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

CRIMINAL APPEAL NO. AAU 59 of 2014
(High Court HAC 222 of 2011)

BETWEEN : **KALI DASS**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra JA**
Gamalath JA
Bandara JA

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

Ms P. Madanavosa for the Respondent

Date of Hearing : **15 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Chandra JA

[1] I agree with the reasoning and conclusion of Gamalath JA.

Gamalath JA

[2] The appellant Kali Dass is the biological father of the victim DY (name suppressed) who was born on 3 September 2001. It is alleged that on three occasions namely (a) between 01 November 2010 and 31 December 2010; (b) between 1 June 2011 and 31 August 2011, and (c) between 1 September 2011 and 5 September 2011, at Nadi, the appellant had raped the victim, in the cane field behind the house where they were living and in the house itself. The representative counts are all preferred under Section 207 (1) and (2) and (3) of the Crimes Act No. 44 of 2009. The victim was merely 10 years old when she fell victim to the alleged crimes..

[3] At the conclusion of the trial at Lautoka High Court, the assessors returned a divided opinion *to wit*;

i. that the 1st Assessor found the appellant guilty of all three counts of Rape;

ii. that the 2nd Assessor found the appellant not guilty of all three counts of Rape;

iii. that the 3rd Assessor found the appellant guilty of the 1st Count of Rape and not guilty of the other two Counts.

[4] Since the Learned Trial Judge was not in agreement with the opinions of the 2nd and 3rd assessors, he pronounced the Judgement convicting the appellant on the second and the third counts as well. Accordingly, as at present the appellant stands convicted on all three counts of Rape. This appeal is only against the said conviction.

The Evidence

[5] As already stated the basis of the case is that the appellant, the father had allegedly sexually abused the daughter. In a nut shell, the other important matters to be referred with regard to the evidence are as follows:

> *(a) that according to the victim's evidence she initially complained about the sexual abuse at the hands of the father to the step mother (after the death of the mother of the victim, the appellant has been remarried) and the step mother in turn had advised her*

to report the incidents of abuse to the grandmother. Later, she complained about .the sexual harassment to the prosecution witness Karishma Devi, the cousin sister of the appellant and the victim's aunt. Karishma Devi took initiatives to report the matter to the police.

(b) *that according to the medical evidence, the victim had shown fresh injuries to her vaginal area; there was no hymen visible; there was a fresh laceration of the hymen; Dr. Karalaini, the doctor who examined the victim had testified that the patient had shown signs of having recent sexual interactions as the laceration of the hymen was fresh and red. The doctor has opined that the injuries were 24 to 48 hours old at the time of the examination. Further, according to the evidence of the doctor, "for the hymen to be missing there had to be repeated penetration into vagina with the object in the size of penis". At the time of the examination, the victim was still bleeding slightly from the vagina.*
The doctor was persistent in her evidence that the injuries found in the vagina of the victim were compatible with repeated penetrations.

(c) *In addition, according to the evidence of the victim, the appellant had even indulged in fellatio (penile penetration in to the month) with the victim when he sexually assaulted her on the sugar field.*

(d) *The appellant denied the allegation at the trial and according to him the victim, had been implicating him falsely as she had been coached to do so by her aunt Karishma Devi along with her husband, for there was bad blood between them for some time before the alleged incident. The prosecution had denied this allegation. The appellant's caution statement was admitted in evidence. It contains admissions that corroborate the evidence of the victim. This in brief is the evidence of this case.*

The Grounds of Appeal

[6] The 3 grounds of appeal are;

> *"GROUND 1: The learned Trial Judge erred in law and in fact when he failed to direct the assessors properly that the evidence of recent complaint is not evidence of the fact complained of and cannot be regarded as corroboration but goes to the consistency of the complainant's conduct with her evidence given as trial.*
>
> *GROUND 2: The learned Trial Judge erred in law and in fact when he convicted the Appellant for three counts of rape when there was no evidence towards one count of rape as per the victim's evidence.*

> *GROUND 3: The learned Trial Judge erred in law when he failed to remind the child victim about the importance of telling the truth before receiving her evidence resulting in unsafe conviction."*

[7] Dealing with the first Ground, it is based on a clear miscomprehension of the language used by the Learned Trial Judge, both in the Summing Up as well as in the Judgment.

In order to understand the basis for this miscomprehension, I now highlight the relevant parts of the evidence of the victim and Karishma Devi, the witness;

In the evidence of the victim she had said that after the last incident of rape she reported the matter to her aunt Karishma Devi. (*emphasis is mine*)

Corroborating this part of the victim's evidence, Karishma Devi in her testimony had stated that the victim had complained to her "how her father took her into the sugar cane field and inserted his penis into her vagina". (*emphasis is mine*)

Based on these portions of evidence that correspond with each other, the Learned Trial Judge in paragraph 32 of the Summing Up had stated as follows,

> *"You saw her giving evidence in court. (referring to the evidence of Karishma Devi). She had given prompt answers to questions put to her by the defence. If you accept her evidence it corroborates the evidence of the victim regarding recent complaint about last incident of rape."* (emphasis is mine)

It is, therefore, not to be construed as the learned Trial Judge was acting under the mistaken belief that the victim's recent complaint about the incident of rape on the cane field to her aunt Karishma Devi corroborates the evidence of the victim at the trial. In other words, it is certainly not to be misconstrued as a direction to the effect that "the alleged commission of the crime of rape finds corroboration from the recent complaint made by the victim to the witness Karishma Devi". In my understanding of the direction of the Learned Trial Judge, had made a rather broad statement by highlighting the fact that Karishma Devi's evidence regarding the complaint she received from the victim does corroborate the evidence of the victim who in her evidence described how she reported the incident of rape to Karishma Devi.

There is no doubt that it would have been much desirous if the learned Trial Judge had employed a more clearer and non-legalistic language to avoid any possible confusion, particularly in view of the fact that the words and phrases such as "corroboration" and "recent complaint" are technical in the context of law of evidence; especially when they are to be applied in a situation where the allegation is relating to one of sexual or kindred offence.

[8] The State, in dealing with the impugned passage in the summing up contends that the passage has not caused a substantial miscarriage of justice. In support of the contention the respondent has cited, **Kehra v. State** [2016] FJCA 1; AAU0117. 2014 (12 January 2016). Another citation in support of this proposition is found in **Shameem Mohammed v. Reginam** 29 FLR 154. Further, it is the contention of the respondent that the evidence for the prosecution, taken as a whole is sufficiently strong to countermand any possible negative impact that may have been left by the impugned statement. In my view, there is no necessity for one to go that far in understanding the kind of purposiveness that the learned Trial Judge was seeking to reach by forming the directions in that fashion. Primarily he was highlighting the nature of consonance emerging out of the evidence of different witnesses who testified for the prosecution at the trial and in my view, given the nature of the present issue any exercise that entails further analysis may be seen as superfluous. Moreover, since the victim in this case had been a 10 years child when she fell victim of the alleged crimes and therefore the need to look for evidence of corroboration has no relevancy in law in this instance.

[9] Having said that, in the light of the totality of the evidence and the other attendant circumstances I find it difficult to agree with the contention contained in the first ground of appeal and therefore it cannot succeed.

Ground 2

[10] In relation to this issue suffice it to state without much ado that the basis for the third Count of Rape is coming directly from the caution statement of the appellant himself wherein he had admitted to having had sexual intercourse with the victim thrice.

[11] The respondent relied on the reported cases of **Mohammed Riyaz v. State**; Criminal Appeal No. AAU 0030 of 2014 (8 March 2018) and **Hassan v. Regina**; Criminal Appeal No. 57 of 1977; 28 July 1978. The appellant did not raise any objection to the justifiability of maintaining a third Count of Rape at the trial. Nor did he refrain from pleading to the 3rd Count at the very beginning of the trial. On 25 February 2014, at the close of the prosecution, the appellant was informed of the rights and he did not make a no case to answer submission on the third Count of Rape. To the contrary he elected to testify at the trial and on the whole, his evidence was directed at assailing the voluntariness of the caution statement; he had made no effort whatsoever to challenge the cogent evidence given by the victim and to challenge the testimonial trustworthiness of the victim's evidence. Referring to his caution statement the answers to questions 84 to question 86 contain the admissions to establish the three counts of rape. He had been unequivocal on this matter and in dealing with the evidence relating to the caution statement the Learned Trial Judge had left the assessors with sufficient directions for their deliberation. The appellant has not challenged in appeal the decision of the Learned Trial Judge on the voluntariness of the caution statement. Nor is there is any ground raised against its admissibility of evidence.

[12] As it had been decided in the cases of **Mohammed Alfaaz v. State** Criminal Appeal No. AAU 0030 of 2014 (8 March 2018) and in the case of **Hassan v. Reginam**, Criminal Appeal No. 57 of 1977; 28 July 1978 [1978] FJCA18, it is possible in law to find an accused person guilty of even a charge of murder, solely based on the admissions contained in a caution statement.

[13] Given the circumstances of this case, there is ample evidence upon which the appellant could be justifiably found guilty for the alleged commission of the third Rape count. In the light of such material, I find that there are no merits to the 2nd Ground of Appeal.

Third Ground of Appeal

[14] It is the third ground of appeal that poses an interesting issue relating to this appeal. The learned Single Judge had decided in his Ruling that without perusing the Court

Record it is not possible to ascertain whether the complainant gave sworn or unsworn evidence. The learned Single Judge ruled that if the victim had given unsworn evidence then the trial Judge was required to remind her the importance of telling the truth; **State v. AV** unreported Cr. Case No. HAC 192/08; 2 February 2008, followed in **Rahul Ravinesh Kumar v. The State**, Cr. App. 110 AAU 0049/12; 4 March 2015. Having perused the Court record I find that no oath had been administered from the victim before she testified at the trial.

[15] However, according to the Court of Appeal record, the learned Trial Judge had asked the victim DY a few questions to "ascertain whether the witness could understand and answer questions,". Having done so, the learned Trial Judge had concluded that the "witness is fit to testify". Thus commenced her evidence at the trial.

[16] I find that it is important to state at this stage that the questions that are asked to determine the competency of the witness should have a clear reflection in the Court Record, so that anyone who has a legitimate interest in finding the nature of the test carried out by the learned trial judge could gain access to the relevant procedure. The requirement to carry out the test of competency and the need to administer the oath of a witness are intrinsically interconnected with the norms of the right to a fair trial. In a situation where having regard to all the attendant circumstances a court is of opinion that the need to administer the oath should be dispensed with, then the procedure that is carried out in arriving at such conclusion should have a reflection in the court record. In the same way the court record should bear the evidence of the nature of the competency test carried out in determining the ability and the level of intelligence of a witness to testify without administering an oath. Section 117 of the Criminal Procedure Act has made this requirement mandatory;

> *"117. (1) Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witnesses shall appear shall have full power and authority to administer the usual oath or affirmation.*
>
> *(2) The court may at any time, if it thinks it just and expedient, take without oath the evidence of any person-*
>
> *(a)Declaring that the taking of the oath whosoever is according to religious belief unlawful or impermissible; or*

(b) who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath.
(3) The court shall record the fact that evidence has been taken in accordance with sub-section (2), and the reasons for allowing the evidence to be taken without oath." (emphasis is mine)

[17] In relation to this issue the other provision of law is in Section 10 of the Juveniles Act, Chapter 56 of the Laws of Fiji:

> *"10.(1)Wherein any proceedings against any person for any offence or in any civil proceedings any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; and the evidence though not given on oath but otherwise taken and reduced into writing so as to comply with any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force;*
>
> *Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated.*
>
> *(2) If any child of tender years whose evidence is thus received wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be liable on conviction to dealt with as if he had been guilty of an offence and the provisions of section 32 shall thereupon apply."*

The above two legal provisions do represent both the substantive law as well as the procedural law

[18] As far as the instant ground of appeal is concerned, what is directly relevant is the "competency test" requirement that is required to be carried out in terms of the above sections of law, relating to the unsworn evidence of the victim of this case.

[19] The decision of the Supreme Court in **Rahul Ravinesh Kumar v The State**, Criminal Petition No. CAV0024.2016 (on appeal from Court of Appeal No.AAU0049.2012), is an important decision in relation to the issues involved in the third ground of appeal.

[20] In paragraph 32 of the said Judgment the Supreme Court had held as follows:

> *"[32] The same applies to the existing requirement for a judge to conduct a 'competent inquiry' before the child gives evidence to ascertain whether, to use the language of section 10(1), the child 'is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth'. I can see how in some cases it may well be apparent to the judge that the child simply lacks the maturity to give evidence, but I suspect that in many cases that assessment may be difficult to make initially, and that it will only be in the course of the child giving evidence that their ability to understand the questions asked of them, their ability to give answers which can be understood, and their appreciation of the need to tell the truth will be apparent. That, no doubt, was what lay behind the legislation in England which caused the Court of Appeal in England in Hampshire to conclude that the law in England no longer required a judge to conduct a preliminary investigation into the child's competence as a witness. If the judge concludes that the child is not competent to be a witness, the judge should exclude the evidence or direct that it be disregarded. In my opinion, the more appropriate course is to follow what has been the practice in England for almost 30 years, and to leave it to the judge to decide whether to conduct a 'competence inquiry' before the child gives evidence, and for the requirement in section 10(1) of the Juveniles Act that the judge must do so to be abolished, although again I can only give effect to that view if that requirement is inconsistent with the Constitution." per Keith J*

Reiterating the very same fact, it states in the paragraph 32 of the Judgment;

> *"... ... that the law in England no longer required a judge to conduct a preliminary investigation into the child's competence as a witness. If the judge concludes that the child is not competent to be a witness, the judge should exclude the evidence or direct that it be disregarded. In my opinion the more appropriate course is to follow what has been the practice in England for almost 30 years, and to leave it for the Judge to decide whether to conduct a 'competence inquiry' before the child gives evidence." per Keith J.*

[21] In relation to the said Judgement, it is important to note that amongst the other issues that came up for the judicial scrutiny was the issue of determining the Constitutionality of Section 10 of the Juveniles Act. However, the Supreme Court has not gone that far as to reach finality on the issue of Constitutionality of the said Section of law. Nor is there any initiatives, known to me, as has been taken by the Legislature to amend the law to be compatible with the rationale contained in the

Judgement .Further, I find that there is no reference to Section 117 of the Criminal Procedure Act or its vigour and force in the Judgement of **Rahul Ravinesh Kumar v. The State**. In my opinion, in order to understand the full operational scope of Section 10 of the Juveniles Act it is imperative that it should be read in conjunction with Section 117 of the Criminal Procedure Act.

[22] In the light of this existing somewhat of a conundrum ,there emerges a perceivable tension between the force of the Sections of the relevant laws as referred to above and the inferential substratum of the decision in Ravinesh Kumar. The powers vested in the Supreme Court, *inter alia,* enables Court to pronounce the Constitutionality of any law and until a judicial pronouncement to such effect is made, the existing laws shall remain valid and should therefore be implemented to the letter.

[23] Having examined the procedure adopted in the High Court in the instant appeal and with having reference to paragraph 15 of my Judgement, I am of opinion that the procedure adopted by the Learned High Court Judge falls short of clear adherence to the provisions of the relevant laws ,that are Section 117 of the Criminal Procedure Code and Section 10 of Juveniles Act. In other words the decision to forego the need to administer the oath and to carry out a competency test are not to be treated as functions to be performed perfunctorily. Strict adherence with the degree of transparency that is required to be maintained through the relevant notes as per Criminal Procedure Act (Record of Evidence in the High Court) Rules 1950 would serve the purpose in situations akin to the instant case.

[24] Having said that and reverting back to the Ground of Appeal 3, I have carefully examined the entirety of the testimony of the victim and it is quite clear that the Court Record does not contain even a semblance of evidence to support the fact that she was an incompetent witness or a witness whose testimony cannot be trusted.

[25] It is equally important to reiterate herein that the prosecution's case is not solely dependent on the evidence of the victim alone, the caution statement of the appellant has also provided strong incriminating evidence against the maker, the appellant.

[26] In the light of these cogent reasons, I hold that the 3rd Ground of Appeal is also without any merit and in light of all the attendant circumstances of this case I hold that this as a fit case where the application of Section 23 (1) Proviso of the Court of Appeal Act and Rules (Cap 12) is justified and thus the third ground of Appeal should also fail.

[27] Before concluding I wish to place on record another issue that attracts my attention within the pale of the facts and circumstances of this Appeal. This is in relation to the extent to which the operational sphere of Sec 10 of the Juveniles Act should be extended. In that context what is directly relevant is that Section 2 of the Juveniles Act defines a "Child" as a person who has not attained the age of fourteen years. It means in effect, that it covers a range of those who are in their infancy (Sect_8 of the Act) up to the upper age limit of 14 years. However, Section 10(1) speaks of a "Child of tender years" who has been called in as a witness in any court proceedings, including any civil proceedings". In my understanding, the application of Section 10(1) is confined to "children of **tender** years", a phrase that finds no specific definition in the Juveniles Act. In other words not all children who are under the age of 14 years are to be considered as "*Children of Tender Years*." For instance there can be many children who come forth as witnesses whose power of comprehension of the oath and its significance may not be in doubt and whether such children should also be included within the category of "children of tender years "who should be exempted from the implementation of Section 10 of the Juveniles Act is doubtful to me. All these doubts could be cleared up by holding a proper preliminary inquiry as envisaged by the relevant Sections of the Criminal Procedure Code and the Juveniles Act to which I have already made reference to. Accentuating this point I wish to place on record, although the victim of this Appeal was merely 10 years old at the time she fell victim of the crimes of Rape, by the time when she appeared in Court to testify she has already reached the age of almost thirteen years and in the circumstances whether she should still be treated as a "child of tender years" is a matter on which some legal probing is justified.

Conclusion

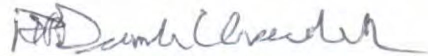
[28] The three Grounds of Appeals are without merits and cannot be considered as valid.

Bandara JA

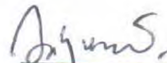
[29] I agree with the reasons and conclusions of Gamalath JA.

Order of the Court

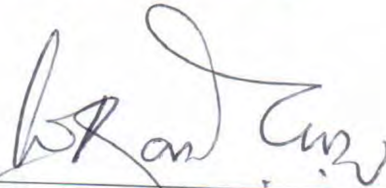
(i) Appeal dismissed.



Hon. Justice S. Chandra
JUSTICE OF APPEAL



Hon. Justice S. Gamalath
JUSTICE OF APPEAL



Hon. Justice W. N. Bandara
JUSTICE OF APPEAL