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

**CRIMINAL APPEAL NO. AAU 0025 OF 2018**
**(High Court No. HAC 417 of 2016)**

**BETWEEN** : **GOVIND SAMI**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Gamalath, JA**
**Prematilaka, JA**
**Dayaratne, JA**

**Counsel** : **Mr D. Sharma for the Appellant**
**Dr A. Jack for the Respondent**

**Date of Hearing** : **09 May, 2022**

**Date of Judgment** : **26 May, 2022**

# JUDGMENT

**Gamalath, JA**

[1] The appellant was charged on three counts in the High Court at Suva and the details of the charges are as follows:

***COUNT ONE***

*Statement of Offence*

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

*Particulars of the Offence*

***GOVIND SAMI** between the 1st to the 31st of July, 2014 at Navua, in the Central Division, inserted his penis into the vagina of **ATELAITE CABEBULA** without her consent.*

***COUNT TWO***

*Statement of Offence*

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

*Particulars of the Offence*

***GOVIND SAMI** on the 25th day of October, 2016 at Navua, in the Central Division, inserted his penis into the vagina of **ATELAITE CABEBULA** without her consent.*

***COUNT THREE***

*Statement of Offence*

***INDECENTLY ANNOYING ANY PERSON**: Contrary to Section 213(1)(a) of the Crimes Act 2009.*

*Particulars of the Offence*

***GOVIND SAMI** on the 29th day of October, 2016, at Navua, in the Central Division, with intent to insult the modesty of **ATELAITE CABEBULA** exhibited his penis to **ATELAITE CABEBULA*** intending that his penis be seen by ***ATELAITE CABEBULA.***

[2] The charges of rape were representative counts as reflected through the particulars above and accordingly the alleged offences had occurred during the period of 1st July 2014 to 29th October 2016.

[3] Following a lengthy trial the appellant was found guilty as charged and sentenced to 9 years imprisonment.

**The facts in brief**

[4] Atelaite Cabebula, the prosecutrix, a domestic worker, married to one Vikendra Prasad, (PW2), was living in the 97 acres estate of the appellant, where Vikedra Prasad was a laborer. The appellant had provided them with accommodation in a small house with 2 rooms. While Vikendra Prasad was working in the farm, the prosecutrix was attending to household work, including washing and folding the clothes of the appellant.

[5] The prosecutrix alleged that on three occasions as referred to in the charges, the appellant had visited the house where she lived and on the first two occasions, i.e. July 2014 and 25 October 2014, he had sexual intercourse with her without her consent. On the third occasion on 29 October 2015, after she returned from her aunt's place at Raiwaqa, Navua, the appellant had ordered her into the house, unzipped his pair of trousers, exposed his penis and wanted her to perform oral sex on him. As she started to cry in fear of the appellant, after about 2 minutes, he walked away leaving her alone.

The prosecutrix described in evidence that on the three occasions of making the sexual advances, she was unable to resist due to the fear of the appellant, who had overpowered her with his imposing physical structure on the one hand, and as can be inferred from the totality of the evidence for the prosecution, on the other hand they were to a great extent depended on the appellant for their meager existence. As it also evinced from the proceedings at the trial, they were laborers serving their master.

In relation to the first sexual encounter, where she was allegedly raped by the appellant in the house where they were living, the prosecutrix maintained in evidence that the incident was reported to her husband in the evening after he returned from work, who did not want to believe her because he had thought that the prosecutrix was making up stories to leave the farm in which she had shown no interest in living continuously. As transpired in evidence, the second incident of rape also had occurred at their home whilst her husband was away at work in the farm.

[6] Finally it was the third instance of the alleged sexual advance that became the turning point in the events where the appellant had allegedly ordered the prosecutrix to perform oral sex on him, and the incident seemed to have caused deep anguish in her, she had not only complained to her husband about the sexual harassment, but also threatened to leave him, if he showed further procrastination in taking meaningful measures to rescue her from the agony. Her evidence is that;

> *"I later told my husband of the above and told him, if he does not help me, I am going to leave him. I wanted him to report the matter to the police. I told my sister Akanisi Wati about the incident. She told me to report the matter."*

[7] In the trial the defense made allusions that the alleged sexual contacts were consensual. The prosecutrix was steadfast in denying she was consenting to indulge in sexual intimacy with the appellant. Her unequivocal position in evidence had been that despite her repeated complaints about the continuing alleged sexual harassment by the appellant her husband seemed to have shown no interest in doing anything about it. On that score one can reasonably assume the fact that he was a laborer working under the appellant may have had a bearing coupled with the fact that he had admitted in his evidence at the trial for having entertained a degree of filial sentiments toward the appellant, who he said had treated him like a son of his own since the time he started to work under him. However, as already stated according to the evidence of the prosectrix, the third incident of the appellant's insistence on having oral sex on him seemed to have been the tipping point of the saga in the sense following the incident the prosecutrix had threatened the husband to leave him if no steps were taken to seek the assistance of the law to rescue her. It is the evidence in the case that after the third incident the prosecutrix had complained to one of her relatives about the ongoing sexual harassments and on being advised to do so she had persuaded the husband to report the matter to the police.

