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

CRIMINAL APPEAL NO. AAU 0018 of 2024
[Suva High Court Case No: HAC 249/2020]

BETWEEN : **SHAHIL DYER RAJ**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Narayan S for the Appellant**
: **Zunaid Z for the Respondent [ODPP]**

Date of Hearing : **13 February, 2025**

Date of Ruling : **26 March, 2025**

RULING

[1] The appellant [**SHAHIL DYER RAJ]** was charged with one count of **Rape** and one count of **Sexual Assault** against AAR - 1 **(Prosecutrix 1),** a child under 13 years of age and with one count of **Rape** against AAR – 2 **(Prosecutrix 2)**, a child under 13 years of age, as below:

COUNT 1

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SHAHIL DYER RAJ between the 1st day of January, 2019 and 29th day of July, 2020 at Caubati, Nasinu in the Central Division, penetrated the vulva of **AAR - 1,** a child under the age of 13 years, with his tongue.

COUNT 2

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SHAHIL DYER RAJ between the 1st day of January, 2019 and 29th day of July, 2020 at Caubati, Nasinu in the Central Division, penetrated the vulva of **AAR - 2,** a child under the age of 13 years, with his tongue.

COUNT 3

(Representative Count)

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210(1) (b) (ii) of the Crimes Act 2009.

Particulars of Offence

SHAHIL DYER RAJ between the 1st day of January 2019 and 29th day of July, 2020 at Caubati, Nasinu in the Central Division, procured **AAR - 1,** a child under the age of 13 years, to witness an act of gross indecency by displaying and placing his penis on the hand of **AAR – 1.**

[2] The appellant pleaded not guilty to the charges filed against him. At the trial, the Prosecution led the evidence of 4 witnesses, including the evidence of AAR – 1 and AAR - 2 the victims. At the end of the Prosecution case, since the Court was convinced of the availability of a prima facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused.

[3] At the end of the trial, the appellant was found guilty as charged and was convicted on 22 January 2024. He was sentenced on 25 January 2024 to 9 years 9 months imprisonment with a non-parole period of 9 years and 3 months.

[4] On 14 March 2024 the appellant through counsel filed a Notice of Leave to appeal against conviction and sentence, with 5 grounds of appeal against conviction and 5 Grounds of appeal against sentence. This Leave application was 14 days out of time. The appellant had filed a Motion to Leave to Appeal out of Time on 14 March 2024. For the purpose of this leave application, I will consider it as being filed timely.

Hearing

[5] The appellant submitted the following grounds of appeal:

i) The trial judge erred in law and fact in relying and taking into considerations inconsistent and or prejudicial evidence in finding the appellant guilty;

ii) The trial judge erred in law and fact in not adequately directing the assessors on the evidence relied on by the state;

iii) The trial judge erred in law and fact in failing to adequately evaluate the evidence before returning a verdict of guilty giving rise to miscarriage of justice;

iv) The trial judge erred in law and fact in not directing himself or made references to defence evidence adduced by the appellant resulting is miscarriage of justice

v) The trial judge erred in law and fact in not adequately directing himself or the assessors that the prosecution evidence against the appellant was highly circumstantial and inadequate to support the prosecution case.

[6] The above grounds involve both questions of law and fact and therefore leave is required for appeal to the court of appeal, as required by section 21(1)(b) of the Court of Appeal Act 2009. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** see: **Caucau v State** [2018] FJCA 171; **Navuki v State** [2018] FJCA 172 and **State v Vakarau** [2018] FJCA 173; and **Sadrugu v The State** [2019] FJCA 87.

[7] Under section 23 (1)(a) of the Court of Appeal Act, the test is not whether the verdict is unsafe and unsatisfactory [vide **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)**]** but whether the verdict is unreasonable or cannot be supported having regard to the evidence or there is a wrong decision of any question of law or there is miscarriage of justice subject to the proviso.

Assessment of Grounds of Appeal

[8] Despite the articulation of the 5 grounds of appeal in the written submission filed before the hearing, at the hearing of the leave application, counsel for the appellant consolidated the grounds of appeal to 3 as follows:

Witness Coaching

i) Lack of credibility in the evidence of the complainant due to coaching by the police and prosecution. This claim arises from the fact that the prosecution at the trial, gave the complainant a doll to explain her evidence better to the court. Illustration charts and booklet of photographs were also used, to assist the court in eliciting the evidence of young complainant. The relevant part of the judgement state: **State v Raj [2024] FJHC**

'*To assist this witness to explain the incident better, the Prosecution hands over a Doll to the witness. Taking the Doll into her hand, the witness shows the groin area of the Doll and says that the Accused licked that part in her body. Testifying further, this witness claimed that thereafter the Accused put his private part on her hand, which was long and oval shaped. To explain further, this witness draws the shape of the private part of the Accused on a paper, which was marked by the Prosecution as* ***PEX4****. Describing the place where the incident happened, she refed to booklet marked* ***PEX3*** *photo 8 and mentioned that this happened on the bottom left below the pink painting and she clearly saw this from the light that came through the window next to the pink painting. She further informed Court that at this time no one else was awake and everyone else was sleeping and since Shahil told her not to tell anyone, she was afraid and didn't tell anyone.'*

In assessing this ground of appeal, I referred to the relevant part of the Bench Book for Children for the Judiciary. At page 44 it states:

"The Criminal Procedure Act 2009 (s.296) outlines a number of measures that the courts can use to assist vulnerable witnesses to give evidence, including the use of video-taped statements, screens, closed-

circuit television, and closed court proceedings (discussed in more detail in Chapter 4 below). The Act does not define "vulnerable witnesses"; however, the Constitution (s.15(9)) makes it clear that special arrangements should be used to assist child witnesses in criminal proceedings to give their best evidence. In addition, the courts have on numerous occasions noted that child complaints are particularly vulnerable and require special accommodation before the courts [Kumar v The State [2016] FJSC 44, CAV0024.2016 (27 October 2016); Daas v. The State [2018] FJSC 28, CAV0014.2018 (2 November 2018); Prakash v. The State [2017] FJHC 263, HAA68.2016 (7 April 2017); State v Cawi [2018] FJHC 965, HAC124.2016 (19 September 2018)]. As such, it would be expected that one or more special measures would be used whenever a child under the age of 18 must give evidence in court, particularly in relation to sexual offences or other crimes of violence, and child witnesses can be considered as vulnerable witnesses without specific evidence being led that the child is likely to be unable to testify through fear, or would suffer emotional trauma from testifying in open court [State v Cawi [2018] FJHC 965, HAC124.2016 (19 September 2018)]."

[9] The submission by counsel for the appellant was not clear on why she considered the assistance as coaching, implying that the evidence unlawfully obtained in breach of the right of the appellant to a fair trial under the Fiji constitution. It is also noted that at the trial, as far as I can discern from the judgement, the appellant was represented by counsel and there was no reservation or objection made for the use of the doll etc. This ground of appeal has no merit.

Medical Evidence – Dr Losana Burua

ii) The other grounds of appeal relate to the evidence of Dr Losana Burua [PW2] which is set out in paragraph 12 of the judgement:

*"12. The second witness for the Prosecution (**PW2**) was **Dr. Losana Burua.** In testifying in Court, she mentioned that she is a GP and in 2020 she worked at Medical Services Pacific Clinic and she has been practicing since 1998 and she has specialized in family practice, especially women and children. According to her on 30/07/2020 she had been at Medical Services Pacific. On that day, when produced by the police, with her mother she had medically examined **PW1** at 1300 hours and filled in the police medical examination form and signed, which was marked as **PEX5.** According to her **i**n D 11 of **PEX5** she had mentioned that the patient was oblivious to what was going on and was carefree. She had mentioned that the patient had nil physical injuries together with her genital area. Her hymen had been intact. However, the patient had informed that the act done was a game. This witness had recommended further counselling for the patient,*

since she was not aware of anything further. Furthermore, Doctor had mentioned that there were nil signs of penetration, but she opined that she couldn't exclude that the tongue was used, since they hardly see any injuries in incidents where the tongue was used to lick the vulva. She further mentioned that, if the use of the tongue was very aggressive, she could have noticed some abrasions in the first week, but vulva could be penetrated with a tongue without causing any injuries. On the same day she had examined AAR – 2 and filled the form and signed, which was marked as ***PEX6.*** *She had examined her at 1.30 pm. AAR – 2 had been very carefree and had acted as a normal child. On examination no abrasions had been noted in her genital area and her hymen had been intact. Further, since this patient also had been of the view that the act was a game, she had recommended her for counselling."*

[10] The appellant submission is that on the basis of the PW2's medical report which found no physical injuries in the genital area of the complainant, coupled with there being no sign of penetration of the vulva and that the hymen was intact, the appellant submits that on that basis the verdict at the trial is not supported by the weight of the evidence. In this case evidence of 2 witnesses PW1 the complainant and PW2 Dr Losana Burua the medical doctor is critical to the finding of the guilty verdict. In the part of judgement with a subheading of "Evaluation of Prosecution Evidence" the trial judge state:

"*18. Through the evidence of* ***Dr. Losana Burua*** *Prosecution notified the Court that on medical examination the two victims had nil physical injuries and their hymens were intact. Further in her evidence she opined that on medical examination of genital area of victims subject to incidents of this nature, doctors hardly see any injuries in incidents where the tongue was used by the perpetrator to lick the vulva of the victim.*

19. By the evidence of PW3, the mother of the victims, Prosecution informed this Court how this matter came into light, when she found her son and the daughter attempting to play the game the Accused had mentioned to them. Further, she testified how her husband was reluctant to report the allegations of the victims to the police, since the Accused was the eldest son in their family and how she sought assistance of the Women Crisis Centre. In relation to the evidence of this witness, this Court recognized that she has had a very cordial relationship with the Accused, and she had trusted him to keep her two young daughters with him alone. In noticing the procedure she followed to complaint against her nephew, this Court has no reason to doubt the inclination of a mother to protect her daughters against any family pressure."

[11] Given the pivotal nature of the medical doctor's evidence in the determination of the guilt or not of the appellant, I expected more critical analysis of this evidence by the trial judge, given that the appellant has a right to fair trial. This is not evident from the judgement. The evidence of PW3 the mother of the victim does not help in refining the medical report in anyway.

[12] There may have been further material before the trial judge which is part of the full record of the trial. There is enough basis in my view for this issue to be reviewed by the full court to provide a determination with the benefit of the full court record. I will grant leave to appeal on this point only.

Lack of Competency Test

iii) This ground was raised at the hearing of the leave to appeal hearing, urging that since there was no competency test undertaken for the victim under section 10 of Juvenile Act, her evidence cannot be relied on. It is no apparent from the judgement in the case that this issue was raised at the trial. That may be due to the fact that, in **Kumar v The State [2016] FJSC 44, CAV0024.2016 (27 October 2016),** the Supreme Court declared that the requirement in section 10(1) of the Juveniles Act for the unsworn evidence of a child to be corroborated is inconsistent with the Constitution and is therefore invalid. This ground has no merit

Appeal Against Sentence

[13] There was only 1 ground filed against sentence, in that it was harsh and excessive. The basis of this submission is that irrelevant factors were taken into account in determining the sentence and also suggestion that the sentence was so severe and disproportionate punishment contrary to section 25 of the Constitution.

[14] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February

1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows:

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the* Court of Appeal Act *(Cap 12)? It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).'*

[15] ***Bae*** (supra) was adopted by the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499.

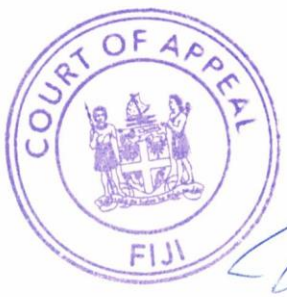
[16] The submission by the appellant did not articulate the how each of the 4 factors identified by the **Bae** decision were not followed by the judge when determining the sentence. There were broad references to Section 8 of the Penalties & Sentencing Act [the Act], about the 2 years reduction in the sentence due to need for rehabilitation. That is not an error of law nor is it an irrelevant factor. The sentence followed the guidelines set out in section 4 of the Act. The claim that the sentence is contrary to section 25 of the Fiji Constitution is desperate attempt to find a violation of the principle of law relevant to sentencing.

[17] I am satisfied that on the basis of the totality of the evidence before him, the judge was within his power pass the sentence he did in this case.

[18] In conclusion, the ground of appeal submitted as regards grounds i) and iii) in paragraph 8 above have no merit and are dismissed. As regard ground ii) covering the medical evidence of Dr Losana Burua leave to appeal is granted. For the appeal against sentence, leave is refused.

ORDERS:

1. Leave to appeal against conviction, is granted for ground ii) in Paragraph 8 above, but refused with regard to grounds i) and iii).
2. Leave to appeal against sentence is refused.



Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL