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

CRIMINAL APPEAL NO. AAU 70 of 2014

(High Court HAC 35 of 2012 at Labasa)

BETWEEN : RUPENI VESIKULA

*APPELLANT*

AND : THE STATE

*RESPONDENT*

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| Coram | : | Calanchini, President<br>Rajasinghe, JA<br>Hamza, JA |
| Counsel | : | Mr. M. Fesaitu for the Appellant<br>Mr. S. Vodokisolomone for the Respondent |
| Date of Hearing | : | 3 July 2018 |
| Date of Judgment | : | 23 October 2018 |

## JUDGMENT

Calanchini, P

[1] I have read in draft form the judgment of Hamza JA and agree that the appeal against conviction should be dismissed.

**Rajasinghe, JA**

[2] I have read in draft judgment of Hamza JA and I agree with his reasons and conclusions.

**Hamza, JA**

**Introduction**

[3] The Appellant was charged in the High Court at Labasa with one count of Rape (Sodomy Rape) of a 12 year old boy, contrary to Section 207(1) and (2) (a) of the Crimes Act 2009 (Crimes Act).

[4] The full details of the Information filed by the State against the Appellant read as follows:

**FIRST COUNT**

*Statement of Offence*

**RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**RUPENI VESIKULA** on the 1st day of April 2012, at Labasa in the Northern Division, had unlawful carnal knowledge of **A.O.**, a boy under the age of thirteen.

[5] Following the trial, the Appellant was convicted of the charge and was sentenced to 12 years' imprisonment, with a non-parole period of 9 years.

[6] Aggrieved with the said conviction and sentence, the Appellant initially filed this appeal against both the conviction and sentence. However, on the date of the leave hearing the appeal against the sentence had been abandoned. Furthermore, at the leave hearing, counsel for the Appellant informed the Court that the appeal against the conviction was advanced

only on the following two grounds (although initially there were three grounds of appeal against conviction):

(i) *The Learned Trial Judge erred in law and in fact when he did not direct and/or guide the Assessors on the cross examination of the prosecution witness by the Appellant resulting in a substantial miscarriage of justice.*

(ii) *The Learned Trial Judge erred in law and in fact when he failed to properly guide the Assessors on how to approach and weigh the fresh evidence of uncharged acts.*

**[7]** The single Judge of the Court of Appeal, by his Ruling dated 16 January 2015, granted leave to appeal only in respect of the second ground. The Appellant did not exercise his right to have the first ground of appeal determined by the full Court, pursuant to Section 35(3) of the Court of Appeal Act. Therefore, the only ground of appeal for determination is the second ground above.

**Summary of Evidence**

**[8]** In April 2012, the complainant was 12 years of age. On 1 April 2012, the Appellant (whom the complainant referred to as Bu Vesi) had called him into his house. The complainant had entered the Appellant's house. The Appellant had been watching a movie at the time. He had told the complainant to change the disc to a "blue movie". It appears that the complainant and Appellant had been watching the blue movie together.

**[9]** The Appellant then went into his room and brought a pillow and a bottle of oil. He was wearing his undergarment at the time. He sat beside the complainant and oiled his erect penis. He had told the complainant to oil his anus. The Appellant had suggested to the complainant that they follow the "blue movie".

**[10]** The complainant had got down on his knees and hands. The Appellant had then penetrated the complainant's anus with his erect penis from the back. He had engaged in anal sex for about 3 minutes. Thereafter, the Appellant had told the complainant to turn around face up. He had then asked the complainant to put both his legs on the Appellant's shoulders and

had penetrated his anus with his penis. This had gone on for another 2 minutes until the Appellant had ejaculated.

**[11]** The complainant had informed his grandmother about the incident. Thereafter, the matter was reported to the Police and an investigation was carried out. Later, on 2 April 2012, the complainant had been medically examined at the Labasa Hospital. The Appellant was arrested and was cautioned interviewed by the Police, wherein he admitted to the above acts.

**[12]** The Appellant testified during the trial. Although he admitted to calling the complainant to his house on 1 April 2012, he denied watching a "blue movie" with the complainant. He also denied oiling his penis and to inserting his penis into the complainant's anus. The Appellant testified that he could not have an erection for the last 6 years and consequently could not penetrate the complainant's anus. Regarding his caution interview statements, the Appellant said that he did not make those statements voluntarily and that the Police had forced him to confess to the incident.

**The Ground of Appeal** - The Learned Trial Judge erred in law and in fact when he failed to properly guide the Assessors on how to approach and weigh the fresh evidence of uncharged acts.

**[13]** The Appellant contends that the Learned Trial Judge has failed to properly direct the Assessors on how to approach and weight the evidence of uncharged acts as referred to in the testimony of Dr. Maryanne Kora'ai.

**[14]** In his summing up the Learned Trial Judge referred to the complainant's Medical Report (Prosecution Exhibit No. 1) and the medical evidence in the following form (from paragraphs 27 to 31 in his summing up):

> *"27. On 2 April 2012, between 2.30 a.m. and 2.40 a.m., approximately 16½ hours after the alleged incident, the complainant was medically examined, at Labasa Hospital by Doctor Maryanne Kora'ai (PW2). She prepared a medical report, which she tendered in evidence as Prosecution Exhibit No. 1. In D (10) of the report, she recorded the history related by the*

*complainant, as follows, ".....History of anal penetration by Pesi's (neighbor) penis yesterday 01/04/12 morning...."*

*28. In D (12) of her report, the Doctor recorded her medical findings as follows, "....General examination-unremarkable. Genitalia: Penis – normal looking, no penile discharge, no laceration, bruising or bleeding. Anal external examination: No bruising, laceration or discharge, anal tone seemed normal, however, did not do full digital rectal examination..." In D (14) of her report, she gave her professional opinion as follows, "...There is no physical evidence on the external examination of sexual penile penetration, however, detailed examination under anesthesia is pending..."*

*29. In D (16) of her report, the doctor concluded as follows, "...From the physical examination there is no evidence from the external genitalia and anal examination to support the history. However, it does not rule out sexual abuse. However, there is evidence of physical abuse..."*

*30. In her evidence, the doctor said as follows, "...Clinically or medically, we have diagnose this case as sexual abuse, despite the external genital examination does not show any sign, it does not rule out penile penetration as per the history. The reasons been: (i) the external anal spinster is made of skeletal structural muscles, which is normally in contracted form. During passing out stool, it allows different sizes of stool to excrete. So it has the capability of stretching to allow the stool to come out. Likewise, it can stretch to allow an erect penis, which is firm, smooth to penetrate the external spinster, and it can go back to its normal contracted position; (ii) if there was any use of any lubricating gel, oil or lotion, it will assist smooth penetration of the penis into the anus, which is the history; (iii) during an erection, there is naturally semen that initiates from the opening of the penis, which again can assist penetration; (iv)* ***as per history that complainant relate to me that, this incident is not the first time, there was history of previous incidents, the previous incidents and the body is a very adaptive organism****. Because of the reasons mentioned, penile penetration cannot be ruled out, despite there is no evidence from my examination..." [Emphasis is mine].*

*31. Looking at the doctor's medical report as a whole, it could be used to support either parties' position. Since the doctor found no anal injuries to the complainant's anus, the report could be used to say there was no penile penetration of the complainant's anus, by the accused's penis, at the material time. However, if you take into account what the doctor said in paragraph 30 above, that could be used to say that there was penile penetration of the complainant's anus by the accused's penis, at the material time. The use of the oil, in the doctor's word, made the penetration smooth and left no injuries. What you make of the doctor's medical report, is a matter entirely for you."*

**Evidence of Uncharged Acts**

**[15]** The Fiji Court of Appeal in ***Senikarawa v. State*** [2006] FJCA 25; AAU0005.2004S (24 March 2006); held:

> *"The learned judge admitted evidence of uncharged acts by the appellant against the complainant. The question of admissibility of such evidence is tested by the broader principle of whether the probative value of the evidence outweighs the prejudice to the accused. **R v. Boardman** [1975] AC 421, **Pfennig v. R** [1995] HCA 7; (1994-95) 127 ALR 99.*
>
> *The nature of the evidence here was relationship evidence. The evidence of the uncharged acts provided an insight into the relationship between the appellant and the complainant and also the mother. It had a probative value beyond its tendency to prove a relevant propensity. It demonstrated an ongoing sexual attraction towards the complainant."*

**[16]** Making reference to the directions given in the summing up by the Learned Trial Judge in the said case, the Court of Appeal held that the direction was sufficient to make it clear to the Assessors of the purpose to be made of the evidence of uncharged acts.

> *"The Assessors must have concluded that the appellant had a marked sexual interest in the complainant and an inclination to manifest that interest physically.*
>
> *The direction was adequate and we are not persuaded that there has been a substantial miscarriage of justice although the inconsistencies between the evidence of the complainant and her mother should have been pointed out to the Assessors. This ground of appeal fails."*

**[17]** His Lordship Justice Goundar in ***State v Nayacalagilagi*** [2009] FJHC 48; HAC165.2007 (17 February 2009); stated: *"If the jury inadvertently hears inadmissible evidence, any prejudice could be avoided or dispelled by a clear warning to disregard the evidence and enable a fair trial. However, if the circumstances are such that the prejudice to the accused could not be dispelled by a warning to the jury, a mistrial is declared as an appropriate remedy to ensure a fair trial for the accused."*

**[18]** I endorse that this is the right approach that a trial judge should follow in the event the evidence of uncharged acts have been led during the course of the trial.

