IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji

CRIMINAL APPEAL AAU 00105/19
High Court Criminal Case No. HAC 176/15 Lautoka

BETWEEN	**AMIT KRISHNA GOUNDAR**	
		Appellant
AND	**THE STATE**	
		Respondent

Coram	**Prematilaka, RJA**
	Andrews, JA
	Dobson, JA
Counsel	**Appellant, in person**
	Ms J Fatiaki, on behalf of the Respondent
Date of Hearing :	**2 May 2024**
Date of Judgment :	**30 May 2024**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of reading in draft the judgment of Andrews, JA and agree with the reasoning and proposed orders that enlargement of time to appeal against conviction should be dismissed.

Andrews, JA

Introduction

[2] The appellant, Amit Krishna Goundar, was convicted by Justice Sunil Sharma in the High Court at Lautoka on 18 May 2018 on one count of rape (s 207(1) and (2(a) Crimes Act 2009), and one count of criminal intimidation (s 375(2)(a) Crimes Act 2009.[1] He was sentenced on 28 May 2018 to an aggregate sentence of 14 years and 7 months imprisonment, with a non-parole period of 12 years.[2]

[3] The appellant sought leave to appeal against his conviction on 1 August 2019. As his application was out of time by approximately 13 months, he sought enlargement of time to apply for leave to appeal. In a written Ruling dated 24 December 2020, Prematilaka RJA refused his application for enlargement of time.[3] The appellant subsequently filed an application seeking leave to appeal on fresh grounds and for enlargement of time, for determination by a Full Bench of the Court of Appeal.[4]

Background

[4] The complainant was 14 years 7 months old at the time of the relevant events. The appellant is her stepfather. As recorded in the conviction judgment, the complainant lived with her mother,

---

1 *State v Goundar* [2018] FJHC 420; HAC176.2015 (18 May 2018) ("conviction judgment").
2 *State v Goundar* [2018] FJHC 438; HAC176.2015 (28 May 2018).
3 *Goundar v State* [2020] FJCA 261; AAU105.2019 (24 December 2020 ("the leave ruling").
4 See s 35(1) Court of Appeal Act 1949.

stepfather, and two brothers. She attended Nadi Special School and was described as being intellectually impaired and a slow learner.

[5] The complainant's evidence, as recorded in the conviction judgment, was that on 14 June 2015, her mother left for work at 7 am and the appellant came home from work at about 8 am. The appellant gave some money to the complainant's brothers to go out to buy sweets, leaving the complainant alone in the house with the appellant. The complainant said that the appellant then inserted his penis into her vagina. The complainant felt bad that she had lost her virginity, the penetration was painful, and blood had come out of her vagina. The complainant had not allowed the appellant to insert his penis into her vagina.

[6] The complainant tried to leave the house to tell someone what the appellant had done, but he threatened her with a cane knife, and said that he would chop her if she told anyone what he had done. The complainant was afraid when she saw the cane knife.

[7] The next day the complainant was late to school, and her teacher noticed that her hair was untidy and her uniform top was not tucked in properly. The teacher asked her why she had come to school like that. The complainant said she had told her mother what the appellant had done to her but her mother did not believe her and hit her with a comb. The teacher said the complainant said she had had a fight with her mother because she had not done some household chores. However, as the complainant was not forthcoming as to whether there was anything else the complainant wanted to say, the teacher took the complainant to talk to the school counsellor. The matter was subsequently reported to the Social Welfare Department and then to the Police.

The appellant's appeal

[8] The appellant initially sought enlargement of time and leave to appeal on three grounds, which may be summarised as follows:

[a] The guilty verdict on the rape charge was unreasonable;

[b] The High Court Judge had erred in law and fact by failing to warn the assessors and himself on the evidence of uncharged acts led at trial, causing the appellant's right to a fair trial to be prejudiced; and

[c] The High Court Judge erred in law and fact by failing to consider adequately and/or assess the inconsistency in the complainant's complaint relayed to the two school teachers, which affected her credibility.

