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

**Criminal Appeal No: AAU 0027 of 2012**
**(High Court Case No: HAC 151 of 2010)**

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| **BETWEEN** | : | **ANTHONY** | ***Appellant*** |
| **AND** | : | **THE STATE** | ***Respondent*** |
| **Coram** | : | **Basnayake JA**<br>**Jayamanne JA**<br>**Temo JA** | |
| **Counsel** | : | **Mr. A. Ravindra Singh for the Appellant**<br>**Ms. P. Madanavosa for the Respondent** | |
| **Date of Hearing** | : | **17 May 2016** | |
| **Date of Judgment** | : | **27 May 2016** | |

# JUDGMENT

**Basnayake JA**

[1] This is a renewed application for leave to appeal against a conviction and the sentence. The appellant was charged with the offence of Rape contrary to section 207 (1) (2) (b) of the Crimes Decree No. 44 of 2009. After trial the appellant was convicted by the learned High Court Judge, concurring with a unanimous opinion of the Assessors finding him guilty. The appellant was sentenced to 14 years imprisonment with a non-parole period of 12 years. The appellant filed a leave to appeal application against the conviction and the

sentence. By a ruling dated 6 March 2015, a single Judge of the Court of Appeal refused leave to appeal against the conviction and the sentence.

[2] It is evident from the Court of Appeal Record that the appellant was allowed by the Court of Appeal to file amended grounds of appeal. The appellant was ordered to file amended grounds and submissions on 23 March 2016. When this case was called before the Hon. President of the Court of Appeal on 23 March 2016, the appellant moved for further time to file the amended grounds and written submissions. Hence a further 14 day period was allowed. The leave to appeal application was directed to be listed for hearing on 6 May 2016.

[3] When this case was taken up for argument the learned counsel for the appellant filed the amended grounds and moved for further time to file written submissions. The learned counsel averred personal reasons for his inability to file the amended grounds and the written submissions on time. As the learned counsel for the respondent did not object, the Court accepted the amended grounds and fixed the case for 17 May 2016 for argument. Prior to the date of hearing both parties had filed their written submissions. Oral submissions too were made at the hearing.

[4] The appellant was charged for having penetrated the vagina of a girl with his fingers without her consent on 26 November 2010. The prosecution tendered the evidence of the victim who was at that time of tender years, over 5 ½ years, the victim's mother, the mother's sister, Doctor Miriama Tatana and WPC Miriama. The appellant exercising his right to remain silent did not give evidence and did not call any witnesses.

**Evidence**

**The victim**

[5] The victim was 7 years old when she gave evidence in court on 29 March 2012. At the time of the offence she was 5 years and 10 months old. Under oath she said that she was

studying in class 2 in school. She was able to give the name of the school she was studying in and the names of her parents. She said that she remembered an incident in November 2010. She said that the appellant had "*poked the "busi*" and licked her. Having laid her down the appellant had licked her "*vedi*" (buttocks). She said that "he poked right inside my "*busi*". She said that he was looking at bad things. This has happened inside the appellant's house. There was no one else in the house.

[6] She said that her mother sent her to the appellant to bring chillies. Later her mother had come. The mother had seen the shoes of this child outside the appellant's house. She had also heard the child crying. The mother had asked the appellant whether he did anything and the appellant had said "no". She said that her mother smacked her with a '*sasa*' broom. Under cross-examination she said that she read the statement to the police before signing it. However she was unable to read it when it was shown to her. She said that she mentioned to the police about licking the "vede". She told Miri (means Miriama the WPC). This was not found in the statement. She admitted her mother saying to the appellant "I will fix you". She was questioned as follows:-

*Q. What you tell in court today is what your mother told you?*
*A. Yes.*
*Q. Your aunt also told you to come to court and tell what was told to you in court?*
*A. Yes.*
*Q. Finally accused did not do anything to you?*
*A. I went to bring chillies. He did the bad thing. Mother came and gave her chillies.*

**Latileta (mother)**

[7] The victim is her daughter. She was born on 22 January 2005. On 26 November 2010 at 4 p.m. she was sitting with her daughter (victim) and her sister under a "baka' tree. At that time the appellant had brought a lamb neck and asked her to cook a curry. She had told the appellant that she does not have chillies for cooking. The appellant had asked one of them to go and get it. The appellant lived about 50 meters away. The appellant had called

the victim, and gone into the appellant's house. It appears to be the case that the appellant is a trader who has a shop in his house. As the witness had to get some potatoes from the shop of the appellant she too had gone to the appellant's house. When she went she had found that all the doors were closed. She had seen her daughter's shoes lying outside the house of the appellant. Then she had gone round the house and knocked on all the doors. But the doors were not opened. When she came to the front door, the appellant had opened the door. When the door was opened she said that she saw her daughter inside the house crying. Only the appellant and her daughter were inside the house. She had asked the daughter what was wrong. The daughter had said that the appellant poked her "*busi*" and liked her "*busi*". She had asked the appellant and the appellant had said "no".

[8] She said that she took the daughter home. While they were at home the appellant has come. She had asked her sister to ask the appellant three times. The appellant had said no. Her sister had then called the police and the appellant had come and asked for forgiveness. The police had arrived and the statements had been recorded. On the following day the daughter was examined by a doctor. Under cross-examination she said that the appellant having asked one of them to come and fetch chillies, called the daughter to go with him to give the chillies. When she was asked whether she smacked her with a '*sasa*' broom, she said that she wanted to hit her, but did not do so. When she was asked why she did not hit the appellant, she said that she wanted to but restrained herself.

[9] The learned counsel suggested to the witness that the witness and her sister had made up a story, which she denied. It was suggested to her that she had asked for $100 from the appellant on 26 November 2010 (the date of this incident). She denied it. It was suggested to her that since the appellant refused to give her $100 this allegation was made. She denied this suggestion. She admitted that she bought provisions from the appellant on credit. She also said that prior to this incident the appellant was nice to her family. The appellant had a good reputation in the area. She also admitted to having borrowed money from the appellant and paid back. She further admitted to having visited

the appellant to watch T.V. She said that she was shocked to hear of this complaint. She also denied being aggressive. The following questions were asked;

*Q. You told accused that you were going to pickup accused?*

*A. No.*

*Q. After 15 minutes you sent child there?*

*A. Yes, were sitting at 'baka' tree.*

*Q. You did that under pretext of bringing chillies?*

*A. No.*

*Q. That was a conspiracy to fix accused.*

*A. No I did not.*

She said that in that neighbourhood he was known as a good man. "But did bad on my daughter. My child related the story".

**Mere Tamoi**

[10] She is a sister of Latileta. She too knew the appellant before the incident. They visited each other. She corroborated the evidence of Latileta.

**WPC Miriama**

[11] She said that on 26 November she received a complaint of rape of a 5 ½ year old child. She recorded the statements of the witnesses. She said that the child's statement was recorded having taken the child into a separate room. The girl was produced before a doctor at Lautoka Hospital. She said that the child had shown her the house of the accused and that she went to the appellant's house.

**Dr. Miriama**

[12] She had obtained an MBBS and specialised in paediatrics. She had examined the victim brought by WPC Miriama and her mother Latileta. The girl had told the doctor what happened after the victim was encouraged by Miriama and the mother of the child stating "please tell the doctor what happened". The Doctor had observed that the victim's left

labia majora was erytherotous (redness). She had a 6 o'clock superficial cut and a 3 o'clock hymen form. Under cross-examination she said that there was no bleeding.

**Grounds of appeal against conviction as per the amended notice tendered to court on 6 May 2016**

1. That the learned trial Judge erred in law when he failed to ask questions and remind the child victim MB about the importance of telling the truth before receiving her evidence, resulting in an unsafe conviction.
2. That the learned trial Judge had erred in law when he failed to correctly direct the Assessors on how to approach the evidence of the child victim MB, resulting in an unsafe conviction.
3. The learned Trial Judge had erred in law and in fact by failing to adequately direct the Assessors about the force and threats used by the mother to get MB to admit and talk about the alleged offence, resulting in an unsafe conviction.
4. That the learned trial Judge had erred in law and in fact by not adequately directing the Assessors to the inconsistencies in evidence between MB and her mother, resulting in a miscarriage of justice.
5. The learned Trial Judge had erred in law and in fact by failing to adequately direct the Assessors on the inconsistencies between the police statement and the oral evidence of MB.
6. That the learned Trial Judge had erred in law and in fact by failing to give a proper direction to the Assessors that MB's mother was a witness with an interest while giving oral evidence in court.
7. That the learned Trial Judge had erred in fact by misdirecting the Assessors by stating that MB had immediately related the story about what allegedly happened when she saw her mother, therefore resulting in an unsafe and unsatisfactory conviction.
8. The learned Trial Judge had erred in fact by failing to adequately direct on the Medical Report, or alternatively, that he misdirected the Assessors about the way that they might

use the evidence from the medical report resulting in an unsafe and unsatisfactory conviction.

**Grounds of Appeal against the sentence**

9. The appellant is appealing against the sentence on the grounds that it is manifestly harsh, excessive and wrong in principle under the circumstances of the case.
10. That the learned Trial Judge had erred when he failed to take into relevant account the appellant's (a) age (b) poor health condition & (c) previous good character while considering the mitigating factors prior to sentencing.

[13] The learned counsel for the appellant and the respondent had tendered written submissions prior to the hearing. Counsel for both parties made oral submissions.

**Ground 1**

[14] That the learned trial Judge had erred in law when he failed to remind the child victim MB about the importance of telling the truth before receiving her evidence, resulting in an unsafe conviction. The learned counsel has formulated this ground of appeal on the strength of **Dass v State** [2015] Cr. App; No. AAU 0059 of 2004. The rationale is that in the event of giving unsworn evidence there is a necessity of the learned Judge to remind the witness of the importance of telling the truth.

[15] In the instant case it is evident from the Record of the High Court that the witness had given evidence under oath. Therefore this ground is without merit. The evidence of this witness is found in pages 224 to 228. She had been extensively cross-examined. Considering the answers given to the questions one can conclude that she understood the meaning of the oath and the need to be truthful. To a question that (pg. 228) was asked whether the accused did not do anything to her, she said that she went to bring chillies and the appellant did bad thing.

**Ground 2**

[16] Ground 2 is that the learned trial Judge had erred in law when he failed to correctly direct the Assessors on how to approach the evidence of the child victim MB due to a lack of truth direction. This ground is based on ground No. 1. For the same reason stated on ground No. 1, this ground cannot stand and has to be rejected.

**Ground 3**

[17] That the learned Judge had erred in law and in fact by failing to adequately direct the Assessors about the force and threats used by the mother to get MB to admit and talk about the alleged offence, resulting in an unsafe conviction. At the outset I must state that I could not see any evidence of force or threat used by the mother to get MB to admit or talk. The only incident that the learned counsel may be referring to relates to an incident where the victim states that she was smacked by the mother soon after this incident. The mother denies the assault. However she states that she wanted to smack her but did not do so. This has nothing to do with this ground of appeal. The ground suggests that the mother used force and threatened the daughter to frame the appellant. A suggestion was also made to the mother that it is the refusal to give $100 by the appellant that made her fabricate a story. In the event of a fabrication of course it is possible to use force or threaten someone to tell a lie. However there is no evidence of any fabrication or using force and there is no necessity to give a direction. Hence this ground is without merit.

[18] The victim in this case is a girl of tender years. She was only 5 years and 10 months old when this incident has happened. Any girl of this age or even older will not openly talk about a sexual act with everyone. According to the facts of this case the appellant may have been prevented from causing any further harm due to the timely intervention of the mother. It is the mother knocking at the doors that might have alarmed the appellant. When the appellant opened the door what did the mother see? The appellant and the daughter coming out of the house. The appellant was with the daughter inside the house with all the doors closed. The daughter was crying and the mother would have been naturally suspicious. Soon after this incident the girl had reported first to the mother of

what the appellant had done to her. She questioned the appellant. Thereafter the appellant was questioned by the girl's aunt. Then the police was informed. On the following day the daughter was taken to a doctor. There is no harm in someone getting another to speak the truth. That cannot be considered as using force or as a threat.

**Ground 4**

[19] This ground is concerning not giving adequate directions with regard to the inconsistencies in evidence between MB and her mother. The learned counsel particularly refers to the smacking. The victim says that she was smacked by the mother. The mother says that she wanted to smack, but did not do so. Another matter is the mother saying in court about the daughter having a pain soon after the incident. However she has failed to mention it to the police in her statement.

[20] The learned counsel for the respondent submitted that the inconsistencies referred to by the appellant do not affect any elements of the offence of rape. Learned counsel for the respondent further submitted that the inconsistencies referred to relates to peripheral issues only (**Prasad v State** [2002] FJCA 77; AAU 0013U.2002 (30 August 2002). I am of the view that even if there are no directions to the Assessors on this evidence, that will not cause any miscarriage of justice.

**Ground 5**

[21] This ground is connected to the previous ground and for the same reason I see no merit in this ground.

**Ground 6**

[22] The learned Judge had erred by failing to give a proper direction to the Assessors that MB's mother was a witness with an interest. The learned counsel has given the following reasons to justify his claim that the mother is a witness with an interest;

1. She is the mother of the victim;
2. She had instigated the police complaint;

3. She was a material prosecution witness;
4. The outcome of the trial was in her interest; and
5. The outcome of the trial was in the interest of her daughter;

The learned counsel for the respondent submitted that the mother did not express any interest apart from the fact that she is the mother of the victim. Even the instigation of the police complaint was not done by her. It was done by PW 3. This witness would have wanted to see that justice is done. She would have co-operated with the police. She is the mother of the victim. Other than that she did not have any other interest. The defence argument is that is a fabricated case. Which mother would want to fabricate a story involving her child with a man? The victim was examined by a doctor on the following day. The doctor found that her hymen was torn. She opined that it was due to fingering.

[23] Apart from that one can see the amount of trust that had been placed on the appellant. Otherwise would a mother allow her little daughter to go with the appellant? The appellant was a close acquaintance. One can see how close they would have been by considering the favour the appellant wanted done by this mother. That is to prepare a curry from the lamb neck the appellant had brought. Without chillies a lamb curry may not be tasty. The mother might have been known for making delicious curries. That would have been the reason to give her the lamb neck. How innocently she had sent her little daughter with the appellant to the appellant's place to bring chillies. The appellant and the mother had been having a cordial relationship. The appellant is a trader. There was immense trust that was placed on the appellant. The appellant has breached that trust.

[24] In **Rahul Ravinesh Kumar v State** [2015] FJCA 32; AAU 0049.2012 the Court of Appeal held that the witness did not express any interest requiring the trial Judge to give directions. I am of the view that this ground is without merit.

**Ground 7**

[25] The learned Judge had erred in fact by misdirecting the Assessors by stating that MB had immediately related the story about what allegedly happened when she saw her mother, therefore resulting in an unsafe and unsatisfactory conviction. The evidence in this case is that the mother was told immediately. The mother of the victim went to get some potatoes from the appellant. Having gone to the appellant's she saw her daughter's shoes outside the house. The house was closed. The child was sent to him to get chillies. The mother would have got excited. She went round the house knocking at the doors as there was no response from the front door. The appellant opened the front door only when the mother went to the front door for the second time. With the appellant she saw the victim crying. The victim complained to the mother and the mother asked the appellant whether he did anything to which the appellant said "No". Now if she wanted to fabricate a story, her answer would have been yes. Another matter of interest is that the mother's evidence was not challenged with regard to her evidence that she found the doors all closed; Why should he have all the doors closed while having the child inside the house? I am of the view that the Judge was correct in directing the Assessors that the story was related immediately after seeing the mother (pg 91 of RHC). Therefore this ground is without merit.

**Ground 8**

[26] The learned Judge had erred in fact by failing to adequately direct on the medical report, or alternatively, for misdirecting the Assessors about the way they might use the evidence from the medical report, resulting in an unsafe and unsatisfactory conviction. The learned Judge directed the Assessors on the available evidence. This evidence has not been challenged. I have already summarised the unchallenged medical evidence. She has interviewed the victim and got a story. After that she has examined the victim and found evidence to justify her story that someone had poked his finger into the vagina of the victim causing a rupture of the hymen. The doctor found redness also on the labia majora.

The redness was detected on the following day. I am of the view that that this ground is without merit.

**Ground 9 & 10**

[27] 9-The appellant is appealing against the sentence on grounds that it is manifestly harsh, excessive and wrong in principle under the circumstances of the case.

10- That the learned Trial Judge had erred when he failed to take into relevant account the appellant's (a) age (b) poor health condition & (c) previous good character while considering mitigating factors prior to sentencing.

The learned counsel mentioned the case of **Rahul Ravinesh Kumar v State** (supra) where the appellant was sentenced to 10 years sentence with a non-parole term of 8 years. The learned counsel for the respondent submitted that the learned Judge had reduced 2 years for the previous good behaviour of the appellant. However considering the Supreme Court judgment in **Raj v State** the 14 years imprisonment is within the tariff

[28] Having carefully considered the grounds urged by the learned counsel I am of the view that this application is lacking in merit and the same is thus dismissed.

**Jayamanne JA**

[29] I agree with the reasoning and the conclusions of Basnayake JA.

**Temo JA**

[30] I too agree with the reasoning and the conclusions of Basnayake JA

***The Orders of the Court are:***

1. *Leave refused.*
2. *Appeal is dismissed.*

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**Hon. Mr. Justice E. Basnayake**
**JUSTICE OF APPEAL**


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

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**Hon. Mr. Justice Temo**
**JUSTICE OF APPEAL**