[8] As already stated the line of defense adopted by the appellant was that the sexual intimacy between the prosecutrix and the appellant had been consensual.

[9] Referring to a specific portion of the cross-examination of the prosecutrix, the learned counsel for the appellant invited the Court to conjure up the possibility of attaching a sense of credibility to the "defense of consent", for it had been suggested to the prosecutrix on several occasions, that the prosecutrix accompanied the appellant to Pender Court, a place of ill repute for nefarious activities, as described by the learned counsel for the appellant. .However, there is nothing on the record to show anything significant coming out of that fact as that no attempt had been made to have further elaboration on that fact either through the prosecution witnesses or through the witnesses for the defense. Least of all there had been no evidence to conclude the nature of the place Pender Court.

[10] Further, it was suggested to the prosecutrix in the extensive cross examination that the appellant and her husband had been "drinking partners". The prosecutrix denied the suggestion and reiterated that they were mere "caretakers" working in the appellant's farm.

[11] In the cross-examination the prosecutrix maintained that she is a "shy person" inferring to her reluctance to be vocal about the sexual encounters and as the learned Counsel for the appellant submitted that there had been another sexual offence committed against the prosecutrix on an earlier occasion by one Amit, who had pleaded guilty to the offence at Navua Magistrate's Court. Obviously through this evidence one cannot expect to derive any support to the suggestion that the prosecutrix was a consenting partner to the alleged incidents of sexual offences coming under the focus in the instant appeal.

[12] Through a witness called on behalf of the appellant the defense had taken up the position that the husband of the prosecutrix had demanded $30,000.00 from the appellant to terminate the proceedings against him; however, the prosecutrix said in evidence she has had no knowledge about that matter.

[13] Taking as a whole, it was the defense position at the trial that the alleged sexual intimacy was not without consent and as such the offences of rape and the sexual indecency cannot be maintained in law.

[14] The prosecution relied on the evidence of the husband of the prosecutrix, Vikendra Prasad, who admitted to having been living in the farmhouse of the appellant, whilst being employed as its caretakers. Although his wife made complaints of the sexual advances

made on her by the prosecutrix, the witness seemed to have disbelieved her because of his loyalty to his employer. He had no place to live when he met the appellant, who having treated him like a son had employed him and provided with accommodation. The witness was taken aback by the complaint made by the prosecutrix and due to the respect and regard he has had for the appellant he had not believed the wife initially. It is noteworthy that in the strenuous cross-examination of the husband nothing had been asked to challenge the position that the prosecutritx ever complained to him about the sexual harassments and as such the overall evidence that is supportive of the promptness in bringing the alleged crime to the attention of some person, in this case the husband of the prosecutrix, remains uncontroverted.

[15] **The defense**; At the closure of the case for the prosecution the defense admitted that there was a case to answer and thus called several witnesses on behalf of the appellant. Importantly, as it is clearly borne out by the proceedings, demonstrating the exercise of his free will, the appellant had "chosen to remain silent". (see p.348)

[16] The witness Viliame Gauna, who once worked as a security guard of the appellant, had testified to the effect that (PW2), Vikendra Prasad, on 12 December 2016, wanted him to convey to the appellant that if he was paid $40,000.00 he would drop the case against him. As can be recalled, the suggestion that PW2 demanded a ransom of $30,000.00 to drop the case against the appellant was rejected by PW2, Vikendra Prasad and the prosecutrix stated in evidence she did not know of such a proposal made by her husband.

Even if that evidence should be considered as creditworthy, any adverse inference that could possibly be drawn out of that evidence does not seem to have a significant bearing on the prosecution's case, for the already pending complaint against the appellant about the alleged sexual advances is an ex post facto and further its inherent heresy nature as evidence would not impact adversely on the evidence of the prosecutrix, who had commendably withstood the vigor of the lengthy cross examination. After all, her evidence shows that her level of education stopped at grade five and she was a domestic helper as already stated earlier.

The defense witness admitted in evidence that the appellant is a wealthy person in Navua and denied that he was paid to resort to fabrication on behalf of the appellant.

[17] The witness Kewal Chand testifying for the appellant presented the picture of the prosecutrix to be that of a person with a quick temper, and acting under tantrums she had once struck the husband with a pair of scissors, causing him injuries. According to the defense evidence the reason for the aggression was that she had resented her husband's socializing with the crowd to drink grog. It is unclear as to what the appellant was driving at through this evidence. Inferentially, the appellant may have wanted to bring home the fact that the prosecutrix was not a timid or submissive person who could have been easily brought under the power of the appellant as she alleged. However, whilst under cross-examination, these matters were not used to confront her to assail her credibility.

[18] There were three other witnesses testified on behalf of the appellant and taken as a whole that evidence does not seem to be having a bearing on the allegations for which the appellant was prosecuted.

[19] As I have already stated, although the appellant had several persons to testify on his behalf, the appellant himself did not give evidence in the trial. In the instant appeal , as the learned counsel for the appellant urged strenuously, as one of the main grounds of appeal, that the counsel who appeared for the defense in the High Court was remiss of his professional duties to advise the appellant accurately and to persuade him to take the stand on his behalf, the learned counsel invited the Court to decide that the lack of proper advise to the appellant at the trial should be considered as forming a valid ground of appeal to vitiate the conviction. As this issue is heavily dependent on by the learned counsel for the appeal, as one of the main grounds for the appellant, it warrants a separate discussion later.

