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

CRIMINAL APPEAL NO. AAU 065 OF 2011
[High Court Case No. HAC 50 of 2010 L]

BETWEEN	:	**SACHEND CHAND**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Basnayake, JA** **A. Fernando, JA** **Wengappuli, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Ms. J. Prasad for the Respondent**
Date of Hearing	:	**9 February 2016**
Date of Judgment	:	**26 February 2016**

JUDGMENT

Basnayake JA

I agree with the reasons and conclusions of Fernando JA.

Anthony F. T. Fernando JA

1. The Appellant in this case had been convicted of the offence of rape contrary to section 207(1) and (2) (c) of the Crimes Decree No 44 of 2009 and sentenced to a period of 16 years with a non-parole period of 14 years imprisonment under section 18(1) of the Sentencing and Penalties Decree.

2. The Appellant had made a leave to appeal application before a single Judge of this Court against his conviction and sentence. The learned Justice of Appeal had refused to grant leave against conviction but granted leave against sentence. The Appellant

who was unrepresented at the time the leave to appeal application was sought and determined, had thereafter sought assistance from the Legal Aid Commission. The instant application for leave to appeal both against conviction and sentence was made by the Legal Aid Commission on behalf of the Appellant under section 35(3) of the Court of Appeal Act.

3. At the hearing before us State had no objection for granting leave to appeal against conviction. Having heard the Appellant's Counsel we decided to grant leave to appeal against conviction also.

4. The Appellant has raised before the full Court two grounds of appeal against his conviction:

(i) The learned Trial Judge erred in law and in fact when he failed to remind the child victim about the importance of telling the truth before receiving her evidence.

(ii) The learned Trial Judge erred in law and in fact when he invited the assessors to look for evidence that supported the Appellant's evidence that he had given his confession involuntarily; and

5. Two grounds of appeal against his sentence:

The learned Trial Judge erred in exercising his discretion to the extent that:

(i) He commenced sentencing at a high starting point; and

(ii) Punished the Appellant twice by using the age of the victim to increase his sentence by 4 years as an aggravating feature.

6. In relation to his ground of appeal against conviction referred to at paragraph 4 (i) above Counsel for the Appellant contended that the victim was 4 years old at the time of offending as per the Agreed Facts tendered to Court under the provisions of section 135 of the Criminal Procedure Code Decree of 2009 and would have been about 5 ½ years old when she testified before the Court. Counsel referred us to the proceedings of 31/05/2011 at 11 am, which notes the commencement of the testimony of the child victim as follows:

> *"BX (Name suppressed)*
> *Sworn on Holy Quaran in Hindi*
> *Tauvegavega*
> *I live with my mother. My mother's name is Kusuma Begum...."*

7. It was the Appellant's submission that "Since the child was of such tender age it was incumbent upon the learned Trial Judge to ascertain whether the victim knew that she had to tell the truth in Court about what had happened to her. The fact that she was sworn does not mean that the child knew the importance of telling the truth in Court." It was his submission that the failure on the part of the Trial Judge was fatal to a fair trial. To further his argument he relied on the Appellant's defence that there "was some enmity between the Appellant and the victim's grandmother (the victim calls her mother) over the boundary of land which had prompted the grandmother to concoct a story to implicate the Appellant"; and referred us to the following evidence in cross-examination of the victim:

> "Q. Your mother told you to say something bad about this man?
> A. Yes
> Q. Because she wanted to take over the land close to the place?
> A. Yes."

The Appellant went on to argue that the victim had contradicted the grandmother for "When the grandmother gave evidence she denied there was any land issue with the Appellant and that she had not concocted this story to implicate the Appellant."

8. In my view what is important is to ascertain from the testimony of the child victim before the Trial Court is, whether she knew that she had to tell the truth in Court about what happened to her and whether the evidence in this case bears out that the victim's grand-mother had a reason to concoct a story to implicate the Appellant. This would necessitate an examination of the testimonies of the victim, her grandmother and the Appellant before the Trial Court. The Judge and the Assessors being triers of fact would have been in the best position to ascertain whether the victim spoke the truth while testifying despite the failure of the Trial Judge to remind her of the importance of speaking the truth.

9. The evidence of the victim referred to as 'BX' is recorded in the record of the proceedings of the High Court as follows. BX who lives with K. Begum, her grandmother, whom she had referred to as her mother had stated that the Appellant is a neighbour of her and she used to call him grandfather. Her evidence had been to the effect that on the day the police came to arrest the Appellant "who did something to me"; the appellant "undressed and pulled his pyjamas down. He put his penis around my vagina from behind and put his penis into mouth. Witness drew 'pumpum' meaning penis shown to Mr. Terere and assessors. He told me not to tell anyone. I told my mother (*reference to her grandmother with whom she lives*). My mother told to another aunt. Her father called the Police. The Police arrested that man. First round my vagina and then from behind and then in my mouth. Not right inside but it was inside. Witness demonstrated with the index finger. He then pulled it out. He then told me not to tell anyone. After he took the penis he pissed on the bed and then he wiped it out, It was white.....from the calendar." (verbatim). BX had identified the Appellant in Court. Under cross- examination she had stated that she used to play in the Appellant's house. The incident had happened midday around 12.00 noon. To the specific questions in cross examination BX had given the following answers:

> *Q. This man, you said that he did bad things to you. Are you sure about that?*
> *A. Yes, I am telling the truth.*
> *Q. You mother told you to say something bad about this man?*
> *A. Yes.*
> *Q. Because she wanted to take over the land close to the place?*

A. Yes.

And in re-examination BX had said: "He did that bad thing. I am telling the truth."

10. The answer in the affirmative by the victim to the question that the mother had told her to say something bad about the Appellant does not necessarily mean that she had been asked to fabricate a case against the Appellant. It may very well be in the mind of a child that she had been asked to report the bad thing the Appellant had done to her. Again a closer view of the question put in cross-examination to the girl is that her mother had told her "to say something bad" about the Appellant. It had not been suggested that she had been coached to say what she told Court in her examination in chief and it is difficult to conceive that she could have concocted such a story. A girl of tender years could not have understood the implications of fabricating a case in order to take over the land of the Appellant. What is important in her testimony is her insistence that "I am telling the truth"; which I believe both the Assessors and the Judge having seen her demeanour while testifying had believed and relied upon.

11. K. Begum testifying before the Trial Court had stated that the victim was her granddaughter, namely son's daughter and that she was looking after the victim as her father had died and her mother gone away leaving her alone. On the day of the incident she had asked the victim to go and get the victims shoes that she had left behind at the Appellant's house. On her return from the Appellant's house the victim had told her: "..... that grandfather did something bad with 'pumpum'. She was sad-excited. ....Accused took off his pants and BX's clothing and took penis out. Rubbed his penis around vagina and from the back and put his penis in her mouth. She said after he pulled penis out of mouth, he pissed on the bed. I waited for my daughter. She got angry. She told that to her husband. We reported the matter to the police. No land issue with the accused.....That's the story we never make up stories. We didn't accuse people."(verbatim)

12. Under cross-examination she had said that the victim goes to the Appellant's house to play with his grand-children when they visit the accused. Her immediate reaction

on hearing of what the Appellant had done was to settle the matter but her sister-in-law had advised her to go to the police. She had denied the defence allegation that she had fabricated this story by making use of her grand-daughter because she was occupying part of the Appellant's land and wanted to get him out of the land. Begum had said that she does not have enmity towards the Appellant.

13. The Appellant in his testimony before the Court had denied the charge levelled against him. He had not attributed any specific reason for Begum to fabricate the case against him, save the general allegation that his neighbours were encroaching on his land and planting bananas in it. He had said: "She must have been manipulated by mother. Because of the boundaries. No other reason to manipulate". (verbatim) He does not even know the name of the victim's grand-mother. He had also admitted that Begum had been invited for his daughter's wedding. He had not stated that the grandmother "wanted to take over the land close to the place".

14. The Appellant had claimed that he had been assaulted non-stop by the police for a total of 8 hours with PVC pipes to the point that he had been vomiting blood. He had been assaulted on his chest, back head and ears and made to sign a paper. He claims that he does not know how to read and write. He had said that he was simply asked to sign a statement. It turns out however that his father's name, his age, his pseudonym, his level of education, his employment, place of work and hours of work, had been correctly stated in his confessional statement. He had admitted that he had not mentioned to the Magistrate about his assaults despite being represented by Counsel to whom he had complained about his assaults. The Appellant is 50 years old and according to his testimony had a kidney problem. The medical report does not bear out any injuries on him.

15. Counsel for the Appellant had sought to place reliance on the High Court case of **The State v A.V,** [2009] FJHC 24; HAC 192 of 2008 (21 February 2009) which he states was endorsed by the Court of Appeal in the case of **Rahul Ravinesh Kumar v**

The State ;Criminal Appeal No AAU0049 of 2012. In the case of **The State v A.V** the learned High Court Judge had stated that when a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has, is to remind the child of the importance of telling the truth before receiving his or her evidence. I have examined this decision and find this had been stated by way of obiter. This undoubtedly is a good practice but it cannot be said that the failure to do so was fatal to the conviction of the Appellant. To hold otherwise would amount to a violation of section 26(1) of the Constitution, which states: "Every person is equal before the law and has the right to equal protection and benefit of the law". Section 26(3) of the Constitution prohibits unfair discrimination against a person directly or indirectly on the ground of age. Section 26(7) of the Constitution states treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be established that the difference in treatment is not unfair in the circumstances. Section 26(8) prescribes circumstances under which the right to equality and freedom from discrimination can be derogated but none of those circumstances apply to the evidence of children of tender years.

16. In the case of **R. v W. (R.)** [1992] 2 S.C.R 122 **McLachlan J** of the Supreme Court of Canada stated at 134:

> *"It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards. To do so would be to create new stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate".*

17. Concentration should not be merely on the age of the child but to determine whether the child witness can understand the questions being asked and whether the Assessors can understand the answers that are being given. In the case of **R v B** [2011] Crim L.R. 233 CA, it was said that the age of a witness is not determinative

of his ability to give truthful and accurate evidence, and if found competent, it is open to a jury to convict on the evidence of a single child witness, whatever his age. Again in the case of **DPP v M** [1997] 2 Cr App.R. 70, DC, it was held that a child should not be judged incompetent on the basis of age alone.

18. The learned Trial Judge and the assessors have decided to accept as true the testimony of the victim as being truthful having gauged her mental development, understanding the ability to communicate and her demeanour when testifying. They were in the best position to make that assessment. It would be wrong on our part to decide otherwise not having had the opportunity to see her testify.

19. It would not be in the best interest of a child and will be inconsistent with the children's right to equality before the law if we are to allow this appeal merely because the learned Trial Judge had failed to remind the child of the importance of telling the truth before receiving his or her evidence. Section 41(2) of the Constitution states: "The best interests of a child are the primary considerations in every matter concerning the child."

20. I have no hesitation in dismissing the first ground of appeal against conviction.

21. The Appellant's second ground of appeal against conviction is that the learned Trial Judge erred in law and in fact when he invited the assessors to look for evidence that supported the Appellant's evidence that he had given his confession involuntarily.

22. He referred to paragraph 38 of the summing up in relation to this where the learned Trial Judge had stated in his Summing Up to the Assessors: ".....You need to consider the evidence of the accused more closely to see whether there is in fact acceptable proof of such assaults by police to affect the reliability of confessions. For this, you must consider whether there were prompt complaints of such assault or

evidence of treatment medically for conditions, if any, created by such assaults." (emphasis by me) It is the contention of the Appellant in making this statement the learned Trial Judge had shifted the burden of proof on the Appellant to prove that he was assaulted by the police officers and was asking the Appellant to prove his innocence. The Appellant had also complained that there was no direction given to the Assessors that if they think the confessions were obtained in the manner stated by the Appellant then they should disregard the confession.

23. There is no challenge by the Appellant to the Ruling on Voir Dire in regard to the learned Trial Judge having misdirected himself on the burden of proof or the presumption of innocence. At a trial it is the duty of the Trial Judge to admit the confession after the voir dire and the duty of the Assessors to decide on its probative value or effect, though in considering that question every matter of fact that may have been relevant to its admissibility should be considered.

24. I am of the view that the challenged statement in paragraph 38 of the summing up does not in any way shift the burden of proof on the Appellant or affect the presumption of innocence. The 'acceptable proof' could well be from the prosecution evidence itself. 'Proof' according to the Trial Judge at paragraph 22 of his summing up can be established only through evidence. As correctly argued by the State, the word 'proof' here is being used synonymously with evidence. The position would have been different had the learned Trial Judge said that the accused failed to establish that he was assaulted, by medical evidence or by having made a prompt complaint.

25. The learned Trial Judge had said in the course of his summing up "The burden of proof of the case, in the light of the presumption of innocence...rests fairly and squarely always with the prosecution. The prosecution is never relieved of that responsibility and it does not shift to the accused-person at all...in other words, if I am to put it differently from the perspective of the accused-person, there is no

burden of proof whatsoever on the accused person that he is innocent." And again "If you find a reasonable doubt in the case for the prosecution, such doubt should always be given to the accused person. You have to remember that, at no time the prosecution is entitled to the benefit of any doubt that may occur in the course of the prosecution case or the defence case…".(emphasis added). It is clear that the defence case had been a denial of the allegation and that the confession was not voluntary. The learned Trial Judge had also said: "The accused also attacks the evidence of police witnesses in regard to cautioned interview statements stating that they were obtained forcefully and after being assaulted. You need to consider the confessions in the cautioned statements in the light of this attack to see whether the confessions were in fact made and if so whether they were voluntary…." He had gone on to state that if the attacks of the accused on the confession are accepted by you "then the prosecution case fails. Or, if you feel that it creates a reasonable doubt, then again, the case for the prosecution fails and the accused should be acquitted." In the light of these directions to the assessors by the learned Trial Judge, I am of the view that there is no merit in the second ground of appeal and it is dismissed.

26. The case against the accused rested not merely on the confession but on the evidence of the victim and her grandmother to whom the victim had made a prompt complaint. The Appellant's description of the incident as stated in his confession is corroborated by the victim's evidence.

27. I therefore dismiss the appeal against conviction.

28. As regards the appeal against sentence the Appellant makes reference to paragraph 14 of the Ruling on Sentence where the learned Trial Judge had stated:

> *"I am in the circumstances, inclined to pick up a starting point of 14 years for the sentence in this case to reflect that the victim is very small compared to those in the two cases referred to above. I add four years for the considerations in paragraphs 10 and 11*

above, which I consider as seriously aggravating circumstances to enhance the sentence to reach 18 years."

The considerations in paragraph 10 and 11 are: "The victim in this case was only four years of age at the time of the incident. She was just stepping into her formative ages and moving around playing. The accused, who was fifty, had three grown up children, two of them were married. The accused had four grandchildren from the two married daughters out of who were in or about the same age as that of the victim. There cannot be any doubt that the accused, in the circumstances, knew the value of children and that they needed protection and shelter from adults. Despite that the accused raped the little girl, who was in the age group of his grandchildren to satisfy his unnatural lust."

29. It was the submission of the Appellant that the learned Trial Judge had already taken into account the tender age of the victim when arriving at the starting point of 14 years imprisonment. By adding another 4 years as part of the aggravating factor on the basis of the victim's age is a case of double punishment which is an error in the exercise of discretion. The State concedes that there had been a double counting or repetition of the same aggravating matter.

30. It is the submission of the Appellant that the starting point of 14 years on the basis of the victim's age was quite high considering the nature of the offending and relies on the Court of Appeal decision in **Asesela Drotini v The State,** Criminal appeal No. AAU 0001 of 2005, where it had been recommended that for rape of a juvenile girl by a person of breach of trust the starting point should be 10 years imprisonment. However the Court had also stated where there are further aggravating factors, there should be substantial increases above the starting point. In the case of **Asesela Drotini** the victim was 9 or 10 years old and the accused had been sentenced to a period of 11 years. The Court however in the case of **Drotini** in dismissing the appeal on sentence had stated: "We consider that the facts of this case merited a sentence of more than eleven years but we do not consider the sentence so manifestly lenient that we should interfere".

31. I am of the view that the starting point of 14 years adopted by the learned High Court Judge was the correct one. I hold that adding 4 years as part of the aggravating factor on the basis of the victim's age is double punishment and the learned High Court Judge erred in this regard. I do not want to disturb the deduction of 15 months made on account of the Appellant being a first offender and I agree with the deduction of 9 months for the period the Appellant had been on remand. I therefore substitute for the sentence passed by the learned Trial Judge, a sentence of 12 years with a non-parole period of 10 years with effect from the 3rd of June 2011.

A. Wengappuli JA

I have read and concur with the judgment of Anthony F. T. Fernando JA.

The Orders of the Court are:

1. *Appeal against conviction is dismissed.*
2. *Sentence of 12 years with a non-parole period of 10 years substituted.*

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Hon. Justice E. L. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice A. Fernando
JUSTICE OF APPEAL

.....
Hon. Justice A. Wengappuli
JUSTICE OF APPEAL

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