[9] The appellant's application was refused by the single Appeal Judge, under s 35(1) of the Court of Appeal Act. The Appeal Judge found that none of the grounds had any real prospect of success. Pursuant to s 35(3) of the Act, the single Judge having refused to exercise his power in the appellant's favour, the appellant may now have his application determined by a Full Bench of the Court of Appeal. The appellant offered no further substantiation for his explanation of the delay of 13 months in filing his application for leave. However, delay alone will not decide the matter of extension of time.[5] It is necessary to consider the merits of the appellant's proposed appeal.

Grounds of appeal to the Full Bench

[10] The appellant has abandoned the three grounds of appeal put to the single Appeal Judge. In his "Application for Leave to Appeal Fresh Grounds and Submissions" filed on 19 April 2022, he set out nine grounds of appeal. The appellant headed each of the grounds as follows:

> *1. The Learned Trial Judge erred in law when he failed to apply the mandatory requirement of Section 155 (1) of the Criminal Procedure Code when he facilitated trial proceedings in this matter and therefore resulted in a substantial miscarriage of justice.*
>
> *2. The Learned Trial Judge erred in law and fact when he failed to make an independent analysis of the evidence in its entirety, failing to have regard to the evidence tendered in evidence and evidence facilitated in trial proceedings in which concerns independent medical evidence which could have resulted in a overturn of the guilty verdict if it had been considered at the trial court therefore a substantial miscarriage of justice has occurred.*

---

[5] *State v Ramesh Patel* [2002] FJCA 13; AAU002U.2002S (15 November 2002).

3. The Learned Trial Judge erred in law and fact failing to consider the evidence in its entirety and therefore now 'Fresh Evidence' is adduced being that the defence is concerned of the records before the Court and how the Learned Trial Judge failed to have regards to the expert, independent medical evidence when making his evaluation of the evidence whereby the neglect of that evidence represents a wrong assessment of the evidence had been made by the Learned Trial Judge in which resulted in a substantial miscarriage of justice.

4. The Learned Trial Judge erred in law and fact failing to consider in his judgment the belatedness in the complaint in which (expert independent medical evidence) Fiji Police Medical Examination Form relays the complainant was obtaining to her vagina region (a) minor abrasions on vulva, (b) hymenal tear noted at 6 o'clock position, (c) bleeding noted from vaginal canal, (d) nil anal injuries, on 1/07/2015 and injuries visible occurring rather recent to 1/07/2015 (having made a correct summary of the evidence) when allegations of rape and criminal intimidation are alleged to have occurred 14/06/2015 whereby PW2 and PW3 also confirmed with their evidence the complainant was lying to the Court (Credibility of the Complainant Critically Challenged) therefore a substantial miscarriage of justice had occurred.

5. The Learned Trial Judge erred in law and fact when he took into consideration the alleged Final Admitted Facts regarded at paragraphs 30-32 of the Summing Up whereby the said facts was never agreed to or signed by the appellant (Authenticated) therefore paragraph 30-32 is a false summary of evidence which was regarded having been summed up which led to a substantial miscarriage of justice.

6. The Learned Trial Judge erred in law and fact when he failed to make any analysis of the independent medical evidence whereby the defence argues that in the absence of any analysis of the independent medical evidence and the absence of any indication as to how much, if any, weight ought to be attached to that evidence represent a wrong assessment of the evidence in which resulted in a substantial miscarriage of justice and breach of the appellants right to a fair trial.

7. The Learned Trial Judge erred in law when he failed to facilitate a fair trial failing to have concern to whether or not all material evidence was facilitated whether or not all pertinent witnesses had been facilitated, failing to follow proper guidelines formulated (Section 155 (1) of the Criminal Procedure Code) when facilitating a trial thus breaching the Constitution Rights of the appellant and resulting in a substantial miscarriage of justice.

8. The Learned Trial Judge erred in law and fact when he accepted the complainant was mentally impaired/intellectually impaired without any medical doctor/psychologist evidence or independent medical evidence to establish this fact then erred in his judgment at paragraphs 23 and 24 neglecting the evidence challenging the credibility of the complainant, then with in hand Fiji Police Medical Examination Form (independent medical evidence) again neglected the evidence challenging the credibility of the complainant in which resulted in a substantial miscarriage of justice.

9. The Learned Trial Judge erred in law failing to have regards to Section 231 of the Criminal Procedure Act 2009 requires the Court to consider two important issues when the evidence of the witnesses for the prosecution has been concluded. If the Court considers that there is no evidence that the accused person committed the offence, it shall record a finding of not guilty. If it considers that there is evidence that the accused person committed the offence, then it shall inform the rights available under section 213 (2) (a) (b) and (d) to the accused.

[11] The Grounds are repetitive. We consider them under the following headings:

[a] Was the High Court Judge wrong to allow a statement of "Final Admitted Facts" to be presented in Court, and to direct the assessors that they could rely on the statements in it as having been proved beyond reasonable doubt?

[b] Was the High Court Judge wrong to accept that the complainant was intellectually impaired, and not require medical or psychological evidence to establish impairment?

[c] Did the High Court Judge fail to give proper consideration to the evidence given by the two teachers?

[d] Was the High Court Judge wrong to not refer to and consider evidence, including a Police Medical Examination Report, Witnesses Statements to the Police, Police Officers' statements, and records of interviews of the appellant?

[e] Was the High Court Judge wrong to allow a drawing done by the complainant to be admitted into evidence?

[f] Did the High Court Judge fail to comply with his duties under s 231 of the Criminal Procedure Act 2009?

Statement of "Final Admitted Facts"

[12] The appellant submitted that the High Court Judge allowed a statement of "Final Admitted Facts" to be produced in Court. He submitted that the "facts" had never been agreed to or signed by him, and were a false summary of the evidence. In particular, he submitted, the statement in

paragraph 1 of the statement, that "[The complainant] the victim in this case was 14 years and 7 months old on the 14th of June 2015..." was a breach of the presumption of innocence and a breach of his fair trial rights under ss 13(1)(d) and 14(2)(e) of the Constitution of the Republic of Fiji. He submitted that if the "Final Admitted Facts" were agreed by his defence counsel, then counsel was prejudiced and incompetent. He further submitted that the High Court Judge should never have allowed the "Final Admitted Facts" to be admitted without being signed and authenticated.

[13] The High Court Record of the proceeding contains two versions of statements of "Admitted Facts": a statement of "Admitted Facts", dated 2 February 2016, which is signed by defence counsel, state counsel, the appellant, and the High Court Judge, and which includes at paragraph 1: "It is admitted that [the complainant] is the victim in this case"; and a statement of "Admitted Facts, which is undated except to note "July 2016, is signed by defence and state counsel, only, and includes the same statement at paragraph 1 as in the statement dated 2 February 2016.

[14] At the hearing before this Court, counsel for the state produced (with leave) the statement of "Final Admitted Facts", dated 9 May 2018. This is signed by state counsel, defence counsel, the appellant, and the High Court Judge. It includes in paragraph 1 the statement set out in paragraph [12], above. The High Court Record records that the appellant was present in Court on 10 May 2018 when the statement of "Final Admitted Facts" was produced to the Court, signed by the Judge, and copies given to counsel for the defence and the state. At the appeal hearing, the appellant acknowledged that he had signed this document, and that his signature appeared on it.

[15] The appellant has not established that a statement of "Final Admitted Facts" was accepted in evidence by the High Court Judge when it had not been signed by him and authenticated. This Ground of appeal has no prospect of success.

The complainant's impairment

[16] The appellant submitted that the High Court Judge wrongly accepted that the complainant was mentally or intellectually impaired, in the absence of any medical or psychological evidence to establish impairment. He submitted that the Judge's error impacted on the assessors' and the Judge's assessment of the complainant's credibility.

