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

CRIMINAL APPEAL NO. AAU 29 OF 2015
(High Court Criminal Case: HAC 99 of 2014)

BETWEEN : **RAJENDRA GOUNDAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath JA**
Prematilaka JA
Nawana JA

Counsel : **Mr M Fesaitu for the Appellant**
Mr S Babitu for the Respondent

Date of Hearing : **10 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath JA

[1] I have read in draft form the judgment and the orders of Nawana, JA. I am in agreement with them.

Prematilaka JA

[2] I have read in draft the judgment of Nawana, JA and agree that the appeal should be dismissed and conviction be affirmed.

Nawana JA

[3] The accused-appellant (appellant) stood charged before the High Court of Lautoka on a single count of sexual assault punishable under Section 210 (1) (a); and, two counts of rape punishable under Section 207 (2) (b) and 207 (2) (a) read with Section 207 (1) of the of the Crimes Act, 2009.

[4] The offence of rape, as defined in Section 207 of the Penal Code, is made out as and when one of the following acts is committed without the consent of the other person. The Section reads as follows:

> *207 (1) Any person who rapes another person commits an indictable offence.*
>
> *(2) A person rapes another person if:*
>
> *(a) the person has carnal knowledge with or of the other person without the other person's consent; or*
>
> *(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or,*
>
> *(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*
>
> *(3) for this section, a child under the age of 13 years is incapable of giving consent.*

[5] The offence of sexual assault is *inter alia* committed when a person unlawfully and indecently assaults another; or, procures another person without that person's consent to commit an act of gross indecency; or, to witness an act of gross indecency by the person or any other person within the meaning of Section 210 of the Crimes Act, 2009.

[6] The offences, as punishable above, were alleged to have been committed on a young girl on 20 July 2014. The girl, born on 20 June 2000, was the biological daughter of the appellant and was fourteen years of age at the time of the incident. The absence of her consent, therefore, was a material element to make out offences of rape and sexual assault under Sections 207 and 210 of the Crimes Act, 2009. The victim-girl will be referred to as the complainant for the ease of reference, whilst maintaining her anonymity, in this judgment.

[7] After trial, the assessors returned a unanimous opinion of guilty on 21 January 2015. The learned judge, in a written judgement on the same date, agreed with the opinion of the assessors and convicted the appellant on the respective charge in each count.

[8] After a hearing, the learned judge sentenced the appellant on 27 January 2015 to a term of fourteen year and six month-imprisonment with a non-parole period of twelve years.

[9] The appellant filed a timely appeal on 30 January 2015. An amended notice of appeal was subsequently filed by learned counsel on appellant's behalf on 15 May 2018 where five grounds of appeal were urged against the conviction and the sentence.

[10] A single Justice of Appeal, by ruling dated 04 December 2018, granted leave to appeal in respect of three grounds of appeal against the conviction and refused leave to appeal against the sentence stating that there was no an arguable error in the sentence.

[11] At the hearing before the full court, the appellant was represented by counsel. Learned counsel for the appellant confined himself only to two grounds challenging the

conviction and abandoned the other ground. The two grounds, pursued in this appeal, were:

> *(i) The learned trial judge should have not directed the assessors on the history related in the medical report, which is hearsay, therefore, causing prejudice to the appellant; and,*
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> *(ii) The learned trial judge erred in law and in fact in not adequately directing the assessors on the confession contained in the caution statement particularly whether the appellant had made the confession.*

[12] Evidence of the complainant at the trial was that she was living in Rakiraki with the appellant, her mother and her four siblings. The complainant was at home on 20 July 2014, the date of the incident, with the appellant. The complainant had cooked rice for their meal as her mother had been away with the grandmother. The appellant told the complainant not to cook dhal curry and that they could go to the shop and buy tinned fish.

[13] On their way to the shop, the complainant was tricked by the appellant and she was asked to walk through a jungle to recover some '*paint*' that was hidden. While the complainant was searching the '*paint*' as requested, the appellant approached the complainant, held her by hand, and told that he had wanted to suck her breasts. The appellant then started sucking the breasts, in the process of which, the complainant fell on the ground. The appellant then threatened the complainant with death if she raised any alarm.

[14] The appellant, thereafter, got the complainant to lower her pants and poked his finger into the vagina. The appellant continued further with his sexual invasion and began to insert his penis into the complainant's vagina while asking whether it was painful.

[15] The complainant asserted that she had not consented to any of the acts committed by the appellant. Soon after the incident, the complainant ran to a nearby house occupied by one Mala and got down her mother by giving a telephone call. The complainant narrated the incidents that took place at the hands of the appellant after arrival of the

mother at Mala's place. The complainant's mother, then, called the police in, immediately.

[16] The complainant, when cross-examined by the appellant, emphatically answered that *'[the appellant] did rape [her]'* and stood by her evidence in court as promptly narrated to the mother on the date of the incident.

[17] The mother of the complainant, Ashwin Ashika Lata, 36, in her unchallenged testimony, confirmed what the complainant had told her that it was the appellant who had committed the acts complained of, when she was called on telephone and also when she arrived at Mala's place. The witness said that the police were summoned immediately thereafter on hearing what had been done to the complainant by the appellant.

[18] Sangeeta Mala, a teacher by profession, to whose house the complainant ran and got her mother down, too, testified and confirmed what the complainant stated in her evidence. Her evidence, too, was not challenged as the appellant chose not to cross-examine.

[19] Dr Alumita Serutabua, had examined the complainant around 9.00 p.m. on 20 July 2014. The doctor had recorded the history of the person at her examination as:

> *…[the complainant's] biological father asked her to go with him to the shop. They took a short-cut through the bushes. There, he forced her on the ground and penetrated her vagina with penis.*

[20] The doctor had made specific findings stating that the hymen was bruised and lacerated at 9 0' clock position. She had noted the presence of dried blood stains at the lacerated site; and, found that the hymen was not intact. It was the opinion of the doctor that the examination was consistent with a forceful penetration of the vagina of the complainant and the injury was of recent onset.

[21] The Medical Examination Form, where the history of the complainant; the findings; and, the conclusions were recorded, was tendered as a production exhibit 'PE-2'. The

doctor's evidence remained uncontroverted as the appellant did not choose to cross-examine the doctor on any of the matters that the doctor testified on.

[22] The prosecution also presented evidence on the caution-interview. The police officer, who conducted the interview under caution, produced the statement as a production exhibit marked as 'PE-4 (A)', where the appellant had admitted the act of sucking the breasts of the complainant. The witness's evidence was sought to be challenged on the basis that the appellant was subjected to assault at the time when the statement was recorded.

[23] The appellant gave evidence and denied the charges. He specifically testified on the fact of being assaulted when the statement was recorded under caution. The appellant produced the Medical Examination Report as D-1 where the history as related by the person to be examined was recorded as having said '*Documentation of any injuries to the patient*' in Column D10 of the Report. However, the medical doctor had not noted any significant findings on examination of the appellant in the form of physical injuries at the examination carried out around 10. 00 a.m. on 21 July 2014, however, before the caution interview. The appellant called no other witnesses in his defence.

[24] It is in light of this evidence that the challenges to the conviction by the appellant in the form of the two grounds of appeal, referred to above, need to be considered.

[25] The objectionable part, as complained by the learned counsel for the appellant, is found at paragraphs 40 and 41 of the summing-up. The learned judge said in his summing up as follows:

> *[40] Doctor was called as the next witness for the prosecution. She is a doctor with 7years experience. She had examined the victim on 20.7.2014 at 9.00 p.m. Medical findings were hymen was bruised and small 1 cm laceration at 9 o'clock position. Dried blood noted at the laceration. Hymen was not intact. Possible cause could be forcible penetration into vagina with any object. The findings are consistent with the history. The injury is a recent one. This witness was also not cross examined by the accused.*
>
> *[41] The doctor is an independent witness. If you believe her evidence there is confirmation on penetration to the vagina. This is a fresh*

injury. You have to decide whether this evidence is confirming the evidence of the victim before attaching any weight to this evidence.

(Underlined for emphasis)

[26] The complaint of the learned counsel for the appellant was that when the complainant was giving evidence in court, no matters were elicited by the prosecution on the examination of the complainant by the medical doctor; hence, there was no reference to a medical report being compiled in the course of the complainant's evidence. Learned counsel submitted that the complainant had not testified on the inclusion of any injuries or findings on her being examined by the medical doctor in a medical report.

[27] Taking the complaint further, learned counsel submitted that the reference by the doctor to her findings without eliciting the matter of medical examination from the complainant in court was objectionable. Learned counsel submitted that the learned judge should have, in the circumstances, prevented the prosecution from making reference to the contents of the medical report in view of the failure to establish the fact of medical examination first through the complainant. It was the learned counsel's submission that the evidence, in the circumstances, should have been excluded; or, the assessors should, in the alternative, have been cautioned over the unacceptable nature of the evidence.

[28] Learned counsel's complaint is founded on the rule against hearsay, which primarily bars the admission of evidence on matters heard outside without them being elicited within the precincts of court. Learned counsel relied on the decision of this court in the case of **Delailagi v State** [2019] FJCA 186; AAU0060.2015 (03 October 2019) on the need to exclude hearsay evidence.

[29] This court, in that case, had the opportunity to consider the ambit of hearsay evidence, which has, however, gone through changes in many jurisdictions to allow its inclusion in a much wider sense than it was some decades before. This court adopted the determination as regards hearsay as explained in the case of **Subramaniam v Public Prosecutor** [1956] 1 WLR 965 at 969, which could, in my view, be adopted for this

case as well, as the matter in issue touches upon the fundamental exclusionary perimeters of hearsay. It was held:

> *Evidence of a statement made to a witness ... may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.*

[30] It was held in **Delailagi's** case, with reference to the facts of that case, that:

> *[32] … the prosecution did not rely on the evidence of history being narrated to the doctor to establish its truth but to establish that such a statement was made to the doctor when the opportunity was accorded. The truth of the statement made in the form of the history of the complainant prior to the medical examination was sought to be established by the prosecution through the best evidence of the complainant-TL herself. The prosecution, going by the transcript of evidence, had not chosen secondary evidence such as the history recorded by the doctor to establish its case. In that light, the learned counsel's submission that this item of evidence had offended the hearsay rule is not entitled to succeed because that item of evidence was not used to establish its truth.*

[31] The above observations, in so far as the issue in this case is concerned, can be rightly applied because the prosecution in this case, too, did not rely on the history recorded and testified on by the medical doctor to establish the truth of the prosecution story. The prosecution, as in **Delailagi**'s case, instead, was relied on the best evidence that emanated from the complainant herself. The testimonial creditworthiness of the complainant was heavily weighed in favour of its quality in view of the complainant's spontaneous response of fleeing the scene of crime to a nearby house followed by her conduct of promptly complaining to the mother, who also stood as a witness in court.

[32] The history recorded by the medical doctor on enquiring the complainant-victim soon after the incident offers, from an evidential perspective, only consistency to the complainant's story and nothing more. I am, therefore, of the view that, the reference to the history in the evidence by the doctor, could not have caused the case to miscarry resulting in prejudice to the appellant on the basis of a purported admission of hearsay evidence.

[33] Eliciting of evidence from a witness on all matters that he or she was subjected to at or around the occurrence of the event that the witness was subsequently testifying on, should, as a good prosecutorial practice, be adhered to. I would, therefore, propose to associate myself with what the Court of Appeal stated in **Delailagi**'s case. The court said:

> *[35] The item of evidence is alleged to have become hearsay in consequence of a lapse on the part of the learned counsel to elicit from TL as to whether she had given the history of being raped by the appellant to the doctor as recorded in the medical report. ... this particular item of evidence, in the circumstances of this case, does not, in my view, qualify to be excluded as hearsay because the witnesses were available in court to test the veracity of the matter in issue and, in fact, testified.*
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> (Underlined for emphasis)

[34] It needs to be stressed here again that the prosecuting counsel, in the conduct of their cases, must pay attention to elicit all matters from the complainant and the witnesses, as applicable, and ensure that no gaps are left for any matter to be affected by breach of the rule against hearsay rule. If a breach happens, then, it is the duty of the learned judge to disallow the relevant piece of evidence, if and only if, the breach goes deep really into the contested matter in issue; or, caution the assessors adequately in the summing-up for them to consider the reliance or rejection of the particular piece of evidence.

[35] This court in **Delailagi** (supra) said as follows; and, its repetition, in my view, would be a worthy exercise in view of the frequent re-emergence of the issue in appeals taken against the decisions of the High Court in criminal cases. It is the duty of the presiding judge, who commands the overall responsibility of ensuring a trial devoid of misreception of evidence, to address the issue rightly and give directions, accordingly. This court said:

> *[33] However, it would be relevant to consider the need to give necessary directions by a trial judge whenever an item of evidence appears to be hearsay…whenever hearsay evidence goes before the jury, fairness requires that the trial judge should give an explicit direction about the dangers inherent in such evidence. It was held in that case:*

> *... [The trial judge] should remind the jury that they have not had the opportunity to assess the credibility and reliability of the maker of the statement at first hand. He should point out that the truth of the statement has not been tested by cross-examination. If the statement was not made under oath or affirmation, he should comment on that too. The trial judge should direct the jury that they must assess the weight of such evidence with care. It there are any dangers in the hearsay evidence that are special to the facts of the case, for example the age or the state of mind of the maker of the statement, or any interest in the outcome or any improper motive on his part, or any other factor bearing on his credibility and reliability, the trial judge should give explicit directions on that point, too.'*

[36] Learned counsel for the state rightly did not contest the issue. While conceding to the errors on the part of the prosecuting counsel and the learned judge, learned counsel for the state relied on **Navaki v State** [2019] FJCA 194; AAU0087.2015 (03 October 2019), where this court held the same view on the issue of failure on the part of the prosecution to elicit the short history recorded in the medical report as part of the prosecution case. This was how the court dealt with the issue:

> *[14] ...In fact the victim had not been asked anything of what she had told the doctor by the prosecution. If the prosecution intended to use the short history as recorded in the medical report as part of the evidence in the prosecution case, it should have first elicited from the victim the fact that she narrated the same to the doctor. Secondly, the prosecution should have called the doctor to testify to the fact that the victim had told him the history which he recorded in the medical report. If these two conditions are not fulfilled such history remains as hearsay evidence. The only exception would be if the history in the medical report is specifically recorded as an agreed fact between the prosecution and the defence. Simply because the appellant had not objected to the production of the medical report, it does not necessarily mean that he was agreeing to the history recorded therein*
>
> .

[37] The court observed further on the matter of recording the history of an examinee at a medical examination and its repetition, in my view, is necessary for the correction of innocuous prosecutorial lapses. The court observed:

> *[17] The recorded history is, therefore, not the result of the doctor's medical examination or expertise. History is what he had heard from the victim. If the history is not confirmed by the person who said it and by the person who heard it, it remains hearsay and cannot be admitted in evidence. However, without fulfilling these requirements if such a statement is admitted in evidence it should be disregarded by the judge and not left to the assessors as its probative value is far outweighed by the prejudice it will cause to the accused. If the assessors have heard or seen it they should be told that it is of no value and they should be warned to ignore it completely.*

[38] The legal question that this court has to address is whether the error was capable of causing a substantial miscarriage of justice. The House of Lords in **Stirland, Appellant v Director of Public Prosecutions** [1944] AC 315, laid down the guideline, which this court in **Navaki's** case suitably adopted. The House of Lords held in that case:

> *When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied.*
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> *A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. ...*

[39] The statutory provisions of Section 23 (3) of the Court of Appeal Act of Fiji are identical in content to the applicable provisions of the English Criminal Appeal Act, 1907, by which the governing guideline has been statutorily enacted for court to consider whether there was a substantial miscarriage of justice caused as a result of the error complained of.

[40] I am of the view that there is a basis for the complaint of the learned counsel for the appellant. I am, however, not convinced that the complaint can justifiably be used as a

ground so as to the affect the validity of the conviction because the evidential lapse committed at the hands of the learned prosecuting counsel had not made the relevant piece of evidence hearsay. In the circumstances, I hold that there was no room to taint the conviction; or, to cause prejudice to the appellant on the basis of any misreception of evidence. I hold further that there was no substantial miscarriage of justice caused to the appellant by reference to the medical history by the doctor; and, by the learned judge adverting the attention of the assessors to the medical history in the course of his summing-up.

[41] I, accordingly, reject the first ground of appeal as being without legal merit on application of the legal principles relating to hearsay in light of the facts and circumstances of this case.

[42] The second ground of appeal was premised on the alleged inadequacy of directions on the confession in the caution-interview statement particularly whether the appellant had made a confession. This was how the ground was formulated:

> *The learned trial judge erred in law and fact in not adequately directing the assessors on the confession contained in the caution statement particularly whether the appellant had made the confession.*

[43] Learned counsel for the appellant referred to the following paragraphs of the summing-up in founding his complaint:

> *43. DC Aveen Kumar was the next witness for the prosecution. He had caution interviewed the accused at Rakiraki police station. It was in Hindi language. It was recorded in the computer. It was printed and given to the accused to read and sign. Surendra Prasad was witnessing officer. He identified and tendered the original Hindi interview marked PE 4A and English translation marked PE4B. He read the English translation to court. There was no complaint from the accused before the interview. He was not assaulted at the reconstruction. He was not assaulted at the end of the interview. The accused gave answers to all questions asked by him.*
>
> *44. Under cross examination he denied that another officer assaulted the accused while the interview being taken. He denied that the accused was slapped on the ears. He denied telling that if you don't tell the truth he will break the accused's nose.*

> *45. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charges are proved by this statement.*

[44] It was not in dispute that the appellant had admitted only the act of sucking the breasts of the complainant in his caution-interview statement. Therefore, if one considers the caution-interview statement as being confessional, it would apply only in relation to the charge of sexual assault under Section 210 of the Crimes Act; but, not in relation to the two charges in relation to the rape in counts (2) and (3).

[45] Moreover, the appellant, in his evidence at the trial, did not take up the position that he had not made a statement at all, confessional or otherwise, before the police officer who testified for the prosecution. Instead, the appellant sought to advance the proposition, both at the *voir dire* and the trial, that he was influenced to make the statement because he was assaulted by police at the time of the statement under caution, which was, however, denied by police witnesses.

[46] The Supreme Court in **Boila vs State** [2008] FJSC 35; CAV005 of 2006.S: (25 February 2008) held that the adequacy of a particular direction will necessarily depend on the circumstances of the case. There is no incantation to be read and the required guidance needs not be formulaic. (**Khan v State** [2014] FJSC 6; CAV009 of 2013: (17 April 2014). Similarly, the Supreme Court in **Tuilaselase v State** [2019]FJSC 2; CAV 0025 of 2018: (25 April 2019) addressing a complaint on an appeal on the issue of required directions to the assessors held that:

> *The enquiry into whether the directions to the assessors were sufficient must therefore be fact specific. The weight to be afforded to the confession in this case, was clear. The detailed nature thereof would almost inevitably give rise to a conviction. As to the truth of the statement, there was never any suggestion by the petitioner that even if voluntarily made the statement may be untrue. In this light, I believe the direction given by the trial judge in paragraph 38 of his summing up was quite sufficient. The fact*

> *that there is no merit in the point must mean that any failure by the Appeal Court to consider it is neither here nor there.*

[47] This court in **Korodrau v State** [2019] FJCA 193; AAU 090.2014 (03 October 2019), having relied on **Tuilaselase v State** (supra); **McGreevy v DPP** [1973] 1 WLR 276, held that:

> *[60] ... [I]t appears that (though due reverence is still accorded) there is no longer any uncompromising insistence on rigid adherence to the traditional formula in the summing-up on the caution interview in Fiji. No dogmatic or ritualistic words or forms are demanded or at least the departure from the ideal recipe would not be considered fatal to a conviction provided the appellate court is satisfied that taking into consideration all the circumstances surrounding the making of the confession and totality of the evidence led at the trial, the reasonably minded assessors would not have expressed a different opinion and the trial Judge would not have arrived at a different verdict in his judgment (being the ultimate decider of facts and law) on the admissibility, weight and truth of the caution interview and the consequential guilt or innocence of the appellant.*

[48] Considering the contents of the summing-up, I am of the view that the learned judge had adequately dealt with the matters pertaining to the caution-interview and the confession as contained in the statement. I am unable to find an error based on a misdirection or a non-direction so as to affect the validity of the conviction. The conviction, in any event, was not based solely on the confession but on the complainant's testimony, which met the tests of spontaneity and consistency for it to be relied on by the assessors and the learned judge to act on.

[49] I do not, in the circumstances, see merit in the second ground urged in support of the appeal. I, accordingly, reject it.

[50] In the result, I would dismiss this appeal.

Orders:

(i) *Appeal dismissed; and,*

(ii) *Conviction on all three counts affirmed.*

Hon. Mr. Justice S Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P Nawana
JUSTICE OF APPEAL