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

CRIMINAL APPEAL NO: AAU 0012 OF 2014
(High Court Criminal Case No: HAC 346 of 2011)

BETWEEN : **FRANK KONARE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra JA**
Fernando JA
Goundar JA

Counsel : **Mr S Waqainabete for the Appellant**
Mr S. Vodokisolomone for the Respondent

Date of Hearing : **16 February 2018**

Date of Judgment : **08 March 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasoning and conclusions of Fernando JA.

A. Fernando JA

[2] This is an appeal against a conviction for rape by the High Court. The Appellant had been charged for the offences of rape, burglary and theft before the High Court of Fiji at Suva. The Appellant had been unanimously found not guilty by the assessors of the charge of rape but convicted of the offences of burglary and theft. The learned High Court Judge had not agreed with the assessors on their *"not guilty verdict"* against rape and rejected it and found the Appellant guilty of rape and sentenced him to a period of 8 years imprisonment with a non-parole period of 5 years. There is no appeal against the sentence.

[3] The Appellant had been charged for committing the offence of rape under section 207 (1) and (2)(a) of the Crimes Act 2009, by penetrating the anus of the victim with his penis, without her consent.

[4] The Appellant had filed the following grounds of appeal against conviction when he sought leave to appeal against the conviction from a single Judge of this Court:

> *"1) That the learned trial judge erred in law and in fact when he made his comment on paragraph 29 line 6 and 30 line 6 of the Summing Up in relation to the Complainant's evidence "She said she never consented to the above, and it appeared through her evidence, that the accused well knew she was not consenting to the above at the time" and "It appeared she gave him no permission to enter her house that night" By doing so the Learned trial judge has usurped the function of the assessors thus resulting in a gross miscarriage of justice.*
>
> *2) The Learned trial judge erred in law and in fact when he did not consider the crucial inconsistencies between the evidence of the complainant and the medical doctor under cross examination when considering the credibility of the complainant in his judgment which was the main determinant factor in accepting whose evidence."* (verbatim)

[5] It was clear from the above grounds that the appeal was only against the conviction for rape. This was confirmed at the hearing by the Appellant's Counsel. The Appellant had been refused leave to appeal on ground 1 by the single Judge who heard the Leave to Appeal application on the basis it was not arguable and granted

leave to appeal only on ground 2. The Appellant did not file any submissions before us, did not seek to re-argue ground 1 and said he was relying on the submissions filed at the leave stage in respect of ground 2.

Evidence in Brief:

[6] The victim is 40 years of age and a a single mother with 3 children, aged 21 years, 14 years and 11 years. She had been separated from her husband and was living with her sick brother and her children in a two bed roomed house. She sleeps alone in her bedroom and on the day of the incident she had been fast asleep when she was awakened when her door to the room had been forcefully opened around 4 am. She had first thought it was her brother but had been surprised to suddenly find the Appellant, lying on her back when she tried to turn. She had been as usual wearing a night dress without any undergarment at that time. She had been lying on her stomach with her hand underneath the pillow. The Appellant had pulled up her night dress and inserted his penis into her anus. She had tried to turn upwards but the Appellant had pushed her head down on the pillow to block her mouth. She had managed to turn upwards and then the Appellant had punched both her thighs. When she turned upwards she had recognised the Appellant. He had been smelling of liquor and looked drunk to her. She could not shout as he had blocked her mouth with a pillow. He had then bitten her chest. The Appellant had then lifted both her legs and penetrated her anus forcefully with his penis. It had been painful. She had said that she felt that he had ejaculated in her anus. She had been in pain and crying. The victim had said that the sex act went on for about 2 to 3 minutes and that she had not consented. The Appellant had later gone outside banging the kitchen door. The victim had heard her sister-in-law shouting to find out as to who was inside the house. Her sister-in-law had then come inside the house and the victim had told her as to what had happened to her. The victim had said that it was degrading for the victim to narrate her story. Her sister-in-law had decided to report the matter to the police. On that day her sister-in-law's phone was being charged and when the Appellant left; the victim had found it was missing. The victim had said that she knew the Appellant since he was a pastor in their church and that she treated him like her own child. She had said that her church group used to visit them sometimes at home. According to the victim the

Appellant had entered her house by climbing in through the kitchen window and had left the house through the kitchen door.

[7] Under cross-examination she had said that she made a police statement three days after the incident. She had denied that she was having a sexual relationship with the Appellant who was 21 years old, had sex with him even on an earlier occasion and had invited him to her house. She had denied that she was the one who had incited the Appellant to have sex with her by kissing him and going on top of him and having sex with him. She had categorically said that she did not consent to have sex with the Appellant. She had however admitted that she visited the Appellant while he was in custody at his mother's request. She had denied that she apologised to the Appellant. In re-examination the victim had stated that the Appellant had through his mother tried to persuade her to withdraw the case. He had even, had it conveyed to her that he will marry her.

[8] The evidence of PW 2 L. Tuirewa goes to show the consistency in the victim's complaint, a fact that has a bearing in deciding the credibility of the victim as a witness. According to PW 2 the victim had told her soon after the incident that the Appellant had come into her house through the kitchen window and into her room, while she was asleep. The victim had told her that the Appellant had punched both her thighs, pressed her head down on the pillow, bit her on the chest, and had inserted his penis into her anus. The victim had told her that she did not like what had happened to her and was in pain. She had also informed PW 2 that the Appellant had taken her phone.

[9] The medical doctor who had specialised in obstetrics and gynaecology and who had examined the victim 3 days after the incident had found a laceration on top of the anus which he had said was consistent with forceful separation of the buttocks and a laceration at the bottom of the anus that was consistent with forceful stretching of the anus. He had also found an abrasion or bruise on the buttocks suggestive of, according to him, of force been applied on the back, to stabilize her. He had tendered his medical report as Exhibit 3, without objection or any challenge from the defence. At exhibit 3, column 10, under the heading "History as related by the person to be examined" the doctor had noted: "The patient was rape 3 days ago by her Pastor

Frank. It was a rectum penetration"; and at column 16, under the heading "Summary and conclusions" the doctor had noted: "There is evidence that she has had rectum penetration". (verbatim from exhibit 3). Under cross-examination the doctor had said that the forceful separation of the buttocks causing the laceration could have been caused by a large object. On being questioned the doctor had said that he had not seen any marks on the victim's thighs, jaws or chest. In re-examination the doctor had said that most of the injuries would have healed, by the time he examined the victim, namely three days after the incident, subject of course to the degree of force.

[10] At the close of the prosecution case the Appellant had given evidence when his defence was called. The Appellant had said that he is 23 years old and at the time of the incident 21 years. According to the Appellant's testimony before the Court he had gone to the house of the victim on the day of the incident, at her invitation and climbed through a window as his knock on the door was not heard. Having entered the house he had gone into the victim's room. The victim had woken up from her sleep and asked him why he was late. They had talked and the victim had told him that she admired him and that she wanted to get married to him. She had kissed him and taken off her clothes. He too had taken off his clothes and had sex. According to the Appellant: "I laid down and she sat on me. She took my penis and put it into her vagina and then moved up and down, for about 2 minutes. We kissed again. She then laid down and I laid on her. She was facing upwards and I was facing her. I kissed her. She put my penis in her vagina. We then had sexual intercourse. Later, we finished." He had thereafter got off the bed and asked for a towel. She had given him a towel. The Appellant had said that he had a shower and went into the house and into the victim's room where she was lying on the bed. He had put on his clothes. The victim had been asleep. He had then left the victim's house by opening a door and gone to his home. While leaving he had removed a phone and a charger from the victim's house. The Appellant had said that he had sex with the victim on two previous occasions in her house at her invitation.

[11] Under cross-examination contradicting his testimony in examination in chief the Appellant had said that on the day of the incident the victim had not been expecting him at her home. He had come from the night club and had been drunk. He had said: *"I did not climb on her. I did not press her head down. I did not punch her. I did not*

penetrate her anus with my penis." According to the Appellant the charge is not true. He had also stated *"I do not know how PW1 (reference is to the victim) suffered the injuries to her anus as reported in the medical report".*

[12] It is to be noted that the caution statement of the Appellant had been tendered to Court by consent as per the Statement of Agreed Facts filed of record. According to the proceedings of the 28th day of June 2012 Counsel for the Appellant had stated to Court: "We will not challenge the alleged confession. There will be no trial within a trial." In his caution statement the Appellant had said, that he had sex with the victim only once and that was normal sex and not anal sex.

[13] What is to be noted from the Appellant's testimony is that according to him he has had sex with the victim on this day only once and that was normal sex. He had under cross-examination stated that the charge of anal rape preferred against him is not true. In view of his categorical denial of having had anal intercourse with the victim he cannot raise the issue of consent in relation to the offence of anal rape for which he was specifically charged. Consent to have vaginal intercourse does not include anal intercourse. Thus even if the Appellant's version that the victim consented to the act of vaginal intercourse was to be given any credence it is of no relevance to the offence with which the Appellant was charged.

[14] In relation to ground one of appeal, for which the learned Justice of Appeal had correctly not granted leave to appeal, I wish to state in passing , that in view of the evidence of the victim and PW2 Tuirewa, the learned Trial Judge had not erred in making the comment at paragraph 29 line 6. As regards the comment at paragraph 30 line 6 the Appellant himself had stated in his evidence under cross-examination, that the victim was not expecting him at her home that night. As a Trial Judge is perfectly entitled to express his views in relation to the facts, the disputed comments certainly do not amount to a usurpation of the functions of the assessors. That is not a direction to the assessors or a usurpation of their functions.

[15] I do not find any inconsistencies between the evidence of the complainant and the medical doctor under cross examination, which is the complaint in ground 2 and for which leave had been given. In fact the doctor's evidence corroborates the fact that

the victim had been subjected to anal intercourse. The evidence of PW2 L.Tuirewa, referred to at paragraph 6 above goes to show the consistency in the victim's complaint and gives credibility to the victim's version. Further the Appellant had admitted that he does not know how the victim had suffered the injuries to her anus as reported in the medical report. If as the Appellant had stated that he only had vaginal intercourse with the victim with her consent in the manner described at paragraph 8 above and without any force being used, it is incomprehensible that she would have sustained a laceration on top of the anus that was consistent with forceful separation of the buttocks; a laceration at the bottom of the anus that was consistent with forceful stretching of the anus and an abrasion or bruise on the buttocks suggestive of force been applied on the back, to stabilize her as per the doctor's evidence. The Appellant tried to argue before us that although the victim had spoken about her being punched on her jaw there was no medical evidence to corroborate it. An explanation to this is found in the testimony of the doctor who examined her. He had said that "If the punches are hard enough, I should be able to see marks" and that "the complainant was referred to me 3 days after the event. Most injuries would heal within 3 days, subject to the degree of force".

[16] The relevant provisions of section 237 of the Criminal Procedure Act 2009 states:

> *"(1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.*
>
> *(3)...*
>
> *(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be —*
>
> *(a) written down; and*
>
> *(b) pronounced in open court.*
>
> *(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the*

majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the all purposes.

(6)...

(7)..."

[17] The learned Trial Judge in rejecting the opinion of the assessors has given his reasons for doing so at paragraphs 9 and 10 of his judgment as required of him under section 237(4) of the Criminal Procedure Act 2009. The said paragraphs show that the learned Judge had 'considered the inconsistencies between the evidence of the victim and the medical doctor under cross examination when considering the credibility of the victim in his judgment'. Paragraphs 9 and 10 reads as follows:

> *"Having listened to the evidence of the parties' witnesses, and carefully observing them in the courtroom, and mindful of the parties competing version of events, on the rape allegation, I accept the evidence of the female complainant. A few minutes after the event, the complainant reported the rape to PW2, who later reported it to the police. If she consented to sexual intercourse with the accused, at the material time, why report the rape to PW2. Such action is not the action of a consenting adult. In addition, she had to undergo a medical examination of her private part by a male doctor, thereby compromising her personal privacy. This is not the action of a consenting adult, or the action of someone who is making up a false allegation.*
>
> *Furthermore, the doctor's evidence was crucial in this case. She was medically examined on 19th October 2011, at CWM Hospital. This was 3 days after the alleged incident. The medical report was tendered as Prosecution Exhibit No.3. In D (10) of the report, the female complainant told the doctor she was raped by the accused. In his conclusion in D (16) of the report, the doctor confirmed that there was evidence of penetration of the female complainant's private part. The doctor said his conclusion was consistent with the female complainant's story. I accept the doctors above evidence and in my view; it confirmed the complainant's version of events. It is largely because of this that I reject the accused's denial."* (emphasis added)

[18] I therefore see no merit in the ground of appeal raised and have no hesitation in dismissing the appeal.

Goundar JA

[19] I agree with the reasoning and conclusions of Fernando JA. The appeal should be dismissed and the conviction affirmed.

Orders of the Court:

1) *The appeal is dismissed.*
2) *The conviction is affirmed.*

Hon. Mr. Justice Chandra
JUSTICE OF APPEAL

Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Mr. Justice Goundar
JUSTICE OF APPEAL