[17] Evidence was given in the High Court by two teachers at the Special School attended by the complainant. The High Court Judge noted in his summing up to the assessors that the complainant's class teacher (PW2) had seven years' experience teaching at the school, and had taught the complainant for four years in the Vocational Girls Class. The Judge recorded her evidence that the complainant was "intellectually impaired and a slow learner academically". The Counsellor (PW3) had been a teacher for 27 years, and had been at the Special School for five years. She was in charge of the "senior girls" (which included the complainant). The Judge recorded in his summing up that she had taken the complainant to a separate room, and that it took a long time for her to "normalise" the complainant and to get her to say what had happened to her.

[18] The High Court Judge set out his own assessment of the complainant in his conviction judgment, as follows:

> *[19] I accept the evidence of the complainant as truthful and reliable. The complainant was able to recall what had happened to her some three years ago. She was able to express herself clearly, was straightforward and forthright in her evidence.*
>
> *[20] The complainant was able to withstand cross examination and was not discredited. She was referred to her police statement given to the police when facts were fresh in her mind, the inconsistence was not significant which did not adversely affect and reliability of the complainant's evidence.*
>
> *[21] I have no doubt in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty.*

[19] The appellant has not established that the High Court Judge was wrong to accept the teachers' assessment of the complainant's impairment. He was entitled to do so, on the basis of the teachers' experience in the Special School and their knowledge of the complainant. Further, this was not a case in which the precise extent of the complainant's impairment was critical to the relevant events. It is also evident from the Judge's assessment of the complainant that her impairment did not adversely affect the complainant's ability to recollect and give evidence as to the relevant events, her ability to express herself, and to withstand cross examination. The appellant has not established that this ground of appeal has any prospect of success.

The High Court Judge's consideration of the evidence given by the two teachers

[20] The appellant submitted that the teachers gave evidence that the complainant made several excuses to them as to why she was late to school. He referred to the evidence of the counsellor that she had taken the complainant to a separate room, and it had taken a long time for her to normalise the complainant and to get her to say what had had happened to her. He submitted that the complainant made no allegation of rape at this time, and the appellant was not in any pain. He further submitted that none of the complainant's excuses for her lateness mentioned that she had been raped by the appellant and had been threatened by him with a cane knife. He submitted that if the complainant had been raped on 14 June then that is exactly what she would have said to the teachers on 15 June, and she would have shown distress, such as pain, suffering, fear and tears.

[21] He submitted that the teachers' evidence critically challenged the credibility of the complainant. He further submitted that she would not have been able to hide her pain and injuries to her vagina if she had in fact been raped or was in fear of being harmed in any way.

[22] This matter was put to the single Appeal Judge in the appellant's initial application for enlargement of time. In paragraphs [20] to [23] of the leave ruling, the Appeal Judge specifically addressed the varying accounts given by the complainant and the teachers in his summing up to the assessors. He recorded that the High Court Judge had referred to the submission by the appellant's counsel that the complainant should not be believed as she had changed her story a few times. The High Court Judge also addressed the assessors as to how to evaluate inconsistent evidence.

[23] Having received the assessors' opinion, the High Court Judge considered the evidence of the complainant and the teachers in the conviction judgment, as follows:

> *[22] The next day when the complainant went to school she told her teachers what the accused was doing at her home. The teachers confirmed in their evidence that the complainant was an intellectually impaired child who was a slow learner she would take her time to answer questions, pause, wait for a while, give a blank look and then answer. Furthermore the complainant was a quiet and reserved child who hardly shared anything with the teachers.*

[23] Since the complainant was a special needs child it was normal to expect that she would express herself by giving different versions of what had happened to the teachers. The most important thing is that she was able to relay the message that the accused had done something unlawful to her. There is no requirement if the law that a complainant has to disclose all the ingredients of an offence but must disclose evidence of material and relevant unlawful conduct on the part of the accused, it is also 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 (see Anand Abhay Raj vs The State CAV0003 of 2014).

[24] I accept that the complainant had told the School Teachers about the unlawful sexual conduct of the accused, the fact that she did not tell the School Teachers that the accused had raped her does not affect the credibility of the complainant's evidence.

[24] The appellant has failed to establish that the High Court Judge erred in his consideration of the teachers' evidence. This ground of appeal has no prospect of success.

Did the High Court Judge fail to refer to and consider evidence?

[25] A substantial focus of the appellant's submissions to this Court was his contention that the High Court Judge failed to refer to and consider a report prepared by a Police medical officer of the examination of the complainant on 1 July 2015 ("the medical report"). The medical report was fundamental to many of the grounds advanced by the appellant, and was at least mentioned to some degree in nearly all others. In particular, the appellant referred to records of dates which, he submitted, showed discrepancies between information recorded in the medical report and the complainant's evidence of the appellant's offending, and demonstrated that her evidence was untrue. A copy of the medical report was annexed to the appellant's submissions.

[26] This Court cannot consider this ground of appeal. The medical report was disclosed by the prosecution to the appellant's counsel. The High Court Record shows that at a pre-trial conference on 9 May 2018 (five days before the appellant's trial began), prosecution counsel advised the High Court Judge and counsel for the accused as to the witnesses to be called for the prosecution, and is recorded as saying that the prosecution was "not relying on the medical report".

[27] The medical report was therefore not in evidence before the High Court, and accordingly is not before this Court, unless it were to be admitted as fresh evidence. Ms Fatiaki indicated for the

State that had an application been made to adduce it as fresh evidence, it would have been opposed. Her reasons for such opposition were entirely valid.

[28] While it would have been open to the appellant's counsel to have tendered the medical report at the appellant's High Court trial, and called evidence in respect of it, that did not occur. Accordingly, the medical report was not before the Court. There can be no issue as to whether the High Court Judge should have referred to and considered the medical report, as it was not tendered in evidence.

[29] Nonetheless, this Court did canvass the potential relevance of the medical report at the appeal hearing, and it is appropriate to include observations about it in disposing of the appeal.

[30] The appellant's counsel was on notice that the prosecution did not intend to adduce and rely on the medical report, so had the opportunity to consider whether it might advantageously be adduced for the appellant. The decision not to put it in evidence could only arise on appeal as a matter of trial counsel competence. That has not been raised and without the procedure necessarily followed when counsel competence is put in issue on an appeal, it is not possible to venture a reasoned view on the prospects for such criticism as a ground of appeal.[6] We do not know, for example, the nature of the dialogue between the appellant and his counsel about this tactical decision.

[31] The appellant now sees the discrepancy in dates, where the prosecution case was that the rape occurred some two weeks before the date endorsed on the report of the complainant's medical examination, as casting significant doubt on the prosecution case. However, the discrepancy in dates may well have been readily explained, and the report of the physical examination of the complainant was clearly prejudicial to the appellant.

[32] The decision not to adduce the medical report was a tactical one and it would more likely than not be recognised as a valid course to advise the appellant to take. As matters stand, it does not appear that there was a credible basis for advancing counsel incompetence on the point.

---

[6] As to that procedure, see *Chand v State* [2019] FJCA 254; AAU0078.2013 (28 November 2019), at [37]; and *Baleiono v State* [2024] FJCA 49; AAU101.2022 (12 March 2024), at [6]-[12].

[33] The appellant also submitted that the High Court Judge failed to refer to and consider a number of witness statements to the Police, Police Officers' statements, and records of interviews of the appellant ("the Police material"). While some witnesses (for example, the complainant) were cross examined on their statements to the Police, the prosecution did not call any of the persons from whom statements had been taken other than the complainant, her mother, and the two teachers. Again, it was open to the defence to do so.

[34] The appellant has not established that the High Court Judge "failed to refer to and consider the medical evidence". It was not available to him to do so. This ground of appeal has no prospect of success.

The drawing done by the complainant while giving evidence

[35] In his summing up to the assessors, the High Court Judge recorded that the complainant had inserted his private part into her private part but she was unable to recall the name of the accused's private part. However, she was able to do a drawing on paper which was tendered as prosecution exhibit no. 1. The complainant explained the private part of the accused was "from where he urinates".

[36] The appellant submitted that admission of the drawing as an exhibit constituted contempt of Court, and was a breach of his right under s 14(2)(e) of the Constitution to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to such evidence.

[37] Admission of the complainant's drawing as an exhibit cannot constitute contempt of Court, nor was it a breach of the appellant's Constitutional rights. It simply occurred because the complainant had difficulty remembering the correct term for the appellant's penis. The High Court Judge recorded in his summing up that the complainant was cross examined on the point, and that she agreed that she had said in her Police statement that the appellant's "nunni was hard and he put his nunni inside her 'nunni'", and agreed that she had told the Court that "she did not know what the appellant's private part was called and also its name in Hindi".

[38] This ground of appeal has no prospect of success.

Did the High Court Judge fail to comply with his duties under s 231 of the Criminal Procedure Act 2009?

[39] Section 231 of the Criminal Procedure Act 2009 provides:

> ***[CP 231] Close of case for the prosecution***
>
> *(1) When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.*
>
> *(2) When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more of several accused persons) committed the offence inform each such accused person of their right—*
> *(a)to address the court, either personally or by his or her lawyer (if any); and*
> *(b)to give evidence on his or her own behalf; or*
> *(c)[Repealed]*
> *(d)to call witnesses in his or her defence.*
> *[subs (2) am Decree 12 of 2010 s 4, effective 1 February 2010]*
>
> *(3) In all cases the court shall require the accused person, or his or her lawyer (if any), to state whether it is intended to call any witnesses as to fact other than the accused person, and upon being informed of this the Judge shall record the response to the question.*
>
> *(4) If an accused person says that he or she does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the prosecutor may sum up the case against the accused person.*
>
> *(5) If an accused person states that he or she intends to give evidence or make an unsworn statement or to adduce evidence, the court shall call upon the accused person to commence his or her defence.*

[40] The appellant submitted that at the conclusion of the prosecution case, the High Court Judge was required to consider whether there was evidence that he had committed offences with which he was charged, whether or not the defence made an application for an order that he had no case to answer, and if he concluded that there was no such evidence, he was required to record a finding of not guilty. He submitted that in his case, the Judge did not seem to have given his independent mind to "the most crucial issue of credibility and the facts supported by evidence". He referred to the medical report, in particular, as evidence that should have led to a finding of not guilty.

[41] There can be no doubt that the High Court Judge complied with s 231. In cases to which s 231 applies, there is no obligation on the Judge to state explicitly that he or she has considered the prosecution evidence and concluded that the accused person has a case to answer. That will be required in the event of an unsuccessful application for a ruling that there was no case to answer, in the course of delivering a ruling on it. It is not otherwise required.

[42] On the evidence before the Court, the appellant clearly had a case to answer. The High Court Record sets out the procedure that was followed at the conclusion of the prosecution case. Counsel for the appellant advised the Court that she had taken instructions from her client and he wished to remain silent. The assessors were then called in and the Judge addressed the appellant directly, advising him that he had the option to give evidence and be subjected to cross examination, or to remain silent. The appellant was further advised that under either option, he could call witnesses. When asked which option he chose, the appellant responded "I will remain silent and I am not calling any witnesses".

[43] The appellant has not established that this ground of appeal has any prospect of success.

[44] As none of the grounds of appeal put forward by the appellant have any prospect of success, the appellant's application to the Full Bench of the Court of Appeal for enlargement of time to appeal against his conviction must be dismissed. In accordance with the Court of Appeal's usual practice, I would treat the hearing of the application for enlargement of time to appeal against conviction as the hearing of the appeal, and dismiss the appeal.

Dobson JA

I have read the judgment of Andrews JA in draft and agree with all the reasoning and the outcome.

ORDERS

(1) The appellant's application for enlargement of time to appeal against his conviction is dismissed.

(2) The appeal is dismissed.

Hon. Justice Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Justice Andrews
JUSTICE OF APPEAL

Hon. Justice Dobson
JUSTICE OF APPEAL