With this I shall now turn to the grounds of appeal.

**The Grounds of Appeal**

[20] The First Ground of Appeal;

"The learned trial Judge erred in law when in his summing up he failed to provide a corroboration warning to the assessors in that the complainant did not make a recent

complaint or obtain a medical report at the material time to suggest that there had been any sort of forceful penetration of the complainant's vagina or bruising to show that she had been forcefully held by the accused.

Clearly, there are several issues wrapped up in this ground and as such the ground *ex facie* suffers the lack of clarity. The trial judge's non directions on the need to look for corroboration evidence is one issue, in a case of rape. The trite law is clear even in the absence of evidence of corroboration, a conviction is a possibility provided that the victim's evidence is convincing and can be acted upon. The failure on the part of the victim to make a prompt complaint is another issue that may have an impact on the credibility of the evidence. The law is well settled that the evidence of making a prompt complaint itself is not to be construed as providing evidence of corroboration, but rather it is to be considered as sustaining the issue of consistency of the victim's version of the victimization. The ground of appeal, as it stands, is fraught with ambiguity.

Upon a careful examination of the summing up, I am unable to find any material in favor of the appellant's contention on any of the fronts, as presented in the ground of appeal.

Having said, the appellant by formulating this ground of appeal, as I perceive it, is attempting to bolster his defense that since there was consensual sex between the prosecutrix and the appellant, the prosecutrix did not make a prompt complaint to the police. In my discussion of the evidence in the preceding chapters I have dealt with the issue of the delay with having reference to the prosecution evidence in which the prosecutrix had without any ambiguity testified to the fact that she in deed informed her husband promptly about the issue with the appellant. That evidence remains uncontroverted.

[21] The prosecutrix evidence taken as a whole would make it clear that the prosecutrix had explained the circumstances under which she could not promptly seek the refuge of the law enforcement authorities against the appellant under whom her husband and herself were working. It was undisputed evidence that despite her repeated complaints about the ongoing sexual aggressions by the appellant to her husband, the husband had shown no interest in seeking legal action against the appellant. In the cross-examination of the

husband of the prosecutrix, the counsel for the appellant did not seek to discredit the witness on the footing that the prosecutrix never complained to him about the ongoing saga and as such the evidence relating to the matter remains undisputed.

Further on a perusal of the court record, as reflected in page 354 of the Court record, there has been re-direction given on the issue of "recent complaint" and as such it is misconceived to believe that the trial judge did not deal with this matter adequately.

[22] On the other hand, what is the nature of the evidence upon which the prosecution relied in establishing the charges against the appellant? The very foundation upon which the case had been built had its own peculiarity in the sense, I find that the prosecution never portrayed a textbook case of sexual offences to establish the charges against the appellant. The very nature of the evidence of the case for the prosecution has its inherent quality of a delayed complaint of the prosecutrix to the law enforcement authorities about the sexual aggression to which she was subjected at the hands of her employer and it had not been disputed that although no complaint was made to the police promptly, as asserted by the prosecutrix, she kept on complaining the matters to her husband, who himself was a laborer working under the appellant.

[23] If the defense of consent was what the appellant was trying to establish by placing an emphasis on the ground as formulated herein, what comes to my mind is the words of Justice Tek Chand of the Supreme Court of India, who decided in the Indian case of **Rao Hamarian v. The State**, 1958 AIR (Punjab 123), in which it states that:

> *"A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent as understood in law. Consent on the part of a woman as a defense to an allegation of rape requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the significance and moral quality of choice between resistance and assent. Submission of her body under the influence of fear is no consent.*
>
> *When the court is confronted with a situation where the victim says that the act was done without her consent and the accused takes up the position that it was done with her consent, then consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other attendant circumstances. In considering the*

*question of "consent" it will also be useful to refer to some observation by Dr. Gour's Penal Law, 7th Edition, pages 1845;*

> *'The question of consent is by far the most important in the case. Of course, such consent may be expressed or implied. If it is an express consent a case will be seldom taken to Court. If it is taken to Court, it will have to consider if such consent was likely to have been given by the Prosecutrix.*
>
> *Excepting of course, the case of prostitutes and other mercenaries, women are seldom prone to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding. In such cases consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances."*

[24] The second ground of appeal on whether the appellant relied reads as follows;

> *"The learned Trial Judge erred in fact and law when in his summing up he failed to direct the assessors to the evidence that the complainant had shown a propensity towards extreme violence towards men who made her angry and that she had a DVRO against her at the material time."*

At the outset I must state that this ground is completely ill conceived and unsupportable having regard to the evidence led in the trial. The ground had been couched in such terms to state that the prosecutrix had a predisposition to be violent towards men who made her angry. In the trial there was no evidence led to conclude this rather generalized attribution of a characteristic to the prosecutrix and in the absence of such evidence, the need to consider that aspect in the summing up did not arise and as such this ground cannot be considered favorably.

[25] Another ground upon which the learned counsel relied in the submission before the Court is the ground that the learned Trial Judge failed in law and facts to properly direct the assessors on the implications of the alleged attempt to extort monies from the accused. The ground 6 is similar in substance to the 5th ground and it states that "the learned Judge erred in fact and in law in failing to uphold the trial Counsel's submission that a conviction would be unsafe in light of the fact that the complainant and her de facto husband had sought to extort money from the accused before the Court by DW1 by dismissing the extortion

allegation on the basis that a criminal charge of rape could not be withdrawn in such manner."

These, I am constrained to state, are scattergun grounds, sometimes appellants tend to use for the sake of testing the destiny coupled with the force of sheer fluke, with the glimmer of hope that such grounds may operate in their favor..

The issue relating to the alleged violent outburst of the prosecutrix towards her husband an incident in isolation , the DVRO that was issued against the prosecutrix and the suggestion that the prosecutrix's husband made attempts to extort money through a third party from the appellant, are all extraneous factors to the alleged sexual crimes committed against the prosecutrix, and even if their credibility is not to be doubted, how such incidents can have a bearing upon the case against the appellant is unclear.

The evidence of Viliame Gauna, that the prosecutrix's husband wanted a ransom of $30,000.00 and he in turn conveyed the message to the appellant cannot be verified for the appellant had chosen not to testify at the trial. On the other hand when the prosecutrix's husband was testifying, he was not specifically cross-examined whether he made the demand for a ransom from the appellant by sending a message through Viliame Gauna.

On the whole, these matters are based completely on factual positions and I am unable to see how they can be of any significance to either the trial against the appellant on the one hand and in relation to the matters to be decided by this Court on the other hand.

[26] It is trite law as well as the principle conceptual bedrock in every jurisdiction where the common law is the norm, the grounds of appeal are construed based on some form of misdirection or non-direction that is discernable in the summing up. As has been the historic development of the concept, "where there had been a misdirection or non-direction, the conviction would be rendered unsafe thereby, unless the Court of Appeal are satisfied that, on the whole of the facts and with a correct direction the only reasonable and proper verdict would have been one of guilty. *Archbold*, 1997, *Chapters* 7-52, *p*.860. On this firm legal concept, there had been numerous well settled decisions, and the original conceptual basis can be found through the dicta contained in **R v. Taddy** [1994] 1 KB

442, 29 Cr. App. R. 182 CCA, **Stirland v. DPP** [1944] AC 315, H.L., **R v. Edwards** (N.W.), 77 Cr. App. R.5 CA.

[27] The underlying principle with an authoritative force is, whether having regard to the totality of evidence that the conviction is unsafe and cannot be sustained. (supra *Archbold*).

In **R v Stoddart**, 2 Cr. App. R. 217, Lord Alverstone CJ, delivering the judgment of a full Court of Criminal Appeal made some general observations where misdirection is alleged,

> *"Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attached might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice." (at pp 245 – 246).*

[28] As to the need to "custom build" a summing up to the issues of fact in the particular case, Lord Hailsham has stated in **R v. Lawrence** [1982] AC 510, as follows:

> *"It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy, or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course, it must include references to the burden of proof and the respective roles of the jury and judge. But it should include references to the burden of proof and the respective roles of the jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and argument of both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*

[29] Reverting to the instant appeal, with a particular emphasis being attached to the complaints as urged by the grounds of appeals to which the attention has already been drawn, I find a

clear, unbiased statement of facts in the paragraph 25 of the Summing Up in which the learned Trial Judge had stated as follows:

> *"Kewal Chand DW2, C. Gounder DW4 and Ashnil Prasad DW5 gave evidence on the alleged fights between the complainant (PW1) and her husband (PW2). They alleged that they witnessed fighting between the couple in 2016. However, none of them were at the crime scene to witness the alleged crimes in count No. 1, 2 and 3. As assessors and judges of fact, how you treat the defence witnesses evidence is, entirely a matter for you. If you accept DW1's evidence that PW1 and PW2 were trying to extort money from the accused, then you may take that into account in deciding whether or not the accused was guilty as charged."*

[30] Again in the analysis of the Accused's case, the learned trial judge had stated as follows:

> *"The Accused's case:*
>
> *I have summarized to you the accused's case in paragraphs 22, 23, 24, 25 and 26 hereof. You are aware that the accused chose to remain silent and nothing negative whatsoever can be imputed to him for choosing to exercise his right to remain silent. You have heard his five witnesses give evidence in the courtroom on 26 and 27 February 2018. None of his witnesses were present at the crime scene at the material time to assist us confirm or otherwise the complainant's version of events. The most damaging evidence was Viliame Gauna's (DW1) allegation that the complainant's husband was trying to extort $40,000.00 from the accused. However, a charge can only be cancelled by the Director of Public Prosecution, and no other. What you make of the defence's case is entirely a matter for you."*

[31] On the whole, the learned Trial Judge's summing up is adequately dealing with the factual matrix of the case with a special emphasis being attached to the case for the defence. I find that the learned Trial Judge had made adequate reference to the defence case, and the cardinal line of defence had been rightly laid down in the paragraph 38 of the summing up in particular. As can be seen, since the learned Trial Judge had accurately and dispassionately performed his duties in the summing up in dealing with the defence , the conviction cannot be conceived as "unsafe and illegal"; see **R v. Badjan**, 50 Cr. App. R. 141 CCA.

[32] Further on the issue of consent, as the final arbitrator on facts, the learned Trial Judge held in his judgment as follows;

See para 6 – pg. 308;

> *"On Count no.1, she said the accused forced himself on her without her consent. The accused was in a position of authority, as owner of the farm and farm house. He pays the complainant's husband to work for him. In my view, the accused knew exactly that she was in no position to stop him. This pattern was also reflected in Counts 2 and 3. Because of his position in the farm, the accused took advantage of the complainant."*

The above passage from the judgment represents the conclusions that the learned trial Judge had drawn by using his discretion as the final trier of facts in the High Court. One can see that scrupulous care had been taken by the trial Judge to abstain from becoming an influence on the assessors discretion to their own conclusions based on the evidence and as such it evinces clearly from the totality of the summing up and the content of the judgment, the learned trial Judge had acted well within the bounds of law. As such the grounds as set out above cannot succeed.

[33] In his submissions, the learned Counsel for the appellant placed a great emphasis on the ground 7 which states that;

> *"The accused was not given proper legal advice about his rights and options and there was ineffective assistance from trial counsel on various aspects of the trial including the failure to render proper legal advice and obtain informed consent about giving evidence under oath."*

[34] Once again I must state albeit reluctantly, this ground is also riddled with multiplicity of issues conjoined together and as such lacks precision and clarity. On the issue of receiving advice on his rights and options, I find that the learned trial Judge following correctly the statutory requirement informed the appellant his rights and options and as such there is no justification to the complaint. On the issue of "ineffective assistance from trial counsel on various aspects of the trial", this is a poorly presented complaint as it is a "neither here nor there" sort of a complaint couched in a generalized form. As can be seen, in other word the learned counsel for the appellant is inferring that the counsel who appeared in the High

Court has performed badly and there is much to be desired as far as his professional dedication is concerned towards the appellant's interest.

[35] Be that as it may, adverting to the submission of the Counsel for the appellant the main thrust of the argument based on this ground is that, since consent was the defense raised by the appellant at the trial, he should have been properly advised to take the stand and testify, as such the failure on the part of the counsel at the trial to follow that course has caused him an irreplaceable damage which had led to his conviction eventually. This is also a speculative claim, for who could predict for certainty how the appellant would have fared as a witness under cross examination is anyone's guess.

[36] At this juncture, I wish to advert to the proceedings in the trial at pages 347 and 348 of the Judges Notes. Accordingly, both counsel conceded that there was a case to answer.

Following that, the learned Judge acting in conformity with the provisions of the law as stipulated in section 231(1) and (2) of the Criminal Procedure Act, 2009 explained to the appellant his rights as a defendant. A particular emphasis shall be placed on the operation of section 231(2) in which it clearly entrusts the trial judge with the task of explaining to the appellant his constitutional right to give evidence on his behalf and at the same time if he so wished even to remain silent. As borne out by the court record there had been due compliance with these provisions at the trial and thus there is hardly any room to take umbrage at the procedure adopted.

[37] The reaction of the appellant to the learned trial Judge's pointing to his rights had been to "choose to remain silent"; see page 348. This is demonstrably a choice that the appellant had made at the trial and as such the counsel at the trial cannot be faulted for not advising him properly, in the light of the material referred herein.

[38] As already stated, the learned counsel for the appellant strenuously urged that had the appellant been properly advised by the counsel at the trial, he would have elected to give evidence. In the submissions, the appellant had asserted that it was the incompetence of the counsel at trial, who advised him not to take the stand, that prevented him from testifying.

[39] A serious allegation of this nature, suffice it to state, should be substantiated, at least with an affidavit, so that judicial notice of the matter could be taken based on a balanced evaluation of every relevant aspect .

[40] The Common Law principles governing the issue would show that "If the Court of Appeal has a lurking doubt that an appellant might have suffered an injustice as a result of flagrantly incompetent advocacy, it will quash the conviction." *Archbold*, 1997; 7-82, p.872.

[41] In **R v. Clinton**; 97 Cr. App. R. 320 CA it was held that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe. For further reference; **R v. Ensor**, 89 Cr. App. R. 139 C.A., **R v. Irwin***;* 85 Cr. App. R. 294 and **R v. Gautam**, [1988] Cr. LR. 109 C.A.

[42] In particular does this apply to the instances where the decision has been made on whether or not to call the appellant to give evidence? The learned editor, *Archbold* states that

> "Conversely, if it is shown that the decision was taken
>
> (1) either in defiance of or without proper instructions,
>
> or
>
> (2) when all promptings of reason and good sense pointed the other way, it may be open to the Court of Appeal to set aside the verdict as being unsafe".
>
> *Archbold*, 1997, para 7-82; p.872.

[43] It, in the circumstances, behooves for this Court to raise the question whether the appellant has provided any material to substantiate the facts that could be vetted in the backdrop of the guiding principles referred to above as forming a valid ground of appeal based on the professional neglect or seemingly lackadaisical approach on the part of the counsel at the trial.

[44] The learned Counsel referred to our consideration that the decisions in Fiji would show that a ground of appeal based on the incompetence on the part of the counsel at the trial

should be substantiated by providing evidence that that incompetence has caused "substantial and grave injustice", a serious assertion that could possibly be made after a deep and forensic analysis of every shred of evidence supposed to be relevant to the contention.

In the case of **Timoci Silatolu and Josefa Soqulu Nata v The State**; Criminal Appeal No. AAU 0024.2003S (High Court Criminal Action No. HAC 0011.2001), the Court of Appeal, Fiji held that the approach of the UK courts could be followed in dealing with the matter;

> *"[21] The manner in which the Court of Appeal in England has approached the matter of the competence of counsel is explained in Ensor v. R [1989] 89 Cr App R 139, 144 where the court cited with approval the statement of Taylor J in the unreported case of Gautam, 4 March 1987, that:*
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> > *'…it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for an appeal.'*
>
> *[22] However, in the (also unreported) case of Swain a few days later, O'Connor LJ added that, if the matters about which complaint is made leave the court with any lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy by his advocate, it would quash the conviction. The court in Ensor adopted both as a correct statement of the position."*

[45] In the case of **Pita Matai v. The State**, in the Court of Appeal of Fiji, Criminal Appeal No; AAU0038/2008, High Court Action No.HAA120 of 2007, the issue relating to the competence on the part of the counsel as a valid ground of appeal became one of the moot points. [The case of **Pita Matai** is a case where a bail pending appeal was considered by a single judge Scutt, JA].

One finds that **Pita Matai** has relied on the decisions in **The Queen v. Alich Charles Green** (CA No. 364/94 old Court of Appeal ) and **R. v. Birks** (1990)19NSWLR677. Placing a special emphasis on **The Queen v. Green**, the Court made reference to two important criteria to be adopted in relation to the issue of the conduct of the counsel in the

trial; "mere fact that valid criticisms can be made of counsel's conduct of the trial does not mean that the case has been a miscarriage of justice or that a conviction should be set aside on appeal".

Referring to **R v. Birks**, it states that "As a general rule an accused person is bound by the way the trial is conducted by Counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by Counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence."

Adopting the dicta in **Green** in **Pita** it was held;

> *"The Queensland Court in **The Queen v Green** commented that this passage from **R v Birks** should be read as indicating no more than that such conduct by counsel will not automatically entitle an accused person to a retrial in every case. It did not mean, said the Queensland Court, that such conduct will never have that result.*
>
> *Whether or not a new trial should be ordered will depend on the circumstances of each case; a new trial will generally not be appropriate unless incompetent or improper conduct by counsel deprived the person convicted of a significant possibility of acquittal, such as for example when the accused is deprived of the opportunity to present his defence: **Sankar v Trinidad and Tobago** [1995] 1 WLR 194)."*

[46] Having regard to the above dicta it is clear that if one wishes to rely on a ground of appeal based on the fact that the trial counsel has failed in his duties, negligent or incompetent there shall be convincing evidence to show that as a result of the conduct of the trial concerned the appellant had suffered an injustice. In support of such a claim, additional information should be provided to conclude the trial counsel acted in defiance of the instructions given to him or did not consult the appellant prior to taking the course adopted in the trial over remits of taking proper instructions or any other factor that would make an appellate court convinced that a grave injustice has been caused to the appellant.

[47] In this appeal there is no evidence to support the proposition to that effect and as such based on the factual basis and having regard to the legal principles as set out above this ground of appeal should also fail.

[48] At the conclusion of the trial the three assessors expressed the opinion the appellant is guilty as charged and the learned trial Judge convicted him and sentenced him to a concurrent sentence of 9 years.

[49] In his plea in mitigation giving expression to his penitence the appellant had stated he was remorseful.

[50] On the basis of the reasons given above I hold the appeal against conviction cannot succeed and as such the conviction is affirmed.

**Prematilaka, JA**

[51] Having read in draft the judgment of Gamalath, JA, I find myself in agreement with the reasons and conclusion that the appeal should stand dismissed. However, on two aspects relating to the appeal arising from my brother's judgment, I wish to place my own views as follows.

[52] Statutory provisions applicable to determination of criminal appeals by the Court of Appeal are set out in section 23 of the Court of Appeal Act which *inter alia* provides that the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed. The proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred. In other words, although a miscarriage of justice may enable the Court to decide the ground of appeal in favour of the appellant, the appeal will nevertheless be dismissed on the application of the proviso if the Court considers that there has been no substantial miscarriage of justice. Thus, for an appellant to succeed he or she must demonstrate that not only is there a miscarriage of justice but also there is a substantial miscarriage of justice.

[53] The proper test to be applied under section 23(1) had been a matter of discussion particularly on the term 'unsafe' or 'unsatisfactory' as employed in the UK.

[54] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) discussed the powers of this Court under section 23(1) of the Court of Appeal Act and considered the above question.

> *'Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal -*
>
> > *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."*
>
> *The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.*
>
> *It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.*
>
> *Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in R v Cooper (1968) 53 Cr. App. R 82.* (emphasis mine)
>
> > *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice*

[55] Thereafter, in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) the Court of Appeal once again considered this issue along with the application of the proviso to section 23(1) and on behalf of the Court Calanchini, P pronounced that

> *[54] In attempting to obtain guidance on the application of section 23(1) of the Court of Appeal Act from the English decisions, reliance can only be placed on those decisions prior to 1968. Section 23(1) is in virtually identical terms to section 4(1) of the Criminal Appeal Act 1907 (UK) which remained in force until 1966. From 1968 the bases upon which the English Court of Appeal must allow an appeal have changed in substance to the point where since 1995 the only test to be applied is whether the conviction is unsafe. This is not the law in Fiji. In addition since 1995 in England there is no longer any provision for the application of the proviso. As a court created by statute the powers of the Court of Appeal in criminal appeals are derived from and are confined to those given in Part IV of the Court of Appeal Act Cap 12. The Court of Appeal does not have an inherent jurisdiction in relation to criminal appeals since the appeal itself is a creation of statute: (See **R –v- Jeffries** [1969] 1 QB 120 and **R –v- Collins** [1970] 1 QB 710).*
>
> *[55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in **R v. Haddy** [1944] 1 KB 442. The decision is authority for the proposition that if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*
>
> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in **R –v- Ramswani Pillai** (unreported criminal appeal No. 11 of 1952; 25 August 1952); **R – v- Labalaba** (1946 – 1955) 4 FLR 28 and **Pillay –v- R** (1981) 27 FLR 202. In **Pillay – v- R** (supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in **R –v- Weir** [1955] NZLR 711 at page 713:*
>
> > *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."*
>
> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply*

*the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.*

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

> *"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

[56] Therefore, the test for allowing an appeal under section 23(1) of the Court of Appeal is not whether it is 'unsafe' or 'unsatisfactory' as in UK.

[57] On the appellant's ground of appeal based on strong criticism of the trial counsel particularly his alleged failure to advise him to take stand despite his willingness to do so to substantiate his apparent defense of consensual sexual intercourse, I would think that this ground of appeal need not have been even considered by this Court in as much as the appellate counsel had not followed the procedure laid down in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) when the ground of appeal was based on criticism of trial counsel. I shall quote from **Chand** those guidelines for the benefit of counsel and appellant once again.

> *'[39] For easy reference and convenience, the above guidelines may be summarized as follows*
>
> *(i) When allegations are made against former counsel, the new counsel should not settle or sign grounds of appeal unless he is satisfied that they are reasonable, have some real prospect of success and are such that he is prepared to argue before court. However, when they are properly made the new counsel must promote and protect fearlessly his client's best interests without regard even to fellow members of the legal profession.*
>
> *(ii) The new counsel should not regard the allegations as 'reasonable' to draft grounds of appeal based on them unless, at the very least, he is in possession of a signed statement of facts and a unequivocal signed waiver of privilege from the client which should be obtained after advising him of the consequences of waiver. The client should also be advised that the allegations against his former counsel are unlikely to carry any weight with court unless they are supported by oral testimony.*
>
> *(iii) Such grounds criticizing the conduct of defense counsel at trial should not be advanced unless the new counsel feels that in the light of the information*

*available to the former counsel, no reasonably competent counsel would sensibly have adopted the course taken by the former counsel.*

*(iv) The compliant or allegations should be set out with precision and clarity in the notice of appeal or application for leave to appeal or for extension of time (grounds of appeal may be perfected later) and it should be lodged accompanied by the waiver of privilege along with the client's signed statement and any request for former counsel to provide any material etc. in the registry without delay. It is proper for the new counsel to speak to the former counsel as a matter of courtesy before grounds are lodged to inform him of the allegations to be made against him.*

*(v) On behalf of the court, the registrar of the appellate court should then send to the former counsel the client's signed statement and waiver of privilege along with other relevant material inviting him to respond to the allegations made against him within a given time.*

*(vi) The former counsel should send his response to the registrar either within the time given or further time obtained from the registrar.*

*(vii) The registrar should send the response received to the new counsel who may reply to it. Then the grounds of appeal, waiver and responses would be placed before the single judge.*

*(viii)Where there is a factual dispute between the client and former counsel both of them may be required to give evidence and be subjected to cross-examination in court to resolve the issue of fact.*

*[40] It was further held in **Michael Patrick Doherty Susan McGregor** that the freshly instructed counsel need to analyze carefully the difficulties faced by the trial counsel under the immediate pressure of the trial process and to consider objectively instructions given post trial. Importantly, Lord Justice Judge said that the circumstances in which the verdict of a jury could be set aside on such grounds would be extremely rare.*

*[41] In 1997 the decision in **Michael Patrick Doherty Susan McGregor** was made in the wake of an increasing tendency, articulated by the Court of Appeal previously, to believe that it is only necessary to assert the fault of trial counsel to sustain an argument that the conviction is unsafe and unsatisfactory. By 2014 the situation had only deteriorated as seen from the judgment of Lord Chief Justice of England in **R v. Achogbuo** [2014] EWCA Crim 567; [2014] WLR (D) 137 where alleged incompetence of trial advocate and solicitor was urged, the Court held inter alia as follows and asked the Registrar to refer the matter to the Solicitors Regulation Authority.*

*'16. Of late it has become the habit for a number of cases to be brought on appeal to this court on the basis of incompetent representation by trial solicitors or trial*

*counsel. … many such cases proceed without any enquiry being made of solicitors and counsel who acted at trial. This means that the lawyer who brings such an application acts on what [are], ex hypothesis,* ***the allegations of a convicted criminal*** *… For a lawyer to put forward such allegations based purely on such a statement, without enquiry, is in our view impermissible. Before applications are made to this court alleging incompetent representation which is based upon* ***an account given by a convicted criminal****, we expect lawyers to take proper steps to ascertain by independent means, including contacting the previous lawyers, as to whether there is any objective and independent basis for the grounds of appeal.*'

*'17. As long ago as 1997 in R v Doherty Susan McGregor [1997] 2 Cr App R 218, this court drew attention to the fact that it was proper for fresh representatives as a matter of courtesy to speak to former counsel before grounds of appeal are lodged. Today circumstances have changed. The frequency of this kind of appeal makes it clear to us that* ***counsel and solicitors would be failing in their duty to this court*** *if they did not make enquiries which would provide an objective and independent basis, other than complaints made by the* ***convicted criminal****, as to what had happened.'*

*'20….. The court expects not only the highest standards of disclosure but also strict compliance with the duties of advocates and solicitors. It is the fundamental duty of advocates and solicitors to make applications to this court after the exercise of due diligence.* ***In cases where the incompetence of trial advocates or solicitors is raised, the exercise of due diligence requires, having made enquiries of trial lawyers said to have acted improperly, taking other steps to obtain objective and independent evidence before submitting grounds of appeal to this court based on incompetence***.' (emphasis added)

*[42]* ***Achoqbuo*** *was followed by* ***Regina v. McCook*** *[2014] EWCA Crim 734 where Lord Chief Justice said*

'*This case illustrates … two matters. First, it is always desirable to consult those who have acted before in a case where fresh counsel and solicitors have been instructed. In R v Achogbuo … we stated that it was necessary to do so [1] where criticisms of previous advocates or solicitors were made, or [2] grounds were to be put forward where there was no basis for doing so other than what the applicant said. Second, it is clear from this case that [3] we must go further to prevent elementary errors of this kind.* ***In any case where fresh solicitors or fresh counsel are instructed, it will henceforth be necessary for those solicitors or counsel to go to the solicitors and/or counsel who have previously acted to ensure that the facts are correct, unless there are in exceptional circumstances good and compelling reasons not to do so.*** *It is not necessary for us to enumerate such exceptional circumstances, but we imagine that they will be very rare.*' (emphasis added)

*[43]Finally I may quote from **R v. James Lee** [2014] EWCA Crim 2928 where the Court of Appeal (Criminal Division) said on the same issue advancing the positions taken up in **McGregor, Achogbuo** and **McCook** even further as follows.*

> *'8. In Doherty & McGregor [1997] 2 Cr App R 218, it was made clear that it was perfectly proper for counsel newly instructed to speak to former counsel as a matter of courtesy before grounds were lodged but counsel were provided with a discretion in the matter. More recently the position has been taken further in a series of decisions of this court, and in particular in R v Davis and Thabangu [2013] EWCA Crim 2424, R v Achogbuo [2014] EWCA Crim 567 and R v McCook [2014] EWCA Crim 734. Thus these decisions make it clear that fresh lawyers recently appointed must take steps to ensure that they are fully appraised of all that occurred while the case was in the hands of previous lawyers in so far as that is relevant to the new proceedings.*
>
> *'9.Where an allegation of actual implicit incompetence is made, enquiries should be made of those prior lawyers, said to have acted improperly, and it is equally important that other objective independent evidence should be sought to substantiate the allegations made. These principles apply not only where there is an allegation of previous lawyers have erred or failed in some way but also in any case where it is essential to ensure the facts are correct: see McCook in paragraph 11.(emphasis added)*

*[44]Therefore, it is no more a matter of courtesy for the fresh lawyers to speak to the former lawyers before allegations against them are made in appeal but it is essential to do so and if not, the fresh lawyers would be failing in their duty towards court and not being content with that they must also go further and look for objective and independent evidence to substantiate the allegations against the former lawyers before such allegations are made the foundation of an appeal. Generally the fresh lawyers must take all steps to inform themselves of all that had happened when the matter was handled by the former lawyers.'*

[58] **Nasilasila v State** [2021] FJCA 138; AAU156.2019 (3 September 2021) is an example where the procedure set down in ***Chand*** was put into practice by the appellate counsel before he perused his ground of appeal based on the conduct of the trial counsel.

**Dayaratne, JA**

[59] I have read the judgment in draft of Gamalath, JA. I agree with his reasoning and conclusion.

***Order of the Court***

1. *Conviction affirmed.*
2. *Appeal dismissed.*

**Hon. Justice S. Gamalath**
**JUSTICE OF APPEAL**


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

**Hon. Justice V. Dayaratne**
**JUSTICE OF APPEAL**