IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 0013.2018
(On Appeal from Court of Appeal No: AAU 0021.2014)

BETWEEN : **AISAKE NAULUMOSI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court**
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court
Hon. Mr. Justice Kankani Chitrasiri, Judge of the Supreme Court

Counsel : **Ms. T. Lee with Mr. K. Prasad for the Petitioner**

Ms. J. Prasad for the Respondent

Date of Hearing : **18 October 2018**
Date of Judgment : **1 November 2018**

JUDGMENT

Marsoof J:

1. I have read through the judgment of my brother Justice Brian Keith in draft, and I agree with his reasoning and conclusions.

Keith J:

Introduction

2. This case raises a practical problem which arises not infrequently. A doctor has prepared a medical report for use in court proceedings. By the time the trial takes place, the doctor has left Fiji. Whether his departure is permanent or temporary, he is not able to give evidence, and his report is inadmissible as hearsay. This case illustrates the solution to the problem which Fiji has come up with.

3. The petitioner is Aisake Naulumosi. I trust that I shall be forgiven for referring to him by his family name from now on for convenience. He faced charges in the High Court relating to sexual offences against his partner's daughter – one count of rape and two counts of indecent assault. The count of rape and one of the counts of indecent assault were contrary to the relevant provisions of the Penal Code as the offences were alleged to have taken place before its repeal, and the other count of indecent assault was contrary to the Crimes Decree (as the Crimes Act 2009 was then called) as it was alleged to have taken place after the Decree came into effect. Two of the assessors expressed the opinion that Naulumosi was not guilty on any of the counts. One of the assessors disagreed, and expressed the opinion that Naulumosi was guilty on all counts. The trial judge, Kumararatnam J, was satisfied of Naulumosi's guilt on all three counts, and accordingly convicted him on those counts. In due course, he sentenced Naulumosi to 13 years' imprisonment for the rape, and to 3 years' imprisonment for each of the two indecent assaults, those sentences to be served concurrently with each other making 13 years' imprisonment in all, with a non-parole period of 10 years.

4. Naulumosi applied to the Court of Appeal for leave to appeal against his conviction and sentence. The single judge refused leave to appeal, and Naulumosi renewed his application for leave to appeal to the Full Court. The Full Court (Chandra, Gamalath and Rajasinghe JJA) dismissed the appeal. The Court did not say in so many words whether it was refusing leave, or granting leave but dismissing the appeal. Nothing turns on that, though the fact that it talked of dismissing the appeal suggests the latter. Naulumosi no

longer pursues any appeal against sentence, but he now petitions the Supreme Court for special leave to appeal against conviction. This is the court's judgment following the hearing of his petition.

The filing of the petition

5. A petitioner has 42 days from the date of the decision of the Court of Appeal to file his petition for special leave to appeal to the Supreme Court. The decision of the Court of Appeal in this case was dated 8 March 2018. Accordingly, the petition had to be filed by 19 April 2018. It was not filed until 25 June 2018. The last few days of that can be ignored because Naulumosi's petition (which he drafted himself) was dated 20 June 2018, and on the assumption that it was handed to the prison authorities that day, it took a few days for it to reach the Registry of the Supreme Court. But even then it would have been over two months late.

6. Naulumosi's counsel, Mr Thompson Lee, told us that the reason why the petition was not filed earlier was because Naulumosi had been waiting for the court records. It was only when they did not arrive that he decided to draft the petition himself. The court records were with the Legal Aid Commission, but we were not told whether the Legal Aid Commission accepted that they had been requested by Naulumosi, (ii) if they had been requested, when that request had been received, and (iii) if it had been received, whether the Commission had indeed not provided them to Naulumosi. In these circumstances, it is difficult for us to decide whether the failure to comply with the rules was excusable or inexcusable. But the delay was not that long compared with the delay in other cases, and the prosecution has not said that it has been prejudiced by knowing of the petition two months later than would otherwise have been the case. In the circumstances, the court should, I think, consider the merits of the appeal, because if they are compelling, the court may well enlarge the time for filing the petition, even though it is unable to say whether the delay has been excusable.

7. I should add one thing to that Mr Lee told us that if someone is represented by the Commission in the Court of Appeal, the Commission will always advise the defendant after judgment has been given whether there are grounds for seeking special leave to appeal to the Supreme Court. If there are, the Commission will draft the petition. If there are not, it will not draft a petition, and the Commission will leave it to the defendant to take such course as he or she chooses. This rather gives the game away. The court will be able readily to infer the private advice the Commission gave from whether the petition was drafted by it or by the defendant in person. Although undesirable, that may be inevitable, but it is something the Commission should think about. What Mr Lee added was that if the defendant decides to draft a petition to the Supreme Court despite the unfavourable advice he or she may have received about the chances of success, the Commission will then represent them at the hearing.

The brief facts

8. In view of the issues which arise on the appeal, the facts can be summarised relatively briefly. Naulumosi was 44 years old when he was tried in 2013. By 2003 he had been living with the girl's mother for 5 years – they were to marry in 2007 – and the girl who was born in August 1996 regarded him as her stepfather even before 2007. The three of them were living together at Nasoki with one of her brothers. The girl's evidence was that one afternoon in 2003 when she would have been either 6 or 7, and her mother was away in Suva and her stepfather was looking after them, her stepfather had brought her home from hospital. There was no evidence about why she had been there. When they got home, he called her to come into the room where he was. He then began to touch her and take off the underclothes she was wearing. He then got her to lie down and after taking off his pants he lay on top of her and put his penis into her vagina. It was very painful and she was crying, but she accepted that she never called for help. She was not able to say how long that lasted, but not long after, he stood up and went out of the room. She acknowledged that she had not told her mother about it when she returned from Suva. She claimed that that was because she was frightened that her mother would not believe her and would be angry with her, presumably for telling lies about her partner. That was the incident to which the count of rape related.

9. In 2005 the family moved to Kinoya and continued to live there until 2007. On one occasion while they were living there, her stepfather came into her bedroom. She was unable to say when that was, but she said that she was 13 at the time. That cannot be right: in view of her date of birth she must have been 8, 9, 10 or 11 depending on when this happened. This time he touched her all over, including her breasts and vagina. She did not say whether this was over or under her clothing. She agreed that she did not call out, but claimed that that was because she was scared that he might get angry with her. Again she did not tell her mother about it. She did not say why that was, but she did say that her stepfather had told her not to tell anyone what had happened. That was the incident to which the first of the two counts of indecent assault related.

10. From Kinoya the family moved to Nabua. On one occasion in 2011 when the girl would have been 14 or 15, her father abused her again. This was the incident to which the second of the two counts of indecent assault related. She was wearing a T-shirt and shorts at the time, and he touched her breasts and vagina over her clothes. She said that she did not call out because she was scared that he might do something else to her. Nor did she complain about what had happened to her mother. Again she said that she had been scared that her mother would not believe her. But she must have had second thoughts about telling someone about what had happened because that year she told one of her schoolteachers about what had been going on. She did not say in her evidence how long before that this incident had taken place, but it was following her disclosure to her teacher that the matter was reported to the police.

11. The girl was 17 years old by the time of her stepfather's trial. In the course of her cross-examination, she said that her stepfather had been "doing it frequently". Indeed, later in her cross-examination, she said that it had happened 13 times. The prosecution did not put the case against Naulumosi on the basis that the counts in the indictment were representative counts. Indeed, none of the three counts stated that they were representative counts, which section 70(3) of the Criminal Procedure Decree (as the Criminal Procedure Act 2009 was then called) required to be done if a course of conduct was being alleged. Maybe that was because the possibility that there had been other

occasions when she had been abused only came out in her cross-examination. What she said about that, therefore, should be put to one side.

12. Naulumosi elected to give evidence at his trial. He denied all the allegations. He said that they just did not happen. His and the girl's evidence was so different that it could not be attributable to a mistake on her part. Either he or she was lying. He could offer no explanation for why she might be telling lies about him, and both his wife and his niece confirmed in their evidence that he looked after the girl very well and loved her. The judge must have been sure that it was she who was telling the truth to have convicted Naulumosi on all 3 counts.

The grounds of appeal against conviction

13. *Inconsistencies in the evidence*. The sole ground of appeal in the Court of Appeal was that the trial judge had not given sufficient weight to inconsistencies in the girl's evidence and to inconsistencies between her evidence and the evidence of other witnesses. The Court of Appeal was unimpressed with that contention, and that was the basis on which the appeal against conviction was dismissed. This ground of appeal was not relied upon in the petition or in the written submissions in support of the petition (which were drafted by counsel other than Mr Lee). Although Mr Lee said in his oral submissions that he wanted nevertheless to resurrect the argument, he did not develop the point at all – no doubt because he had other new points, and maybe Mr Lee thought that it would be tactically unwise to press too many of them. We therefore put that point to one side: the decision of the Court of Appeal on the point speaks for itself.

14. *The dates in the counts*. The girl had not been able to identify the dates when the three incidents she spoke about had happened. Accordingly, the three counts did not assign specific dates to them. Instead, a period during which each particular incident took place was identified in each count. In the count of rape, the period was 1 January 2003 to 31 December 2003 as the girl had said that the incident occurred in 2003. In the first count of indecent assault, the period was 1 January 2005 to 31 December 2007 as the girl had

said that the incident had occurred while the family was living in Kinoya between 2005 and 2007. In the second count of indecent assault, the period was 1 January 2011 to 18 September 2011 as the girl had said that the incident had occurred in 2011, and the witness statement of her teacher had given 19 September 2011 as the date on which the girl had told her what was supposed to have happened.

15. Mr Lee contends that all this placed Naulumosi at a significant disadvantage. It prevented him from being able to defend the charges properly. Without knowing with greater specificity when the incidents were alleged to have taken place, he was not able to say whether he had an alibi for the day in question, and was not able to call witnesses who might have been able to say that on the day in question they were at the family home and nothing of the kind alleged by the girl had occurred. This is an entirely new ground of appeal. It was not raised in the Court of Appeal, and as everyone knows, the Supreme Court will not allow new ground of appeal to be advanced unless they are truly compelling, and that a miscarriage of justice might otherwise occur. Indeed, it was not mentioned either in the grounds for special leave to appeal to the Supreme Court or in the written submissions in support of the petition. So counsel for the prosecution, Ms Jayneeta Prasad, did not even know that this was to be one of the arguments until the day of the hearing.

16. Ms Prasad argued that the lack of specificity about the dates might have been material if, for example, Naulumosi's defence was one of alibi. Since his defence was that nothing had happened at all, and that the girl was making things up, the actual dates when the incidents took place were immaterial. I do not agree. It was because Naulumosi did not know when the incidents took place that he could not say, for example, that he was elsewhere at the relevant time. Although his defence was that nothing happened, the lack of specificity over the dates meant that he was hampered in his search for evidence to support his account, whether evidence about where he was on the day in question or evidence from others about their presence in the family home at the relevant time.

17. Since the girl was unable to recall when the incidents took place, it was just not possible for the prosecution to identify when they occurred with any greater specificity. But

leaving that aside, Mr Lee's new argument is more fanciful than real. Firstly, the alleged rape and the first alleged indecent assault had occurred so long before the trial that it would have been difficult, if not impossible, for Naulumosi to recall where he had been during the period in question if a shorter period had been specified, or for potential witnesses to recall whether they had been at the family home on the day in question if a particular day had been specified.

18. Secondly, Naulumosi's legal team knew before the trial started (a) broadly speaking when the rape was alleged to have occurred and (b) precisely when the second of the two indecent assaults was alleged to have occurred. As for the alleged rape, the girl had said in her witness statement (served on the defence well before the trial) that it had occurred during term 2 of her school year while her mother was in Suva. It is true that she did not say in her witness statement how long her mother had been in Suva, but Naulumosi's legal team was in touch with the girl's mother: she was called as a witness for Naulumosi. Her evidence was that she had been in Suva for a week, and that information would presumably have been known to the defence before the trial. If anyone could have helped on when in 2003 that had been, it would have been the girl's mother. As for the second of the two alleged indecent assaults, the girl's teacher had made a witness statement which had also been served on the defence well before the trial. In that statement, she said that on Monday 19 September 2011 the girl had told her that her stepfather had raped her, and that he had done so on the previous Thursday, ie 15 September 2011.

19. For these reasons, the way the argument was developed cannot really help Naulumosi, but the argument has nevertheless highlighted a problem which other jurisdictions have grappled with but which Fiji, so far as I can tell, has not. That problem relates to the disadvantages faced by defendants who are tried many years after the relevant events took place. That commonly happens in historic sex cases, but the problem is not necessarily confined to them. The possible disadvantages were spelled out in Part 1 of the Crown Court Compendium entitled "Jury and Trial Management and Summing Up" issued by the Judicial College for England Wales in June 2018 at p 10-16 as follows (in which V refers to the complainant and D the defendant):

> "The passage of time may also have put D at a serious disadvantage. For example (again depending on the evidence in the particular case):
>
> (a) D may not now be able to remember details which could have helped his/her defence.
>
> (b) Because, after all this time, V has not been able to state exactly when and / or where D committed the crimes of which D is accused, D has not been able to put forward defences, such as showing that he/she could not have been present at particular places at particular times, which D may have been able to put forward but for the delay.
>
> (c) D has not been able to call witnesses who could have helped his/her defence because they have died / cannot be traced / cannot now remember what happened.
>
> (d) D has not been able to produce documents which could have helped his/her defence because they have been lost / destroyed / cannot be traced."

20. In an extreme case, the remedy for that is to stay the proceedings, but that is a course of last resort and in the overwhelming majority of cases such disadvantages as the defendant may be under can be catered for by a suitable direction in the judge's summing-up. Blackstone's Criminal Practice 2016 at para D3.79 contains an accurate summary of when a direction about those disadvantages is required:

> "In *H* [1998] 2 Cr App R 161 at p 168, the Court of Appeal said that a direction on delay 'is not to be regarded as invariably required except in cases where some significant difficulty or aspect of prejudice is aired or otherwise becomes apparent to the judge in the course of the trial'. However, 'such a direction should be given in any case where it is necessary for the purposes of being even-handed as between complainant and defendant'. In *M* [2000] 1 Cr App R 49, it was said that trial judges should tailor their directions to the circumstances of the particular case. The Court of Appeal added that, where the evidence was cogent, such a warning might not be necessary and its

absence would not necessarily render a conviction unsafe, particularly when counsel's submissions at trial had not highlighted any specific risk of prejudice."

21. Blackstone noted at para D3. 80 that cases involving sexual offences, such as child abuse cases, may be regarded as an exceptional category in their own right:

> "It is often the case that such allegations emerge a long time after the alleged abuse took place. The view generally taken by the courts is that the unfairness can be minimised by a direction to the jury to take proper account of the fact that the accused was handicapped in defending the case because of the length of time which has elapsed since the alleged offence was committed. Any residual prejudice is regarded as outweighed by the importance of prosecuting such serious offences. In E [2004] 2 Cr App R 61, the Court of Appeal said that juries should be trusted to make allowances not only for the lapse of time but also for the difficulties faced by an accused who could only deny the offence (per Keith J)."

22. It is indeed the case that Naulumosi could do no more than simply deny that anything had happened, but for the reasons given earlier, the disadvantages which he claims to have been under as a result of the lack of specificity of the dates in the charges – which was itself a product of the lapse of time since some of the offences had allegedly been committed – were more imagined than real. Indeed, these supposed disadvantages were not, as far as I can see, relied on at the trial. In the circumstances, had the summing-up been criticised on the basis that a direction on the disadvantages under which Naulumosi was labouring as a result of this lapse of time had not been given, I would have rejected such a complaint.

23. *The medical evidence*. The girl was examined by a doctor on the day after the police became involved. He prepared a report of his examination of her. That report was among the documents served on the defence almost two years before the trial. The record shows that it was on 21 February 2013 that trial dates were fixed – namely 11-15

November 2013. However, by the time of the trial, the doctor had left Fiji permanently, and would be unable to give evidence at the trial. We do not know precisely when the prosecution became aware of that, although on 1 October 2013 the doctor's name appeared on a list of those witnesses who were to be summoned to attend the trial. Sometime between then and 5 November 2013 the prosecution must have become aware that the doctor would not be able to attend the trial, because on that date the Court was informed of the absence of the original doctor and of the prosecution's intention to call another doctor. The new doctor's name appeared on a list dated 6 November 2013 of those witnesses who were summoned to attend the trial. The defence took no point on any of this at the time. They did not object to the original doctor's report being produced in evidence, or to the new doctor being called to give evidence about the contents of the report. The trial duly proceeded on 11 November 2003 with the original doctor's report produced in evidence, and the new doctor being called to comment on it.

24. The medical report referred to the doctor's examination of the girl's vagina. He described the vulva as normal but added that the hymen could not be seen in its entirety. He referred to the hymen as "scrunchy", and he made two small sketches of it. Although he did not say it in so many words, I infer that one sketch represented what he would have expected a normal hymen to look like, and the other represented what the girl's hymen looked like. However, he did not say that the scrunchy appearance of the girl's hymen looked abnormal, and so this part of the report does not take things any further.

25. The important part of the report for present purposes is the last paragraph in the report in which the doctor expressed his opinion about what conclusions could be drawn from his physical examination of the girl's vagina. He made the point that the penetrative incident was alleged to have occurred many years previously, and for that reason "acute trauma" (if it had ever been present) would no longer have been visible. He concluded that his "findings *could* suggest previous penetration of vagina" (emphasis supplied). By "findings" he must have been referring to what the physical examination of the girl's vagina had revealed.

26. The new doctor purported to produce this report. The note of his evidence in the court record is unsatisfactory. The only statement of substance in his evidence-in-chief was: "I must agree with the doctor." But we do not know what the question was, so we do not know what he was agreeing with the original doctor about. He could not have been agreeing with what the original doctor found on his physical examination of the girl because he did not see what the original doctor had seen. Nor could he have been agreeing with the original doctor's opinion that the state of the girl's vagina was consistent with previous penetration because he had not seen the girl's vagina. I take it that he must just have been agreeing with the original doctor's sketch of what a normal hymen looks like. I cannot see anything else in the report which he was capable of agreeing with.

27. The note of the new doctor's evidence in cross-examination in the court record is incomplete, and no assistance can be derived from what the new doctor is there recorded to have said. But in his summing-up the judge said at para 34:

> "In the cross examination witness said that there is a possibility of hymeneal damage due to possible sexual act or due to active sports."

The new doctor could not, of course, say whether there was any damage to the girl's hymen as he had not examined it, and I therefore assume that he was saying that a woman's hymen can become damaged as a result of vigorous activity like playing sport as well as a result of penetrative sex.

28. There is no criticism of the fact that a new doctor was called to give evidence. That is not surprising. Section 133 of the Criminal Procedure Act 2009 (as the Criminal Procedure Decree is now called) deals, amongst other things, with reports from medical practitioners. Section 133(5) provides:

> "The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under

> sub-section (2), may be referred to and commented upon by another expert called as a witness in any criminal trial."

On my reading of what the new doctor said about the report, he was entitled by this provision to say what he did, provided that the requisite notice under section 133(2) had been given.

29. The criticism is that the judge should not have permitted the report to be produced in evidence without the original doctor being called to give evidence. That is because it amounted to inadmissible hearsay. Reliance was placed on the recent decision of the Supreme Court in ***Tuilagi v The State*** [2018] FJSC 3 in which the Court said at para 55:

> "... the petitioner had complained that the learned trial judge treating the medical reports as hearsay evidence is in violation of section 116(1) and (2) of the Criminal Procedure Act. In the course of the main trial the medical reports pertaining to the petitioner had been produced but the medical officer who prepared the report had not been summoned to testify. As such the learned trial judge had correctly treated the reports as hearsay ..."

Although this argument was made a ground of appeal in the petition (indeed, the only ground of appeal), it had not been raised in the Court of Appeal. Accordingly, we can only consider granting leave for this ground to be argued if it is truly compelling and a miscarriage of justice might occur if we refused to consider it.

30. The Supreme Court in ***Tuilagi*** did not refer to section 133 of the Criminal Procedure Act. Maybe it was not brought to the Court's attention. Section 133 in effect creates an exception to the rule against hearsay, and permits medical reports (as well as other kinds of reports) to be produced in evidence without the maker of the report being called as a witness provided that certain conditions are satisfied: see the decision of the Supreme Court in *Nacagilevu v The State* [2016] FJSC 19. It provides, so far as is material:

> "(1) Any … report … purporting to have been made … in the course of … [a] profession by any of the persons specified in sub-section (3), may be given in evidence in any trial …, unless the person shall be required to attend as a witness by –
>
> (a) the court; or
>
> (b) the accused person, in which case the accused person shall give notice to the prosecutor not less than 14 clear days before the trial …
>
> (2) In any case in which the prosecutor intends to adduce in evidence a … report … a copy of it shall be delivered to the accused not less than 21 clear days before the commencement of the trial …"

Medical practitioners are among the persons specified in section 133(3). Accordingly, the original doctor's report could have been produced in evidence without the original doctor being called to give evidence provided two conditions were satisfied: Naulumosi had not required the original doctor to attend, and his report had been served on the defence at least 21 clear days before the trial.

31. Both these conditions were satisfied. The report had been served on the defence with the rest of the disclosures on 1 February 2012, almost two years before the start of the trial. And Naulumosi's legal team did not require the original doctor to attend the trial when they became aware 6 days before the trial was due to begin that he was not going to attend. It is true that they would not have been able to give the 14 clear days' notice of the need for him to attend in view of the imminent start of the trial, but that requirement was included in section 133(1) to ensure that the prosecution was not taken by surprise by being told too near the trial that the original doctor had to attend. In any event, the question whether sufficient notice had been given only arises if the defence told the prosecution that it wanted the original doctor to attend, and it never did. If it had, even though it could not have given the prosecution the 14 days clear notice, the prosecution would not have been able to rely on the report unless they recalled the original doctor from overseas.

32. In the interests of completeness, I have also considered whether the proviso to section 23(1) of the Court of Appeal Act would have had to be applied if I had thought that the report of the original doctor had been wrongly admitted into evidence. I do not think that a substantial miscarriage of justice would have occurred. The effect of the report was only that the girl's physical condition was consistent with penetrative sex having occurred at some time. But there was no question of that having been likely: indeed, the evidence of the new doctor was that it was just as consistent with vigorous physical activity. In other words, the medical evidence only showed that penetrative sex could not be ruled out as a possibility. In the circumstances, the proviso to section 23(1) would have saved Naulumosi's convictions from being quashed if the report had been admitted into evidence erroneously.

33. Finally, I appreciate that the judge misdescribed the original doctor's findings when he said in both his summing-up and his judgment that those findings *would*, not *could*, suggest penetrative sex. But he was aware of the new doctor's evidence about other things which her physical condition might have been attributable to, and the use of the word "would" rather than "could" by someone whose first language was not English is not a sure foundation for saying that he completely misunderstood the effect of the combined evidence of the report and the new doctor.

Conclusion

34. For these reasons, I do not think that the merits of the proposed appeal are sufficiently compelling to justify granting Naulumosi an extension of time for filing his petition. I would therefore refuse an extension of time, but even if I had thought that his time should be extended, I would have refused Naulumosi special leave to appeal against his convictions on the basis that they raised no important point of principle and that no miscarriage of justice had occurred.

Chitrasiri J:

35. I have read in draft the judgment of Keith J and agree with his conclusions and reasoning and with the order proposed.

Order of the Court:

Application for an extension of time in which to file the petition for special leave to appeal against conviction refused.

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Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court

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Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

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Hon. Mr. Justice Kankani Chitrasiri
Judge of the Supreme Court

Solicitors:
Office of the Legal Aid Commission for the Petitioner
Office of the Director of Public Prosecutions for the Respondent.