IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0113 of 2014
[In the High Court at Suva Case No. HAC 115 of 2012]

BETWEEN	:	**MOHAMMED ISMAIL**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**(Dr) Almeida Guneratne, AP** **Chandana Prematilaka, JA** **Wasantha Bandara, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**08 April 2021**
Date of Judgment	:	**29 April 2021**

JUDGMENT

Guneratne, AP

[1] I agree with the judgment of Bandara, JA.

Prematilaka, JA

[2] I have read in draft the judgment of Bandara, JA and agree in the proposed order thereof.

Bandara, JA

[3] The Appellant was tried by the High Court at Lautoka on the information of the Director of Public Prosecutions, under three counts, each of Attempt to commit Rape contrary to Section 208, Rape, contrary to Section 207 (1) and (2) (a), and indecently insulting a person contrary to Section 213 (1) (b) of Crimes Act No. 44 of 2009. The victim in respect of all three counts was the Appellant's estranged wife who was six months pregnant at the time of the incident.

[4] **Spousal Rape**

In Regina V. R [1992 1 A.C 599] their Lordships of the House of Lords, extensively discussed the legal framework on whether the 'husband' is immune from charges of Rape or attempt of Rape of his wife and held that,

"We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."

[5] Fiji legislation explicitly criminalizes marital or spousal rape, and no marriage or any other relationship, constitute a defence to a charge of rape. When the victim is above 13 years, what matters in a sexual intercourse is the consent, not the nature of the relationship between the perpetrator and the victim.

The information against the Appellant read as follows:

Count 1

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MOHAMMED ISMAIL on the 8th day of May 2012 at Bau Settlement, Matawailevu, Nalawa, Rakiraki in the Western Division attempted to penetrate the mouth of SL with his penis without her consent.

Count 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MOHAMMED ISMAIL on the 8th day of May 2012 at Bau Settlement, Matawailevu, Nalawa, Rakiraki in the Western Division penetrated the vagina of SL with his penis without her consent.

Count 3

Statement of Offence

INDECENTLY INSULTING A PERSON: Contrary to Section 213 (1) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MOHAMMED ISMAIL on the 9th day of May 2012 at Bau Settlement, Matawailevu, Nalawa, Rakiraki in the Western Division intruded into the privacy of SL by showing his penis in front of the said Seruwaia Liau.

[6] **Facts of the Case in Brief:**

Agreed Facts:

It is among the agreed facts that;

(i) the accused was the husband of the victim;

(ii) the victim and the accused were living separately at the time of the incident and;

(iii) they were having three children.

The Evidence

[7] At the time of the incident the Appellant was living with another woman. On the 8th May 2012, the Appellant had come to the victim's house around 3 – 4 am and knocked on the window. Since the appellant insisted on coming inside the complainant had opened the door. Appellant having come inside the house had told her that he wanted to "discuss something". Their eldest daughter had been awake at the time and had greeted him with "Good morning". When the Appellant asked the victim for the divorce she had refused saying **"Bible does not permit it".** The Appellant had started praising the woman with whom he was living. When the victim said that she was sleepy and she wanted to go to bed, the Appellant had wanted to shake hands with her. Thereafter, he had proceeded to hug and kiss her forcibly.

[8] When the Appellant asked her whether they can have sex, the victim had asked him why he wanted to have sex with her, when he didn't like her and wanted to go for a remarriage. The accused had then told her ***"old is gold"***. From this point onwards the victim had proceeded to describe in detail how the Appellant had proceeded to have sex with her forcibly by inserting his penis into her vagina, without her consent.

[9] In the course of the said process;

1. When the victim struggled the Appellant told her that she was behaving like a virgin;

2. Appellant had told her that he can do anything to her since she was legally married to him;

3. When the victim refused a demand to have oral sex the Appellant had rubbed his penis on her mouth;

4. She had not screamed since she did not want her children to see or hear what was happening;

5. In the course of the struggle her panty had got torn which she gave to the police;

She had made the complaint to the police around 6.30 – 7.00 am.

Outcome of the case before the High Court:

[10] At the conclusion of the trial, on the 20th August, the three assessors returned the unanimous opinion of guilty in respect of all three counts. The learned trial Judge concurred with the opinion of the Assessors and convicted the Appellant accordingly.

The Resulting Sentence and the Aftermath:

[11] On the 26th August 2014 the learned trial Judge sentenced the Appellant to a total term of twelve years imprisonment with a non-parole term of nine years. Being aggrieved by the said conviction, on the 22nd September 2014 the Appellant sought leave to appeal (against conviction only), giving a timely Notice and setting out three grounds of appeal.

Ground of Appeal: "The absence of adequate Alibi directions"

[12] The single Judge of Appeal who heard the application granted leave only on ground two which is to the effect "***That the learned trial Judge did not give adequate direction on the defence of Alibi.***"

[13] The Appellant has not filed any renewal application in respect of the grounds of appeal on which leave was refused, pursuing before this Court only the ground of Appeal on which Leave was granted.

Discussion – The Law

[14] The word "*Alibi*" comes from Latin, bearing the literal meaning in translation to read as **"elsewhere".** It does not constitute a defence in its proper sense: where an accused raises an *Alibi* he is merely denying that he was in a position to commit the crime with which he is charged. It is well settled jurisprudence that, when raising the defence of

Alibi an accused does not bear the burden of proof beyond reasonable doubt, and a mere raising a reasonable doubt about the prosecution case will suffice.

