement with the judge, is that the appellant's lie about his fertility was not capable in law of negating consent. This appeal therefore succeeds on the first ground. In those circumstances there is no need for us to consider the appellant's submissions concerning the judge's directions in the summing up. We find that the appellant's convictions on counts 8 and 9 are unsafe and must be quashed."

[49] **Lawrence** is a thought provoking decision that discusses a whole range of issues relating to the complex subject of deception in the context of consent in cases of rape. Deriving the legal principle from **Lawrence** would be in deciding on the issue of deception as a valid basis to vitiate consent one must ask the question "whether the appellant's lie was sufficiently closely connected to the performance of the sexual act, rather than the broad circumstances surrounding it"

Matters relating to the instant appeal

[50] **Lawrence** (supra) deals with ostensible consent in rape cases where the main concentration is on the issue of perceived "deception" used in reaching at the goal of having sexual intercourse with a person who would not have consented to the act of intercourse if not for the deception. In my understanding of **Lawrence**, disregarding the surrounding web of

deception that had been woven encircling the target, what is required to be directly examined is the nature of the deception used in achieving the penetration, the *actus reus*. In the case of section 206 (2)(e) of the Crimes Act where the equivalent of deception as found in the English Law has been presented in terms of "by false and fraudulent representation about the nature or purpose of the act", in order to understand the efficacy of the sub-section, can one use the criteria found in Lawrence that "whether the appellant's lie sufficiently closely connected to the performance of the sexual act rather than the broad circumstances surrounding it"?

[51] Referring to the evidence at the trial not only the appellant who saw nothing wrong in what he was doing with Selai Tabua, but also Selai Tabua verily believed that there was absolutely nothing wrong in what she did with the appellant.

[52] In the backdrop of such evidence was the learned trial Judge convinced about the culpability of the appellant based on the fact that the appellant's actions were capable of satisfying the element of false and fraudulent representation as stipulated in the section?

[53] I find the learned Judge's directions in the summing up as found in paragraph 66 and in paragraph 14 of the judgement are totally inadequate to deal with the nature of the deception that the appellant supposed to have carried out in having sexual intercourse with the complainant Selai Tabua. Giving vent to his own uncertainty about the crucial issue the learned trial Judge had used vague terms to describe his own opinion on the subject when he said that "In my view the evidence <u>suggests</u> that the accused had made a false and fraudulent representation to Ms Tabua about the nature and purpose of inserting his penis into her vagina". (emphasis added).

[54] The learned trial Judge had overlooked the fact that the evidence does not suggest what he thinks as has been suggested. Ms Tabua does not accept the fact that there was a false representation or fraud carried out in having sex with her by the appellant. Nor did the appellant in his evidence admitted that his actions were either fraudulent or based on false representations. Prosecution did not call evidence to establish the purported truth or otherwise of the religious beliefs of both the appellant and Selai Tabua and the learned trial

Judge's directions on this most crucial issue falls far short of the required standard of proving the charges beyond any reasonable doubt.

[55] In the circumstances I am of opinion that the conviction of the appellant on the first three counts relating to Selai Tabua are bad in law and as such he should be acquitted on those counts.

[56] As the counsel for the appellant also rightly conceded the fourth count of rape on Siteri Tino shall stand unchanged as the complainant was uncontroverted on the issue of her non-consensual participation with the sexual activity based on the supposedly pseudo religious beliefs of the appellant.

[57] In the circumstances finally what becomes relevant to the appeal is to decide on the issue of the sentence of imprisonment imposed on the appellant. The learned trial Judge acknowledged the fact that the appellant was a first offender who cooperated with police. Before us he showed his signs of senility of a man of 81 years. He was present in Court and in my observation he showed signs of not been able to walk normally.

However before us there is no appeal against the sentence and consequently this court is not in a position at this stage to consider any variants to the sentence.

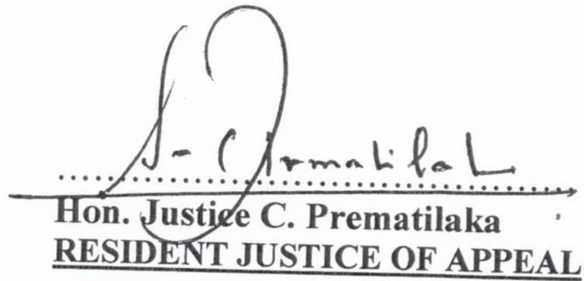
<u>Nawana, JA</u>

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

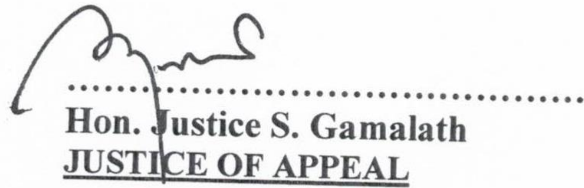
Orders of the Court

(1) Appeal is allowed against the conviction on first to third counts of rape and accordingly the conviction quashed on the said three counts alone.

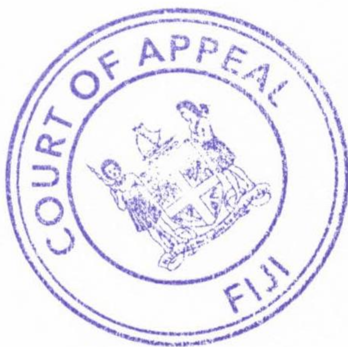
(2) Conviction on the fourth count affirmed.

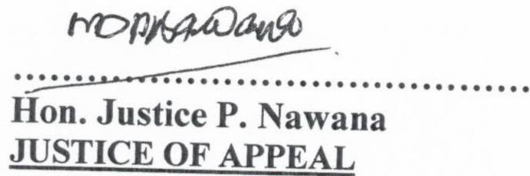


Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice S. Gamalath
JUSTICE OF APPEAL





Hon. Justice P. Nawana
JUSTICE OF APPEAL