IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 105 of 2014
(High Court HAC 114 of 2013)

BETWEEN	:	**SEMI MOCEITUBA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Chandra, JA** **Goundar, JA** **Sharma, JA**
Counsel	:	**Mr. M Fesaitu with Ms. V Narara for the Appellant** **Mr. S Babitu with Mr. A Singh for the Respondent**
Date of Hearing	:	**5 July, 2018**
Date of Judgment	:	**6 December, 2018**

JUDGMENT

Chandra, JA

[1] The Appellant was charged with two counts of Rape contrary to section 207(1) (2)(b) and (3) of the Crimes Act, 2009.

[2] The Appellant was found guilty, convicted and sentenced to a term of 13 years imprisonment with a non-parole period of 10 years.

[3] The Appellant sought leave to appeal to the Court of Appeal against his conviction and sentence on the following grounds:

1. The learned trial judge erred in law and in fact when he failed to direct and or guide the assessors properly on the significance of the recent complaint evidence.
2. The learned trial judge erred in law and in fact when he failed to remind the complainant of the importance of telling the truth.
3. The learned trial judge erred in law when he failed to deduct the remand period from the interim period as a separate factor.

[4] The single Judge of the Court of Appeal granted the Appellant leave to appeal against his conviction and sentence.

Factual Background

[5] In 2013 the victim and her mother had lived in Navo with her brother's family. Her step-father, the Appellant also lived with them in the same house. The victim had been 7 years old and when her mother had asked her whether anything was going on between her and the Appellant, she was seen to be scared. She had been seen with the Appellant often. After some time the victim had told her mother that the Appellant used to touch her body after she takes a shower, that he touched her face, kissed her breast and inserted his finger

into her vagina. The Appellant had threatened the victim and told her not to tell anyone as he would beat her and kill her mother. After the victim had revealed to her mother what the Appellant had been doing to her, a complaint was made to the Police which led to the Appellant being arrested and charged.

[6] At the trial before the High Court, the victim's mother, the victim, the Doctor who examined the victim, and two Police Officers gave evidence for the prosecution while the Appellant gave evidence on his behalf and denied the charge.

[7] The Assessors were unanimous in their opinion of guilt of the Appellant and the learned trial Judge concurred with same and the Appellant was convicted.

[8] The Appellant was sentenced to 13 years imprisonment with a non-parole period of 10 years.

The present appeal

[9] The first ground of appeal is on the inadequacy in the summing up of the learned trial Judge regarding recent complaint.

[10] The significance of recent complaint has been discussed in several cases previously. Recent complaint has been considered only as evidence of consistency of the complainant's conduct. In **Raj v State** [2014] FJSC 12; CAV 0003.2014 (20 August 2014) the Court said:

> *"[33] In any case evidence of recent complaint was ever 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 & Others v The State** Crim. App. 12 of 1989; Jones v The Queen [1997] HCA 12; (1997) 191 CLR 439; **Vasu v The State** Crim. App. AAU0011/2006S, 24th November 2006."*

[11] In the present case, at the commencement of the case, when the evidence of the victim (who was 9 years old at that time) was about to be taken, she had started crying stating that she wanted her mother to be with her. Thereupon the prosecution made an application to call the mother first, which was allowed. The victim's evidence was taken after the mother's evidence.

[12] This was an instance where the victim when spoken to by her mother had come out with as to what the Appellant had done to her. The mother having been suspicious about the manner in which the Appellant had taken an affinity to the victim had asked her as to whether anything was going on. It is thereafter that the victim had come out with what the Appellant had done to her. It is a classic example of a situation where children of a very young age would not complain unless someone probes into the strange conduct of such children. The question that would arise would be whether what was revealed by such a child in such circumstances would become a recent complaint. In this instance, the learned trial Judge did not deal with complaint evidence in his summing up.

[13] In his summing up the learned trial Judge having explained the law that was applicable, summarized the evidence led at the trial and stated that it was left for the Assessors to consider the evidence carefully. Reference was also made to section 129 of the Criminal Procedure Act 2009 stating that corroboration was not required in sexual offences cases.

[14] It is also to be noted that in his judgment concurring with the opinion of the Assessors, the learned trial Judge stated specifically that the victim had given very firm evidence and that the doctor's evidence was to the effect that the hymen of the victim was damaged which could have been due to the insertion of any foreign object including a finger. The learned trial Judge in his judgment did not refer to the evidence of the mother which would further support the position that he was relying on the evidence of the victim.

[15] It is apparent therefore that the learned trial Judge had relied on the evidence of the victim and had been satisfied that her evidence was credible. When considering the evidence given by the victim and the cross-examination it would seem to be so as she has

withstood the cross-examination well. Therefore if the victim's evidence was credible the learned trial Judge who had observed the victim giving evidence and if he was satisfied with the demeanour of the victim as well, he could have arrived at the conclusion that the Appellant was guilty on the basis of the evidence of the victim which was consistent with the medical evidence. In such an instance a direction on recent complaint in the summing up to the Assessors may not be necessary.

[16] Therefore the submission that the failure of the learned trial Judge to direct the Assessors on recent complaint being prejudicial to the Appellant cannot be maintained as the victim's evidence alone was sufficient to establish the Appellant's guilt. The assessors brought in a unanimous opinion that the Appellant was guilty, which would indicate that they believed the victim. Therefore this ground of appeal fails.

[17] The 2nd ground of Appeal relates to the manner in which the learned trial Judge should have dealt with the victim's evidence when she commenced to give evidence. The submission was that the learned trial Judge failed to remind the child victim the importance of telling the truth.

[18] The proceedings reveal that the child victim had given evidence without taking an oath. There is no record of the learned trial Judge carrying out a competency test as is usually done regarding child witnesses. She had been 9 years old at that time. In her examination-in-chief the victim had told about herself and her schooling and thereafter had answered the specific questions put to her.

[19] The victim had been cross-examined by the Appellant (who was unrepresented) and she had answered the questions put to her by the Appellant.

[20] The questions and answers related to the incidents involving the Appellant and she had given direct answers to them.

[21] This therefore was an instance where the child victim had given unsworn evidence and where the learned trial Judge had not carried out a competency test and not reminded the victim that she should tell the truth. Do these factors by themselves cause a miscarriage of justice as submitted by Counsel for the Appellant?

[22] Counsel for the Appellant submitted citing the decision in Kumar v State which endorsed the decision in **State v A.V.** unreported Criminal Case HAC 192 of 2008; 2 February 2008; that the trial judge had an obligation to remind the complainant of telling the truth and that in the present case it had not been done. That since the only evidence implicating the Appellant was the evidence of the complainant, that it was crucial for the trial judge to remind the complainant of telling the truth before accepting her evidence and later assessing her evidence. That thereby the Appellant has suffered a miscarriage of justice.

[23] Counsel for the Respondent submitted that the failure of the learned trial Judge of reminding the victim to tell the truth was not fatal in the circumstances of this case. He cited **Chand v State** [2016] FJCA 20; AAU065.2011 (26 February 2016) which also dealt with an instance where the trial Judge had failed to remind the victim to tell the truth.

[24] In Chand the learned trial Judge had failed to remind the child victim to tell the truth, and the Court of Appeal stated thus:

> *"[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 ..... 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.*
>
> ... ...
>
> *[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."

[25] On a consideration of the above matters stated in **Chand**, what would be necessary to see in the instant case is whether the trial Judge and the Assessors were able to determine from the questions asked of the victim and the answers given that the victim was capable of understanding the questions and answered them in the manner that she had answered them implicating the Appellant.

[26] The victim was cross-examined by the Appellant who was unrepresented and she answered as follows:

"1. Are you sure that this incident did by me? Yes.
2. Did we sleep together in the same room ? No.
3. Were you staying together ? Yes.
4. When.....happened your .... Are you sure that I ....come to your bedroom?
5. Not in the bedroom but in the room.
6. Did I do the bad things everytime? Yes.
7. Did I do this bad thing everytime or certain time? Everytime."

[27] On a perusal of the evidence of the child victim, her evidence in examination-in-chief and cross examination (stated above) is clearly indicative of the fact that she was competent to give evidence, she had understood the questions that her evidence was truthful and could be relied upon in determining the culpability of the Appellant.

[28] In the above circumstances, the failure of the learned trial Judge to remind the victim that she should tell the truth has not caused prejudice to the Appellant and to my mind there has been no miscarriage of justice. This ground of appeal therefore fails.

[29] The third ground of appeal is against sentence, where he has stated that the learned trial Judge has not deducted the period that the Appellant had been in remand separately when sentencing him.

[30] The learned trial Judge when sentencing the Appellant had considered the period spent in remand by the Appellant as a mitigating factor and had given a discount of 2 years.

[31] The mitigating factors taken into consideration were:

> *"1. The accused is a first offender.*
> *2. He is 63 years of age and a retired government servant.*
> *3. His wife is not living with him.*
> *4. He is in remand since 08/06/2013.*
> *5. He is suffering from constant spinal pain."*

[32] The Appellant had spent 1 year and 1 month and two weeks in remand.

[33] Of these only the fact that the Appellant being a first offender which goes to previous good character is a mitigating factor. The 2 year discount given to the Appellant would therefore subsume the period spent in remand. In those circumstances there is no miscarriage of justice and the ground of appeal against sentence fails.

Goundar, JA

[34] Agree.

Sharma, JA

[35] I have read the draft judgment of Chandra, JA. I agree the appeal against conviction and sentence be dismissed.

Orders of Court:

1. *The appeal against conviction is dismissed.*
2. *The appeal against sentence is dismissed.*

Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

Hon. Justice Daniel Goundar
JUSTICE OF APPEAL

Hon. Justice Sunil Sharma
JUSTICE OF APPEAL