

IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

Criminal Petition No: CAV0008 of 2013

BETWEEN:

KALIOVA VUKI BALEMAIRA

Petitioner

AND:

THE STATE

Respondent

Coram: Hon. Mr. Justice Anthony Gates, President of Supreme Court
Hon. Mr. Justice William Calanchini, Judge of Supreme Court
Hon. Mr. Justice Daniel Goundar, Judge of Supreme Court

Counsel: Mr. R. Vananalagi for Petitioner
Mr. M. Korovou for State

Date of Hearing: 13 November 2013
Date of Judgment: 6 December 2013

JUDGMENT OF THE COURT

Gates P

I have read the judgment of Goundar JA in draft form. I agree with it and its reasoning and with the proposed orders. The appeal must succeed.

Calanchini JA

I have read the draft judgment of Goundar JA and agree that special leave should be granted and the appeal allowed.

Goundar JA

Introduction

- [1] The petitioner seeks special leave to appeal against a final judgment of the Court of Appeal that confirmed his conviction for one count of rape. In the High Court, the petitioner was tried on two counts of rape, which appeared to be based on one

transaction. He was acquitted on the first count but convicted on the second. The petitioner seeks special leave on the following questions:

- a) Did the Court of Appeal err in its duty to consider whether the trial judge failed to direct the assessors carefully in detail on the issue of the expert evidence relating to the presence of the semen on the crotch area of the complainant's panty and to instruct the assessors to assess it against the credibility of the evidence of the complainant and the petitioner.
- b) Did the Court of Appeal err in law by failing to make an independent assessment of the expert evidence before affirming a verdict which was unsafe, unsatisfactory and supported by evidence giving rise to a grave miscarriage of justice.
- c) Did the Court of Appeal err in law by failing to make an independent assessment of the complainant's evidence on the issue of consent on the second rape.

[2] At the hearing, the petitioner explained the significance of the semen found in the complainant's underwear to his defence of consent. The prosecution's case was that the complainant's underwear was removed by force and it remained on the floor near where the rape occurred on a bed until a forensic officer seized it as an exhibit. The defence case was that the complainant had consensual sex with the petitioner and when one of the petitioner's mates, Chad Miller knocked at their bedroom door, the complainant put on the underwear before the petitioner opened the door. The petitioner's argument is that the only rational explanation for the semen found on the crotch region of the complainant's underwear is that she did put on the underwear after the sexual intercourse as the petitioner said in his evidence. The petitioner argues that the presence of semen on the complainant's underwear is inconsistent with her evidence that her underwear remained on the floor after the sexual intercourse.

[3] The petitioner submits that the failure of the Court of Appeal to independently assess the evidence of semen found in the complainant's underwear has resulted in an unreasonable or an inconsistent verdict. For the petitioner to succeed with his arguments, he must satisfy either one of the requirements for special leave provided by section 7(2) of the Supreme Court Act 1998. Section 7 (2) states that the Supreme Court must not grant special leave to appeal unless-

- “(a) a question of general legal importance is involved;
- (b) a substantial question of principle affecting the administration of criminal justice is involved; or
- (c) substantial and grave injustice may otherwise occur.”

Proceedings in the High Court

- [4] On 5 October 2010, the trial of the petitioner commenced in the High Court at Suva after he pleaded not guilty to the following charges:

First Count **Statement of Offence**

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap. 17.

Particulars of Offence

KALIOVA VUKI BALEMAIRA, on the 20th day of November 2007 at Navua in the Central Division, had unlawful carnal knowledge of a woman, namely MARJORIE PARR, without her consent.

Second Count **Statement of Offence**

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap. 17.

Particulars of Offence

KALIOVA VUKI BALEMAIRA, on the 20th day of November 2007 at Navua in the Central Division, on an occasion after that which is referred to in Count 1, had unlawful carnal knowledge of a woman, namely MARJORIE PARR, without her consent.

- [5] At trial, the prosecution called six witnesses. The first witness was the complainant, Marjorie Parr. Marjorie’s evidence was that she was 31 years old and married with two children. She is an Australian national, but due to her Fijian family links, she was engaged to play for the Fiji national netball team. In 2007, she represented Fiji in the world cup netball tournament held in New Zealand. After the conclusion of the world cup, she returned to Fiji on 19 November 2007 to collect her bags and then head to her home in Sydney, Australia. She arrived in Nadi at 3.00am with her team and at 7am they headed to Suva in a coach.
- [6] After spending the day in Suva, she went to spend the night in Deuba. She arrived in Deuba at 7.30pm with three other teammates, Taraima, Talei and Matelita. They

stayed in a villa belonging Taraima's father. After having a light meal at around 8pm, the four girls started drinking. The girls were joined by four boys at around 11pm. Among the four boys were the petitioner, Lionel Evans, Chad Miller and another man who Marjorie did not know by name. Either Taraima or Matelita knew these boys and Marjorie said she took no issue to them joining their drinking party. After the boys had a few drinks, they all went to the bar at the Uprising Resort. When they arrived at the resort gate, they were told by a security guard that the bar was closed. They returned to the villa and continued drinking, this time, at the poolside.

- [7] Eventually, Marjorie and Taraima ended up in the pool. After 20 minutes, Marjorie got out of the pool, changed into her night gown and went to bed after saying goodnight to her mates who were still drinking at the poolside. Marjorie said she wore a grey pyjama shorts and underwear and singlet. She saw her watch and it was about midnight when she went to bed in a room she was going to share with Talei. There were two beds in the room and Marjorie chose the one on the right side. She went to sleep and later in the night she was awoken by somebody pulling her legs. What transpired after that is explained by Marjorie at page 235 of the court record as follows:

"I was awake by somebody pulling my legs. I could feel someone gading my breasts. My first reaction was I wasn't quite sure what was happening to me. I then realized that I had no buttons on, I had no pants on. I heard a voice telling me to keep still and to keep quiet. I was turning my head. I think that moment I realized what was happening. I knew there was a man and no clothes on. I could feel his hand going up my top. I tried to push his hand down and I was saying no. I could feel my legs were pinned up. My legs were to the side. I was on the bed facing up. It was his torso upper part of his legs, his groin pinned me. I was not trying to see very far. I had my eyes closed. My head was turned. He kept telling me to keep still. Because my leg were still aside I could feel his penis going inside of me. I said to him no. I have my periods I am married and I have a son. He said "I don't care, I don't mind." He kept going. He was having intercourse with me. He put his penis in my vagina. He had intercourse this time. I felt like a long time about 5 minutes. After that I had my eyes closed, head aside. He tried to kiss me. When he tried to kiss me I had my head aside. I felt him stop because I thought he had finished. I did feel that he finished. Then he pulled up my shoulders and turned me over. Then I was face down. He then tried to enter me from behind. I still told him I have my period stop. He asked

me why I was crying. Because he was leaning over and spoke to me. I could feel his body weight move. I felt him shift off to the side of my back. Then I remember moving my arm and my leg pushing him off. Then I was able to move him off. I remember pulling a bed sheet which he pulled back. I was still crying. I pulled the sheet over my body. I remember scrambling to end of the bed to get up. I got to the door and I realized that the door was locked. I unlocked it and opened the door at that time I remember him sitting on the bed. I stood in the door way. I remember saying do you know what you have done to me. Then he put his head down and I continued. I was still crying. I said in the eyes of god and the law and my family do you know what you have done. He said yes. I told him that because I was 31, married and had no intention to sleep with another man. I was hurt that somebody disrespected me. I could see this person very clearly. I recognized him. He was Vuki from the party from the night before. That person is present in court today. *(Witness points at the accused in the dock).*

- [8] Marjorie told the trial court that she left the bedroom and saw Talei and Taraima sleeping on the couch in the living room. She called their names and when the girls woke up Marjorie told them that she had been raped. Matelita came out from the other room and Marjorie also complained to her. While the girls were contacting the police, Marjorie called her husband, Scott in Sydney and complained to him. Her underwear was left lying on the bedroom floor until a forensic officer collected it.
- [9] From the above version of Marjorie's evidence, it was clear that on the second incident that was part of count 2, penetration had not occurred because Marjorie said the petitioner stopped when she asked him to do so. Later in her direct examination, Marjorie confirmed penetration when the prosecutor pressed on with the following questions:

“Q: Now I take you back to 20/11/2009 the second time when the accused had turned you over on the bed. You said he had been trying to enter from behind.

A: Yes.

Q: Did you succeed?

A: I think so.

Q: Why did you say so?

A: I remember him tried to move my knees, my legs. He was trying to separate. He separated. Then he managed to put his penis inside my vagina.”

- [10] Marjorie was cross-examined at length on her physical built and strength and her failure to fight back or raise alarm by screaming knowing that there were other people present in the house at the time of the alleged rape. It was suggested to Marjorie that she had consensual sex and when she realised that one of the petitioner's mate, Chad Miller saw her and the petitioner inside the bedroom in the early hours of 20 November 2007, she cried out rape. Marjorie's explanation for not raising an alarm when she was being raped was that she was scared and was not aware if anyone was inside the house.
- [11] The next witness was Marjorie's husband, Scott Parr. The only significance of Scott's evidence was that Marjorie called him in the morning of 20 November 2007 and complained she was raped.
- [12] The third witness was a forensic officer from the Fiji Police Force who carried out forensic tests on the clothing that the complainant wore on the night of the alleged rape. Forensic tests revealed presence of sperms in the crotch region of the complainant's underwear. No further tests were conducted to identify the source of the sperms, but in cross-examination, it was not suggested that the sperms were not of the petitioner.
- [13] The fourth witness was a medical practitioner who examined the complainant on 20 November 2007 after she complained of rape. Medical examination found no vaginal bruises or injury. The only injury was a bruise on the complainant's forearm.
- [14] The next witness was Taraima Mitchell. Taraima said the petitioner arrived at their villa between 10 to 10.30pm with his mates. Around 11 to 11.30pm they went to the Uprising Resort and when they learnt the bar was closed, they returned to their villa around 12 midnight. Shortly after, the complainant went to bed. At around 4am, Taraima had her shower. When she came out of the shower, the petitioner was drinking alone outside the villa. The rest of the boys had left. Talei was awake and was in the living room. Taraima and Talei watched the television in the living room until they fell asleep. Taraima said she woke up at around 5am when she heard the

complainant calling from the living room. When Taraima asked what was wrong the complainant did not respond. Shortly after, she heard the complainant screaming at the petitioner to get out. When Taraima asked the complainant what was wrong, the complainant kept on saying to the petitioner to get out. At this stage the petitioner was walking towards the deck outside the villa. By this time the other girls had woken up and when Matelita asked what had happened, the complainant said she was raped.

- [15] The final witness for the prosecution was Inspector Naimasi who caution interviewed the petitioner. In his caution interview the petitioner made exculpatory statements to the effect that he had consensual sex with the complainant.

- [16] The petitioner gave evidence and called two witnesses. His evidence was that he had 'hooked up' with the complainant while they were drinking outside the villa after returning from the Uprising Resort. At around 1am or 2 am he accompanied the complainant to her bedroom. There he had consensual sexual intercourse with the complainant in one of the beds using the 'missionary position'. After a while they moved onto the floor where they continued to have sex, this time using 'woman on top position', until he ejaculated. He remained with her inside the bedroom and went off to sleep until around 5.30 to 6 am when he heard a knock at the door and someone calling his name. The petitioner recognised that it was Chad who was calling him and when he wanted to open the door, the complainant tried to convince him not to do so. The petitioner said he opened the door and spoke with Chad after he assured the complainant that Chad will keep matters discrete. After Chad had left, the petitioner returned to the bed with the complainant and while they were chatting he received a call. The petitioner went out of the bedroom for a while and when he returned they engaged in further consensual sex. This last episode was an uncharged act but it was led in evidence by the petitioner to show that he had consensual sex with the complainant on more than one occasions on the day in question.

- [17] The second defence witness was Kevin Skibber. Kevin was among the group at the villa on 20 November 2007. Kevin said he had an impression that the petitioner and the complainant were 'caughting' each other while they were all drinking at the villa. He is not sure of the time, but he left the villa at sunrise.

- [18] The final defence witness was Chad Miller. He said the petitioner and the complainant gave him an impression that they were 'caughting' each other when they were drinking outside the villa. Later he saw them going inside a bedroom. Chad said he was not sure of the exact time but between 6 to 6.30am he knocked at the petitioner's bedroom door to let him know the boys were leaving. Chad said he saw the complainant inside the bedroom and she appeared to have just finishing putting on clothes. The petitioner told Chad to wait for him. Chad said he waited for a while and when the petitioner did not come out of the bedroom, he left the villa at around 7am.
- [19] On 1 November 2010, the trial judge summed-up the case to the assessors. After deliberating for three hours, the petitioner was found not guilty on count 1 by majority opinion and guilty on count 2 by unanimous opinion. The trial judge adjourned the case and on 4 November 2010, delivered his judgment. The trial judge acquitted the petitioner on count 1 but convicted him on count 2. The trial judge briefly summarised the evidence and then gave the following reasons for his decision:

"On this evidence, on the 1st Count, accused had sexual intercourse until he ejaculated keeping her face up position. She said that she said No. Thereafter on the 2nd count of Rape her evidence was when the accused inserted his penis into her vagina, when she was turned face down, she managed to push the accused and escape.

When you analyse the evidence of the complainant herself, on the issue of consent at the time of the 1st intercourse, where the accused continued until he ejaculated, a reasonable doubt exists as to whether she consented to the 1st act of intercourse. Whereas at the time of the 2nd intercourse where she pushed him and escaped.

Therefore I find when consider the evidence of the complainant, the Assessors majority verdict of not guilty on Count No. 1 is consistent with the evidence placed in Court."

Proceedings in the Court of Appeal

- [20] In the Court of Appeal, Marshalls JA granted the petitioner leave to appeal against conviction limited to the ground that the verdict was unreasonable or cannot be supported having regard to the evidence. The petitioner's appeal was heard by the Full

Court on 15 May 2013, and on 30 May 2013, the appeal was dismissed. The Court of Appeal concluded that two separate acts of sexual intercourse occurred between the complainant and the petitioner. Without examining the inconsistency in the verdict, the Court of Appeal concluded that the complainant was a plausible witness because she complained immediately after the alleged incident. The Court of Appeal further concluded that the defence witnesses were not able to create doubt in the prosecution's case because they were not sure of the time sequence of the events that occurred at the villa on 20 November 2007.

Is the guilty verdict unreasonable or inconsistent?

- [21] Whether a guilty verdict is unreasonable or inconsistent requires careful consideration of the evidence. The principles to be applied in such cases were summarised by the Court of Appeal in *Nemani Tuinavavi & Semi Turagabete* Criminal Appeal No. HAC0002/2005L at paragraph [23]:

“The law on inconsistent verdicts is accepted by both Appellants and respondents is as it is summarized by the Canadian Supreme Court in R v. Pittman [2006] 1 SCR 381. It is similar to that of the High Court of Australia in Mackenzie v. The Queen (1966) 190 CLR 348 (per Gaudron, Gummow and Kirby JJ), and in Osland v. The Queen [1998] HC 75. It is that a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts. It is the Appellant who must satisfy the court that the verdicts are unreasonable or “an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury’s duty” (Mackenzie v. The Queen at page 368). See also R v. Darby (1982) 148 CLR 668 (per Murphy J).”

- [22] More recently, in *Lole Vulaca v The State* Criminal Appeal No. CAV0005 of 2011 (21 November 2013), this Court endorsed the above principles at paragraph [67]:

“As was observed by the High Court of Australia in *Mackenzie v R* (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, “is one of logic and reasonableness.” In the course of its judgment, the High Court of Australia cited a passage in an unreported judgment of Devlin J in *R v Stone* (13 December 1954), to the effect that an accused who asserts that two verdicts are inconsistent with each other, “must satisfy the court that the two verdicts cannot stand together”.”

- [23] Although these cases involved multiple defendants with different verdicts on the same charge, the nature of the inquiry is the same in cases where one defendant is charged with multiple offences of similar nature. That inquiry was aptly described in the Canadian case of *R v McShannok* (1980) 44 CCC (2d) 53 (Ont C.A.) at p.56 as follows:

“Where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered.”

- [24] To convict the petitioner for rape as alleged, the prosecution carried the burden to prove beyond reasonable doubt the following ingredients:

- (i) The petitioner had sexual intercourse with the complainant,
- (ii) The sexual intercourse was without the consent of the complainant, and
- (iii) The petitioner knew that the complainant had not consented to the sexual intercourse.

- [25] At trial, the petitioner did not dispute that he had sexual intercourse with the complainant. However, he disputed the number of acts of sexual intercourse and the positions used during the sexual intercourse. His defence was that all the acts of sexual intercourse were consensual.

- [26] The prosecution's case was based on the complainant's version of sexual intercourse and positions used. The penetration that was subject of count 1 was based on the missionary position, while the penetration that was subject of count 2 was from behind. On complainant's own evidence, both penetrations occurred as part of one sexual activity. She said she had not consented to any sexual act with the petitioner. But the prosecution failed to provide any logical explanation for the presence of semen on the complainant's underwear when her evidence was that she did not put it on after the sexual intercourse.

- [27] The only logical explanation for the not guilty opinion by the majority assessors on count 1 is that they did not believe the complainant's evidence of lack of consent. After disbelieving the complainant's evidence of lack of consent, the assessors then accepts the same complainant's evidence of lack of consent to convict the petitioner for rape that allegedly occurred immediately after count 1. The guilty opinion on count 2 is therefore illogical when consent or lack of it was the only issue at trial.
- [28] The trial judge accepted that a reasonable doubt existed on the complainant's evidence of lack of consent to the sexual intercourse on count 1. The trial judge then convicts the petitioner on count 2 on the basis that the complainant pushed the petitioner and escaped during the second sexual intercourse. There are problems with this reasoning. Firstly, there was no evidence that the complainant pushed the petitioner and escaped during the second sexual intercourse. The complainant's evidence was that when she told the petitioner to stop, he stopped. The petitioner rolled on the side and she told him what he did was wrong. After telling him off, she walked out of the bedroom. Secondly, even if the complainant had pushed and escaped, then the same reasoning could have applied to the lack of consent on count 1. There is no logic in the reasoning that the resistance and escape on behalf of the complainant only applied to the second sexual penetration when her evidence was that she had not consented to any sexual activity with the petitioner. The guilty verdict on count 2 is inconsistent with the not guilty verdict on count 1.
- [29] It is clear that the Court of Appeal failed to carry out a proper inquiry into the reasonableness of the trial judge's verdict in this case. If the Court of Appeal would have applied the correct principles of unreasonable verdict, they would have reached the conclusion that we have reached regarding the inconsistency in the petitioner's guilty verdict, resulting in substantial and grave injustice. The criteria for special leave have been satisfied. For these reasons, we would grant special leave and quash the petitioner's conviction and sentence. The paucity of evidence against the petitioner and the length of sentence that the petitioner has already served have led us to conclude that it is not in the interests of justice to order a re-trial.

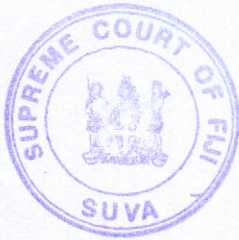
Result

Special leave granted.

Appeal allowed.

Conviction and sentence quashed.

Acquittal entered.



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Hon. Mr. Justice Anthony Gates
President of the Supreme Court

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Hon. Mr. Justice William Calanchini
Judge of the Supreme Court

.....
Hon. Mr. Justice Daniel Goundar
Judge of the Supreme Court

Solicitors:

Office of the Legal Aid Commission for Appellant

Office of the Director of Public Prosecutions for State