IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Lautoka

CIVIL APPEAL NO.AAU 0017/2018
High Court Civil Case No. HAC 124/16

BETWEEN	:	**OSEA CAWI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
		Qetaki, JA
		Andrews, JA
Counsel	:	**Appellant in person**
		Mr T Tuenuku for the State
Date of Hearing	:	**6 February 2024**
Date of Judgment	:	**28 February 2024**

JUDGMENT

Prematilaka, RJA

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

Qetaki, JA

[2] I have read in draft the judgment of Madam Andrews, JA, and I agree with it and the reasoning and orders.

Andrews, JA

Introduction

[3] Osea Cawi was convicted in the High Court at Lautoka on 19 September 2018 by Aluthge HCJ, on a single count of rape.[1] He was sentenced in the High Court at Lautoka on 10 October 2018 to imprisonment for 11 years 3 months, with a non-parole period of 10 years.[2] He applied to this Court for leave to appeal against his conviction. In a Ruling delivered on 13 August 2021 by Prematilaka ARJA (as he then was) his application was refused.[3] He has renewed his application for leave to appeal before a full Court of the Court of Appeal. He has not sought to appeal against sentence.

Background

[4] The complainant, who at the time of the complaint was 4 years old, is related to the appellant, who was 30. It was alleged that the appellant called the complainant into his room, she lay down beside him on a mattress, and the appellant penetrated the complainant's vagina by inserting his finger into her vagina, then chased her away. The complainant's mother noticed blood in her underwear later the same day and asked what had happened. The complainant said that the appellant had put his finger inside her private parts.

[5] The complainant's mother took her to the Police Station to report the matter. A statement was taken from the complainant. She was medically examined the same day. The examination report recorded a blood stain (5 cm x 3 cm) on her underwear, dry blood around the superior region of her vagina, a small laceration (about 1-2 mm) on her vagina, some

1 *State v Cawi* [2018] FJHC 964; HAC124.2016 (19 September 2018).
2 *State v Cawi* [2018] FJHC 970; HAC124.2016 (10 October 2018).
3 *Cawi v State* [2021] FJCA 210; HAC124.2016 (13 August 2021).

blood around her vulva, and tenderness around her vulva. The doctor concluded that there was some blunt force trauma to the complainant's vagina, which did not rule in or rule out penetration.

[6] The appellant was interviewed by the Police under caution on 8 June 2016. In the course of the interview the appellant said he was mending a hole in his trousers when the complainant came in and said "let's have sex", she lay down, put her legs apart and took her pink shorts off. The appellant said "I told her to leave the room and I poke her vagina and chased her away". He said "I want to state that she willingly remove her pink shorts and I did insert my fingers inside her vagina".[4] When asked why he inserted his finger he said "I was joking when I did that" He later said "I want to apologise for what I have done to [the complainant], I was just joking by doing that when I poke her vagina with my finger."

[7] The appellant was arrested and charged on 9 June 2016.

[8] Prior to the appellant's trial the High Court Judge conducted a *voir dire* hearing to consider his objection to the admissibility of the caution interview. The grounds of the objection were that the caution interview was not a true reflection of the appellant's answers given to the interviewing officer, that he was not asked if he clearly understood the English language (as he only understood the iTaukei language and as such had not understood the entirety of the interview and charge), and that there was a breach of his constitutional rights. The interviewing, witnessing, and charging officers were called to give evidence and were cross examined. Following the hearing, the trial Judge issued a Ruling in which he held that the caution interview and charge statement were admissible.[5]

[9] Evidence for the prosecution was given at the trial by the complainant, her mother, the doctor who carried out the medical examination, and the Police interviewing, witnessing and charging officers. The appellant exercised his right to remain silent. Closing submissions were made by counsel for the prosecution and for the appellant. The Judge then summed up

---

4 The caution interview transcript records the appellant as saying in answer to a further question, that he inserted one finger (indicating his right index finger).

5 *State v Cawi* [2018]FJHC 962; HAC124.2016 (11 September 2018).

the case for the Assessors, who subsequently were unanimous in finding the appellant guilty of rape. The High Court Judge agreed with the Assessors and entered a conviction.

Grounds of Appeal

[10] The appellant's grounds of appeal to the Full Court are set out in his Supplementary Grounds of Appeal, dated 8 November 2021,[6] and may be summarised as being that the Judge may have erred in law by:

1. failing to conduct a *voir dire* trial to determine the admissibility of the appellant's caution interview;

2. failing to direct himself and the assessors on the weight and the truth and/or credibility to be given to the appellant's confession;

3. failing to consider that the State had coached the complainant on her answers to a question posed by the Judge prior to an adjournment; and

4. failing to effectively canvass the defence case in his summing up, thereby encumbering the appellant's right to a fair trial.

The appellant also contended that guilty verdict is unreasonable and could not be supported having regard to the evidence.

Did the Judge fail to conduct a *voir dire* trial?

[11] As recorded at paragraph [8], above, the Judge conducted a *voir dire* hearing. He considered the evidence given by the Police witnesses, and found it to be consistent and plausible. He found that any inconsistencies between the record of the interview and the Police Station Diary were not material, because the entries had been made by different officers. He

---

[6] The appellant confirmed at the hearing that he was abandoning the ground of appeal pursued before the single Appeal Judge.

accepted the prosecution evidence that the appellant understood the contents of the interview and charge statement before he signed them.

[12] The Judge recorded that the appellant had gone to a High School where English is the medium of instruction. Although the appellant had dropped himself out from school after completing Form 4, he had received an English education for a considerable period of time. He recorded that the appellant had signed the acknowledgement that he preferred to be interviewed in English. The Judge concluded that the prosecution had proved beyond reasonable doubt that the appellant's confessions were obtained voluntarily and fairly, and held that the caution interview statement and charge statement were admissible in evidence.

[13] This ground of appeal has no merit. It is abundantly clear that a *voir dire* hearing was conducted, and the admissibility of the appellant's caution interview was considered and determined. This ground of appeal must fail.

Did the High Court Judge fail to direct himself and the Assessors as to the weight and and/or credibility to be given to the appellant's confession?

[14] As recorded earlier, the interviewing officer and the witnessing officer gave evidence as to the appellant's statements in the caution interview, in which he admitted that he had inserted his finger in the complainant's vagina. This ground of appeal requires an examination of the High Court Judge's summing up. I refer, first, to the Judge's directions on matters of law. At paragraphs 7 and 8 the Judge said:

> 7. *On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.*
>
> 8. *The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.*

[15] In addressing the evaluation of evidence, the High Court Judge said at paragraphs 10, 12, and 13:

> *10. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.*
>
> *12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was she or he evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find the Court environment distracting.*
>
> *13. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.*

[16] In relation to the appellant's caution interview, the Judge directed as follows, at paragraphs 16, 17 and 67:

> *16. Police interviewing officer read the caution statement of the accused in evidence. I now direct you as to how to approach caution statement evidence. The defence says that the caution interview was conducted in the Nadroga dialect but the accused had to sign the record of interview that was in English and therefore he could not understand its content. Defence says that the accused was thereby prejudiced. They also say that certain questions and answers have been fabricated by the interviewing officer and therefore it should not be relied upon as a true statement of the accused. Prosecution on the other hand says that the accused had received English education up to Form 4 and he preferred to be interviewed in English and he signed the record of interview voluntarily adopting its contents. Police Officers deny that they had fabricated the interview.*
>
> *17. If you are satisfied that the accused had given those answers in his interview, it is for you to assess what weight you should give to answers given by the accused. It is your duty to consider the caution statement as a whole and other evidence led in trial in deciding where the truth lies. If you are not sure, for whatever reason, that the confession is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it.*
>
> ...

67. At questions 28, 32, 33, 34, 40 and 41 in his caution interview the accused had confessed to the crime. If you are satisfied that accused had given those answers and that he had told the truth to police you can act upon his confession. If you are not sure that accused had given those answers or that he had not told the truth, you may disregard it.

[17] I have concluded that the Judge's summing provided the Assessors with appropriate directions as to their consideration of the caution interview. The Assessors were first directed as to the burden and standard of proof required to prove the charge against the appellant, they were directed as to their assessment of the evidence given as to the caution interview, and they were reminded of the defence case, that the record of the interview was not correct, and was fabricated. Further, the Assessors were appropriately directed as to what they should do in the event that they were unsure if the appellant's confession to inserting his finger into the complainant's vagina was true.

[18] Further, at the conclusion of his summing up the Judge enquired of counsel if any re-directions were sought, and none were. I am not persuaded that the Judge erred in his directions to the Assessors. This ground of appeal must fail.

Did the Judge fail to consider that the State had coached the complainant on her answers to a question posed by the Judge prior to an adjournment?

[19] Because of the complainant's age (she was six at the time of the trial) the Judge made a Ruling as to the procedure for her to give evidence, having heard submissions from counsel for the prosecution and defence.[7] The Judge ruled that the statement the complainant made to the Police was to be read aloud in court by counsel for the prosecution, subject to the complainant being subject to cross examination. This was in addition to standard orders for a trial in closed court, suppression of the complainant's name, a screen being in place to screen the appellant from the complainant, and the presence of a support person to be seated beside the complainant.

---

7 *State v Cawi* [2018] FJHC 965; HAC124/2016 (19 September 2018).

[20] The appellant submitted on appeal that the complainant had been asked a question about the allegation, and her answer at first was to deny that the act of penetration had happened. He submitted that counsel for the prosecution then called for an adjournment and when the complainant resumed giving evidence she gave a definite answer. He said that during the adjournment, the Assessors and the prosecution and defence lawyers were in Court. The complainant was told to sing, to get comfortable with the Court environment. He said he heard the prosecution lawyer say that the complainant should say "Osea touched my vagina". He said he informed his lawyer but she did not do anything; he did not know why this was.

[21] In answer to a question from this Court as to who said the complainant should say those words, the appellant said, first, that "so many people", said them, then that the Court Officer said them. After appeal submissions for the State were heard, the appellant was asked if he maintained his submission. He said that he did, that it was the support person who said the words to the complainant, and that he had informed his lawyer.

[22] The trial transcript records that after the complainant's statement was read out, she was called to give evidence. She was asked questions by the Judge, as follows: "How did you come to Court today?", "With whom?", "What is your father's name?", and "What is your mother's name?". The transcript records the complainant's answer to each question. The transcript does not include any reference to the alleged incident involving the appellant. After the question as to her mother's name, counsel for the prosecution made an application to the Judge to remove his wig, and for counsel to remove their wigs. The Judge agreed, and offered to leave the bench and sit at the clerk's table. An adjournment was then called.

[23] The transcript records that when Court resumed, counsel for the prosecution said to the Judge "You may ask her again what you had asked her earlier I think she is ready to answer". The Judge then asked the complaint "How are you today? "What did you have for breakfast today" "Your father is outside?" and "I forgot your father's name?" I set out the questions and answers that followed:

> *Crt: Why are you here today.*
>
> *A: He used his finger to poke my vagina my Lord.*

Crt: Who is he?

A: Osea my Lord.

Crt: Who is that Osea?

A: He resides in Korotogo my Lord.

[24] The complainant's evidence in chief was completed by the following question asked by counsel for the prosecution:

SC: [Complainant], Osea is your what?

A: My uncle my Lord.

[25] The Judge referred to the adjournment in his conviction judgment. He referred to a closing submission made by counsel for the appellant, in which the possibility of the complainant having been coached was raised. I set out the relevant paragraphs:

8. The victim was a 4-year old student at the time of the offence and now she is 6 years old. In the process of testing the competency of the child victim to give evidence and her capacity to understand the importance of telling the truth, I asked the victim "Why are you here today?" She first said "I don't know".

9. When I was speaking to the victim, it appeared to me that she was not comfortable in speaking up. My understanding was that her reluctance was due to her being exposed to a highly child unfriendly and distracting environment in the precincts of the court house. Even though a lady from the Women's Crisis Centre was allowed to be seated beside the victim and a screen was set up to cover the Accused, I found those measures inadequate to make the victim comfortable. Therefore, on an application of the State, I adjourned the court for 15 minutes for the victim to familiarize herself with the court environment and to facilitate the staff to make her comfortable.

10. When the Court reconvened, I did not go on to the bench but sat with lawyers at the bar table without the wig and gown. The lawyers also had taken off their wigs. The victim was no longer sitting in the witness box. When I asked the same question "Why are you here today?" the victim said "Osea used his finger to poke my vagina". I reproduce the relevant proceedings below: ... [omitted]

11. In her closing, the Defence Counsel invited the assessors to consider if the victim had been coached during the adjournment to come up with her answers to court. I am unable to agree with Counsel's proposition that the victim would have been

coached. If somebody wanted to coach the victim it could have been done well before the trial, my understanding is that the victim was feeling comfortable to open up with her story when the court reconvened in a more child friendly environment.

[26] It is clear from the conviction judgment that the Judge considered whether the complainant had been coached. It is also clear that defence counsel did not "do nothing", as the appellant contended. She made a submission to the Assessors that the complainant had been coached. I am not persuaded that the Judge erred in rejecting that submission. This ground of appeal must fail.

Did the Judge fail to canvass the defence case adequately, and thereby encumber the appellant's right to a fair trial?

[27] The appellant exercised his right to silence, and did not give or lead any evidence. His defence to the charge was a denial that the alleged incident ever occurred. His counsel put to the complainant in cross examination that she had not told the truth when she said that the appellant had used his finger to poke her vagina (to which she responded that she was telling the truth) and that the appellant had not done that (to which she responded that he had). His counsel put to the complainant's mother that whatever happened to the complainant, she knew that it was not done by the appellant, and that it was done by another person. She also put to the complainant's mother that she had personal grudges against the appellant. The complainant's mother denied both. The appellant's counsel covered those points in her closing address to the Assessors.

[28] In his summing up, the Judge summarised the evidence for the prosecution, then went on to provide an analysis. At the end of that summary the Judge referred to the appellant's election to remain silent, as follows:

60. You know that the accused elected to exercise their right to remain silent. That is his right. You should not assume that he remained silent because he is guilty. He has nothing to prove and is under no obligation to prove his innocence.

[29] In the course of his analysis of the case, the Judge reminded the Assessors as to the central issue for determination, at paragraph 64:

64. If you find that the victim has been digitally raped, you must be sure that it was the accused Osea Cawi and nobody else that had committed this crime. You have to be satisfied beyond reasonable doubt as to the identity of the accused before coming to the conclusion that he is guilty.

[30] With respect to the defence case, the Judge said, at paragraph 68:

68. Defence case is one of denial. Defence Counsel argues that the victim did not tell the truth in court. She wants you to disbelieve the witnesses called by the prosecution. She wants you to believe that victim's mother had made up this story and falsely implicated the accused for a crime somebody had committed.

[31] The Judge concluded his summing up as follows:

69. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution must prove their case beyond reasonable doubt.

70. If you believe that the victim is telling you the truth when she said that the accused poked his finger inside her vagina, you should find the accused guilty of rape. But if you do not believe victim's evidence regarding the alleged offence, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty. Your possible opinion is either guilty or not guilty.

[32] I am not persuaded that the Judge failed to give an adequate outline of the defence case. To the contrary, the Judge covered the matters canvassed in cross examination of the prosecution witnesses, and in counsel's closing address. This ground of appeal must fail.

Was the guilty verdict unreasonable and unsupportable?

[33] The appellant's final submission was that the guilty verdict was unreasonable and could not be supported having regard to the evidence.

[34] There is no merit in this submission. The guilty verdict was well supported by the evidence before the Court, in the form of the complainant's evidence, the evidence of her mother and the Police medical examiner, and the appellant's admissions in his caution interview. The appellant's submission is rejected.

ORDERS

(1) The appeal is dismissed

Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL