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

CRIMINAL APPEAL NO.AAU 17 of 2021
[In the High Court at Lautoka Case No. HAC 186 of 2020]

BETWEEN	**:**	**MOHAMMED RIYAZ**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. M. Fesaitu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**31 August 2023**
Date of Ruling	**:**	**01 September 2023**

RULING

[1] The appellant, the victim's father's brother, had been charged with one count of rape and one count of attempted rape of the female child victim of 11 years old, under the Penal Code in the Magistrates court at Ba. The charge was as follows:

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

***MOHAMMED RIYAZ** on the 16th day of July, 2008 at Koronubu, Ba in the Western Division had unlawful carnal knowledge of "LB" without her consent.*

SECOND COUNT

Statement of Offence

ATTEMPTED RAPE*: Contrary to section 151 of the Penal Code, Cap 17.*

Particulars of Offence

MOHAMMED RIYAZ *on the 17th day of July, 2008 at Koronubu, Ba in the Western Division attempted to have unlawful carnal knowledge of "LB".*

[2] The prosecution case was based on the testimony of the victim LB, her medical report and the appellant's cautioned interview. The appellant had given evidence in his defence and stated that the allegations were fabricated by a person called Monica. On 23 November 2020 the learned Magistrate found the appellant guilty of rape and he was convicted accordingly. The case was then sent to the High Court for sentencing pursuant to section 190 (1) of the Criminal Procedure Act. The High Court on 25 January 2021 sentenced the appellant to an aggregate imprisonment of 16 years and after the pre-trial remand period was deduced the final sentence became 15 years, 09 months and 16 days. The sentence was also subject to a 13 years' non–parole period.

[3] The appellant's appeal against conviction and sentence is timely. In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[4] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[5] The High Court Judge had summarised the facts in the sentencing order as follows.

5. 'The brief facts are as follows:

The victim and the accused are known to each other, the accused is the victim's paternal uncle. In the year 2008 the victim was 11 years of age and a class 6 student both were living in the same house.

6. On 16th July, 2008 the victim came back from school late, at about 3.45pm she was having tea at home. At this time the victim's grandmother and sisters were in the farm. The victim wanted to join them in the farm, however, the accused called the victim into his bedroom. When the victim went in the room she saw the accused was wearing a towel at this time the accused held the victim tightly, put her on the bed and removed her panty and his towel.

7. The accused threatened the victim if she shouted he would assault her, thereafter the accused had forceful sexual intercourse with the victim.

8. The next day on the 17th the accused called the victim in his room. In the bedroom he laid the victim on his bed lifted her dress, removed his towel and got on top of the victim. The accused threatened the victim not to shout otherwise he will assault her.

9. The accused wanted to have sexual intercourse with the victim but could not so he forcefully rubbed his penis on the victim's vagina and then licked her vagina. Later the matter was reported to the police, the accused was arrested, caution interviewed and charged.

[6] The grounds of appeal urged by the appellant are as follows.

*'**Conviction:***

Ground 1

THAT the learned trial Magistrate had erred in ruling the appellant's caution interview statement admissible, in doing so, was erroneous in assessing the evidences.

Ground 2

THAT the learned trial Magistrate had erred in determining that the medical doctor's finding is consistent to the history relayed, when the history relayed by the complainant is inadmissible on the basis of hearsay.

Ground 3

THAT the conviction on the charge of attempted rape is not supported by the totality of the evidence.

Ground 4

THAT the conviction on the charge of rape is unreasonable.

Sentence:

Ground 5

THAT the learned sentencing Judge may have erred in fact and law in allowing extraneous or irrelevant matters to guide or affect him resulting in the enhancing of sentence because of double counting.

Ground 6

THAT the learned sentencing Judge may have erred in fact and law in mistaking a fact of appellant planning the alleged offending resulting in the enhancing of sentence.

Ground 7

THAT the learned sentencing Judge may have erred in fact and law in failing to take into account some relevant considerations to decease the sentence.

01st ground of appeal

[7] This ground of appeal is based on the Magistrate's reasoning at paragraph 11 of the *voir dire* ruling in accepting the cautioned interview partly due to the failure of his counsel to comply with **Browne v Dunn** [(1893) 6 R 67 at 70, 76 – originally a civil case) rule which is a rule of practice that requires the counsel to put the substance of the contradictory evidence to the opposing witness during cross-examination, so that the witness might comment on it. This rule of practice ensures that a witness has the opportunity to explain a matter of substance if the opposing party intends to later contradict or discredit the witness in relation to it. This failure is known as 'lack of puttage' in Australia.

[8] In **HKSAR v CHAN Hing Kai** CACC 65/2017/[2019] HKCA 172 (24 January 2020) Zervos JA in the Court of Appeal in Hong Kong examined the application of ***Browne v Dunn*** rule in criminal cases and said that there are two aspects to this rule namely (i) it is a rule of practice or procedure designed to achieve fairness to witnesses and a fair trial between the parties (ii) it is a rule relating to weight or cogency of evidence and summarized the relevant principles as as follows.

1. *The rule in Browne v Dunn is a rule of professional practice and of fairness designed to allow witnesses to confront and respond to any proposed challenges to their evidence.*

2. *The rule does not apply to criminal proceedings in the same way or with the same consequences as it does in civil proceedings, due to the accusatorial nature of criminal trials and the different obligations placed on the prosecution and defence.*

3. *The rule admits to flexibility and requires considerable care and circumspection in it application.*

4. *The extent of the obligations that arise under the rule in a particular case will be informed by the nature of the defence case and the forensic context of the trial. A cross-examiner must not only disclose that the evidence of the witness is to be challenged, but also how it is to be challenged.*

5. *Where counsel does not comply with the rule, the trial judge has a discretion as to how to remedy any unfairness that may result and the actions he takes will depend on the circumstances of the case.*

6. *Measures should be employed to avoid having to direct the jury about a breach of the rule, such as, drawing the attention of counsel to the need to put matters to the witness, and permitting a witness to be recalled to be cross-examined and questioned on the matters omitted. Other measures may also be available depending upon the nature of the breach of the rule and the circumstances of the case.*

7. *Where an apparent failure to comply with the rule is followed by judicial comment to the jury, it is important to consider the substance of the comment, the purpose of which may differ depending on the circumstances.*

8. *Where the trial judge considers that it is necessary to direct the jury about the effect that failure to comply with the rule may have on their assessment of the contradictory evidence, the judge should:*

    i. *outline the rule in Browne v Dunn and its purpose;*

ii. *tell the jury that, under the rule, the witness should have been challenged about the relevant matters, so that he or she had an opportunity to deal with the challenge;*
iii. *tell the jury that the witness was not challenged, and thus was denied the opportunity to respond to the challenge; and*
iv. *tell the jury that they have therefore been deprived of the opportunity of hearing his or her evidence in response.*

9. Only in exceptional cases should the trial judge consider directing the jury that an adverse inference as to credibility may be drawn against the accused in consequence of a breach. It is one thing to remark upon the fact that a witness or a party appears to have been treated unfairly, but it is another thing all together to comment that the evidence of a person should be disbelieved, perhaps as a recent invention, because it raises matters that were not put in cross-examination to other witnesses by that person's counsel. Such a direction will only be appropriate where the circumstances surrounding the failure to put the allegation to the witness raise a "prominent hypothesis" that the contradictory evidence is a recent invention or is otherwise a fabrication.

10. Such a direction is fraught with difficulty and should only be given with considerable care and circumspection and must be accompanied with an explanation that other inferences may be drawn on why a party failed to comply with the rule with examples of those inferences.

[9] Trial judges must be careful not to embark on impermissible reasoning founded upon lack of puttage (see **Abourizk v The State** CAV 012 of 2019 (28 April 2022). An examination of an accused person which proceeds by reference to there being but one reason why a mater has not been put to a witness is 'fraught with peril' (per King CJ in **R v Manunta** (1989) 54 SASR 17]. King CJ observed that there may be many explanations for the omission which do not reflect upon the credibility of the accused, for example the defence counsel misunderstanding the accused's instructions or forensic pressure resulting in looseness in framing questions or not advancing certain matters deliberately upon which he had instructions but they were unlikely to assist the defence. The State has argued in **Muhammed Raheesh Isoof v The State** AAU 011 of 2022 (HAC 161/2019) that where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a trial judge to rely on a lack of puttage to impugn the credit of an accused.

[10] The appeal court should put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an

inconsequential or immaterial mistake or irregularity (vide **R v Matenga** [2009] 3 NZLR 145]. An error or irregularity which could not have affected the result of the trial will not amount to a miscarriage of justice and inconsequential error, including an inconsequential error of law, is not a miscarriage (vide **Hoffer v The Queen** [2021] HCA 36 (10 November 2021).

[11] In the circumstances, I am inclined to leave it to the full court to consider whether the Magistrate's flawed reasoning arising from defence counsel's lack of puttage amounts to a mere irregularity or a miscarriage which could have affected the result of the trial. The question would also arise that even if there had been a miscarriage as aforesaid, whether it would amount to a substantial miscarriage of justice or not. I am also mindful that disregarding the cautioned interview, there was still the evidence of the victim supported by medical evidence to prove the charges. Thus, even assuming that the above error of law had led to a substantial miscarriage of justice and therefore, the admission of the cautioned interview is to disregarded, the evidence of the victim and the doctor may still sustain the verdict of guilty. Yet, a clarification by the full court on the approach to lack of puttage by Magistrates and trial judges is very opportune and essential.

[12] I am also concerned that the learned Magistrate had not delved into the evidence that the appellant had indeed complained to the Magistrate and showed his injuries allegedly inflicted on him whist in police custody and his having been sent for a medical examination, regarding the voluntariness of the cautioned interview.

02nd ground of appeal

[13] The appellant suggest that the statement made by the Magistrate at paragraph 12 of the judgment that the doctor's finding was consistent with history related by the patient that there was vaginal penetration as per the complaint, was hearsay. He relies on the decision in **Subramanianm v Public Prosecutor** [1956] 1 WLR 965.

[14] If the history is duly admitted in evidence the purpose for which it could be used is to show only the consistency of the person who relates it to the medical officer. History

recorded in the medical report could never corroborate the evidence of the victim [vide **Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019)]. The same rules that apply to recent complaint evidence would apply to the evidence of medical history and complaints made to investigating officers (**Senikarawa v State** AAU0005of 2004S: 24 March 2006 [2006] FJCA 25). In ***Navaki*** it was held

'[17]. *The recorded history is, therefore, not the result of the doctor's medical examination or expertise. History is what he had heard from the victim. If the history is not confirmed by the person who said it and by the person who heard it, it remains hearsay and cannot be admitted in evidence. However, without fulfilling these requirements if such a statement is admitted in evidence it should be disregarded by the judge and not left to the assessors as its probative value is far outweighed by the prejudice it will cause to the accused. If the assessors have heard or seen it they should be told that it is of no value and they should be warned to ignore it completely.*

[15] The judgment does not indicate whether the victim had spoken to anything she had told the doctor. If so, the Magistrate may have considered hearsay material to show the consistency of the victim's evidence enhancing her credibility. If that be the case, the full court will have to consider whether by this error of law any substantial miscarriage of justice has actually occurred in convicting the appellant by considering whether a reasonable Magistrate properly directing himself would, on the evidence properly admissible, without doubt have convicted. In other words, excluding this piece of evidence of history recorded in the medical report, the victim's evidence and medical evidence was sufficient and strong enough to establish the charges beyond reasonable doubt. However, this complaint cannot be examined any further without the trial transcripts, particularly the evidence of the victim and the doctor and I allow that task to the full court.

03rd ground of appeal

[16] The appellant argues that the conviction for attempted rape is not supported by the totality of evidence.

[17] The Magistrate admits at paragraph 19 of the judgment that the victim had not given a detailed account of what happened on the second occasion *i.e.* 17 July 2008 relating to

attempted rape but states that the appellant had admitted it in his cautioned interview. The Magistrate had not summarised the victim's evidence regarding the attempted rape charge other than saying at paragraph 10 that on the second occasion the appellant had threatened her again.

[18] I have examined the appellant's cautioned interview and found that there is a clear confession that he penetrated her vagina with his penis on the first occasion (from Q37-Q45). However, the appellant had admitted only to rubbing his penis on her vagina and licking her vagina because he wanted to give some feelings to the victim and then have sexual intercourse (Q53-Q57 & Q70).

[19] In the absence of victim's evidence recorded by the Magistrate in the judgment on the attempt to commit rape coupled with the appellant's own confession of only rubbing his penis on her vagina and licking her vagina, I think this issue whether attempted rape had ben proved beyond reasonable doubt too should be left to the full court to examine with the help of the trial transcripts.

04th ground of appeal

[20] The appellant complains that the conviction on the rape charge is unreasonable. He particularly targets the element of consent.

[21] The victim had said in evidence that the appellant threatened her with assault with a knife if she shouted. She had not been recorded in the judgment having said in evidence specifically that she did not consent to what the appellant did to her. Lack of consent was an element to be proved by the prosecution though the victim was 11 years old as the charge had been laid under the Penal Code. The appellant in his confession had stated (Q41) that the victim was in pain when he inserted his penis into her vagina. Thus, the appellant's threat and the fact that the victim was in pain may suggest that the victim did not consent to penetration of her vagina.

[22] Whilst in many cases the complainant's evidence on the issue of consent may be determinative, there will be situations where he or she may have a limited or distorted

appreciation or understanding of their role in sexual relations and the true nature of what occurred. In these situations, the prosecution is not obliged to call overt evidence from the alleged victim to the effect that he or she did not consent (see **R v Malone** (1998) 2 Cr. App. R. 447)

[23] One of the consequences when vulnerable people are groomed for sexual exploitation is that compliance can mask the lack of true consent. In such a case, a young and immature person may not understand the full significance of what he or she is doing. They may be placed in a position where they are led to acquiesce rather than give proper or real consent (see **R v Robinson** [2011] EWCA Crim 916 and ***R v Olugboja*** [1981] EWCA Crim 2)

[24] In a case where a vulnerable or immature individual has been groomed, the question of whether real or proper consent was given will usually be for the jury unless the evidence clearly indicates that proper consent was given (see **R v Hysa** [2007] EWCA Crim 2056).

[25] In **R v PK and TK** [2008] EWCA Crim 434 the Court of Appeal considered the issue of whether true consent existed when a young homeless girl submitted to sexual intercourse in exchange for money to buy food. The question for the Court of Appeal was whether there was sufficient evidence to show a lack of consent. The Court reached the conclusion that in the context of this offence there was sufficient evidence.

[26] In **R v Sean Robinson** [2011] EWCA Crim 1916, the Court Appeal held that in circumstances where, due to immaturity, the complainant does not, or may not, have the capacity to understand the full significance of what she is doing, and in particular, where there is evidence of acceptance or acquiescence, then it would be open to the jury to infer she unwillingly went along with the acts, which she did not in fact wish to engage in. The judgment highlights aspects of the evidence in the case which, it was said, could be relied on to infer the acquiescence or acceptance of the complainant rather than positive consent.

[27] Thus, in the context of this case, I have no doubt that the victim had not consented to sexual intercourse. On this account, I think it was open to the assessor to find the

appellant guilty on the totality of the evidence [see **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) at para [8] to [24] and **Naduva v State** [2021] FJCA 98; AAU0125.2015 (27 May 2021) at para [36] to [44]. The trial judge too could have reasonably convicted the appellant on the evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013).

05th, 06th and 07thgrounds of appeal (sentence)

[28] On a perusal of the sentencing order, I find that the High Court Judge had applied the correct tariff of 11-20 years for juvenile rape (vide **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) and taken 11 years as the starting point. He had considered appropriate aggravating and mitigating circumstances to arrive at the sentence. The judge had given the discount for pre-trial remand period as well. There is no double counting and the trial judge had correctly seen some degree of planning by the appellant. He had not taken extraneous or irrelevant maters into account but sentencing process had been carried out taking into account the relevant factors. Yet, I do not find the trial judge having considered the significant age difference as another aggravating factor.

[29] However, it appears that the commission of the offence was in July 2008 and after numerous adjournments 'for one reason or the other' the case proceeded to trial only in June 2019. Thus, it had taken 11 years for the trial to commence. There is nothing to indicate at this moment that the appellant was even partly responsible for the delay. Therefore, he may have been eligible to receive some discount for the inordinate delay in concluding the case in the MC. However, no such discount had been given to the appellant. I am persuaded to allow this aspect to be considered by the full court.

[30] However, when as when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)] and the approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies

within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]; if outside the range, whether sufficient reasons have been adduced by the trial judge.

Orders

1. Leave to appeal against conviction is allowed on 01st, 02nd, 03rd grounds.
2. Leave to appeal against sentence is allowed only on the question of inordinate delay.

Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL