

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

CRIMINAL APPEAL NO.AAU 0032 of 2015
[In the High Court at Suva Case No. HAC 30 of 2012]

BETWEEN : **RAVINESH SINGH**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandana Prematilaka, JA**
Wasantha Bandara, JA
Salesi Temo, JA

Counsel : **Ms. S. Ratu for the Appellant**
: **Ms. P. Madanavosa for the Respondent**

Date of Hearing : **08 April 2021**

Date of Judgment : **29 April 2021**

JUDGMENT

Prematilaka, JA

[1] I have read the judgment and agree with the order proposed.

Bandara, JA

[2] The Appellant was charged with one count of Rape contrary to Section 207 (1) (2) (a) (3) of the Crimes Act 2009.

The information read as follows;

First Count

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAVINESH SINGH on the 7th day of December 2011, at Nausori in the Eastern Division, had carnal knowledge of **S.S**, a girl under the age of 13 years.

[2] **Crux of the prosecution case**

At the time of the incident the victim had been 12 years old. On the day in question the wife of the Appellant (the co-accused at the trial) had gone to the victim's house and brought her to the stall to assist her in selling watermelon. Whilst the victim was serving a customer she distinctly heard the co-accused calling the Appellant over the phone specifically mentioning the words "she is here." Short while thereafter, the Appellant had come to the stall and dragged the victim towards a bush near a bread fruit tree and raped her. When the victim started to bleed consequent to the rape, the wife of the Appellant made her to have a bath. When the victim still bled the wife of the Appellant phoned the mother of the victim, asked her to come and take her daughter saying she was "*having menses*". The victim was given \$20 for her assistance at the stall. Whilst on their way home the victim had told the mother of the incident, whereupon the mother took her to the police to make a prompt complaint. The Appellant had confessed to the crime in his caution interview, which was admitted at the trial, consequent to the *Voir Dire* inquiry.

[3] **Outcome of the case**

At the conclusion of the trial the assessors unanimously expressed the opinion that the Appellant was guilty of the charge, and the learned trial judge concurred with their opinion. Thereupon, on the 17th March 2015, the Appellant was convicted and on the 2nd March 2015 he was sentenced to 13 years' imprisonment with a non-parole period of 11 years' imprisonment. The co-accused at the trial (the Appellant's own wife) who was charged and convicted along with him had abandoned her appeal against both the conviction and the sentence.

[4] **Consideration of the ground of appeal**

Being aggrieved by the said conviction the Appellant filed a Notice of Appeal before this court (against the conviction only), advancing three grounds of appeal, which was heard by a single Judge. Having heard the application, the single judge of Appeal had granted leave only on ground two.

[5] The appellant had not filed any application for renewal of the other two grounds of Appeal in respect of which leave was refused.

Ground of Appeal two is as follows,

2. "The learned trial Judge erred in law when he failed to conduct competency inquiry as required by section 10 (1) of the Juveniles Act (Cap 56) and failed to remind the witness the importance of telling the truth.

[6] It is worthy to note here the following observations made by the learned single judge of Appeal, which indicates that he had not had the advantage of having the full Court Record before him, to ascertain as to how the trial judge dealt with the issue of the victim juvenile witnesses' competency to testify.

"In the absence of the record at this stage, it is uncertain as to whether the learned trial judge had conducted the competency inquiry when the victim was called to give evidence. The Summing-up does not refer to this. Therefore, it is not certain whether the victim gave sworn or unsworn evidence.

When the record is available the full court can consider this ground and therefore I would grant leave on this"

[7] Accordingly, it appears that granting of leave is conditional, upon the full court's consideration, whether the trial judge had conducted a competency inquiry or not.

The complete court record was available to this court at the appeal hearing. Therein, the trial proceedings reflect the facts, that the victim had **given sworn evidence**, and that she had been 15 years old at the time of testifying.

Moreover, referring to the testimony of the victim the learned trial judge at paragraph 6 of his judgment states that "*I find the evidence of the SS is consistent and truthful*".

[8] Learned trial judge had not held a competency inquiry which in my view was not a requirement, and caused no miscarriage of justice in the circumstances of the case. At no stage of the trial had the defence challenged the competency of the victim.

[9] It is worth noting here the views expressed by ARCHIBOLD in **Criminal Pleading, Evidence and Practice** (2017 at page 386)

'It is plainly advisable to take any objection to competency before the witness is sworn or commences to give evidence The incompetency of a witness may become apparent, however, only after he has commenced evidence.... and, at common law, the objection has been allowed to be taken at any time during the trial..... It was said that where a judge has admitted a witness as competent to give evidence, but upon proof of facts affecting the capacity of the witness, and upon observation of his subsequent behavior, changes his opinion with regard thereto, he may stop the examination, and direct the jury to consider the case exclusively on the evidence of the other witnesses. It would clearly be within his discretion to discharge the jury.... Where the issue of competency is re-examined at the end of a witness's evidence, the court will no more be addressing credibility at that stage than when conducting the competency test at the outset'

[10] It is also relevant to note the following observations made by the Supreme Court in **Kumar v State** Criminal Petition No. CAV0024 of 2016: 27 October 2016 [2016] FJSC 44.

'I shall return to what impact the trial judge's failure to conduct a competence inquiry" should have on Kumar's conviction when I have considered the other grounds of appeal, though I should add just one thing. It is good practice for a judge to tell the child that he or she must tell the truth. I have not considered whether that rule of practice could be said to have been elevated to a rule of law....'..... the trial Judge should have determined before the girl gave evidence whether she could give sworn evidence. If he had decided that she could not, he should then have determined whether she could give unsworn evidence. 'I do not believe that the assessors were less likely to accept the girl's evidence if it had been unsworn than if it had been sworn. If it had been apparent to the trial judge in the course of the girl's evidence that she did not satisfy the conditions for giving even unsworn evidence, he would have directed the assessors to disregard her evidence.

The fact that he did not do that means that he must have thought that she was intelligent enough to understand that she had to tell the truth. In the circumstances, despite the trial judge not having done what section 10(1) required him to do, no substantial miscarriage of justice occurred.'

[11] In the above circumstances, the learned counsel for the defence, rightly, did not press the impugned ground of Appeal before us.

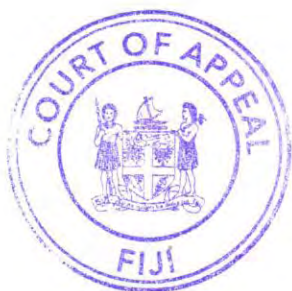
[12] Having regard to the above considerations I would hold that the impugned ground of appeal is not tenable.

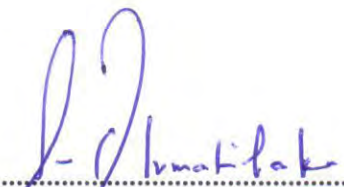
• **Temo, JA**

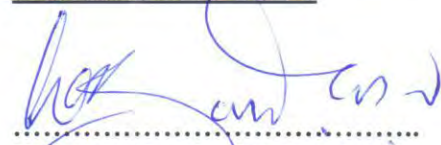
[13] I have perused the draft judgment, I concur with the same.

Orders of the Court

1. Appeal is dismissed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL


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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL