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

CRIMINAL APPEAL NO. AAU 149 of 2014
(High Court No. HAC 54 of 2014)

BETWEEN	:	**SAKARAIA BULIVAKARUA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, JA** **Fernando, JA** **Nawana, JA**
Counsel	:	**Mr T Lee for the Appellant** **Mr M Vosawale for the Respondent**
Date of Hearing	:	**13 September, 2019**
Date of Judgment	:	**3 October, 2019**

JUDGMENT

Prematilaka, JA

[1] I have read in draft the judgment of Nawana JA and agree with the reasons and conclusions herein.

Fernando, JA

[2] I agree.

Nawana, JA

Introduction

[3] This is an appeal by the accused-appellant (appellant) against his conviction on charges of sexual assault and rape. The conviction was entered after trial before the High Court of Suva on 6 December 2014.

[4] The victim's name is suppressed in this judgment for anonymity in the best interests of the victim-child; and, she is referred to as MPK, instead.

[5] The statements and the particulars of offences presented by the Director of Public Prosecutions (DPP) dated 02 October 2014 were as follows:

Count 1

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the **Crimes Decree 2009**.

Particulars of Offence

SAKARAIA BULIVAKARUA between the 1st to the 30th day of April 2010 at Vunivivi, Nausori in the EASTERN DIVISION, unlawfully and indecently assaulted **MPK**.

Count 2

Statement of Offence

RAPE: Contrary to section 207 (1) and 207 (2)(b) of the **Crimes Decree 2009**.

Particulars of Offence

SAKARAIA BULIVAKARUA between the 1st to the 30th day of April 2010 at Vunivivi, Nausori in the EASTERN DIVISION, penetrated the vagina of **MPK** with his finger, without her consent.

Count 3

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the **Crimes Decree 2009**.

Particulars of Offence

SAKARAIA BULIVAKARUA between the 1st to the 31st day of May 2012 at Manoca, Nausori in the EASTERN DIVISION, unlawfully and indecently assaulted **MPK**.

Count 4

Statement of Offence

RAPE: Contrary to section 207 (1) and 207 (2)(b) of the **Crimes Decree 2009**.

Particulars of Offence

SAKARAIA BULIVAKARUA between the 1st to the 31st day of May 2012 at Manoca, Nausori in the EASTERN DIVISION, penetrated the vagina of **MPK** with his finger, without her consent.

[6] MPK, on whom the offences were alleged to have been committed, was eight years old. The appellant, who was the younger brother of the victim's father, Joeli Vula, was MPK's paternal uncle in terms of relationship. The appellant was living with MPK's family in the same house at the time of the alleged offences.

[7] The dates of the alleged offending by the appellant, however, were unspecified on the face of the information. Instead, the offending in relation to the four counts in the information was stated to have taken place during the months of April and May 2012.

Trial

[8] At the trial, the prosecution led the evidence of Joeli Vula; victim-MPK; the school teacher, who complained to police of the sexual assault; and, the medical doctor, who examined the victim in October 2012. Medical examination was done on MPK after about four months from the month of May, 2012, around when the alleged sexual invasion by the appellant was committed and first complained to the father.

Evidence of the Prosecution case

[9] Evidence, as presented by Joeli Vula, was that the appellant, the victim-MPK and the rest of the family were sleeping in the same sitting room of their dwelling at Nausori. MPK had complained of an act of sexual invasion by the appellant on an unspecified day in the month of May, 2012. The complaint was that of touching the victim's breasts in the middle of a

night by the appellant. Joeli Vula, being the father, promptly wanted to enquire from the appellant about the incident soon after the complaint. But, Joeli could not do so as the appellant feigned sleeping.

[10] MPK testified that the appellant had touched her breast, stomach, bum with his hand, in the middle of a night at her dwelling when she was at sleep. As she was awakened, she identified the appellant through the light that emanated from a low-burning lamp. The matter was complained to her father then and there; and, later to her teacher when she had developed some problem with her stomach at school. The victim, however, was silent in her evidence as to the exact date or range of dates within which the sexual invasion had happened on her.

[11] The teacher, in her evidence, confirmed the information being received from MPK on 25 October 2012. As the information revealed an act of sexual invasion on a student of hers of eight years of age, the matter was referred to police forthwith. The complaint to police ensued an investigation culminating in the criminal prosecution of the appellant.

[12] Dr Evelin Tuivaga, who examined the victim on 26 October 2012, had observed that the vaginal orifice of the victim was open. She concluded that such an opening was consistent with penetration of the vagina by a blunt object. However, the history recorded by the medical doctor, after speaking to MPK, was that her uncle had only touched her vagina. In answer to the specific question, as revealed in evidence, whether it was '*rubbing or insert[ing]*', MPK had said that it '*was on her neck*'. The date, on which the alleged act of sexual invasion took place, irrespective of its nature, was not elicited or recorded at the medical examination.

[13] The prosecution, in addition, relied on the statement of the appellant made under caution on the basis of its confessional content.

Appellant's Caution Interview Statement

[14] The appellant's caution interview statement was admitted into evidence marked as PE-1A through witnesses who conducted the interview. In the statement, the appellant admitted that he was living with his elder brother, Joeli, from January-August 2012 and that he had to leave that home as MPK had complained of his touching of the victim, to the father. The statement contained admissions on the fact of touching the victim's head, stomach and private parts. These admissions rendered the statement confessional, which led the prosecution to mark and produce it in evidence.

[15] The case for the prosecution was closed with the evidence as summarized above.

No case to answer on Counts (1) and (2)

[16] The appellant made an application in terms of Section 293 (1) of the Criminal Procedure Code, in respect of counts (1), (2) and (4) seeking that the appellant be acquitted without calling for defence. Learned counsel for the state conceded to the application only in respect of count Nos. (1) and (2) obviously on the basis that no evidence had surfaced as to any wrongful conduct in relation to the time period from 01-30 April 2012, as alleged in counts (1) and (2) in the information against the appellant. Learned trial judge, in the circumstances, rightly upheld the application and acquitted the appellant only of Count Nos (1) and (2). The defence was called for from the appellant in respect of Count Nos (3) and (4).

[17] The appellant, accordingly, made his defence in respect of the remaining charges in Count Nos (3) and (4) by giving evidence.

Appellant's Evidence

[18] The appellant denied the charges and disputed that he had ever entered the room occupied by the victim. It was the appellant's position that Joeli, father of MPK, took offence at him for not accepting that he had entered the room of MPK and did '*bad things*' on her. The appellant further said that this disagreement created differences between them forcing him to leave the dwelling of Joeli later in 2012.

[19] As regards the caution interview, the appellant stated that he had agreed to what the police interviewer said. It was his evidence that he was under threat when he was being questioned by Police Constable Etuarte, who conducted the interview stating that he would be slapped if he did not admit what was being questioned on.

[20] The case for the defence was closed with evidence of the appellant whereupon the trial ended.

Assessors Opinions and Resultant Conviction

[21] The assessors returned unanimous opinions of guilty in respect of both counts.

[22] The learned trial judge, in a reasoned-out ruling dated 16 December 2014, agreed with the opinions of the assessors and convicted the appellant of the two charges. The appellant was sentenced to a term of five year-imprisonment in respect of the charge of sexual assault in Count No (3); and, to a term of twelve year-imprisonment in respect of the charge of rape in Count (4) in pursuance of the sentencing ruling dated 17 December 2014. The sentences were ordered to run concurrently with a non-parole period of ten years.

Application for Leave to Appeal

[23] The appellant made a timely application for leave to appeal against the conviction in terms of Section 21 (1) of the Court of Appeal Act. The appeal, being involved with questions of fact, was considered by a single Justice of Appeal for the grant of leave at a hearing on 06 April 2017. The application for leave was considered on the basis of following amended grounds of appeal dated 11 May 2016.

Grounds of Appeal

[24] The grounds of appeal were:

(i) The learned trial judge failed to direct the assessors and himself in terms of the weight to be given to the admissions contained in the caution interview;

(ii) The learned trial judge caused the trial to miscarry when he considered the medical report examination of the complainant conducted a few months after

the alleged complaint as circumstantial evidence despite the complainant only stating she was touched; and,

(iii) The learned trial judge erred in law and fact in accepting the suggestion by the state counsel at paragraph 12 of his judgement with reference to the level of understanding of the complainant when no expert opinion was rendered on the subject.

[25] The single Justice of Appeal, by his ruling dated 11 April 2017, held that the first two grounds were arguable and granted leave to appeal, accordingly. Leave to appeal was refused on the third ground.

[26] At the hearing before Full Court, learned counsel for the appellant pursued the first two grounds strenuously.

Appellant's submissions on Ground (1)

[27] Learned counsel, in spite of the challenges made by the appellant against the admissibility of the confession under caution at the trial, maintained that the caution interview statement, too, had formed the mass of evidence in the case. Such evidence, learned counsel submitted, should have been taken into account by assessors after being properly directed by the learned trial judge.

[28] It was the learned counsel's submission that there were no directions by the learned trial judge for the assessors to consider attaching the required weight to the admission by the appellant that he [the appellant] had only '*touched*' the person of the victim. Written-submissions filed on behalf of the appellant advanced the same proposition.