[15] Where the *Alibi* evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, "being elsewhere" the onus (always) remains with the Prosecution to eliminate any reasonable possibility that the *Alibi* is true. The prosecution must establish beyond reasonable doubt that despite the *Alibi*, the facts alleged as to the commission of "the act of rape" are nevertheless true.

The facts as revealed from the Evidence

[16] It is common ground that before the commencement of the trial before the High Court the Appellant had not applied for leave from the trial judge to file a formal notice of *Alibi* in terms of Section 125 (2) of the Criminal Procedure Act (***Rules as to Alibi***). Then the question arises as to whether there was any evidence that warranted the trial judge to give directions to the assessors on the defence of Alibi. The answer to the question would necessarily be in the negative when the following factors are taken into consideration:

[17] The defence at the conclusion of the summing-up had not sought any redirection on the said ground set out in the impugned ground of Appeal.

[18] In paragraph 9 (v) the learned trial judge had asked the counsel of both parties, ***"Any re-directions or additions to what I said in my summing-up. Ms. Latu and Mr. Jitoko".*** The response to which appears at page 170 of the high court proceedings, where neither party had sought any redirections.

[19] The above failure of the defence to seek a redirection (if it really intended to raise the defence of *Alibi* at the trial), should be viewed in the light of the observations made by the Supreme Court in **Varasiłe Tuwai v State [2016 FJSC 35, 26 August 2016]**.

> *"Before I go any further I must say that the trial Judge had asked the parties if they needed any re-directions in the matter. The parties did not seek any re-directions on the grounds they alleged that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate Court's approach must be stringent.*
>
> *Litigants must not wait for trial judges to make mistakes to find a point of Appeal.*

The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial Judge has asked the parties to seek re-directions and they do not and subsequently raise the issue in the Appellate Court then in the absence of any cogent reasons, it should be held against that party as having employed a deliberate tactic to find an appeal point.

The petitioner has not given any reasons why any re-directions were not sought. This complaint that he will suffer a miscarriage of justice is therefore unacceptable.

[20] That judicially laid down test, when applied to the instant case, it is obvious that the impugned ground of Appeal based on the defence of *Alibi*, was raised for the first time at the leave to Appeal hearing, in a deliberate tactic to find an appeal point.

[21] At the conclusion of the prosecution case the accused had exercised his right to remain silent. However, he called his aunt Adriana Nasiga to give evidence on his behalf.

[22] According to Nasiga on the day of the incident about 11.30 – 12.00pm the accused and his brother had come to her home. Their home had been 50 feet away from the house where the victim was residing. Having come to her house they had had dinner and gone to sleep. The only time after which the Appellant was seen by the defence witness was when he woke up at breakfast time after 8.00am. In the cross-examination she had categorically stated that, ***"I didn't know anything happened between 1.00am to 7.00am***." According to the victim's evidence the incident had occurred around 3 – 4.30am. By 7.00am the victim had made the complainant to the police. It is obvious that witness Nasiga's evidence did not help the Appellant to raise the plea of Alibi, since she did not know the whereabouts of him from 01.00am to 08.00am, and given the fact that the Appellant was at 50 feet away from the crime scene, when the witness last saw him. Ms. L. L the daughter of the Appellant who greeted with "Good morning" had given evidence corroborating vital parts of the victim's version to a great extent, precedent and antecent to the incident of rape.

[23] At the Appeal hearing the counsel for the Appellant pointed out the following specific evidence on which she relied on, to advance the defence of *Alibi*.

(From the evidence of the victim).

(Page 159) *Q: Why didn't you bite his lips if you didn't like it?*

A: I was pregnant.

Q: You didn't do that because it never happened?

A: It happened.

(From the evidence of the daughter of the victim)

(Page 163) Cross-examination: Q: He was not there. You were coached by your Mum to say so? A: No. I saw him.

[24] The above suggestion made to the daughter of the Appellant could mean that the Appellant was not there at the crime scene, but does not necessarily mean that he was elsewhere, falling in line with the literal meaning of the term *Alibi. E*vidence led by the defence through the Appellant's aunt Adriana Nasiga, strongly suggests that the Appellant was at her home which was fifty feet away from the crime scene. (Page 168 of the High Court proceedings).

[25] Accordingly, I hold that no circumstance in the instant case imposed an obligation on the learned trial judge to sum up the assessors on the legal position relating to *Alibi.*

[26] It clearly appears that at the trial, the line of defence taken up by the Appellant had been a total denial which is obvious from paragraph 8 of the summing up where the learned trial judge states that, **"The accused took up the defence of total denial."**

[27] Hence it clearly appears that an issue of *Alibi* had only surfaced at the leave to appeal hearing.

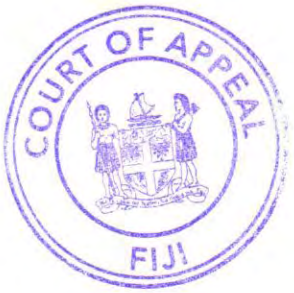
[28] Having regard to the above considerations, I find no merit in the Appeal and would dismiss the same.

Orders of the Court

1. Appeal is dismissed.

.....

Hon. Almeida. Guneratne, AP
ACTING PRESIDENT OF APPEAL



.....

Hon. Chandana. Prematilaka
JUSTICE OF APPEAL

.....

Hon. Wasantha. Bandara
JUSTICE OF APPEAL