

IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Lautoka

CRIMINAL APPEAL NO.AAU 119/19
High Court Criminal Case No. HAC 73/17

BETWEEN : **MUNESHWAR REDDY**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka RJA**
Qetaki JA
Andrews JA

Counsel : **Appellant in person**
Ms R. Uce for the State

Dates of Hearing : **12 and 20 February 2024**

Date of Judgment : **28 February 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Andrews, JA and agree with the analysis and conclusions arrived at by her Ladyship. Accordingly, I concur with the orders of the court.

Qetaki, JA

[2] I have considered the judgment in draft, and I agree with it, the reasoning and the orders.

Andrews, JA

[3] The appellant was convicted on 9 April 2019 on two charges of rape following a trial in the High Court at Lautoka before the Honourable Justice Sunil Sharma.¹ He was sentenced on 23 April 2019 to an aggregate sentence of imprisonment for 11 years 11 months and 15 days, and ordered to serve a non-parole period of 10 years.² He sought leave to appeal against conviction and sentence.

[4] In a Ruling delivered by Prematilaka ARJA (as he then was) on 29 November 2021, the appellant was refused leave to appeal to this Court.³ In a Notice of Appeal dated 30 November 2021 the appellant sought pursuant to s 35(3) of the Court of Appeal Act 1949 to have his application for leave to appeal heard before a full Court of the Court of Appeal. He also filed an application to adduce fresh evidence on appeal.

The evidence

[5] The complainant was born in Fiji and lived there until she was 14 or 15, when she was adopted by her aunt and moved to Germany to live with her. She returned to Fiji for school,

¹ *State v Reddy* [2019] FJHC 321; HAC 73/2017 (9 April 2019).

² *State v Reddy* [2019] FJHC 391; HAC 72/2017 (23 April 2019).

³ *Reddy v State* [2021] FJCA 212; AAU 119/2017 (29 November 2021).

college, and university breaks each year. In 2015 she came to Fiji with an idea to start a business in Fiji.

[6] The appellant and the complainant were in a personal and business relationship. It was an admitted fact at the trial that their personal relationship started after they met in August 2015, but they disputed whether it had ended at the time of the alleged rape. Their business relationship was centred on a boat named “Blue Wave” which was used for tourist fishing and island trips, under the name Utopian Water Sports. The complainant said in evidence that she bought and paid for the boat in September 2015, but the appellant said that he bought the boat but subsequently transferred it to the complainant in 2015. According to the complainant, the boat capsized in the third week of February 2017. The complainant said in evidence that the appellant had deliberately capsized the boat, and she did not want to have anything to do with him after that. She said that the appellant then started threatening her.

[7] On 14 March 2017, the complainant made a complaint to the Police at Nadi that the appellant had raped her by penetrating her mouth and vagina with his penis. The Police took statements from the complainant on 14 and 16 March 2017. She alleged that the rape had occurred on 3 March 2017, at the appellant’s home. The appellant was interviewed under caution on 16 March 2017. He agreed that he and the complainant had met on that day, and had taken her to his home, but denied that he had raped her. The Police also took a statement from the complainant’s mother.

[8] Both the complainant and the appellant gave evidence at the trial. The following summary of the complainant’s evidence as to the alleged rape is derived from the Judge’s Summing Up (all events referred to were in March 2017):

[a] The appellant called her many times on 3 March wanting to meet but she did not want to. The appellant threatened to kill her, but she did not take the threat seriously, so did not report him to the Police. The appellant drove to her house at a time when her mother was at work and her father out at a funeral, and sat outside honking the car horn. As she was embarrassed and did not want to cause a drama outside the house, she went out to talk to him and got into his car when he asked her to. She did not bring

her mobile phone with her or change from her indoor clothes of T-shirt and track pants, and was not wearing shoes, as she did not intend to go anywhere with the appellant.

- [b] As soon as she was in the car, the appellant punched her and slapped her and drove very fast so that she could not escape. She saw a dagger in the footwell of the car. The appellant drove her to his house, continuing to slap and punch her. He threatened to kill her, chop her body into pieces, and dump it into the ocean in a sack. At his house, the appellant dragged her into the house and into the living room, punched and slapped her again, tied her legs, then removed her clothes. She said he took photographs of her partly clad and naked, then removed his clothes and forcibly inserted his penis into her mouth, then into her vagina.
- [c] She did not consent, and begged the appellant to stop. She screamed for help but the appellant suffocated her with a cushion. The appellant threatened to kill her if she reported him to the Police, but she eventually persuaded him that she would not report the matter. The appellant then drove her to a doctor, but when she was talking to the doctor the appellant came into the room and would not leave. He grabbed her by the arm and took her away from the doctor's office. She cried and begged for help but no one assisted.
- [d] The appellant drove her to a beach, saying that this was where he would kill her and throw her in the water, and throughout the drive he was punching and slapping her and swearing at her. From the beach, the appellant took her to a pharmacy where he bought painkillers. The appellant then called her mother and arranged for her mother to meet them. She took photographs of her injuries after she returned home. After she made her complaint to the Police, she gave the Police screen shots of the photographs, and of a message she said was sent by the appellant in which he confessed that he had raped her, and said he was sorry for what he had done to her. She produced the photograph in court.
- [9] The prosecution called evidence from the complainant's mother. She said that on 3 March the complainant's father had returned home to find the complainant not there, but her mobile

phone was on her bed. The mother then phoned the appellant, and an arrangement was made for her to collect the appellant. She said the complainant's face was swollen, and she asked the appellant if he had assaulted her. She said the complainant told her about the rape, ten days later, on 13 March.

[10] The prosecution also called evidence from Dr Fong, who saw the complainant briefly on 3 March. He told the Court that the complainant looked distressed and said she had been assaulted by her boyfriend. He said that as he was starting to explain the procedure for reporting an assault to the Police, the appellant came into the surgery. Dr Fong's evidence was that he told the appellant to take the complainant to the local hospital. He said he was able to see the complainant's face, but he did not report seeing any injuries.

[11] After the complainant went to the Police, she was examined by Dr Chand at Nadi Hospital, on 15 March. He observed slight bruises on her lower left and right legs, but found no laceration of the vaginal wall, no vaginal discharge, and no marks or bruises. His opinion, as recorded in his Medical Examination Report, was "injury light bruising only visible, highly likely out of assault, but late presentation at hospital". At the trial, Dr Chand was shown photographs and concluded that the photographs showed the same bruising as he had observed.

[12] The following summary of the appellant's evidence is also derived from the Judge's Summing Up:

[a] He had a date with the complainant on 3 March, and was supposed to pick her up at 10.30 am. However, he was at home preparing for a boat trip with customers (having bought another boat that day) and was late and did not get to her house until around 12 noon. He denied that he had a dagger in the car. The complainant was very angry about his being late and the boat capsize (which he said was the result of an accident). The complainant came out wearing indoor clothes, without makeup, and got very angry when he asked if she was going to go out like that.

- [b] The complainant started yelling saying that everything was about the boat and the business and nothing about her and the appellant was embarrassed and asked her to come in the car as he did not want to waste his time. The gate to the complainant's property was locked so she climbed over the fence.
- [c] The complainant wanted to go to his house. The appellant denied that he punched, assaulted or threatened the complainant, and he denied that he drove away quickly so that she could not escape. On the way to his house the complainant started getting physical, throwing her hands around and scratching his face, then suddenly pushed his face. The complainant was not wearing a seat belt, so when he retaliated by pushing her, she got hit on the side of her forehead by the seat buckle. He stopped the car, got out, and asked the complainant if she were all right. He said he was sorry, and apologised. He denied that he dragged the complainant out of the car and into his house.
- [d] When they got to his house he took a cold bottle of fizzy drink out of the refrigerator (as he had no ice) and placed on her forehead, however the complainant reacted saying he wanted to kill her now he had destroyed her face, then went to the washroom. When she came out of the washroom she became aggressive, alleging that she had seen a girl's hair in the washroom and he was having an affair. The complainant wanted to have sex with him but he refused, but the complainant took off her clothes. She threatened him that if he left her she would destroy him and she knew how to destroy him. He took a photograph of the complainant, and denied penetrating either the complainant's mouth or vagina that day, and he denied that he suffocated her with a cushion or threatened to kill her. Because he was going on a trip with clients, he was wearing a wetsuit and $\frac{3}{4}$ shorts.
- [e] They talked about how to explain the complainant's injuries, and the complainant wanted to go to a doctor. The doctor they first considered was a bit far away, and was very busy, so he took her to another doctor. When he went into the surgery, the doctor first said he had no right to be there, then when the appellant said he was the complainant's partner, the doctor told him to take her to Nadi hospital. He did not

grab the complainant's arm, just held her hand when they left the doctor's surgery. He was angry that he had had to cancel the trip with clients, and the complainant's mother was calling him.

[f] The complainant did not want to go to the hospital. They were heading for a pharmacy and he took a short cut past a beach, but stopped on the way at the beach to answer a call from the complainant's mother. He denied that he assaulted the complainant at the beach. They talked about what she would tell her parents about her injury. He took the complainant to a pharmacy where he bought painkillers for her. The complainant spoke to the lady at the pharmacy and told her what she wanted, and he paid.

[g] After they left the pharmacy to go to Nadi to meet the complainant's mother, he received a call from a man who sold his tourist trips, who wanted to meet him to be paid commission due to him. He picked the man up from a bus stop but did not go further as the complainant's mother wanted him to stay where he was. He, the complainant, and the man waited until the complainant's mother arrived. The man sat in the front passenger seat of the car, and the complainant sat in the back.

[h] The appellant denied that he had sent the complainant the photograph he had taken of her, or admitted that he had raped her. He agreed that the photograph produced by the complainant was the one he had taken, but said he did not send the message to the complainant, and that he "could not admit that he raped her".

[13] The defence called Michael Ting, who said he met the appellant and the complainant on 3 March, so that he could receive commission that was owing to him. He said he was in the car with the appellant and the complainant: he sat in the back seat and the complainant and the appellant were in the front seat.

[14] The final witness for the defence was Roneel Vishal. He created a Facebook account for Utopian Water Sports. He said that originally only he and the appellant had the password for access to the account, but he later gave the password to the complainant, after there was

an argument. He said that after the argument he gave the administrator rights over the account to the complainant and told the appellant he would not do anything more unless and until they both agreed.

