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

CRIMINAL APPEAL NO. AAU 131 of 2018

[High Court Criminal Case No. HAC 130 of 2016L]

BETWEEN : **SAMUELA TAWANANUMI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Jitoko, VP**
Mataitoga, JA
Morgan, JA

Counsel : **Ms L. Manulevu and Ms S. Daunivesi for the Appellant**
Ms P. Madanavosa for the Respondent

Date of Hearing : **10 July 2023**

Date of Judgment : **27 July 2023**

JUDGMENT

Jitoko VP

[1] This is an appeal from the decision of the High Court at Lautoka on 6 December 2018, against the appellant's conviction of rape and sexual assault for which he was sentenced to 14 years' imprisonment with a non-parole period of 12 years.

[2] The appellant wished to appeal his conviction and as required under section 21 (1) (b) of the Court of Appeal Act he sought leave of this Court to appeal, which leave was granted under section 20 (1) (a) by Prematilaka JA on 28 January, 2021.

[3] The appellant was charged with the following offences:

First Count

Statement of Offence

SEXUAL ASSAULT*: Contrary to section 210 of the Crimes Act 2009*

Particulars of Offence

SAMUELA TAWANANUMI *between the 1st of November, 2015 and the 30th of November, 2015 at Lautoka in the Western Division unlawfully and indecently assaulted AK by touching her vagina.*

Second Count

Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009*

Particulars of Offence

SAMUELA TAWANANUMI *between the 1st of November, 2015 and 30th of November, 2015 and 30th of November, 2015, at Lautoka in the Western Division penetrated the vagina of AK, a child under the age of 13 years.*

Brief Facts

[4] The facts as summarised by the trial judge are set out at paragraphs 3 and 4 of the Court's Sentencing as follows:

> *"3. The facts proved at trial in this case are that in November 2015, at one night, the victim was sleeping alone in her bedroom. While she was still sleeping she felt someone taking off her long pants and panty. Then she looked up and saw her father (accused). When she looked up at him he told her to sleep. She closed her eyes. She felt her father touching her vagina. After that*

he went back to sleep. She was so scared of father. She never told anyone what happened as her father told her not to tell mother what happened, and if she did, he will kill her.

4. The next day at night the victim was sleeping with her cousins in the second bedroom. While she was sleeping, her father came and woke her up and told her to go with him to the sitting room. She then went to the sitting room with father where no one was sleeping. Then he made her lie down, took off her pants and panty and then he put his penis into her vagina. She felt pain inside her. Then he told her not to tell mother what happened. The next morning when she went to the toilet she then saw blood in her vagina and wiped it with a toilet paper. She never told anyone what happened because she feared.

Grounds of Appeal

[5] The two (2) grounds of appeal against conviction are:

"Ground 1
The learned trial Judge had erred in law and in facts in allowing the complainant to read her statement in Court whilst she was giving evidence, which is inadmissible amounting to prior consistent statement.

Ground 2
The learned trial Judge had erred in law and in facts by directing the assessors and himself in that the complainant evidence is further bolstered by the recent complaint evidence."

Ground 1: Previous Consistent Statements

[6] This ground is raised and based on the trial judges allowing the complainant to read her statement to the police as evidence, after prosecution had made, and the Court approved, an application under section 134 of the Criminal Procedure Act, for the complainant's statement be tendered into evidence.

[7] This Court notes that the Counsel for the appellant had objected but the Court allowed the application and added at page 6 of the High Court record:

> *"Yes, application of the State has been allowed subject to the right to cross-examine the child victim and her witness statement will be read in evidence by counsel for the Prosecution and she will be subject to cross-examination by the defense counsel."*

[8] This was confirmed later in the trial judge's summing up at paragraph 40 as follows:

> *"Madam and Gentlemen assessors, you heard what AK, the complainant in this case had told the police on 26 April 2016. Her statement was read in evidence in court. Generally a statement given by a witness to police is not admissible in evidence unless it was used to test the credibility or consistency of his or her evidence in court. There are exceptional cases where the law permits the courts in the interest of justice to allow such statements to be read in evidence. This is one such case and therefore you can consider the statement the complainant had given to police as evidence before this court for all purposes and you may give such weight to it as you think appropriate."*

[9] Counsel for the appellant contends that the court had, neither in its summing up nor in the judgment itself made clear the basis of the complainant been given the approval to give evidence by simply reading her statement to the police. In the counsel's view, her reading of her police statement comes under previous consistent statement which as a general rule in evidence, is inadmissible.

[10] State counsel alluded to the Court's record and the circumstances in which the trial judge had allowed the complainant's police statement to be read in evidence.

[11] At the beginning of the trial, the court agreed given that the complainant was only 11 years old (9 years at the time of the offending), that special arrangements including the shedding

of wigs and gowns by the court officials, with a screen to protect the complainant from the accused, were to be put in place.

[12] State counsel then formally made section 134 application as appears on pages 4 and 5 of the court record (Trial Proper):

> *"SC: My Lord ... we had just spoken to the victim and she seems a bit nervous and scared to give evidence, therefore we are making an application under section 134 if a statement could just be tendered into evidence. However she is available for cross-examination. We had informed Legal Aid in September that we were thinking of making an application under section 134 and we had received their response last week.*
>
> *DC: We confirm, we did receive an application, sorry, a letter indicating that the intended application. We had informed them that we will be objecting, for the sole reason that my client will be prejudiced by it and for the interest of justice. I do we are minded and we do acknowledge that she is a vulnerable witness, a child witness, but the police statements that are to be tendered is not evidence at all, just police statements, and this has to be processed in due course through the oral evidence that she will offer in court. For the sole reason we will be objecting, we are requesting that she proceeds, that she gives her oral evidence and we'll cross examine her My Lord.*
>
> *SC: My Lord as you are aware the defence has raised that there will be prejudicial and its in the interest of justice. The client will not be prejudicial in this matter because the victim will be presented for cross-examination, can put their case to her. Yes we have to be mindful that this is a child witness and the reason we making this application is because we do not want this child to go through what she had gone through and as I have mentioned before, the accused will not be prejudicial at all. They have the statement, they will see it, they will cross-examine, they will put whatever case is to the victim.*
>
> *Court: All you can say the accused is going to be prejudiced. How is he going to be prejudiced?*
>
> *DC: My Lord the victim giving her statement, there is a possibility or there is a risk that whatever she says in her evidence maybe not consistent with the statement she is going to give. My concern is if the whole statement is given in as evidence, this will be before the assessors, minded that at the end of the trial, they are the judges of facts and that it is up to them, but my concern is if the whole statement is given in as*

> *evidence, that would be prejudicial to my client. We do have an opportunity to cross-examine the victim, however for the interest of justice, that is why it is prejudicial to my client."*

[13] In addition, State Counsel clarified that the requirements of section 134 of the Criminal Procedure Act, had been satisfied and that the request to the Court that the complainant's statement to the police be allowed to be read into the court record, was made pursuant to section 134.

[14] The basis underlying the general rule of evidence on prior or previous consistent statements being inadmissible, is that a party is not permitted to make evidence for himself: **R v Roberts** 28 Cr. App. R 102. The exceptions at common law apart from the statutory exception under section 134, are:

(i) statement's constituting recent complaints in sexual cases,
(ii) statement's forming part of res gestae and
(iii) statement's which tended to rebut an allegation of recent fabrication.

[15] Under both (i) and (iii) a statement is not admissible as evidence of the truth of its contents but may be admitted only to show consistency on the part of the complainant.

[16] In **Conibeer v The State** [2017] FJCA 135; AAU0074.2013 (30 November, 2017, the court stated (at paragraph 28) :

> *"As a general rule, a prior consistent statement of a witness is inadmissible evidence. However, there are many exceptions to this rule. One of the exceptions to the rule is in sexual cases. In sexual cases, the evidence, a recent complaint of the sexual assault made to another person by the complainant is allowed to show the consistency of the conduct of the complainant and to negative consent."*

[17] A more inclusive analysis is set out in the Supreme Court decision of **Anand Abhay Raj v The State** [2014] FJSC 12; CA0003.2014 (20 August 2014) as follows: (paragraphs 33, 37 and 38):

> *"[33] In any case, evidence of recent complaint was never capable of corroborating the complainant's account:* ***R v Whitehead*** *(1929) 1 KB 99. At most it was relevant to the question of consistency or inconsistency, in the complainant's conduct and as such was a matter going to her 'credibility and reliability as a witness:* ***Basant Singh & Ors v The State*** *Crim. App. 12.1989;* ***Jones v The Queen*** *[1997] HCA 12 (1997)191 CLR 439;* ***Vasu v The State*** *Crim. App AAU0011/2006S, 24 November 2006.*
>
> *[37] Procedurally for the evidence of recent complaint to be admissible both the complainant and the witness complained to, must testify as to the terms of the complaint:* ***Kory White v The Queen*** *[1999] 1AC 210.*
>
> *[38] The complaint is not evidence of facts complaint of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant."*

[18] In his Ruling, granting leave for appeal, the single judge raised what appeared to be anomalies in the trial judge's decision to allow the complainant's statement to be read in evidence, without the need for the complainant and the witness complained to be produced to testify as required in Anand Abhai Raj's dictum. Neither had the trial judge specifically referred to the complainant's statement to the police as constituting recent complaint.

[19] The important issue in the end as the single judge had correctly pointed out is whether the complainant's police statement in a sexual offence, could be led as recent complaint evidence given that the trial judge had, in his direction to the assessors, told them to consider the statement as evidence before the court.

[20] In my view, so long as the prosecution has satisfied the requirements of section 134 of the Criminal Procedure Act, the court may, in its discretion, allow a complainant's police statement to be read in evidence.

[21] Section 134 (1) and (2) state:

> *"(1) In any criminal proceedings, a written statement by any person shall, if such of the conditions mentioned in sub-section (2) as are applicable are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.*
>
> *(2) The conditions referred to in sub-section (1) shall be that –*
>
> *(a) the statement purports to be signed by the person who made it;*
>
> *(b) the statement contains a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution for any statement in which he or she knew to be false or did not believe to be true;*
>
> *(c) at least 28 clear days before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;*
>
> *(d) none of the other parties or their lawyers within 14 days from the service of the copy of the statement serves a notice on the party so proposing, objecting to the statement being tendered in evidence under this section."*

[22] The transcript of the court record cited at paragraph [12] above revealed that the prosecution had, in September 2018, some two months before the trial, informed by letter, the Legal Aid Commission, appearing as Counsel for the appellant, that they were considering the likelihood of making a section 134 application. They did not receive a reply according to State Counsel, until one week before the beginning of the trial. As to the S134 (2) (c) requirement, the complainant's statement that was to be served on the appellant, was already in the defence possession as part of the disclosures served on 29 July, 2016.

[23] The trial judge had considered the section 134 application in the light of other relevant factors, the complainant being only 11 years old, that she had demonstrated on the first day of the trial, her extreme nervousness, conceded by defence counsel, and especially the fact that the accused was her very own father, and that she was available to be cross-examined by the defence, before deciding to allow the complainant's statement to be read into evidence.

[24] The State Counsel referred to a similar case of **Osea Cawi v The State** HAC 124 of 2016 (19 December, 2018) wherein the Court had also allowed a section 134 application by the prosecution for the statement of the child witness to be read in evidence, provided the requirement of the section are satisfied. While, in that case, the state had not given a clear indication to the defence before 28 clear days of the hearing that the victim's statement will be tendered in evidence, the Court was satisfied that the defence had enough time and opportunity to peruse the witness statement and prepare for cross-examination.

[25] The court in **Osea Cawi** (supra) also referred to Part XX of the Criminal Procedure Act which provides for evidence in video forms for vulnerable witnesses to be allowed but provided they are subject to cross-examination. The Court held the view that the rationale of allowing court statements in the form of pre-recorded videotapes should also be applicable to written witness statements. This court shares the same view.

[26] Having heard all the arguments and submissions of counsel, I am satisfied that the trial judge had not made an error when he allowed the complainant's police statement to be read into evidence, and the fact that the complainant was subject to a full cross-examination by Counsel for the appellant. The appellant was not prejudiced.

[27] This ground is without merit.

Ground 2: Recent Complaint Evidence

[28] The appellant submits that:

> *"The learned trial judge had erred in law and in facts by directing the assessors and himself in that the complainant evidence is further bolstered by the recent complaint evidence."*

[29] The basis for the ground may be found in PW3 Ana, the complainant grandmother's evidence, where she related everything, including the identity of the offender, the nature and time of the offences, and her own observation of the change she observed in the character and habit of the complainant after the incidents. The trial judge at paragraph 66 of his summing up said:

> *"66 Prosecution called the complainant, her grandmother Ana, and doctor Konrote. Prosecution says that the complainant is a reliable witness and her evidence is further bolstered by the recent complaint evidence, distress evidence and medical evidence of the doctor."*

[30] The appellant argued that PW3's evidence, could not be treated as recent complaint evidence, and even if it were, it could not be said, as the trial judge had stated, that it bolstered the evidence of the complainant.

[31] In the leave Ruling, the single judge had referred to **Anand Abhay Raj** (supra) that stated at paragraph 46:

> *"In the instant case, the judge's recounting of the prosecutor's closing argument may have been infelicitous. It was after all the credibility and consistency of the complainant that was supported, if accepted by the evidence of recent complaints, not the complainant's evidence that was strengthened."*

[32] Prematilaka JA also referred to the Court of Appeal's opinion on the subject in the case of **Seni Karawa v The State** [2006] FJCA 25; AAU0005.2004S (24 March 2006) to whit:

> *"[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 has a misdirection which amounted to a miscarriage of justice."*

[33] It would certainly seems from the trial judge's summing up at paragraph 66 referred to above, that he had misdirected the assessors as to how PW3's evidence should be treated. However, paragraph 66 should, as the State Counsel submitted, be contextualised within the totality of the trial judge's summing up. At paragraph 19 of his summing up, he said:

> *"If you consider this complaint to be a recent complaint in the circumstances of this case, I will direct you as to how you deal with recent complaint evidence. Ana was not present when the alleged incident occurred, and therefore, she is not capable of giving evidence as to what actually happened between the complainant and the accused. Therefore what Ana heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show the consistency in the conduct of the complainant and is relevant only in assessing her credibility. If you find Ana to be a credible witness than you may use her evidence to test the consistency and credibility of the complainant."*

[34] In my view, while it is unfortunate that the trial judge appeared to suggest the importance of the evidence of PW3 Ana to strengthen the complainants' statement, it must be understood in the context of the totality of his summing up. In all the circumstances, and given all the evidence before the court, this court is convinced that the assessors would still have without paragraph 66 of the trial judge's Summing Up, found the appellant guilty. The appellant is not prejudiced and there is no miscarriage of justice.

[35] This ground is also without merit.

Mataitoga JA

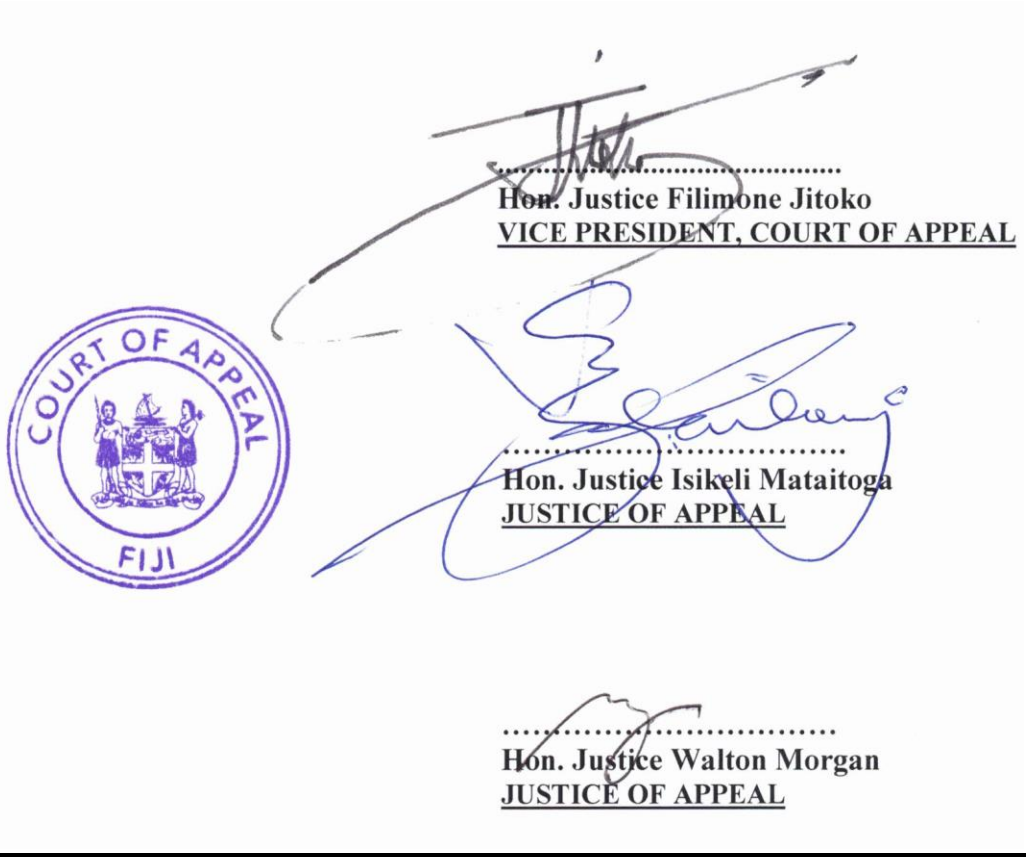
[36] I agree with the reasoning and conclusions of Justice Jitoko.

Morgan JA

[37] I agree with the reasoning and conclusions of Jitoko J's judgment.

[38] **Orders**

1. *Appeal is dismissed.*
2. *No order as to costs.*



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Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL

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Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

.....
Hon. Justice Walton Morgan
JUSTICE OF APPEAL

Solicitors
LAC for the Appellant
ODPP for the Respondent