**[19]** His Lordship Justice Goundar continued:

> *"I am concerned about the deliberate conduct of the prosecution to lead evidence of uncharged acts without giving any notice to the defence to object to the evidence, and knowing that the evidence is highly prejudicial to the Accused persons. Section 28 (1) (f) of the Constitution gives an accused the right to challenge evidence. In my view, leading evidence that the Accused persons assaulted other people in a similar manner and that they counselled [constituted] unnatural offences between males, without any notice to the defence to challenge the evidence in a voir dire, are so prejudicial that it could not be dispelled by a warning to the Assessors to disregard the evidence. In these circumstances the possibility of a miscarriage of justice occurring cannot be ruled out. The courts have a duty to prevent a miscarriage of justice from occurring by ensuring that the trial of an accused person regardless of his or her social and economic status in the society is fair."*

**[20]** His Lordship also referred to the case of ***Crofts v. R.*** (1996) 70 AJLR 917 at p. 927, where the High Court of Australia held that:

> *"No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial discretion designed to overcome its apprehended impact. As the court below acknowledge, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript."*

**[21]** In ***Chand v. State*** [2016] FJCA 61; AAU0015.2012 (27 May 2016); the Fiji Court of Appeal had to decide on a similar issue, whether the Learned High Court Judge erred in law and in fact by allowing prejudicial information of uncharged acts contained in the caution interview of the Appellant to be tendered as evidence and failed to direct the Assessors to disregard those prejudicial evidence whilst forming their opinion on the guilt of the Appellant.

**[22]** The Court of Appeal held as follows:

> *"The Respondent seems to admit in its written submissions that, the above questions and answers contain prejudicial material of uncharged acts but argues that they were blotted out. I examined the marked copy of P15A in the case record and found that except Q46 and the answer, other disputed questions and answers had been blotted out with a white liquid but I could still read most of the words beneath. In the original caution statement in Hindi (P15) the removal of the questionable questions and answers had been done successfully. The Learned High Court Judge at the end of the summing up had requested the assessors to take with them the documents marked before court and their notes. Therefore obviously the assessors would have taken P15 and P15A also with them. They may, in all probability would have been able to read those so called blotted out parts as well.*
>
> *The sentences complained of by the Appellant contain not previous convicted offences but a previous unsuccessful act of robbery attempted (or actually committed) by the Appellant and Praveen Kumar and crucially referred to the same belt belonging to the Appellant being taken to the robbery that had been used to strangle the deceased in the present case as well. The chances are that the assessors may have concluded that the Appellant was a habitual criminal and was in the habit of using his belt as an instrument in committing crimes including the murder he was being charged with. This possibility cannot be ruled out at all.*
>
> .....
>
> *Unfortunately, the Learned High Court Judge's attention had not been drawn to that aspect at all and I find no direction to the Assessors on how they should deal with the prejudicial evidence complained of though I am of the view that a proper direction on his part could have dispelled the prejudicial value of those questions and answers. In the circumstances I am of the view that substantial miscarriage of justice has ensued and in the light of the fact that the most crucial evidence for the prosecution is the caution interview makes it even harder to escape from the above conclusion. I think a retrial is the only remedy to redress this irreversible lapse. Appeal against conviction is allowed on this ground."*

**[23]** It is common practice that the history given by the patient to the Doctor (the contents of column D 10 in the Fiji Police Medical Examination Form), is not led before the Assessors, unless it qualifies as recent complaint evidence. Such evidence may otherwise tantamount to hearsay evidence.

**[24]** It was held in ***Senikarawa v. State*** (supra) that:

> *"Evidence of recent complaint may be adduced to show the consistency of the conduct of the complainant and to negative consent. **Kory White v. R** [1999] AC 210 requires that both the complainant and the named person to whom the complaint was made must testify as to the terms of the complaint. If the evidence of recent complaint is admitted then the jury should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial.*
>
> *The principle on which the evidence is admitted is to support and enhance the credibility of the complainant. The jury, in assessing the truth of the complainant's evidence, may take into account evidence as to the consistency between that evidence and evidence of her contemporaneous complaint. It can be an aid to her credit (**Spooner v. R** [2004] EWCA Crim. 1320, Eng. Court of Appeal)."*

**[25]** In relation to medical evidence the Court of Appeal in ***Senikarawa v. State*** (supra) held:

> *"There is also the question of the evidence of Dr. Elsie Bentley who examined the complainant on 21 February 2002. In the summing-up the learned judge said that the complainant "told her [the doctor] that she had sexual intercourse with her stepfather by force in November 2001." Her Lordship told the Assessors that Dr. Bentley's evidence showed Mereseini's "consistency as a witness." This was a misleading direction and we are unclear of the basis upon which it was put to the Assessors.* ***Again, we think that if it was on the basis of recent complaint evidence it should not have been so admitted and placed before the Assessors."*** *[Emphasis is mine].*

**[26]** In the instant case, on a perusal of the complainant's Medical Report (Prosecution Exhibit No. 1), in column D 10 (History as related by the person to be examined), the Doctor has only recorded: "History of anal penetration by Pesi's (neighbor) penis yesterday 01/04/12 morning." There is no mention in column D 10 to any previous incidents. As such, it is quite intriguing as to the basis on which the Doctor testified to the previous incidents.

**[27]** Furthermore, at no point in time did the complainant testify to any previous incidents. In fact, in cross examination the complainant has said: "....Accused put his penis into my anus. This has not happened to me before. It was painful...."

[28] However, the Learned Trial Judge has clearly failed to give any directions to the Assessors as to the manner in which the evidence pertaining to previous incidents should be evaluated. In my view, this non direction does amount to a miscarriage of justice. The issue however is whether the said non direction had resulted in a substantial miscarriage of justice.

[29] To prove its case, the State is relying on the evidence of the complainant, the complainant's grandmother, Reapi Vumaicake (Prosecution Witness No.3), the medical evidence and the admissions made by the Appellant in his caution interview statement.

[30] The Learned Trial Judge has duly analyzed the prosecution case and the Appellant's case in his summing up. He has correctly directed that the evidence of the complainant's grandmother, is recent complaint evidence. The Appellant's caution interview statement was tested at a *voir dire* hearing to test its admissibility. The Learned Trial Judge in his ruling found the caution interview statement to be admissible. Furthermore, the Assessors were directed on voluntariness and the weight that should be attached to the said caution interview statement.

[31] Regarding the Appellant's caution interview statement, the Learned Trial Judge has directed the Assessors as follows (at paragraph 32 of his summing up):

> *"32. On 2nd and 3rd April 2012, a day or two after the alleged incident, the accused was caution interviewed by then police officer DC4177 Joseph Sikuri (PW5) at Labasa Police Station. PW5 interviewed the accused in the "i-taukei" language, and later interpreted the same into English. He submitted the interview notes, as evidence, that is, Prosecution Exhibit No. 4(a) – hand written "i-taukei" version, 4(b) – hand written "English" version and 4(c) – typed "English" version. According to PW5, the accused was given his rights to consult a lawyer, including the standard rest and meal breaks. PW5 asked the accused a total of 65 questions, and the accused gave 65 answers. From questions and answers 29 to 40, 51, 55, 56, 58 – 60, the accused admitted he oiled his penis and the complainant oiled his anus, before he penetrated the complainant's anus. In other words, he confessed to committing the crime, at the material time."*

[32] Therefore, considering the evidence of the complainant, the evidence of his grandmother, and the admissions found in the Appellant's caution interview statement, it is my opinion,

that there has been adequate evidence led by the prosecution to prove its case beyond reasonable doubt.

**[33]** In any event, in terms of Section 129 of the Criminal Procedure Act 2009, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted.

**[34]** In the instant case, the Assessors have unanimously found the Appellant guilty of the charge. The Learned Trial Judge has accepted their unanimous decision and found the Appellant guilty as charged and has convicted him.

**[35]** Section 23 (1) of the Court of Appeal Act (as amended) provides:

> *"23.–(1) The Court of Appeal –*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; and*
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> *(b) on any such appeal against acquittal shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was acquitted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;*
>
> *Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

**[36]** Although the Learned Trial Judge has failed to give any directions to the Assessors as to the manner in which the evidence pertaining to previous incidents should be evaluated, considering all the facts and circumstances of the case, I am of the opinion that this non direction has not resulted in a substantial miscarriage of justice.

[37] Therefore, I conclude that this appeal should stand dismissed and the conviction be affirmed.

**The Orders of the Court are:**

1. Appeal is dismissed
2. Conviction is affirmed.

**Hon. Mr. Justice W. Calanchini**
**PRESIDENT, COURT OF APPEAL**

**Hon. Mr. Justice R. D. R. T. Rajasinghe**
**JUSTICE OF APPEAL**

**Hon. Mr. Justice R. Hamza**
**JUSTICE OF APPEAL**

**Solicitors for the Appellant : Office of the Legal Aid Commission.**
**Solicitors for the Respondent : Office of the Director Public Prosecutions.**