[15] Mr Vishal was shown the photograph the complainant produced in court. He was not able to determine who sent the photograph to the complainant, but said that an administrator of the account would have access to use it to send messages.

Application to adduce fresh evidence

[16] It is necessary, first, to consider the appellant's application for leave to adduce fresh evidence. This Court may accept fresh evidence if it thinks it necessary or expedient in the interests of justice.⁴ It is well settled that an applicant for leave to adduce fresh evidence on appeal must satisfy the appellate court that the evidence sought to be admitted is "fresh" (that is, could not with reasonable diligence have been obtained before the trial), is cogent (that is, could have had a substantial influence on the outcome of the trial), and is apparently credible.⁵

[17] The application sought leave to adduce:

- [a] A letter on Utopian Water Sports letterhead, dated 5 March 2016, addressed to "Whomsoever It May Concern", signed by the complainant;
- [b] A Survey Certificate issued under the Marine Act in relation to the "Blue Wave", issued on 4 August 2014 and valid until 3 February 2015;
- [c] An application for registration of a business name, and Certificate of Registration of the name "Utopian Water Sports", dated 23 September 2014.

⁴ S 28 Court of Appeal Act 1949.

⁵ See, for example, *Ladd v Marshall* [1954] 3 All ER 745; *Mudaliar v State* [2008] FJSC 25; CAV 0001.2007 (17 October 2008); *Chand v State* [2012] FJSC 6; CAV0014.2010 (9 May 2012).

The 5 March 2016 letter

[18] The appellant submitted that this letter was delivered by the complainant to the Lautoka Corrections Centre, where he was serving a term of imprisonment on an unrelated matter. He said that the complainant visited him once during that period, and he asked her to write a letter in support of his application for early release. He said that the complainant returned to her home in Germany soon after, and he assumed she had not written a letter, as he was not granted early release. He submitted that the letter met the test for admission, as he was not aware of it until after the trial, and it would have had a significant influence on the outcome of the trial.

[19] The appellant said he first became aware of the letter when he was imprisoned in the present matter, when a prison official who was interviewing him showed it to him in his prison file. He submitted that the letter clearly showed that the complainant had lied in the High Court as to the duration of their relationship: whereas she said in the High Court that the relationship had been of only four months' duration, up until December 2015, the letter stated that the complainant had known the appellant "since mid-2012", and had been "romantically involved since past 4 years". He submitted that the letter also showed that the complainant lied when she said in the High Court that she, not the appellant, owned the Blue Wave, as she referred in the letter to "our boat 'Blue Wave'".

[20] While it may be accepted that the appellant could not with reasonable diligence have obtained the letter before the trial, it was in his possession at the time he made his application for leave to appeal, yet it was not produced to this Court, or referred to, in the course of that application. The appellant told this Court that he told his lawyer about the letter in 2019 when he was applying for legal aid to appeal, and the lawyer had a copy of it when the application was made. He said that the lawyer told him that the letter was not important and he accepted that advice.

[21] I am not persuaded that the letter would have had a significant influence on the outcome of the trial. This is because the "inconsistencies" the appellant pointed to are not material. It was an agreed fact at the trial that the complainant and the appellant "had been in a boyfriend

and girlfriend relationship since 2015”. The statement of agreed facts was signed by counsel for the prosecution, the appellant’s counsel, the appellant, and the trial Judge. The only dispute at trial was as to whether (and if so when) the relationship ended. The letter does not point to any inconsistency on that point.

[22] Secondly, the letter speaks of “our boat ‘Blue Wave’”. While the appellant maintained before this Court that he was the owner of the boat, his evidence in the High Court was that he had been the owner, but he had transferred ownership to the complainant. The letter does not disclose any inconsistency. For these reasons, I would not give leave for the letter to be admitted. The grounds for leave are not made out.

The Marine Act Survey document and Business Name Registration documents

[23] The appellant advised this Court that his father obtained these two documents on his behalf. They are both public record documents and as such readily available. The appellant said he told his lawyer about the documents at the time of the trial but she said they were not important.

[24] I am not persuaded that these documents can be considered “fresh”, as they were available to the appellant at the time of his trial. The fact that his counsel advised against producing them at trial does not alter that fact that they were “available”. Further, I am not persuaded that they would have had a significant (or any) influence on the outcome of the trial. While they both indicate that the appellant was the owner of the “Blue Wave” as at the date of each document, the appellant’s evidence was that he transferred ownership of the boat to the complainant. Accordingly, the grounds for leave to produce them are not made out and I would not give leave for either document to be admitted.

The Appeal against conviction

[25] At the appeal hearing, the appellant relied on the 20 grounds of appeal set out in his application for extension of time to appeal, dated 1 July 2022, and the submissions set out in an undated document, which is date stamped (as being a “Certified True Copy”) 7 July 2022.

[26] The grounds of appeal were grouped in the appellant's submissions as follows:

Ground 1: that the Judge failed to direct himself and the assessors that it was open to them to consider the complainant's motive in making the complaint, such that they could conclude that the complaint was fabricated;

Grounds 2-6, 9, 12 and 14: that the Judge failed to address the prosecution and defence cases evenly, and to address the assessors as to irreconcilable inconsistencies, improbabilities, and incurable weaknesses in the prosecution evidence;

Ground 7: that the Judge failed to direct himself and the assessors adequately as to the "recent complaint" evidence given by the complainant's mother;

Grounds 11, 15-18: that in his judgment the Judge shifted the burden of proof to the appellant;

Grounds 8, 10, 13: that the Judge failed to direct himself and the assessors in his summing up as to the inferences they were entitled to draw from their conclusions as to the primary facts of the case; and

Ground 20: that the Judge failed to direct himself and the assessors adequately on the rule as to previous inconsistent statements.

[27] Before considering the grounds of appeal, I summarise the Judge's Summing Up, and his Judgment.

Summing Up

[28] The Judge first directed the assessors in general terms on the burden and standard of proof. He directed that the burden rests on the prosecution, and never shifts to the accused, and that there is no obligation on the accused to prove his innocence: an accused person is presumed innocent until proven guilty. He directed that the standard of proof in a criminal trial is that

of beyond reasonable doubt: that they had to be sure of the accused person's guilt before they could express an opinion that he was guilty, and that if they had any reasonable doubt as to the accused's guilt, they must express an opinion that he was not guilty. He also directed the assessors that their decision must be based exclusively on the evidence heard in Court, without prejudice or sympathy to either the accused or the complainant, and without fear, favour, or ill will.

[29] After setting out the charge against the appellant, the Judge directed the assessors as to the elements of the charge of rape. The Judge stated that the appellant denied committing the offences of rape and directed that it was for the prosecution to prove beyond reasonable doubt that he had penetrated the complainant's mouth and vagina with his penis, without her consent. He directed that if the assessors were satisfied beyond reasonable doubt that the prosecution had proved beyond reasonable doubt that the appellant inserted his penis into the complainant's mouth and vagina without her consent, then they must find him guilty as charged. On the other hand, if they had a reasonable doubt with regard to any of the elements of the offence of rape, they must find him not guilty.

[30] The Judge referred to the Statement of Admitted Facts, and directed that these were part of the evidence, and should be accepted as accurate, truthful, and proven beyond reasonable doubt.

[31] The Judge then summarised the evidence given by the complainant. It is not necessary to repeat the Judge's summary. The Judge next referred to the complainant's evidence that she did not tell Dr Fong, or the salesperson at the pharmacy, or her mother when she was collected on 3 March 2017, that she had been raped. The Judge directed, at paragraph 82:

... a late complaint does not necessarily signify a false complaint, and an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to [that evidence].

[32] In relation to the complainant's and her mother's evidence that she complained to her mother on 13 March that she had been raped, the Judge directed the assessors as to "recent complaint" evidence. He directed, at paragraphs 83-84:

83 *The evidence given by [the complainant's mother] is not evidence of what actually happened between the complainant and the accused since [the complainant's mother] was not present and she did not see what happened between the complainant and the accused.*

84 *You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. ...*

[33] Having summarised the prosecution and defence submissions as to whether they should accept the complainant's evidence, the Judge directed, at paragraph 87:

It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility as a witness. That is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.

[34] The Judge then referred to the cross-examination of the complainant and her mother by the appellant's counsel as to "inconsistencies and omissions in the statement they gave to the Police after the incident when the facts were fresh in their minds with their evidence given in court." The Judge continued, at paragraphs 92-94:

92. *... You are allowed to take into consideration the inconsistencies or omissions in such a statement when you consider whether the witnesses are believable and credible, However, the police statement itself is not evidence of the truth of its contents.*

93. *It is obvious that the passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to another.*

94. *If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it adversely affects the reliability and credibility of the issue that you are considering, If it is significant, you will great to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency or omission is so fundamental, then it is for you to decide as to what extent that influences your judgment in respect of the reliability of the witness you are considering.*

[35] Having referred to the evidence of Dr Chang and Dr Fong, the Judge turned to the evidence given by the appellant and the two witnesses he called to give evidence. He began this section of his Summing Up by saying, at paragraph 110:

At the end of the prosecution case you heard me explain options to the accused. He has these options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence and called two witnesses so you must take into account what the defence adduced in evidence through the accused and defence witnesses when considering the issues of fact which you are determining.

[36] The Judge then summarised the evidence given by the appellant, at paragraphs 111 to 136. Again, it is not necessary to repeat the Judge's summary. He also summarised the evidence of Mr Ting and Mr Vishal.

[37] The next section of the Summing Up was headed "Analysis" and comprised a brief summary of the prosecution case, and the appellant's denial. In relation to the appellant's denial, the Judge said (at paragraphs 148-149):

148. The defence on the other hand denies all allegations the accused takes the position that the complainant has made up a story against him since the boat she had given the accused had sunk and she was alleging that the accused had deliberately done so. the complainant was not happy with the accused about this. The boyfriend and girlfriend relationship between the two had turned sour.

149. The accused did not on the 3rd March insert his penis into the mouth or vagina of the complainant as alleged. In respect of the message sent to the complainant under the accused's business name was not sent by him the complainant also had the password to the Facebook account.

[38] The Judge then directed the assessors, at paragraphs 150-157, as follows:

150. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.

151. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

152. In deciding the credibility of the witnesses and the reliability of the evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's

evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

153. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the evidence is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

154. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

155. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and I never shifts to the accused at any stage of the trial.

156. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proved guilty.

[39] At the conclusion of his Summing Up, the Judge asked counsel if there was anything they wished him to add or alter in his Summing Up. No issues were raised.

The Judgment

[40] The judgment was delivered the day after the assessors returned with a unanimous opinion that the appellant was guilty of both charges of rape. The Judge recorded that he was directing himself in accordance with his Summing Up and the evidence adduced at the trial. After summarising the prosecution and defence evidence, the Judge made the following findings with respect to the prosecution evidence:

[a] He accepted the evidence of all the prosecution witnesses as credible, truthful, and reliable. He recorded that the complainant was able to recall clearly what had happened and had given a coherent and honest account of what the appellant had done to her on 3 March, and had not been discredited during vigorous cross examination. The Judge accepted that the complainant was threatened and assaulted by the appellant,

was afraid and traumatised, preventing her from making complaints, especially about being raped by the appellant (paragraphs 62-63).

- [b] The fact that the Police statement of the complaint did not mention in detail everything the complainant told the court was not a significant inconsistency in view of her explanation that she had told the Police Officer everything and when she read the statement the important points such as beating, rape, the visit to Dr Fong etc were there so she signed it (paragraph 65).
- [c] The complainant's mother had also given a credible and honest version of what she was told by the complainant, and the fact that she did not tell the Police that the complainant had told her about being raped was not a significant inconsistency, as she had explained that when she gave the Police statement she was only asked about the repeated phone calls made by the appellant, and what the appellant had done at the gate of her house on 14 March. The Judge also found that the complainant's mother had withstood cross examination (paragraphs 66-67).
- [d] The late complaint to the complainant's mother did not affect the reliability of the complainant's evidence. He considered that the complainant's refusal to make any complaints to anyone was a "natural reaction" to the events, and the ten-day period before she complained was not a substantial delay. Further, there was nothing to suggest that the complainant's silence or delay in complaining to her mother, or anyone, meant that she had not been raped (paragraphs 68-70).

[41] With respect to the defence evidence, the Judge concluded that:

- [a] The appellant had not told the truth; he had deliberately told long stories to detract from the main issues in question, and as the appellant's evidence progressed it was obvious that the appellant was not forthright in his answers, and most of what he told the court was irrelevant and had not been put to the complainant.⁶

⁶ As required pursuant to the rule stated by the House of Lords in *Browne v Dunn* (1893) 6 R 67, at 70,76.

- [b] The Judge did not accept that the appellant had only pushed the complainant in the car, resulting in her being injured on her forehead, and accepted the complainant's account of the appellant's violence.
- [c] The journey from Dr Fong's surgery to the beach was taken to instil further fear in the complainant, since she had complained against him to the doctor.
- [d] The Judge did not accept the appellant's evidence that he had not sent the complainant the message containing a confession, or that the complainant knew the password of the appellant's Facebook account. The Judge considered that Mr Vishal's evidence did not support the appellant's contention, because at the time he created the Facebook account for Utopian Water Sports there was no messaging option on the page. The Judge accepted the complainant's evidence that the appellant sent the message to the complainant from Link messenger and not from his Facebook account (paragraphs 74-75).
- [e] The Judge had no doubt that the appellant had sent the complainant a photograph of the complainant in her underwear, with her hands together. He referred to the appellant's having agreed in cross examination that he had taken the photograph.
- [f] The purpose of Mr Ting's evidence was not clear, but it contradicted the appellant's evidence.
- [g] The appellant's defence was denial, and an assertion that the complainant had fabricated a story against him with the motivation of getting even with him for sinking her boat. The Judge said (at paragraph 80):

The defence of denial was implausible and untenable considering the totality of the evidence. The defence has not been able to create any reasonable doubt in the prosecution case.

Appeal Ground 1: Did the Judge fail to direct that it was open to the assessors and himself to consider whether there was a reason or motive for the complaint, such that they could hold that the complaint was fabricated and acquit the appellant?

[42] The appellant's primary contention was that the Judge failed to adequately analyse the defence case, which was that the complainant had fabricated her evidence. With reference to paragraph 148 of the Summing Up (set out above at paragraph [37]), he submitted that the Summing Up was formulaic, stereotypical and conventional, and failed to focus the Assessors on this crucial issue of the defence case. He submitted that the Judge failed to evaluate the defence evidence, such that the verdict is unsafe, and unsupported by the evidence as a whole.

[43] Mrs Uce submitted for the State that the Judge fairly summarised the defence case to the assessors, including setting out the appellant's evidence and that of his two witnesses, and what each said in examination in chief, cross examination, and re-examination. She submitted that the defence of total denial was clear to the assessors, as was the appellant's claim that he had been framed by the complainant.

[44] It must be observed, first, that in summing up to the assessors, it was not the Judge's role to "evaluate" the defence evidence (or, for that matter, the prosecution evidence). Evaluation of the evidence was a matter for the assessors. The Judge's task was to ensure that the assessors were reminded of the relevant law they were required to apply, the evidence given during the trial, and the cases for the prosecution and defence, so that the assessors could undertake a proper evaluation.

[45] On appeal, an appellant has the burden of satisfying the appeal court that the trial Judge erred. In the present case, having reviewed the Summing Up, I am not persuaded that the Judge failed give the assessors adequate directions as to the defence case. It is apparent from the passages set out above (in particular at paragraphs [36] to [38]), that the Judge fairly summarised the defence case. The Judge referred to the appellant's defence of denial, and his contention that the complainant had fabricated the complaint against him. The judge gave directions as to the assessors' evaluation of the evidence, including the evaluation of

defence evidence, and reminded the assessors that that the appellant did not have to prove anything, and that the burden of proving the charges beyond reasonable doubt remained on the prosecution throughout the trial, and never shifted to the appellant.

[46] I have concluded that this ground of appeal must fail.

Appeal Grounds 2-6, 9, 12 and 14: Did the Judge fail to evenly handle the prosecution and defence evidence in its entirety?

[47] The appellant submitted that in considering the culpability of an accused person, the paramount duty of a court of law is to consider whether, on the whole, the evidence led at the trial has the strength to meet the standard of proof the prosecution is required to meet in order to prove its case beyond reasonable doubt. He further submitted that if evidence is unsatisfactory, saddled with incurable inconsistencies, improbabilities or other weaknesses, such infirmities should fall to the benefit of the accused.

[48] The appellant also submitted that a trial Judge should carefully examine the weight to be attached to inconsistencies, improbabilities and other weaknesses, and is duty bound to examine them carefully and evaluate them for the purpose of determining the final effect on the credibility of the relevant evidence.

[49] The appellant referred to paragraphs 31, 32, 34-45, 47-54, 57, 58, and 64 of the Summing Up in which, he submitted, the Judge failed to direct the assessors as to inaccurate evidence, inconsistencies between witness's evidence and their earlier statements, or between the evidence of individual witnesses. He submitted that the complainant's evidence was riddled with inconsistencies and improbabilities, as she had lied as to their relationship, as to the ownership of the boat "Blue Wave", as to the events of 3 March, and as to what she said to the Police in her statement. He submitted that despite these contentious issues, the Judge failed to consider any of it in determining the testimonial trustworthiness of the complainant's evidence, and should have been more circumspect in examining the totality of the evidence. He submitted that in light of the deficiencies in the prosecution evidence, and his evidence that he had not committed the offences, the conviction was unsafe.

- [50] I note that the appellant also referred in his submissions to the evidence sought to be admitted as fresh evidence, and submitted that the letter and the documents showed that the complainant had invented and fabricated her evidence in order to make her story look more real. As his application to adduce those items has not succeeded, they cannot be considered further.
- [51] Mrs Uce submitted that each of the issues raised by the appellant related to matters that should have been raised during the trial, and cannot now complain if he considers that any inconsistencies, contradictions, or improbabilities were not put to the prosecution witnesses.
- [52] She further submitted that even if the issues had been put to the complainant during the trial, it would not have affected her complaint of rape, considering the totality of the evidence. She submitted that the complainant gave a detailed account, and her account was supported by the photographs tendered in court, and the evidence of her mother and the two doctors. She submitted that the totality of the evidence allowed the assessors and the Judge to safely convict the appellant on the two counts of rape.
- [53] I accept Mrs Uce's submission that the issues raised by the appellant were matters for trial. It was for the appellant and his counsel to make decisions as to trial strategy, and to ensure that the prosecution evidence was appropriately tested. The appellant cannot now complain that the assessors were not directed as to any inconsistencies and improbabilities in the evidence against him. That was a matter for trial counsel, by putting any perceived inconsistencies and improbabilities to the prosecution witnesses in cross examination and highlighting them in their closing address to the assessors.
- [54] I am not persuaded that the appellant has established that the Judge erred, and have concluded that these grounds of appeal must fail.

Appeal Ground 7: Did the Judge err by not adequately directing himself and the assessors in his Summing Up and his Judgment in respect of recent complaint evidence?

[55] The appellant submitted that the evidence of the complainant's mother was "recent complaint" evidence and as such the Judge should have directed himself and the assessors that it was not evidence of the facts complained of, and could not be regarded as corroboration of the complainant's evidence.

[56] He further submitted that there were inconsistencies between the complainant's and her mother's evidence, and their statements to the Police, which indicated that the complainant had lied when she said she told her mother "everything" on 13 March. He submitted that the only inference to be drawn was that the complainant did not disclose the rape to her mother on 13 March, and there was, therefore, no evidence of a "recent complaint": the complainant's mother was not made aware of the complainant's complaint of rape on 13 March. The appellant submitted that the Judge's direction on "recent complaint" was wrong, and was a material misdirection: there was no "recent complaint" which could be used to enhance the complainant's credibility, such that a substantial miscarriage of justice had been caused.

[57] Mrs Uce submitted that the complainant's mother gave evidence in the trial that the complainant informed her on 13 March that the appellant had assaulted her and raped her, and that a complaint was then made to the Police. She submitted that the evidence given at the trial by the complainant's mother was "recent complaint" evidence, requiring an appropriate direction. She submitted that the Judge directed the assessors as to the evidence in his Summing Up, and any issues the appellant and his counsel had about the direction should have been addressed by way of asking the Judge for a re-direction.

[58] There is no merit in this ground of appeal. The complainant's mother gave evidence at the trial that the complainant told her on 13 March that the appellant had raped her. I accept Mrs Uce's submission that this was "recent complaint" evidence, and the Judge was required to give a direction as to how it was to be treated. The Judge's direction was at paragraphs 83, 84 and 87 of the Summing Up, and is set out at paragraph [32] and [33], above. The

Judge was not asked to add to or amend the direction. I have concluded that this ground of appeal must fail.

Appeal Grounds 11 and 15-18: Did the Judge err by shifting the burden of proof to the appellant?

[59] The appellant referred to paragraphs 71 and 80 of the Judgment, and paragraphs 151-154 of the Summing Up in support of these grounds. The essence of his submission was that despite directing the assessors that the burden of proof never shifts from the prosecution, the Judge reversed the burden in his directions, in particular, the direction at paragraph 154 of the Summing Up:

It is up to you whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the Prosecution's case.

[60] The appellant also referred to paragraphs 62, 71 and 80 of the Judgment:

62. After considering the evidence adduced by the prosecution and the defence I accept the evidence of all prosecution witnesses as credible, truthful and reliable, the complainant was able to recall clearly what had happened to her in 2017. She gave a coherent and honest account of what the accused had done to her on the 3rd March 2017.

*71. The accused on the other hand did not tell the truth in court his demeanour was such that he was deliberately telling long stories to detract from the main issues in question most of what he told the court was irrelevant and did not comply with the rule in *Browne v Dunn*. As his evidence progressed it was obvious to me during cross examination that the accused was not forthright in his answers. He appeared to be a short tempered aggressive person moreover his demeanour in court portrayed a picture of his stubbornness and arrogance.*

...

80. This court rejects the defence of denial as implausible and untenable considering the totality of the evidence. The defence has not been able to create any doubt in the prosecution case.

[61] The appellant submitted that the paragraphs set out above show that the Judge accepted the evidence given by the complainant on the grounds that she was a more credible witness than the appellant. He submitted that by doing that the Judge was placing a burden on the appellant such that in order to defeat the prosecution case, the appellant had to satisfy the

court that the evidence he gave was more credible than that of the complainant, and finding that the appellant had failed to satisfy that burden.

[62] The appellant referred to the judgments of the High Court of Australia in *Liberato v R*,⁷ and of this Court in *Goundar v State*,⁸ and submitted that the Judge was required to direct the assessors that if they believed the appellant's evidence he must be acquitted, if they neither believed nor disbelieved it, yet it created a reasonable doubt in their minds about the prosecution's case they must find him not guilty, and if they rejected the appellant's version of events, that did not mean that the prosecution had established that he was guilty: they still had to be satisfied that the prosecution had established, on its own evidence, beyond reasonable doubt, that the appellant had committed the offences as charged.

[63] The appellant submitted that while the Judge had directed the assessors that the burden of proof never shifted to the accused, the directions as to evaluating the appellant's evidence at paragraphs 151-154 of the Summing Up created confusion, thus making a material misdirection on the burden of proof.

[64] Mrs Uce submitted that the Judge's directions did not amount to shifting the burden of proof. She further submitted that on the entirety of the evidence before the Court, it was open to the assessors and the Judge to find the appellant guilty beyond reasonable doubt.

[65] I refer, first, to the appellant's reference to *Liberato*. In that case, his Honour Justice Brennan spoke of cases which turn on a conflict between the evidence of the prosecution witness and the defence witness, and it is commonplace for a Judge to invite the jury to consider the question: who is to be believed. His Honour went on to stress that it is essential for the Judge to direct that if the answer to that question is adverse to the defence, it is not to be taken as decisive of the issue of whether the prosecution has proved its case beyond reasonable doubt.

[66] Paragraphs 150 to 156 of the Summing Up are set out at paragraph [38], above. The appellant's submissions fail to refer to paragraphs 155 and 156, in which the Judge directed:

⁷ *Liberato v R* (1985) 159 CLR 507 (HCA).

⁸ *Goundar v State* [2015] FJCA 1; AAU007.2011 (2 January 2015).

155. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and I never shifts to the accused at any stage of the trial.

156. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proved guilty.

[67] I am not persuaded that the assessors would have been left with any confusion as to the burden of proof, or whether, if they did not believe the appellant's evidence, they still had to be satisfied that the prosecution had proved the case beyond reasonable doubt.

[68] I turn to the Judgment and, in particular, the Judge's statement at paragraph 80 that "*the defence has not been able to create any reasonable doubt in the prosecution case*". It must be noted that this statement was made in the Judgment, not the directions to the assessors, so cannot have had any prejudicial effect on the assessors' consideration of the evidence.

[69] In *Rokocika v State*, this Court said as to a similar statement:⁹

[39] ... I find from the judgment that the impugned statement that 'the defence has not been able to create any reasonable doubt in the prosecution case' is the result of the trial Judge's analysis of VR's mother's evidence on behalf of the appellant ... and therefore, all that the trial Judge was asserting at paragraph 30 was that VR's mother's evidence had failed to create a reasonable doubt in the prosecution case.

[40] In the legal context, stating that the defence has not been able to create any reasonable doubt in the prosecution's case is not inherently wrong or improper. It is a common way to assess the strength of the defence's arguments in court. It does not amount to shifting of burden to the accused.

[70] I am not persuaded that these grounds of appeal have any merit. I have concluded that they must fail.

⁹ *Rokocika v State* [2023] FJCA 251; AAU0040.2019 (23 November 2023), at [39]-[40].

Appeal Grounds 8, 10 and 13: Mis-direction and non-direction in Summing Up and Judgment

[71] The appellant submitted that the Judge's Summing Up dealt with the relevant law and evidence in sufficient detail, but lacked adequate directions on what inferences the assessors were entitled to draw from their conclusions on the primary facts of the case. He submitted that the Judge could have directed himself properly in the Judgment, but failed. He submitted that had the Judge carried out an independent analysis of the evidence he would have disagreed with the assessors and found the appellant not guilty, as the Judge could not reasonably have convicted the appellant on the evidence before him.

[72] In support of that submission, the appellant submitted that the only incriminating evidence was that of the complainant, and that there was no evidence that the complainant did not freely and voluntarily agree to the sexual acts. He further submitted that while the defence took the strategic position at trial and did not explore the issue of consent, that did not relieve the prosecution of the burden of proving lack of consent. He submitted that the complainant's evidence was that she refused and did not co-operate, but she offered no explanation as to why she did not resist but submitted to the sexual acts.

[73] Mrs Uce submitted that the Judge's Summing Up included reference to the matters the appellant complains of in these grounds. She submitted that the Summing Up was well-balanced, objective, and fair.

[74] I am not persuaded that these grounds have merit. The complainant's evidence was that she did not consent to the appellant's penetration of her mouth and vagina, that she begged him to let her go, that the appellant said he would kill her, that he suffocated her with a cushion when she tried to scream to get the attention of neighbours, and that she wanted to get out of the house alive. It may have been a strategic decision by the appellant and his counsel to contend at the trial that no sexual acts occurred at all, and thus not explore the question of consent with the complainant, but the effect was that the complainant's evidence as to lack of consent was not challenged. The assessors and the Judge were entitled to infer from the lack of such a challenge that consent was not an issue.

[75] In any event, the Judge directed the assessors as to the elements of the offence of rape, including the lack of consent. At paragraph 18 of the Summing Up the Judge said:

The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, than that consent is no consent at all. Furthermore submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

[76] There is no error in that direction. The complainant told the court that she did not consent, she was scared and threatened, and wanted to get out of the house alive. I am not persuaded that the Judge was required to direct the assessors that if (contrary to the appellant's contention that they never occurred) they concluded that the appellant had penetrated the complainant's mouth and vagina with his penis, they were entitled to infer that she had consented. These grounds of appeal must fail.

Ground 20: Previous inconsistent statement

[77] The appellant submitted that the Judge failed to direct the assessors as to previous inconsistent statements made by the complainant and her mother. He submitted that the failure to do so caused a grave and substantial miscarriage of justice. He did not identify which particular statements he was referring to. I have assumed that the appellant intended to refer to the "inconsistencies" set out in relation to grounds 2-6, 9, 12 and 14 of his appeal.

[78] Mrs Uce referred to paragraphs 92-94 of the Summing Up, and submitted that the Judge adequately addressed the assessors on how to approach any inconsistency or omission in the evidence of the complainant and her mother.

[79] Paragraphs 92-94 of the Summing Up were set out at paragraph [34], above. I am not persuaded that the Judge erred failed to give a direction as to inconsistent statements. This ground of appeal must fail.

[80] Finally, with respect to the appellant's submission that the Judge could not reasonably have convicted him, it is appropriate to refer to the judgment of the Supreme Court in *Ram v State*:¹⁰

A trial judge's decision to differ from, or affirm the opinion of the assessors necessarily involved an evaluation of the entirety of the evidence led at the trial including the agreed facts, and so does the decision of the Court of Appeal where the soundness of the trial judge's decision is challenged by way of appeal as in the instant case. In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of the evidence in the case.

[81] Having reviewed the totality of the evidence in this case, and bearing in mind the advantage the assessors and the Judge had in seeing and hearing the evidence given over the course of the trial,¹¹ I am not persuaded that the guilty verdict was unsafe or dangerous.

Appeal against sentence

[82] Although the appellant's Notice of Appeal to the Full Court of Appeal referred to an appeal against sentence, he has made no submissions in support of such an appeal. Similarly, the appellant did not make any submissions regarding his sentence in his submissions in support of his initial application for leave to appeal. Notwithstanding that, the Ruling of 29 November 2021 includes an analysis of the sentence imposed, which concluded that the sentence could not be called disproportionate, harsh or excessive.

[83] I am not persuaded that that analysis and conclusion were wrong. The appeal against sentence must be dismissed.

¹⁰ *Ram v State* [2012] FJSC 12; CAV0001.2011 (9 May 2012), at paragraph 80.

¹¹ See *Wang v State* [2023] FJSC 39; CAV0013.2021 (26 October 2023), at [57].

ORDERS

- (1) The application to adduce evidence is refused.
- (2) The appeal against conviction is dismissed.
- (3) The appeal against sentence is dismissed.



Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL