**IN THE COURT OF APPEAL, FIJI**

**[Criminal Appellate Jurisdiction]**

**Criminal Appeal No: AAU 0016 of 2013**

**(High Court No. HAC 142 of 2011L)**

**BETWEEN:** **ROHIT RANJIT KUMAR**

***Appellant***

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

***Respondent***

| | | |
|---|---|---|
| **Coram** | : | **S. Chandra, JA**<br>**A. Fernando, JA**<br>**T. Rajasinghe, JA** |
| **Counsel** | : | **Mr. T. Lee for the Appellant**<br>**Mr. L.J. Burney for the Respondent** |
| **Date of Hearing** | : | **08 May 2017** |
| **Date of Ruling** | : | **26 May 2017** |

# JUDGMENT

**Chandra, JA**

[1] I agree with the reasons and conclusions of Rajasinghe JA

**Fernando, JA**

[2] I agree with the reasons and conclusions of Rajasinghe JA

**Rajasinghe, JA**

[3] The Appellant has been convicted and sentenced for a period of sixteen (16) years imprisonment with a non-parole period of fifteen (15) years for one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act by the High Court of Lautoka on the 27th of March 2013. Aggrieved with the said conviction and the sentence, the Appellant filed an application for leave to appeal, stating thirteen (13) grounds of appeal against the conviction and three (3) grounds of appeal against the sentence.

[4] During the course of the hearing of the leave application, the Appellant abandoned the grounds of appeal against the sentence. Hence, the leave hearing was conducted only on thirteen (13) grounds of appeal against the conviction. Justice Calanchini, the Hon President of Court of Appeal, in his ruling dated 20th of July 2015 granted leave only for the first three grounds of appeal.

[5] I reproduce the said three grounds of appeal against the convictions as stated by the Appellant.

*i) That the learned trial judge erred in law and fact in refusing the Appellant's application under section 116 of the Criminal Procedure Act to recall the complainant for the purpose of re-examination of her previous convictions which was not disclosed to the defence but only found by the Appellant's counsel after the addresses by the defence and the State's counsel before the summing up by the learned Trial Judge. That the said refusal to recall the complainant caused a substantial miscarriage of justice,*

*ii) That the Learned Trial Judge disregarded the proposition of law that was cited by the Appellant's counsel when the Appellant's counsel made the application to recall the complainant under Section 116 of the Criminal Procedure Decree on the basis that the prosecution failed to disclose the previous conviction of the complainant who had given evidence and the Appellant's counsel had no opportunity to cross-examine her due to the*

*non-disclosure of her previous conviction. The following authorities were cited by the Appellant's counsel and a copy of submissions served on the State's counsel since the Court refused to accept the Appellant's written submission and as such the Appellant's counsel read his written submission.*

*iii) That the prosecution's non-disclosure of the previous conviction of the Complainant to the Appellant led to a denial of a fair trial and as such a substantive miscarriage of justice,*

**Background**

[6] The Appellant was charged in the High Court of Lautoka on 6th of October 2011 for one count of Rape, contrary to Section 207(1) and (2) (a) of the Crimes Act. The Appellant pleaded not guilty. Hence, the matter proceeded to hearing. The hearing commenced on the 27th of February 2013. The prosecution called three witnesses including the complainant. The Appellant then gave evidence and called one witness for his defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing submissions on 14th of March 2013. The matter was adjourned till 15th of March 2013 for the summing up.

[7] On the 15th of March 2013, the learned counsel for the Appellant made an application pursuant to Section 116 (1) of the Criminal Procedure Act, seeking an order of the court to recall the complainant for re-examination in relation to her previous conviction. The learned counsel for the Appellant had submitted in the High Court that the Complainant has been charged and convicted for the offence of receiving stolen property in the Magistrates Court of Ba. This information was disclosed to the defence only after the closing submissions of the counsel. The learned counsel had further submitted if that information was disclosed to the defence during the hearing, he would have cross examined the complainant regarding the said conviction in order to challenge the honesty of the complainant.

[8] The prosecution had objected to this application on the ground that the defence did not put such a proposition to the complainant during the hearing.

[9] The learned trial Judge refused this application on the ground that this application of the Appellant does not qualify under Section 116 of the Criminal Procedure Act.

[10] The learned trial Judge then proceeded with the summing up. The three assessors in their unanimous opinion found the accused guilty for the offence. Having concurred with the opinion of the assessors, the learned trial Judge in his judgment dated 15th of March 2013, found the Appellant guilty for the offence of Rape as charged. The Appellant was then sentenced on the 27th of March 2013, for sixteen (16) years of imprisonment with fifteen (15) years of non-parole period.

[11] The prosecution alleged that the Appellant was a pastor and the complainant was a member of the same church. The Appellant used to visit the house of the complainant often. According to the evidence given by the complainant, the Appellant had gifted her a mobile phone as a birthday gift. He then started to send her text messages saying that he loves her. On this particular day, he came to her house, while other members of her family were away. He then forcefully had sexual intercourse with the complainant without her consent. Subsequent to that, he threatened the complainant that he will do something to himself and blame her, if she tells anyone about this. She did not report the matter to anyone else immediately after the alleged incident. However, after nearly two months, she told her father about the mobile phone and texting of the Appellant, but did not tell about this alleged rape incident. However, the subsequent events resulted in leveling accusation towards her for texting the Appellant. That led her to drink engine degreaser. She was admitted to Ba Mission Hospital. She has told one Police Officer about this alleged rape incident while she was in the Ba Hospital. However, that Police Officer failed to take any steps. Once she was discharged from the hospital, she went to the Ba Police Station and reported this matter.

[12] The Appellant in his defence denied the allegation, stating that it was a fabrication by the complainant and her father in order to extort money from him.

**Ground III**

[13] Having briefly discussed the procedural and factual background of this appeal, I now proceed to discuss the three grounds of appeal. For convenience, I first turn onto the third ground of appeal, that is founded on the contention that the non- disclosure of the previous conviction of the complainant by the prosecution, led to a denial of a fair trial, causing a substantial miscarriage of justice.

[14] This ground constitutes two main issues. The first is whether the Prosecution purposefully and deliberately withheld in disclosing the previous conviction of the complainant. The second issue is, if so, whether it led to a denial of a fair trial, causing a substantial miscarriage of justice.

[15] The House of Lords in **R v Brown (1997) 3 All ER 769, at 773,** observed that the common law duty of disclosure has originated from the concept of "fair trial", where Lord Hope said that;

> *"The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed".*

[16] Having examined the judicial approaches adopted by the courts in England on the duty of disclosure, Lord Hope in **Brown (supra)** defined the scope of the duty of disclosure in an inclusive manner, where His Lordship held that:

> *"The common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. The prosecution is not*

*obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet, fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed".*

[17] Accordingly, the prosecution is required to disclose the defence about the materials in their possession which could undermine the credibility and reliability of their potential witnesses. The record of previous convictions of a witness comes within the meaning of such materials.

[18] The Court of Appeal in New Zealand in **Wilson v Police (1992) 2 NZLR 533, at 542,** have discussed the scope of the duty of prosecution to disclose the defence the record of previous convictions of the witnesses of prosecution, where the Court of Appeal held that:

*"Before all defended trials, whether on indictment or summary, the prosecution should as a general rule notify the defence of any conviction known to the prosecution of a proposed witness whose credibility is likely to be in issue, if that conviction could reasonably be seen to affect credibility. For this purpose knowledge must of course extend to every such conviction of which the prosecution is in fact aware as the result of a computer check or otherwise.....*

*In the event of a decision not to disclose any conviction on the grounds, for instance, that it does not bear on credibility likely to be in issue or that interference with the witness is feared, the prosecution should notify the defence in general terms that there is a conviction which it is not considered necessary or appropriate to disclose. Thus the defence, if desirous of testing*

*the point, will have an opportunity of applying for a ruling to a judge in chambers, in the court where the trial is pending.....*

[19] The Supreme Court of Fiji in **Dip Chand v The State (2012) FJSC 6; CAV0014.2010 (9 May 2012)** found that the duty to disclose also includes the disclosure of all material that affects the case of the prosecution. The Supreme Court of Fiji held that:

> *"Under the common law, the duty to disclose encompassed the disclosure of all material matters which affect the case relied on by the prosecution, whether they would strengthen or weaken the prosecution case or assist the defense case. Traditionally, the prosecution duty was considered to be restricted to a duty to make available to the defence, witnesses whom the prosecution did not intend to call, and earlier inconsistent statements of witnesses whom the prosecution were to call".*

[20] In view of the above judicial precedents, it is a duty of the prosecution to disclose the defence the material in their possession which could affect the case of the prosecution. It includes the records of previous convictions of proposed witnesses. However, as Justice Shameem held in **Ali v The State [2005] FJHC 473; HAA0023J.2005S (7 October 2005)**, the duty does not extend to the material that are not in possession of the prosecution.

[21] In this matter, the Prosecution had disclosed the previous conviction of the complainant to the defence at the conclusion of the respective closing addressees of the parties, and it is not disputed by the Appellant during the hearing of this appeal. The Respondent submitted that the prosecution disclosed the said previous conviction of the complainant as soon as the state came to know about it, though the prosecution finds it does not affect the credibility of the complainant.

[22] The Supreme Court of Fiji in **Dip Chand (supra)** while referring the approach adopted in **R v Ward (1993) 1 WLR 619, at 674**, in defining the duty of disclosure, found that the duty to disclose applies not only in the pre-trial period but also throughout the trial.

[23] Lord Denning MR in **Dallison v Caffery (1964) 2 All ER 610 at 618,** found that the disclosure of a statement of a witness immediately after the conclusion of the proceedings was accurate and within the scope of duty to disclosure, where Lord Denning MR held that:

> *"The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings, gave the solicitor for the defence the statement of Mr. and Mrs. Stamp; and thereby he did his duty".*

[24] As stated above, the prosecution had disclosed the previous conviction of the complainant soon after the conclusion of the closing addresses by the counsel. In view of the observation made in **Dip Chand (supra)** and **Dallison (supra),** I find the prosecution has properly done its duty of disclosing the said previous conviction of the complainant. Therefore, I find the prosecution has not purposefully delayed or withheld disclosing the defence about the previous conviction of the complainant. I accordingly find the third ground of appeal has no merit and fails accordingly.

**Ground I & II**

[25] The first and second grounds of appeal are inter-related and founded on the same contention. Hence, I would proceed to consider both of them together. These two grounds of appeal encompass two main issues. They are:

i) Whether the learned trial Judge properly considered the relevant facts in exercising his discretionary power under Section 116 (1) of the Criminal Procedure Act,

ii) Whether the order in refusing to recall the Complainant pursuant to Section 116 (1) of the Criminal Procedure Act, has caused a substantial miscarriage of justice to the defence.

[26] The learned counsel for the Appellant submitted in his written submissions that the learned trial Judge has mainly considered the issue of delay in refusing the application made under Section 116 (1) of the Criminal Procedure Act.

[27] Having carefully perused the said impugn ruling delivered on the 15th of March 2013, I do not find that the learned trial Judge has considered the delay in reaching his conclusion to refuse the application. In the ruling, the learned trial Judge has first outlined the procedural history of the matter. He has then reproduced Section 116 of the Criminal Procedure Act. In the final paragraph, the learned trial Judge has concluded that the defence application is not qualified under Section 116 of the Criminal Procedure Act. The learned trial Judge has concluded in the said ruling, that:

> *"Considering the application of the defence counsel in light of the law and history of this case, I do not find that the defence application is qualified under Section 116 of the Criminal Procedure Decree, hence I reject the application"*

[28] Section 116 (1) of the Criminal Procedure Act states that:

> *I) At any stage of trial or other proceeding under this Decree, any court may —*
> *a) summon or call any person as a witness; or*
> *b) examine any person in attendance though not summoned as a witness; or recall and re-examine any person already examined –*
> *and the court shall summon and examine, or recall and re-examine any such person if the evidence appears to the court to be essential to the just decision of the case.*

[29] According to Section 116 (1) of the Criminal Procedure Act, the court has to satisfy that the proposed evidence, that is expected to adduce by re-calling the witness, is essential to the just decision of the case. Hence, the main qualification to succeed an application under Section 116 (1) is whether the proposed evidence is essential to the just decision of the case.

[30] It appears that the learned trial Judge has satisfied that the application made by the Appellant to re-call the complainant does not qualify under Section 116 of the Act. Accordingly, I am satisfied that the learned trial Judge has correctly exercised his discretion. I further find that the learned trial Judge has not considered the issue of delay in his ruling.

[31] I now draw my attention to consider whether the ruling in refusing to recall the complainant pursuant to Section 116 (1) of the Criminal Procedure Act, has caused a substantial miscarriage of justice to the defence.

[32] Byrne J in **R v McKenna (1956) 40 Cr. App R 65, at 66,** held that the Appellate Court will not interfere with the exercise of the discretion of the learned trial Judge unless it appears that an injustice has thereby resulted.

[33] In order to determine whether the refusal of recalling the complainant to give evidence about her previous conviction has caused a substantial miscarriage of justice to the Appellant, the court has to first consider the relevancy of her previous conviction and its effects to the issues of the matter.

[34] The Court of Appeal of New Zealand in **R v G (1992) 8 CRNZ 9 (CA)** has outlined the applicable approach in determining the relevancy of undisclosed materials and its effects on the issues of dispute, where it was held that:

> *"whether a reasonable jury or other tribunal of fact could regard it as tending to shake confidence in the reliability of the witness"*

[35] The Supreme Court of Fiji in **Deve Vudiniabola and Others v Regina (9 FLR 158)** held that the Appellate Court in an application of this nature must consider if the issue in contention is raised at the trial, the court below would still reach to the same conclusion. The Supreme Court of Fiji held that:

> *"It is the duty of this Court to examine the record and consider whether even if the point had been raised at the trial, the Court below must necessarily have come to the same conclusion as to the guilt of the appellants".*

[36] In **Deve Vudiniabola (supra),** the Supreme Court held that non-disclosure of the previous conviction of burglary of the main prosecution witness, the taxi driver, has caused a substantial prejudice to the appellants. In that case the Appellants were charged for stealing 39,600 cigarettes from a locked van in Lautoka. Subsequent to the hearing, the appellants were convicted for the offence of Larceny solely upon the evidence of a taxi driver, who drove all the appellants from Lautoka to Navua with the stolen items in his taxi.

[37] In **Manola Matthews (1975) 60 Cr App R 292,** Brabin J found that non-disclosure of the previous convictions of the prosecution witnesses has not affected the issue that was considered by the jury. In **Manola Matthews (supra),** the Appellant who was the driver of a car got involved in an altercation with a driver and passengers in another car. As a result of that, the said driver and one of the passengers sustained injuries. The Appellant was charged with wounding, assault occasioning actual bodily harm and other offences arising out of the incident. In the trial, the Appellant took up a defence that a gang of six persons attacked him and during the course of the melee, two of the attackers were attacked and injured by one or more members of their own gang. The Appellant never raised the defence of "self defence". During the course of the hearing the Appellant was informed by the prosecution that none of the prosecution witness has previous convictions, which was proved otherwise after the conclusion of the hearing. Hence, the Appellant contended in the appeal that if the previous convictions of the witnesses had been disclosed, he would have cross-examined them to that effect. While adopting the observation made in **Parks (1961) 46 Cr App R 29,** Brain J found that:

*"The second question is whether it was relevant. Whether it was relevant or not depends on the exact issue which was before the jury"*

[38] In **R v Edwards ( 1991) 2 All ER, 266,** the Appellant was convicted for the offence of Robbery mainly on the four confessions made to the police officers at four different occasions after he was arrested. At the conclusion of the trial, it was revealed that two of these police officers had disciplinary actions in respect of fabrication of confessions in two previous cases. In the appeal, the Appellant argued that if the records of those disciplinary actions were disclosed to the Appellant at the trial, it would have allowed him to adduce them in evidence. If then, the final outcome of the trial would or might be different. Lord Lane CJ held that:

*"If the circumstances surrounding those two cases which we have described had been known to the defence, it would have been relevant and admissible to put to the officers in question that they had given evidence in the trials, that in each of the trials there was an issue as to whether alleged confessions had been fabricated and that the trials had ended in the way described. There was in each case a sufficient connection of the trial to entitle the defence to cross examine the officers concerned about these matters upon the question of their credibility in the instant case"*

[39] The court of Appeal of New Zealand in **R v G (supra)** found that non-disclosure of previous convictions relating to property based offences of a rape victim has minimum bearing in determining the credibility of her evidence given in relation to a gross sexual attack by someone who was very close to her. In this case, the victim who was 16 years old was raped by one of her friends whom the victim and her boyfriend had invited to stay with them for few days. On that particular night, the accused came to her room while no one was at home and raped her. He was convicted for three counts of sexual violation by rape and two counts of sexual violation by unlawful sexual connection.

[40] In the appeal, the accused mainly relied on the ground that non-disclosure of the record of previous convictions of the victim relating to property based offences prevented the

accused to confront the victim about them in order to challenge the credibility and reliability of her evidence.

[41] Richardson J in his judgment found that non-disclosure of such previous convictions of the victim has minimum bearing in determining the credibility of her evidence given in relation to a gross sexual attack by someone who was very close to her. Richardson J held that:

> *"That offending while not trivial and while bearing on general credibility could, we are satisfied, have had little bearing on the veracity of her allegations of sexual violation. The issue was whether she was telling the truth in her account of a gross sexual attack by someone who was very close to her. Property based offending on her part the year previously would have been almost irrelevant when weighing such a serious allegation".*

[42] According to the above judicial precedents, it appears that the Courts have considered the nature of the previous offending and its direct relevancy to the main issues of the case.

[43] In **Deve Vudiniabola (supra)** the prosecution case was mainly founded on the evidence of the taxi driver, who transported the accused in his taxi together with the stolen items. The previous conviction of the taxi driver relating to burglary had a direct bearing in determining the credibility and reliability of his evidence.

[44] Likewise, in **Edward (supra),** the case of the prosecution was mainly relied on the evidence of four police officers to whom the accused made confessions at four different occasions. Accordingly, the records of the disciplinary actions in relations to fabrication of confessions in another two cases have direct relevancy in assessing the credibility of the evidence given by those two police officers.

[45] The same approach was adopted in **Manola Matthews** (supra), where the Court found that the defence raised by the accused had no direct relevancy to the nature of previous offending of the witness of the prosecution.

[46] Having considered the nature and gravity of the previous offending and the offences that the accused was charged with, the Court of Appeal of New Zealand in **R v G (supra)** found the relevancy is negligible and non-disclosure have not caused a substantial prejudice to the accused.

[47] In this instant case, the complainant was convicted and bound over for sum of $200 for the offence of receiving stolen goods in July 2012 by the Magistrate's Court in Ba. The said offence was committed after this alleged rape had taken place. However, she was convicted for that offence before the commencement of the trial in the High Court.

[48] Having perused the record of the proceedings in the trial, I find the defence adopted by the Appellant was mainly founded on the ground of fabrication. The Appellant has put to the complainant that she and her sister had fabricated rape incidents against other men, which she denied. However, the Appellant in his evidence did not explain about the said allegation. The Appellant mainly gave evidence explaining how the father of the complainant tried to extort money from him in order to settle this issue.

[49] During the cross examination by the learned counsel of the prosecution, the Appellant said that the complainant was sacked from her employment because she had stolen money from there. However, this proposition was not put to the complainant while she gave evidence. Accordingly, I find the defence has mainly focused on the ground of fabrication in order to challenge the credibility and reliability of the evidence given by the complainant.

[50] Having considered the reasons discussed and the approaches adopted in aforementioned judicial precedents, I find a previous conviction of receiving a stolen item has no direct relevancy to discredit the veracity of the allegation made by the complainant regarding this sexual violation committed by the Appellant, who was very closely known to her.

[51] Accordingly, I find the said ruling of the learned trial Judge in refusing to recall the complainant pursuant to Section 116 (1) of the Criminal Procedure Act, has not caused a substantial miscarriage of justice to the defence. Therefore, I find no merit in the first and second grounds of appeal and refuse them accordingly.

**Order of the Court:**

The appeal against the conviction is dismissed.

**Hon. Mr. Justice S. Chandra**
**JUSTICE OF APPEAL**


**Hon. Mr. Justice A. Fernando**
**JUSTICE OF APPEAL**

**Hon. Mr. Justice T. Rajasinghe**
**JUSTICE OF APPEAL**