IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

Criminal Petition No: CAV 0028 of 2019
[On Appeal from the Court of Appeal Criminal Appeal No: AAU 0087/15; HAC 198 of 2012]

BETWEEN: **ILAI NAVAKI**

Petitioner

AND: **THE STATE**

Respondent

Coram: The Hon. Chief Justice Kamal Kumar, President of the Supreme Court
The Hon. Mr. Justice Anthony Gates, Judge of the Supreme Court
The Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court

Counsel: Petitioner in Person
Mr. A Jack for the Respondent

Date of Hearing: 6 October 2022

Date of Judgment: 27 October 2022

JUDGMENT

Kumar P

[1] I concur with the reasons and orders proposed by Gates J.

Gates J

[2] The main complaint in this petition is that there was a miscarriage of justice caused by the Resident Magistrate's wrongful evaluation of the medical certificate issued after the examination of the complainant.

[3] The Petitioner was charged with rape under the Penal Code. He elected to be tried in the Magistrates Court where, after a trial, he was convicted. The Magistrate sent the case up to the High Court for sentence. On 18th October 2012, the High Court sentenced him to a term of 15 years imprisonment with a non-parole period of 12 years.

[4] He appealed late to the Court of Appeal raising 3 grounds. On 8th August, 2017 the single Judge granted an extension of time, and gave leave to appeal on one ground only. That ground was almost identical to the main ground before this Court, the wrongful use of the medical certificate.

[5] The Petitioner was not represented at his trial, but he had counsel before the High Court for his sentencing.

The Magistrates Court Trial

[6] The complainant was aged 16 at the trial. She was a primary school student at the time of the offence aged 6 years.

[7] Dates and timings of incidents in the evidence were unsurprisingly inexact. However the Magistrate concentrated on whether the complainant was telling the truth. The Petitioner gave sworn evidence in his defence. He denied any wrongful interference with the complainant. He denied the rape and the account given by the complainant.

[8] At the time of the incident she was staying with her mother and the Petitioner. She treated the Petitioner as her step-father. He was in a de facto relationship with her mother. She referred to two instances.

[9] On the first occasion she was in the kitchen, when he called her from his room. He asked her to come in and not to tell anyone what he was going to do. He told her to undress. He threatened her, she said, and she was scared. So she did what he told her to do. He laid her down and started to fondle her. Then he raped her on the floor. She described exactly what he did and said it was very painful. After it was all over she noticed white fluid and blood over her clothes, and that she was bleeding.

[10] There was a second occasion where they had gone to search for firewood. It was after breakfast. She went with her two brothers also. The Petitioner told the boys to go and search for firewood. He asked the complainant to stay back.

[11] He cleared a place on the ground and then called her. He warned her not to tell anyone. He undressed her, and then raped her. He did the same as he had done before she said. She was told afterwards not to tell anyone or "*he would kill all of us*." The report to the police was made by her mother's elder sister.

[12] In evidence, the medical report was tendered through the complainant. She identified it, and it was exhibited.

[13] The Petitioner did not ask any questions of the complainant. However, the Magistrate questioned her. He asked whether the offences happened in 2001 or 2004. She said in 2001.

Q: Why didn't you tell your mother that same day itself?

A: Because he had threatened me.

Q: Were you medically examined in 2001, same year?

A: Yes, in 2001.

[14] The dates do not seem right. The medical examination according to the medical report was undertaken on 25.01.2005.

[15] The complainant's mother gave evidence. At the commencement she broke down. The Magistrate adjourned early for lunch, and continued her evidence on the resumption. She said her daughter informed her of what had happened. She said *"he had constantly threatened me. It was hard for me to go and report to the police. He physically abused me, because he did not want this matter reported to the police."*

[16] This tended to confirm the threats already made to the complainant. Though the dates are not clear, the mother's evidence explained why there was no immediate report to the police. The prosecution did not rely on this evidence as a recent complaint.

[17] In the evidence of the Investigating Officer the Magistrate asked him whether he had asked the mother why it was a belated complaint. He answered "*yes, they were fear (sic) of complaint. The Accused had threatened them. They were fear of life."*

[18] The Petitioner elected to give sworn evidence. He categorically denied the allegation of rape. He said he "*did not do anything to the victim*." He said he had no opportunity to do these things. He was always employed. He was working at a Service Station. He said the complainant had no previous enmity or reason for complaint against him. That was the case for the defence. When he was found guilty by the court, in mitigation, he apologized for what he had done, and promised that he will not re-offend. This apparent about-face did not form part of the evidence in the trial for consideration of guilt.

The Magistrate's decision

[19] The Magistrate considered the lateness of the report to the police. The incident had occurred in 2001. It was only reported in 2004, and the Petitioner was charged in 2009. Why the bringing of the charge took so long was not clear. Both the complainant and her mother said they had been threatened by the Accused if they reported the matter to the police.

[20] The Magistrate accepted that explanation as reasonable, and having seen and heard both witnesses, he believed them. The Magistrate noted that the mother had been physically abused by the Petitioner and therefore that her fear was not fanciful. He noted also that the mother and complainant both depended on the Petitioner who was the sole breadwinner of the family. The Magistrate in his judgment wrote:

> *"This had caused the belatedness and it is understandable. The victim cannot remember the exact date but it did not harm or prejudice the Accused as he totally denied the allegation."*

[21] The Magistrate found the complainant's evidence to be "*cogent and impressive*." He accepted the complainant's testimony as being "*credible, reliable and truthful",* and found the rape charge proved beyond reasonable doubt.

Court of Appeal

[22] On 3rd October, 2019 the Court of Appeal handed down its decision. It was an appeal against conviction only. The Petitioner had his appeal argued by counsel. Counsel had informed the court that only one ground would be urged, that was the ground for which leave had been granted by the single judge.

[23] That ground was:

> *"(3) The Learned Magistrate erred in law and in fact when he allowed and considered was contained (sic) presumably under the heading of "history relayed by the victim" in the medical report when the State through the complainant did not lead any evidence to (sic) that regard nor called the examining medical doctor to give evidence."*

[24] In the Full Court, Prematilaka J referred to the Magistrate's evaluation of the report in his judgment:

> "*[29] The prosecution case is primarily based on the evidence of PW1. This court accepts that there is no corroboration required in sexual offences cases. But Medical report has proved the victim was not a virgin at the time of examine (sic). Further she had told to the doctor how she had lost her virginity. She had told that the accused raped her one and half years ago. The victim was raped when she was at the age of 8 to 11. The age and dates were not very clear but it does not vitiate the conviction. It strengthens the prosecution version. I hold the victim's evidence is cogent and impressive. In Sumanasena case (Supra) the court observed that "Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law." I have no hesitation to accept victim's evidence as credible, reliable and truthful.'(Emphasis added)*

[25] The medical report form has a section headed "*History by Patient*." What the doctor recorded at this part of the report was said to be hearsay. Defence counsel had claimed this was a clear breach of the rules of evidence causing a miscarriage of justice.

[26] The State argued that because the medical report was allowed to be produced without objection by the Petitioner at the trial it became part of the evidence. Accordingly, the Magistrate was entitled to use the history narrated by the complainant to the doctor in the manner that he did in the judgment.

[27] Unfortunately the complainant was not asked in examination in chief as to what she had told the doctor concerning what had happened to her in the incident which had caused her to be medically examined.

[28] At paragraph 17 Prematilaka J set out how the evidence should have been evaluated:

> *"If the prosecution intended to use the short history as recorded in the medical report as part of the evidence in the prosecution case, it should have first elicited from the victim the fact that she narrated the same to the doctor. Secondly, the prosecution should have called the doctor to testify to the fact that the victim had told him the history which he recorded in the medical report. If these two conditions are not fulfilled such history remains as hearsay evidence. The only exception would be if the history in the medical report is specifically recorded as an agreed fact between the prosecution and the defence. Simply because the appellant had not objected to the production of the medical report, it does not necessarily mean that he was agreeing to the history recorded therein."*

[29] The court concluded [at paragraph 18]:

> *"In my view, what could have been made use of the medical report by the Magistrate was so much of the report as dealt with the examination of the patient and the professional opinions of the doctor and not the case history entered by the doctor on information supposedly supplied by the victim in as much as the victim did not speak to making such a statement to the doctor and the doctor was not even called as witness."*

[30] The history recorded by the doctor in the medical report, if properly admitted, could only go to show the consistency of the patient being examined. The history recorded is not corroboration. The State does not rely on the history as a recent complaint, or as supporting the complainant. In **Senikarawa v State** AAU0005 of 2004S: 24 March 2006 [2006] FJCA 25, the Court of Appeal said:

> "*[24] In any event, the direction given to the assessors on recent complaint was itself defective. It spoke of "strengthening" the complainant's evidence. This was a misdirection. The direction could have spoken of strengthening the credibility of the complainant but not strengthening her evidence. Again, this was a misdirection which amounted to a miscarriage of justice.*

[31] The court decided in the instant case that the learned Magistrate had been wrong to use the history in the way he did, and in considering that it strengthened the victim's evidence he was also wrong. There had been a miscarriage of justice.

[32] It was necessary however to go on to consider whether, from these errors, there had been "*a substantial miscarriage of justice*": **Stirland v Director of Public Prosecutions** [1944] AC 315.

[33] The test in **Stirland** had been:

> "*When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied*
>
> *'A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case.*

[34] In the instant case the Court below decided [at paragraph 25]:

> *"Disregarding the inadmissible piece of evidence namely the history found in the medical report, I am of the view that the evidence of the victim had been credible, reliable and could be acted upon to bring home the charge of rape against the appellant. The admission of the short history had only been an unwarranted diversion from her otherwise unblemished evidence of the victim. Thus, upon my examination of the evidence led at the trial, I am fully convinced that any reasonable judge on the evidence properly admitted would without doubt have convicted the appellant and could not have failed to convict the appellant on the rest of the evidence to which no objection could be taken. Therefore, I conclude that no substantial miscarriage of justice has occurred. Therefore, I would readily apply the proviso to section 23(1) of the Court of Appeal Act and dismiss the appeal."*

Grounds before Supreme Court

[35] On the 31st October 2019 the Petitioner lodged a timely appeal to this court. He put forward the ground concerning the history in the medical report, which had formed

the sole ground urged before the Court of Appeal. He raised also new grounds against both conviction and sentence.

[36] The ground against sentence cannot be dealt with. The Petitioner must first raise an appeal against sentence to the Court of Appeal. It may be he eventually realised that such a sentence appeal could not be entertained unless first brought to the Court of Appeal. For in his latest grounds and submissions filed on 2nd of September 2022, he argued only two grounds – one against the history matter and the other on recent complaint. He did not pursue the earlier ground against sentence.

[37] '*Recent complaint'*, as argued in the Petitioner's submission has been misconceived. It complained of the lack of recent complaint evidence. Maybe it was thought that there must be some evidence of a recent complaint in order for there to be a conviction for rape. That is not so. Since the prosecution did not rely on recent complaint, and it did not form part of the reasons for conviction, this ground has no substance and must fail.

[38] Of the first grounds lodged, ground 2 complained of "*the judge failing to direct the assessors on the inconsistent statements of the complainant."* This was a trial by a single judicial officer, a Resident Magistrate, who sits without the assistance of assessors. No details were given of which inconsistent statements in the record were to be referred to. The Magistrate was well aware of the uncertainty of dates of events in the story. Nonetheless, he believed the complaint was genuine, and importantly, believed she was telling the truth that the crime had been committed against her. This ground, which was not mentioned in the latest submission, must also fail.

[39] Ground 3 of the first submissions complained that the judge had failed to make an assessment of the evidence independent of that of the assessors. As I have already said, there were no assessors in this trial. It was a trial before a Magistrate alone.

This ground, no doubt written by helpers within the prisons, misconstrues the case. It must be rejected.

Ground 1 – the Medical Report

[40] One of the complaints about the medical report form was that the complainant (the patient) never gave her consent. Of that fact, we cannot be sure, the doctor omitted to fill that part of the form. Certainly the mother of the 10 year old child gave her consent on behalf of her daughter. Nothing turns on this supposed inadequacy.

[41] The form, apart from the final page which was filled at the Police Station, was completed by the doctor in the course of her medical examination of the complainant. Its admissibility is provided for in section 133 of the Criminal Procedure Act which states:

"133. – (1) Any plan, report, photograph or document purporting to have been made or taken in the course of an office, appointment or profession by or under the hand of any of the persons specified in sub-section (3), may be given in evidence in any trial or other proceeding under the provisions of this Decree, unless the person shall be required to attend as a witness by –

(a) the court; or
(b) the accused person, in which case the accused person shall give notice to the prosecutor not less than 14 clear days before the trial or other proceeding.

(2) In any case in which the prosecutor intends to adduce in evidence a plan, report, photograph or document a copy of it shall be delivered to the accused not less than 21 clear days before the commencement of the trial or other proceeding.

(3) The following persons shall be the persons to whom this section shall apply –

(a) medical practitioners and medical officers;
(b) Government analysts and chemists and laboratory superintendents employed by the Government;
(c) registered and Government land surveyors;
(d) examiners of weights and measures;

(e) veterinary officers, livestock officers and veterinary assistants;
(f) the officer in charge of the Criminal Records Office;
(g) engineers holding a degree in any relevant engineering discipline;
(h) authorized examiners appointed under the provisions of the Land Transport Act;
(i) dental practitioners and dental officers;
(j) survey technical assistants employed by the Government;
(k) police photographers; and
(l) scientists holding a degree in science relevant to botany, chemistry, micro-biology or any other scientific discipline relevant to forensics.

(4) The court may presume that the signature to any plan, report or document is genuine and that the person signing it held the qualification, appointment or office which he or she professed to hold at the time when the plan, report or document was signed.

(5) The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under sub-section (2), may be referred to and commented upon by any other expert called as a witness in any criminal trial."

[42] Section 133 states that the prosecution must provide to the accused a copy of the report at least 21 days prior to the commencement of the trial. If the Accused wishes the medical practitioner to attend as a witness he or she must give the prosecutor notice of this requirement at least 14 days prior to the trial. In this case the report with the disclosures was served on the Accused on or about 22nd June 2010 when the plea was also taken. The trial commenced on 25th November 2011.

[43] No notification to the prosecutor was given. The Petitioner was represented initially by counsel from the Legal Aid Commission who could have called for the doctor to be present. But at the trial the Petitioner had agreed to the production of the medical report. As is clear the doctor should have been called by the prosecutor to give evidence, and the complainant should have been asked what she had related to the doctor concerning her condition and the events that might have caused such condition. Only the complainant is a witness to the events that she said happened to her at the hand of the Petitioner. There was no recent complaint, and the doctor, or the report itself on the history, cannot support the complainant's allegations. The

findings as a result of the medical examination could support the allegation of penetration, but could not indicate the person responsible or provide the evidential circumstances. At the end of the day, the medical report had only a small part to play in the prosecution's case.

[44] Section 133 (5) is a convenient provision in cases where the original doctor is not available, is overseas on a course, or who has migrated. Section 133 grants admissibility in such cases. But courts need to be alert to those parts of the report which are not foundational facts discovered by the doctor on examination or which comprise information provided by others on events outside of the doctor's professional expertise and opinions.

[45] I conclude that the Court of Appeal was correct to find that this was a proper case in which to apply the proviso. The decision of the Magistrate, save for the errors indicated, was not to be faulted.

[46] The criteria for leave to appeal to this court have not been met. Therefore, the petition must be rejected.

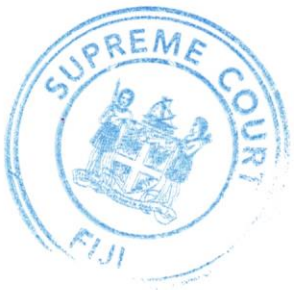
Marsoof J

[47] I have read the judgment of Gates J in draft and I agree with his reasoning and conclusions.

Orders of Court:

In the result, the Orders of the Court are:

1) *Leave to appeal refused.*
2) *Conviction and sentence affirmed.*



Hon. Chief Justice Kamal Kumar
President of the Supreme Court

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