Consideration of counsel's submission

[29] It is observed, on a perusal of evidence of the appellant as noted above, that the matter had before the assessors insofar as the caution interview statement was concerned was not the simple issue of attaching weight to the truthfulness of the confession as urged at the appeal hearing. On the contrary, it was the voluntariness of the confession, which was more or

less at issue in view of the challenges by the appellant in order to exclude the confession from evidence at the trial.

[30] The adequacy of the directions of the learned trial judge, therefore, has to be considered in light of the above. The learned trial judge in paragraph 22 of his summing-up said:

> *In respect of the record of caution interview of the accused person, you are allowed to take into account the contents of the caution interview if you believe and satisfy that the accused person had given his statement voluntarily and on his free will.*

[31] Moreover, with reference to the evidence, the learned trial judge in paragraphs 42 and 43 said:

> *In respect of the caution interview of the accused, he stated that [the father of the victim] visited him at the police station and told him to admit the allegation. He said that he had to admit the allegation as he was threatened by the interviewing officer and also [by the father of the victim].*
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> *... The accused maintained his position that he had to admit the allegations in the caution interview because of the threat made by his brother [the father of the victim] and the police officer who intervened him.*

Conclusions on Ground 1

[32] In my view, the learned trial judge had adequately directed the assessors on the issue of voluntariness and also on the issue of contents of the confession in consideration of the matters raised at the trial. Hence, the learned trial judge could not justifiably be faulted for any non-direction or misdirection. The fault, in my view, lay in the appellant himself. That is because the appellant had been taking up two inconsistent positions on the confession in the course of his journey through the trial to the appeal hearing denying himself of the benefit of the weight of his admission on the act of touching the victim as opposed to any penetration as charged. The assessors, therefore, could have, in light of the position of the appellant, disregarded the confession totally considering the issue of voluntariness alone without deliberating on the content and the weight.

[33] The learned judge, in any event, had directed on the issue leaving the matter for the assessors to decide as required by the law.

[34] In the circumstances, I conclude that there was no merit on this ground and the same is rejected.

Appellants Submissions on Ground 2

[35] It was the counsel's position that the conviction on the count of rape was improper as the evidence did not permit the assessors to form an opinion of guilty against the appellant on the count of rape in the absence of precise evidence of penetration to support the charge as alleged in the information. Learned counsel submitted that the learned trial judge had, in the circumstances, erred in his judgment in agreeing with the assessors and convicting the appellant.

[36] As regards the second ground of appeal, it is clear that the appellant's wrongful conduct of sexually invading MPK had only involved acts of touching as promptly complained to the father, Joeli, by her on the unspecified day in May, 2012. This position appeared to be consistent when the matter was brought to the notice of the schoolteacher and to the medical doctor when MPK was clinically examined in October, 2012. Thus, evidence had before the trial court as to the act of touching by the appellant to constitute the offence of sexual assault punishable under Section 210 (1) (a) of the Crimes Act, 2009, continued to remain without any inconsistency.

[37] Learned counsel's complaint on the second ground of appeal is that, medical doctor's observation on the point of vaginal orifice opening due to penetration by a blunt object, caused the trial to miscarry in the absence of specific directions for the assessors to consider the medical doctor's observation correctly. This became so important in light of the victim's evidence stating that she was only touched by the appellant. The absence of directions by the learned trial judge, it was submitted, could have led the assessors to believe that the orifice opening was due to the act by the appellant, which eventually made them to find him guilty for rape.

Consideration of the counsel's submissions

[38] The learned trial judge, in paragraph 33 of his summing-up, said as follows on the issue:

> *In view of the evidence given by the victim, it appear[ed] that she did not specifically state that the accused penetrated her vagina with fingers. She only stated that he touched her breast, stomach, bum and private part by his hand. She further stated that she clearly identified the accused when he came to her bed in the night.*

[39] It, therefore, appears that the learned trial judge had clearly summed-up on the evidence given by the victim to enable the assessors to decide on the offence that the appellant could be found guilty of. In my view, the learned trial judge must also have referred to the consistency of the assertion of the victim on three different occasions when the matter of sexual invasion was enquired into by three different adults on the three different occasions within a span of four months. Moreover, the learned judge must have directed the assessors on the lapse of about four months before examining the victim by the doctor and direct on the inconclusiveness of the observation of vaginal orifice opening to find the appellant guilty for rape.

[40] The learned judge, instead, had summed-up the case on the relevant point as follows:

> *In respect of the element of penetration, indeed, the finding and the opinion in the medical report is helpful. You must consider the element of penetration with the findings and opinion given by the Doctor in her medical report. However, it is your duty as judges of facts to consider whether there [was] evidence of penetration [of] the vagina of the victim by the accused with his finger in the form of either direct or circumstantial evidence. If you do not find such evidence, the prosecution has not satisfied the element of penetration the vagina of the victim by the accused with his finger.*
>
> [underlined for emphasis]

[41] '*Direct*' evidence was available only from MPK, which excluded the act of penetration by the appellant. Availability of any '*circumstantial*' evidence is not clear on the transcript of

evidence to establish penetration by the appellant. The statement of the learned judge is, therefore, not supported by evidence.

[42] However, it appears, from the reading of the contents of the paragraph, that the learned trial judge would have meant the observations of the medical doctor in regard to the vaginal orifice opening and its possible cause to constitute circumstantial evidence. In my view, such a medical conclusion could not have been an item of circumstantial evidence; but, an expert opinion, which is relevant under the rules of evidence, acceptance of which, is entirely a matter for assessors to decide on right directions by the learned trial judge.

[43] The learned trial judge, in spite of the misstatement on the circumstantial evidence, had directed the assessors to consider the issue of vaginal penetration by the appellant in deciding on the charge of rape on the basis of paragraphs 23, 39 and 46 of the summing-up. However, the direction on the point, in my opinion, is, nevertheless, inadequate in the context of the facts of the case. The learned trial judge should have given more specific directions on the inconclusiveness of the medical opinion as against the appellant in light of the fact of the appellant leaving MPK after May 2012 and he had not met the appellant until the medical examination on 26 October 2012.

[44] In this regard, it would be instructive to rely on In **R v Lawrence** [1981] 1 All ER 974 at 977, where Lord Halisman pronouncing on how directions to the jury should be given, stated that:

> *A direction to the jury should be custom-built to make the jury understand their task in relation to particular case. Of course, it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments of both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.*

[45] I subscribe to the view that the directions of the learned judge were deficient on an important issue of fact where the assessors had to deliberate on and determine. Had the

assessors been correctly directed, it was possible for the assessors not to have returned opinions of guilty in respect of the count on rape.

[46] In the result, I hold that the absence of required directions caused the case to miscarry and led the assessors to find the appellant guilty for rape when evidence, as emanated from the victim herself, was so consistent on the act of touching only. I, accordingly, uphold the second ground of appeal.

[47] Learned trial judge, upon receiving the opinions of the assessors as to the guilt of the appellant for the charge of rape, had painstakingly explained as to why he was accepting the opinions of the assessors in paragraphs 9, 11, 12, and 13 of the judgment. The learned judge said:

> *The victim did not specifically state that the accused penetrated her vagina with his finger. She only stated that the accused touched her private part from his hand. She only stated that the accused touched her private part from his hand. She said that the accused put his hand inside her clothes, but did not specify which part of her body he touched putting his hand through her clothes. Moreover, she stated in her evidence that she could not specifically say which part of the hand of accused touched her body.*

[48] The learned trial judge, having mistakenly taken 27 August 2012, as the date on which the medical examination was conducted on MPK, had taken into account the medical opinion to infer vaginal penetration by the appellant for his reasons as set-out below:

> *The learned counsel for the Prosecution submitted in his submission that the age of the victim and her level of understanding of such incidents need to be considered in forming such a positive inference of the accused person's guilt. There is no evidence to generate any reasonable doubt that someone apart from the accused had touched her private parts. The accused and PW1 stated during the course of their respective evidence that this alleged incident took place in May 2012. The medical report was conducted on 26th of August 2012. The victim is a small girl. The doctor in her evidence ruled out the possibility of self-penetration by a girl as of the victim's age.*

[49] Apart from the erroneous fact as to the date of medical examination, which is very vital, facts and circumstances as deposed to by the witnesses would not make it permissible to infer guilt against the appellant insofar as the rape count is concerned. That is because such an inference must be exceptionally strong to disbelieve the consistent accounts of MPK that the appellant had only touched her private parts, date of which still remained undisclosed but for the father's evidence on the date of complaint in May 2012.

[50] In view of the above analysis, I set-aside the conviction on the charge of rape in Count No. (4) and the sentence thereon. The conviction on Count (3) affirmed.

Orders of Court are:

(1) Conviction on Count (3) affirmed;
(2) Appeal on Count (3) dismissed;
(3) Conviction and Sentence on Count (4) set-aside;
(4) Appeal on Count (4) allowed;
(5) Appellant shall be eligible to be released upon completion of the term of five years imposed for Count (3) with effect from 17 December 2014; and,
(6) The Domestic Violence Restraining Order against the appellant shall continue to be in force until it is set-aside by a competent court.

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice A. Fernando
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL