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

CRIMINAL APPEAL NO.AAU 131 of 2018
[In the High Court at Lautoka Case No. HAC 130 of 2016]

BETWEEN	:	**SAMUELA TAWANANUMI**	***Appellant***
AND	:	**STATE**	***Respondent***
Coram	:	**Prematilaka, JA**	
Counsel	:	**Ms. S. Nasedra for the Appellant**	
	:	**Ms. S. Madanavosa for the Respondent**	
Date of Hearing	:	**27 January 2021**	
Date of Ruling	:	**28 January 2021**	

RULING

[1] The appellant had been indicted in the High Court of Lautoka on one count of sexual assault contrary to Section 210 (1) (a) of the Crimes Act of 2009 and one count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 committed at Lautoka in the Western Division. The victim was 09 years old and the appellant was her biological father of 28 years of age at the time of the commission of the offences.

[2] The information read as follows.

First Count

Statement of Offence

Sexual Assault: *Contrary to Section 210 (1) (a) of the Crimes Act of 2009.*

Particulars of Offence

SAMUELA TAWANANUMI *between the 1st of November, 2015 and 30th of November, 2015 at Lautoka in the Western Division unlawfully and indecently assaulted AK by touching her vagina.*

Second Count

Statement of Offence

Rape: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.*

Particulars of Offence

SAMUELA TAWANANUMI *between the 1st of November, 2015 and 30th of November, 2015 at Lautoka in the Western Division penetrated the vagina of AK with his penis, a child under the age of 13 years.*

[3] The brief facts as could be gathered from the sentencing order are as follows.

> *3. The facts proved at trial in this case are that in November 2015, at one night, the victim was sleeping alone in her bedroom. While she was still sleeping she felt someone taking off her long pants and panty. Then she looked up and saw her father (accused). When she looked up at him he told her to sleep. She closed her eyes. She felt her father touching her vagina. After that he went back to sleep. She was so scared of father. She never told anyone what happened as her father told her not to tell mother what happened, and if she did, he will kill her.*
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> *4. The next day at night the victim was sleeping with her cousins in the second bedroom. While she was sleeping, her father came and woke her up and told her to go with him to the sitting room. She then went to the sitting room with father where no one was sleeping. Then he made her lie down, took off her pants and panty and then he put his penis into her vagina. She felt pain inside her. Then he told her not to tell mother what happened. The next morning when she went to the toilet she then saw blood in her vagina and wiped it with a toilet paper. She never told anyone what happened because she feared.*

[4] At the conclusion of the summing-up on 29 November 2018 the assessors had unanimously opined that the appellant was guilty of both counts. The learned trial judge had agreed with the assessors in his judgment delivered on 04 December 2018, convicted the appellant on all counts and sentenced him on 06 December 2018 to 04 years on imprisonment on count 01 and 14 years of imprisonment on count 02 (both to run concurrently) subject to a non-parole period of 12 years.

[5] The appellant's timely application for leave to appeal against conviction had been filed on 20 December 2018. The Legal Aid Commission had tendered amended grounds of appeal against conviction along with written submissions on 23/24 September 2020. The state had tendered some not so useful written submissions on 06 November 2020.

[6] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[7] Grounds of appeal urged on behalf of the appellant are as follows.

Conviction

1. *The learned trial judge had erred in law and in facts in allowing the complainant to read her statement in court whilst she was giving evidence which is inadmissible amounting to prior consistent statement.*

2. *The learned trial judge had erred in law and in facts by directing the assessors and himself in that the complainant's evidence is further bolstered by the recent complaint evidence.*

01st ground of appeal

[8] The appellant argues that the according to paragraph 40 of the summing-up the victim's police statement had been read in evidence but the trial judge had not shed any light as to the basis of allowing this statement to be led. The appellant's position is that this was inadmissible evidence.

[9] Paragraph 40 of the summing-up is as follows.

> *'40. Madam and Gentlemen assessors, you heard what I.K. the complainant in this case had told police on the 26th April, 2016. Her statement was read in evidence in court. Generally a statement given by a witness to police is not admissible in evidence unless it was used to test the credibility or consistency of his or her evidence in court. There are exceptional cases where the law permits the courts in the interest of justice to allow such statements to be read in evidence. This is one such case and therefore you can consider the statement the complainant had given to police as evidence before this court for all purposes and you may give such weight to it as you think appropriate.'*

[10] It is clear from the summing-up that the victim had been called as a witness and given evidence at the trial and been subjected to cross-examination as well (see paragraphs 47-49). At the same time it also appears that the victim's police statement made on 26 April 2016 had been read in evidence (see paragraphs 40 and 41). It is not clear what the trial judge had mentioned at paragraphs 42-46 of the summing-up consists of what she had testified at the trial or contents of her police statement or both.

[11] The appellant cites **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017) which had dealt with the law relating to recent complaint evidence.

> *[28] As a general rule, a prior consistent statement of a witness is inadmissible evidence. However, there are many exceptions to this rule. One of the exceptions to the rule is in sexual cases. In sexual cases, the evidence a recent complaint of the sexual assault made to another person by the complainant is allowed to show the consistency of the conduct of the complainant and to negative consent (Peniasi Senikarawa v The State unreported Cr App No AAU0005 of 2004S: 24 march 2006). The relevance of the evidence was explained by the Supreme Court in Anand Abhay Raj v The State unreported Cr App No CAV0003 of 2014: 20 August 2014 at [38]:*
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> *The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
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> *[29] At trial, the complainant gave evidence that she told her boyfriend that the appellant had raped her shortly after the alleged incident. The complainant's boyfriend gave evidence and confirmed that the complainant made a complaint to him that the appellant had raped her. In paragraph 38 of the summing up, the learned trial judge told the assessors that the evidence of the boyfriend cannot be used to prove the truth of the alleged rape but as*

evidence of the consistency of the complainant's conduct with the story she told in the witness box. The direction is correct in law. This ground fails.

[12] In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court had earlier set down the law regarding recent complaint evidence as follows.

> *'[33] In any case evidence of recent complaint was never 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.*
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> *[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*
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> *[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*
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> *[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'*

[13] It is not clear that the victim's police statement had been led on the basis that it was recent complaint evidence. However, no police officer had been called to testify at the trial regarding the recording of her statement and therefore in terms of the pronouncement in ***Raj*** the victim's statement could not have been led in evidence even as recent complaint evidence. However, the trial judge had not specifically referred to her police statement as constituting 'recent complaint' evidence either. It appears that the victim's statement to the police may not have been led in evidence as recent complaint evidence.

[14] The crucial issue is whether in any event a police statement made by a victim of a sexual crime could be led as recent complaint evidence or for that matter as any form of substantive evidence. The trial judge had directed the assessors to consider the statement of the victim to the police as evidence before the trial court for all purposes

and to give such weight to it as they thought appropriate. In other words the trial judge had treated the contents of the victim's police statement as substantive evidence.

[15] Neither party had referred to this court any authorities on these important issues. The written submission of the state filed in this court has maintained a deafening silence on these vital matters and not enlightened court on what basis the prosecution had read the victim's police statement in evidence at the trial. Regrettably, the state's written submission had taken the path of least assistance to this court.

[16] Both counsel submitted that section 134 (1) of the Criminal Procedure Act, 2009 makes a written statement by any person admissible as evidence having the similar effect to oral evidence by that person provided the conditions in sub-section (2) are satisfied. It is not clear whether in this case such conditions in section 134(2) as are applicable had been satisfied before the victim's police statement was read in evidence. Without the complete trial proceedings, I cannot probe this issue any further at this stage.

[17] Goundar J in **State v Nayacalagilagi** [2009] FJHC 48; HAC165.2007 (17 February 2009) stated:

> *"If the jury inadvertently hears inadmissible evidence, any prejudice could be avoided or dispelled by a clear warning to disregard the evidence and enable a fair trial. However, if the circumstances are such that the prejudice to the accused could not be dispelled by a warning to the jury, a mistrial is declared as an appropriate remedy to ensure a fair trial for the accused."*

02nd ground of appeal

[18] The appellant also argues that the trial judge had misdirected the assessors and himself when he said that the recent complaint evidence has bolstered the victim' evidence at paragraph 66 of the summing-up.

> *'66. Prosecution called the complainant, her grandmother Ana and doctor Konrote. Prosecution says that the complainant is a reliable witness and her evidence is further bolstered by the recent complaint evidence, distress evidence and the medical evidence of the doctor.'*

[19] The trial judge may perhaps be referring to the victim's grandmother's evidence as recent complaint evidence. He had informed the assessors as follows.

> *55. Ana told us what she heard from her granddaughter AK. AK told her that in the month of November, 2016, on a Sunday night, she was lying down alone in the room. She could feel that somebody removed her long pants and her panty. She could feel that somebody was touching her private parts. When she opened her eyes she saw her father. Her father told her to go back to sleep.*
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> *56. On Monday, (that was on the following day) she was sleeping with other sisters and brother who are the daughters and son of her big aunty. They were all sleeping in that same room. Her father came and woke her up for them to sleep in the sitting room. He removed her long pants and her panty and put his penis into her vagina. When she wanted to speak to the father, he blocked her mouth. She said it was painful to her but the act only happened in a short period of time. On the next morning when she went to the toilet, she found blood coming out from her private part.*
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> *57. Then Ana described what she observed in AK during her school break in November 2015 and what prompted her to inquire about the incidents. Ana said that she took AK and her other grandchildren to Waya Island in Yasawa for them to spend the holidays with her. AK was quite active girl. On this particular school break she observed AK going to the extension of the house, staying there alone and crying. Whenever she found AK there, she always called her and asked her what's wrong with her. She had attended a lot of workshops regarding child abuse. By looking at AK's unusual behaviour during school break, it came in to her mind to ask her.*
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> *58. Ana further said that when they had come back in January for her to start school, the teachers had reported to her eldest sister that they had seen a change in AK and that she was not interested at all in her studies. She urged AK and asked her if she could tell what happened. AK told her, "grandma, dad informed me if I mentioned this to anyone, he will kill me"*
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> *59. Under cross-examination, Ana agreed that during this 8 week holiday, AK did not complain to her. By the time she arrived with AK at Natokowaqa, Lautoka, Samuela had left and was no longer residing at home. She heard that AK's mother Lusia was living with another man in Nadi.*
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> *60. She said that when she returned to Natokowaqa, in the month of March 2016 she came to know about the incidents and the matter was first reported to Welfare and the Welfare had reported it to police.*
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> *61. AK's teacher reported that AK was not concentrating on her education recommend if she could be enrolled at "Sunshine Special School". AK was enrolled at the Sunshine Special School after the complaint was lodged with the police."*

[20] It appears that the victim had confided with the grandmother, Ana as to what the appellant had done to her a few months (05) after the incidents in November 2016. Therefore, whether Ana's evidence could have been treated as recent complaint evidence is another matter to be considered in the case.

[21] In any event, the appellant's complaint is that even if it is treated as recent complaint evidence such evidence could not be said to have bolstered the evidence of the victim as directed by the trial judge. In ***Raj*** (supra) the Supreme Court said as follows.

> *[46] In the instant case, the judge's recounting of the prosecutor's closing arguments may have been infelicitous. It was after all the credibility and consistency of the complainant that was supported, if accepted, by the evidence of recent complaints, not the complainant's 'evidence' that was strengthened. The distinction in the purpose of the evidence has been done away with in England by the passing of the Criminal Justice Act 2003 which makes the previous statements admissible if certain conditions are met [s.120 (4) (7) and (8)].*

[22] In **Senikarawa v State** [2006] FJCA 25; AAU0005.2004S (24 March 2006) the Court of Appeal remarked:

> *'[24] In any event, the direction given to the assessors on recent complaint was itself defective. It spoke of "strengthening" the complainant's evidence. This was a misdirection. The direction could have spoken of strengthening the credibility of the complainant but not strengthening her evidence. Again, this was a misdirection which amounted to a miscarriage of justice.'*

[23] In the light of the above two decisions and that of **Conibeer v State** (supra) the trial judge appears to have misdirected the assessors as to the use to which a recent complaint can be put in a trial involving sexual offences by stating that recent complaint evidence could bolster the victim' s evidence. Although, the trial judge had put it to the assessors as a proposition coming from the prosecution, in the absence of a correct direction on recent complaint evidence as expounded in the above decisions, the assessors would have taken the misdirection as the proper manner in which they should consider the grandmother's evidence.

[24] State's written submission has lent little assistance on this issue as well.

[25] I think to decide the correct approach that should be taken by the appellate court in dealing with the first ground of appeal it is useful to see how the courts have dealt with the following areas.

Bad character evidence

[26] In **Mohan v State** [2015] FJCA 155; AAU103.2011 (3 December 2015) affirmed by the Supreme Court in **King v State** [2019] FJSC 11; CAV0002.2016 (21 May 2019) the Court of Appeal considered a complaint where bad character evidence had crept in through the cautioned interview and remarked as follows.

> *22. Due to this prejudicial inadmissible evidence of bad character pertainng to both the appellants was included. This has caused a miscarriage of justice in this case.*
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> *23. However there was ample evidence in this case on all elements of the offence which could have led reasonable assessors to convict the Appellants.*
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> *24. I hold that although there was a miscarriage of justice by the inclusion of bad character evidence, when considering the totality of the evidence in the case it cannot be considered as a substantial miscarriage of justice. Therefore I hold that this falls within the proviso to Section 23 (1)(a) of the Court of Appeal Act. Hence I uphold the conviction*

Evidence of an uncharged act

[27] **Rokete v State** [2019] FJCA 49; AAU0009.2014 (7 March 2019) the Court of Appeal dealt with a complaint of the prosecution having led evidence of an uncharged act as follows.

> *'[35] Once again the appellant complains of an alleged non-direction by the trial Judge with regard to an uncharged act on the evidence of his having escaped from Ba Police Station during interview. Admittedly, this had not been raised by the counsel for the appellant when the trial Judge asked for any redirections. The appellant relies on **Senikarawa v State** AAU0005 of 2004 S: 24 March 2006 [2006] FJCA 25 and **Vesikula v State** AAU0070 of 2014: 23 October 2018 [2018] FJCA 176 in support of his argument. The litmus test for leading evidence of an uncharged act is whether the probative value of the evidence outweighs the prejudice to the accused.*

First time dock identification

[28] On a complaint of the irregularity of a first time dock identification the following test was formulated in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) following **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018)

> "[36] *Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23 (1) of the Court of Appeal Act would apply and appeal would be dismissed*

[29] The same or similar two-tiered test may be suitable to the appellant's complaint under this ground of appeal. **Firstly,** the appellate court would consider ignoring the evidence of the victim's police statement whether there was sufficient evidence on which the assessors could express the opinion that the appellant was guilty and on which the trial judge could find him guilty (*i.e.* quantity/sufficiency of the evidence available sans the impugned item of evidence). **Secondly,** the court would see whether the assessors and the judge would have found the appellant guilty even in the absence of the victim's police statement (*i.e.* whether the quality/credibility of the available evidence without the impugned evidence is capable of proving the case against the accused beyond reasonable doubt).

[30] The above approach in consistent with the powers conferred on the appellate court under section 23 of the Court of Appeal Act *i.e.* having considered the admissible evidence against the appellant as a whole, could the appellate court say that the verdict was unreasonable; whether there was admissible evidence on which the verdict could be

based [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020)].

[31] In other words, could the trial judge also have reasonably convicted the appellant on the admissible evidence before him (vide **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) and **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[32] Regarding the non-direction of the trial judge to the assessors to consider recent complaint evidence as bolstering the victim's evidence canvassed under the second ground of appeal the proper test for the appellate court is laid down in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)

> *'[55] The approach that should be followed in deciding whether to apply the* ***proviso to section 23*** *(1) of the* Court of Appeal Act *was explained by the Court of Appeal in* ***R v. Haddy*** [1944] 1 KB 442. *The decision is authority for the proposition that* ***if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice****. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the* Court of Appeal Act.
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> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in* ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R –v- Weir*** [1955] NZLR 711 *at page 713:*
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> > *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."***
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> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.*

*In **Vuki –v- The State** (unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

*"The application of the **proviso to section 23** (1) ___ of necessity, must be a very fact and circumstance – specific exercise."*

[33] However, these matters need to be considered by the full court after perusing the complete appeal record and not just the summing-up and the judgment.

[34] Therefore, I think the appellant should be allowed to canvass these two grounds of appeal before the full court though I cannot at this stage assess the prospect of success of his appeal due to lack of all the material.

Order

1. Leave to appeal against conviction is allowed.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL