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

CRIMINAL APPEAL NO. AAU 0087 OF 2015
[High Court Criminal Case No. HAC 198 of 2012S]

BETWEEN	**:**	**ILAI NAVAKI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Chandra, JA** **Prematilaka, JA** **Fernando, JA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant** **Mr. A. Jack for the Respondent**
Date of Hearing	**:**	**16 September 2019**
Date of Judgment	**:**	**03 October 2019**

JUDGMENT

Chandra, JA

[1] I agree with the reasons and conclusions of Prematilaka, JA.

Prematilaka, JA

[2] This appeal arises from the conviction of the appellant on one count of rape contrary to section 149 of the Penal Code. The charge dated 27 August 2009 alleges that the appellant on 31 December 2001 at Nasinu in the Central Division had carnal knowledge of P (name withheld) without her consent.

[3] The appellant elected to be tried in the Magistrates' Court. Following the trial, he was convicted of the charge of rape. After recording the conviction, the learned trial Magistrate transferred the case to the High Court for sentence pursuant to section 190(1) (b) of the Criminal Procedure Act 2009. On 18 October 2012, the High Court sentenced the appellant to 15 years imprisonment with a non-parole period of 12 years.

[4] On 13 July 2015, the appellant had filed an untimely notice of appeal seeking extension of time to seek leave to appeal against conviction only and sought bail pending appeal as well. The single Judge of this Court in his ruling delivered on 08 August 2017 granted extension of time and leave to appeal on appeal ground three. Bail pending appeal was refused.

[5] Both counsel made oral submissions at the hearing and they had earlier informed this Court in writing that they would rely on written submissions filed at the leave to appeal stage. The counsel for the appellant specifically stated at the appeal hearing that he would pursue only the third ground of appeal. Therefore, I shall consider only the third ground of appeal for which leave to appeal had been granted.

Facts in brief

[6] The victim had said that she was raped in 2001 by the appellant, her stepfather when she was in class 4. At that time the victim was staying with her mother and stepfather. According to her she was six years old when she was raped by the stepfather. Her version of events in her own words was as follows.

> *'I was in the kitchen, He had returned somewhere. He came into the kitchen to hang his shirt. He then went to the room, and then he started to call me come*

inside to the room. No one was in the room, only he was there. Then he asked me to come in and not to tell anyone that (sic) he was going to do. I was cooking in the kitchen; I went to the room to see what he wanted. When I went to the room the room he told me to undressed (sic) myself and not to cry. He threatened to me. I was scared, so I did what he told. When I undress myself, he laid me down and started to fondle me. Then he raped me. He removed my under garments. He inserted his penis to my vagina. He raped me on the floor, when he inserted his penis, it was very painful. He was pushing his penis into my vagina about 20 minutes. No one was inside the home.'

[7] The victim had said that she noticed white fluid and blood in her clothes that came from her vagina. She had also said that the appellant raped her for the second time when they went to fetch fire woods after breakfast. At that time she said that they went with her two brothers. According to her

> *'He told me my two brothers to go to bushes and fetch for fire woods, but he told me to remain with him. After they had left he had cleared small place on the ground, then he called me and warned me to not to tell anyone. Then he laid me down. He undressed me. Then he raped me. He had done what he had done to me earlier by inserting his penis to my vagina"*

[8] The victim had said that she was threatened by the accused not to tell anyone or he would kill the whole family. The victim also had said that she did not consent to what the appellant did by saying *'I did not like what he did to me.'*

[9] A complaint had been lodged belatedly and the victim had been medically examined only on 25 January 2005. The medical examination had revealed that the victim's hymen was not intact and found evidence of previous sexual intercourse. Medical report had been produced in the course of the victim's evidence (not objected to by the appellant) but the doctor who had performed the medical examination had not been called. The appellant was unrepresented at the trial.

<u>Ground of appeal</u>

> *'(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.'*

[10] The complaint of the appellant is based on paragraph 29 of the judgment of the learned Magistrate. I quote

> *'[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)*

[11] The appellant complains that what the learned Magistrate had used as part of his reasoning in paragraph 29 (as underlined) of the judgment is in fact what the victim purports to have told the doctor recorded under *'history by patient'* and tantamount to hearsay evidence. He argues that it is a clear breach of the rules of evidence causing a gross miscarriage of justice.

[12] The State admits that the learned Magistrate had used what the victim had told the doctor to place credence on her evidence but takes up the position that because the medical report was allowed to be produced without any objection by the appellant at the trial it became part of the evidence and the trial Judge was entitled to use the history narrated by the victim to the doctor in the manner he did in the judgment.

[13] When one examines the short history found in the medical report it is clear that the learned Magistrate had used only a part of it in paragraph 29 of the judgment and treated that portion as strengthening the prosecution version.

[14] I have examined the evidence of the victim but do not find any evidence from her that she had narrated a history to the doctor at the time of the examination. In fact the victim had not been asked anything of what she had told the doctor by the prosecution. 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.

[15] What is admissible as a result of the consent of the appellant to produce the medical report is the medical findings and opinions of the doctor arising from the medical examination conducted by him and the admissibility of the report does not extend to matters such as history given by the patient in that such information is not ascertained by the doctor from his own examination of the victim.

[16] Usually and in the ordinary course of business, the examination by the doctor commences with the ascertainment of the case history of the patient. This is a part of his professional duty as much as the physical examination and treatment and report thereon. Indeed it is necessary for the doctor to acquaint himself with the background even in normal circumstances before entering upon examination and treatment. However, a doctor is not expected to conduct an investigation into the commission of an offence. That is a matter for the Police.

[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.

[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. In cases where persons giving or recording the history (or one of them) are not called then the rules pertaining to hearsay evidence would apply. Even where such person and the doctor are called as witnesses, the value and weight of such evidence will vary from case to case.

[19] On the other hand, 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.

[20] In **Senikarawa v State** AAU0005of 2004S: 24 March 2006 [2006] FJCA 25 in her evidence the complainant had said that she complained to her mother about the rape by the appellant but the mother gave no evidence that her daughter complained to her of rape. Thus, the mother did not confirm her daughter's evidence that she complained to her about being raped by the appellant. The Court held that it follows that there was no evidence of recent complaint of rape and made the following remarks and indicated that the same rules would apply to the evidence of medical history and complaints made to investigating officers.

> *'[14] 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.*
>
> *[15] 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).'*

[22] 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.

'[23] The same may be said for the evidence of the police officer, Pradeep Kumar, who said that the complainant told him that she had been raped and indecently assaulted by the appellant. This evidence should not have been admitted and we believe led to a miscarriage of justice. Having been admitted the lack of probative value should have been explained to the assessors.

[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.'

[21] Therefore it clear that not only was the learned Magistrate's use of the history in the medical report wrong but his considering it as strengthening the victim's evidence was also wrong. The learned Magistrate had erred in respect of both leading to a miscarriage of justice.

[22] However, given the facts of this case this Court has to answer the further question whether there has been a substantial miscarriage of justice. House of Lords in **Stirland, Appellant; and Director of Public Prosecutions, Respondent** [1944] A.C 315 laid down the test that should be applied in this situation as follows.

'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. The Court of Criminal Appeal has recently in R. v. Haddy (2) correctly interpreted s. 4, sub-s. 1 of the Criminal Appeal Act…'*

[23] Section 4(1) of the Criminal Appeal Act, 1907 in U.K. gave the Court of Appeal the authority to quash convictions in the following terms.

> *'if they think that the verdict of the jury 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 grounds there was a miscarriage of justice'*

[24] However, the proviso stated 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.

[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.

Fernando, JA

[26] I agree with the judgment of Prematilaka, JA that the appeal be dismissed for the reasons stated therein.

Orders of the Court;

(i) Appeal dismissed

(ii) Conviction and Sentence affirmed.

.....
Hon. Justice S. Chandra
JUSTICE OF APPEAL

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

.....
Hon. Justice A. Fernando
JUSTICE OF APPEAL