IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	**20/Suv/ 0005**
BETWEEN:	**SALINI** **APPELLANT**
AND:	**ANAND** **RESPONDENT**
APPEARANCES:	*Mr. N. Rattan for the Appellant.* *Mr. P. Sharma for the Respondent.*
DATE/PLACE OF JUDGMENT:	*Thursday 06 July 2023 at Suva.*
CORAM:	*Hon. Madam Justice Anjala Wati.*
CATEGORY:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.*

JUDGMENT

A. Catchwords:

Family Law – Practice and Procedure – Amendment of Grounds of Appeal – provisions in the Family Law Act governing amendment of appeals – provision in the High Court Rules (Standard Rules) governing amendment of appeals – was leave necessary to amend grounds of appeal given the circumstances of this case – is amendment restricted to the existing grounds of appeal or can it include adding new grounds of appeal - if new grounds of appeal are added via an amendment outside the time limited for filing an appeal, is an application for extension of time to appeal out of time necessary.

Family Law – General Matters – Definition of assault – is it within the purview of the Family Law Act to impose a sentence on the perpetrator – the obligations of the court personnel to report child abuse cases.

Family Law - Appeal– Allegations of Child Abuse – whether it was open to the trial Court to arrive at the finding that the child was abused based on the various evidence presented to it including medical and psychotherapist's evidence – whether the Psychotherapist was agreed to be called as an expert evidence and if so whether her expertise in her specialized field could be challenged on the appeal – whether there is any basis for the appellate court to interfere in the findings of the lower court.

B. Cases:

1. ***Paino v. Paino 40 Fam LR 96***.

C. Conventions:

1. ***Convention on the Rights of the Child (1989).***

D. Legislation:

1. ***Constitution of Fiji: s. 41.***
2. ***Family Law Act 2003: s. 26, 42, 113; 114; 121 and 185.***
3. ***Family Law Rules 2005: Rules 1.02; 1.03; 8.15.***
4. ***Family Law Regulations 2005: Reg.6.***
5. ***High Court Rules 1988: Order 55.***

Cause and Background

1. On 5 May 2017, the father filed an application alleging that the mother and his partner had abused the child of the marriage. The allegations in the application were as follows:

    1. ***That the child regularly becomes sick as a result of the mother's neglect and lack of care.***

    2. ***On 12 October 2016, the child said that his mother's friend, the big uncle, bit him on the cheek.***

    3. ***On 13 and 21 November 2016, the child told his paternal grandmother, his nanny and the father that his mother had put a plaster on his mouth and locked him in a room. When the mother came to pick the child up for contact on 3 December 2016, the child repeatedly pleaded with the mother not to put plaster on his mouth and lock him in the room.***

    4. ***On 29 November 2016, the son came to his father's place after contact with his mother. The father saw a bruise on his left lower back. Upon asking the child, the father was informed by the child that his mother had smacked him.***

5. ***On 14 April 2017, the son told the father that his mother had hit him on the head and that the mother's partner hit him in the leg and that his leg can be broken.***

6. ***On 1 May 2017, the child's paternal grandmother called the father and told him that the child was constantly asking the grandmother to hit his mother and his partner because they have been hitting the child. The father then lodged a complaint against the mother and his partner with the Samabula Police Station.***

7. ***On 4 May 2017, the mother was interviewed at the Samabula Police Station for child abuse and was charged with two counts of assault occasioning actual bodily harm.***

2. The child was born in 2013. As at the date of the allegations of child abuse, he was 3 years old. The Attorney – General's Chambers was appointed as the child representative to protect the interest of the child.

3. The allegations were strongly opposed and the child abuse application was listed for hearing to determine the allegations. The substantive parenting order application is yet to be heard. This concerns me in terms of case management because the allegations of child abuse should have been heard in the substantive parenting order hearing. This would have avoided the hearing on piece meal basis. There would be one trial and all the evidence on the best interest factors could have been tendered in court together with the evidence on the allegations of child abuse.

4. By now the substantive parenting order hearing would have been completed. I am concerned that the parties will have to again give evidence on the substantive parenting order hearing which is not only costly in terms of finance but also in terms of time factor.

5. The mandate in the Family Law Act is that a court should proceed with the matters without undue formality and without protracting the proceedings. Directions must be given to ensure speedy resolution of cases: ***s. 185 (4) of the Family Law Act and Regulation 6(3) of the Family Law Regulations 2005.***

6. I do not concur with the manner in which the issue of child abuse was heard separately from the main hearing on the parenting order application. I will urge the trial court to in future observe the mandate in the Family Law Act and unless a party can establish irreparable prejudice, there shall be no mini trials in respect of any general proceedings.

7. Be that as it may, let me reflect further on the background of the proceedings. At the time of the hearing, the first allegation was withdrawn against the mother. The court therefore properly did not deal with the allegation that was withdrawn as no evidence was tendered to support that allegation.

8. In its decision of 30 June 2020, the court found that allegations 3 to 6 identified in paragraph 1 of the judgment was made out. The 2nd allegation was dismissed as it was not established against the mother and his partner.

9. The Court also found that allegation 7 which stated that *on 4 May 2017 the mother was interviewed at the Samabula Police Station for abusing the child and was charged for two counts of assault occasioning actual bodily harm* was not an allegation but a supporting fact in relation to the allegation.

10. It is against the decision of the trial Court that this appeal is founded.

Grounds of Appeal

11. The mother contends that the trial Court has erred in law and in fact:

    1. *In finding that the medical report by Doctor Om supported the child's allegations.*

    2. *In failing to place sufficient weight on the evidence of Doctor Om under cross-examination.*

    3. *In failing to give any weight and or consider the evidence of Doctor Mortel despite qualifying it as credible evidence.*

4. *By qualifying and accepting Ms. Selina Kuruleca as an expert witness in the absence of any substantial and/or verified documentary evidence tendered to support her qualification as an expert.*

5. *In failing to exercise caution while giving weight to the opinion evidence provided by Ms. Selina Kuruleca.*

6. *In failing to consider and place sufficient weight on the reports of Empower Pacific dated 23 October 2017, 1 May 2018 and 4 July 2018 when the reports were directed by Court and were all independent reports.*

7. *In finding the evidence of the video footage tendered by the father to be more credible then the evidence of the video footage tendered in by the mother.*

8. *In finding that the mother's reply in negative or with laughter to the father's allegations of child abuse was a demonstration of the mother's evasiveness and lack of concern for the child.*

12. Ground 7 of the appeal has been abandoned. All other grounds were maintained and robustly opposed by the father. I now turn to the determination of the grounds.

Submissions, Law and Analysis

13. Before I deal with the grounds of appeal, I will address the preliminary objection raised by Mr. Sharma that the appellant who had amended his grounds of appeal on 1 August 2020 needs to both seek leave to file the amended grounds of appeal and also to seek leave for extension of time to file new grounds of appeal.

14. He argued that grounds 1 to 5 and 8 of the amended grounds of appeal were new grounds of appeal and as such it was not filed within the required time frame of 1 month from the date of the order so leave to file the new grounds out of time was necessary. Ground 6, he argued, was an amended ground incorporating the two initial grounds of appeal for which leave to amend was necessary.

15. In Family Court, the procedure on amendment of all documents is provided for by Division 8.5 of the Family Law Rules 2005. This provision falls under the general proceedings procedure. It is not specific to the appeals filed in Family Court but since it applies to general proceedings, it is not absurd or unfair to apply it to the appeals proceedings as well. The rules under Division 8.5 are rules 8.14 to 8.17. The relevant rule applicable to the issue at hand is Rule 8.15 which reads as follows:

8.15. A party who has filed and served a document may amend the document without the leave of the court, or the consent of any other party to the proceedings, at any time before a date is fixed for the final hearing of the proceedings.

16. The above rule clearly empowers the appellant to amend the appeal without the leave of the court at any time before the matter is fixed for hearing. The appellant filed the amended appeal before the hearing. There is no issue surrounding service of the amended grounds of appeal before the hearing. I thus find that the appellant did not need leave to file the amended grounds of appeal in this instance.

17. Further, the time period of one month to file the appeal is applicable to the original appeal and not to any amendment. An appeal filed within time can be amended any time before the same is fixed for hearing without the leave of the court to include new grounds of appeal, remove the existing grounds of appeal or to modify the same. There is no prohibition that new grounds of appeal cannot be added to the original one without leave been granted by the court or only upon leave to appeal out of time is granted by the court if the amendment is filed after one month.

18. I have also gone through the High Court Rules 1988. I am referring to the High Court Rules because Rule 1.02 (3) of the Family Law Rules states that *"where a practice or procedure is not provided for in these Rules, the standard rules of the court in which the proceedings are being conducted apply"*.

19. The definition of standard rules in Rule 1.03 in relation to the High Court means the High Court Rules 1988. Although there is a specific rule in the Family Law Rules governing amendments, I still find it important to reflect on the High Court Rules specifically governing the procedure for amendment of appeal proceedings.

20. Order 55 Rule 1 of the High Court Rules states that *"subject to paragraphs (2) and (3), this Order shall apply to every appeal which by or under any enactment lies to the High Court from any court, tribunal or person"*. Order 55 Rule (2) (a) and (b) states that *"this Order shall not apply to (a) any appeal by case stated; or (b) any appeal under any enactment for which rules governing appeals have been made thereunder, save to the extent that such rules do not provide for any matter dealt with by these Rules".*

21. If there is any reservations about the applicability of Rule 8.15 of the Family Law Rules to the current appeal proceedings then Rule 1.02 of the Family Law Rules 2005 and Order 55 of the High Court Rules 1988 permits the provisions of the High Court Rules to be applied to determine the procedure on amending an appeal. Order 55 Rule 6 (1) is the specific provision on amendment of appeal proceedings. It reads:

" The notice of motion by which an appeal to which this Order applies may be amended by the appellant, without leave, by supplementary notice served not less than 7 days before the day appointed for the hearing of the appeal, on each of the persons on whom the notice to be amended was served".

22. So, even the HCR allows for amendment without leave. An amendment is not restricted to the existing grounds. An amendment can include new grounds of appeal. It can either be an amendment to enlarge, reduce, change or introduce new grounds of appeal. I therefore do not find any basis for Mr. Sharma's preliminary objection which ought to be dismissed. I now turn to the substantive appeal.

23. The first 3 grounds of appeal relates to the medical evidence given by Doctor Om and Doctor Mortel. The mother is aggrieved that the evidence of Doctor Om was accepted over the evidence of Doctor Mortel.

24. In support of the first 3 grounds of appeal, the mother's counsel submitted that the medical report by Doctor Om of 30 November 2016 was not conclusive of child abuse. It was submitted that the report also did not outline or capture any of the allegations by the father or the child. Mr. Rattan argued that the report did not make any reference to any findings of child abuse or mentions the cause of the injuries.

25. It was further submitted by the mother's counsel that paragraph 144 and 145 of the Magistrates' ruling on child abuse reads as follows:

"144. Dr. Om further in cross- examination informed the Court that he asked the father of the child who had brought the child to him that the back of the child looked "unusual" and then he was told that the child was beaten. According to Dr. Om from what he noted he was not 100% "sure whether it was abuse". It was based on what he heard or what was claimed by the parent so what he wrote in the report is what he examined and saw.

145. Further in cross-examination Dr. Om agreed with Ms. Vaurasi that at no time when the father saw him or brought the child, there any saying or indications made to him that Mommy's friend beat him on the cheek. Neither at no time on the 30th of November 2016 was he told that the child was put plasters on his mouth".

26. The mother's counsel submitted that from paragraph 144 of the judgment it is evident that Doctor Om was specifically informed by the father that the child was beaten by the mother. It was argued that despite receiving such information, Doctor Om reported what he examined. He did not write in his report that the child was abused. Mr. Rattan said that Doctor Om also stated in cross-examination that he is not saying that the child was abused but that abuse is a possible cause.

27. It was further contended by the mother's counsel that from paragraph 145 it is evident that when the child was being examined by Doctor Om, he was never informed of the plaster being put in the child's mouth or that the mother's friend had bitten the child on the cheek.

28. It was also submitted that if the Court accepted the evidence of Doctor Om as credible then it should have given weight to his evidence in cross-examination which was that he was not saying that the child was abused and that the father had never told the doctor about the 3rd allegation at the time when the compliant in the 4th allegation was relayed to the doctor. There was therefore no direct or sufficient medical evidence for the Court to hold that the medical report and the evidence supported the allegations.

29. It was further contended by Mr. Rattan that apart from Doctor Om, Doctor Mortel also gave evidence. He was called by the mother to give evidence. He gave evidence in regards to a medical report which he had prepared of the child after examining the child on 16 November 2015 and subsequently reporting the findings via a medical report dated 24 November 2015.

30. It was argued that the court had qualified Doctor Mortel's evidence as believable, but it did not accept his evidence in arriving at a finding that the child was abused. It was contended that the evidence of Doctor Mortel was sufficient to suggest that the child had a history of suffering from an infection which caused marks on the child's skin.

31. I have gone through the evidence of both the doctors. The evidence of Doctor Om was in respect of the 4th allegation that on ***29 November 2016, the son came home after contact and the father saw a bruise on his left lower back. Upon asking the child, the father was informed that his mother had smacked him.*** Doctor Mortel, on the other hand, had examined the child on 16 November 2015 and reported his findings on 24 November 2015.

32. I must first of all clarify that Doctor Om's evidence was only in respect of the 4th allegation. His medical report and his oral evidence did not address the 3rd allegation or any other allegations. The evidence of Doctor Om covered only the back injury that the child had. It is therefore improper for the mother's counsel to assert that the father had not told the doctor about the plaster incident which is subject of the 3rd allegation. There was no injury related to the plaster allegation for the father to ask the doctor to examine his child.

33. The insinuation by the mother's counsel that since the plaster incident and the mother's partner biting the child on the cheek was not reported to Doctor Om means that the 3rd and 4th

allegation is not established is preposterous as those two are separate incidents and Doctor Om's evidence cannot be applied to the 3rd allegation or any adverse inference be drawn when he was not informed of the 3rd allegation.

34. Doctor Om had examined the child on 30 November 2016. He had tendered a report dated 30 November 2016. The material part of the medical report states *"an unusual skin blood clot like lesion was noted at the mid back of the patient which did not look anywhere like flea bites…"*

35. Doctor Om testified in Court too. He stated that the unusual lesion was near the lumbar region which is the lower mid back and is in an indented form. In medical terms it is called hematoma. Hematoma is seeping of blood out of the blood vessels into the soft tissues secondary to a blunt injury in the soft tissues. He further testified that generally that type of injury is seen in motor vehicle accidents or falls but in cases of falls it is unusual to see it at the lumber region because if someone falls, the most likely place to land is on the buttocks. He added that this kind of injury is also seen in child abuse cases when the child is being slapped or belted or if they are being tied by some kind of strap. The Doctor went onto say that the injury was more than 2 days and less than 5 days old.

36. I am surprised that the mother's counsel impliedly wants the oral evidence of Doctor Om to be excluded as evidence on the basis that he did not mention in the report that there was child abuse and that he only wrote in the report what he saw.

37. Different doctors make different types of medical report. In this case the doctor wrote what he examined and saw. He did not write what he thought has caused the injury on the child as he was not sure but in his oral evidence he says that it is possible that the injury is due to the abuse as he had information from the father that the child was abused. The doctor's oral evidence cannot be impeached on the basis that he did not put every information in the report. He need not. He wrote what he thought was essential. I do not think that he should have recorded what the counsel in hindsight think is proper or what the court thinks ought to have gone in the report. A doctor can always clarify what he wrote in his report through his oral evidence. It is for the court to either accept or reject that.

38. The court had to see whether the medical evidence of Doctor Om was impeached by any witness, either non-medical or medical witnesses. It was not. In fact Doctor Om's evidence remained unchallenged by other medical and non – medical evidence.

39. The medical evidence of Doctor Mortel was not sufficient to dispute the allegations or the evidence of Doctor Om. Doctor Mortel had examined the child on 16 November 2015, a year before Doctor Om examined him. Doctor Mortel's evidence was that the child had been found to be suffering from hand, foot and mouth infection. The infection caused the blisters which erupts as well.

40. Doctor Mortel never stated that such infections cause hematoma. Hematoma and blisters are two different medical conditions and it presents itself differently too. If the child had blisters in 2015, those blisters cannot be said to be equivalent to a hematoma seen a year after in the child. The evidence of Doctor Mortel was confined to his examination in 2015 and not 2016. In fact, there was no evidence that Doctor Mortel saw the child in 2016. I find it extremely difficult to fathom how the mother's counsel expects the court to treat the evidence of Doctor Mortel relevant to the type and nature of injury sustained by the child on his back.

41. I find the evidence of Doctor Mortel totally irrelevant to the 4th allegation in respect of which Doctor Om confined his evidence to.

42. Further, It was not only the medical evidence based on which the Court had arrived at the finding that the 4th allegation was established. The Court had looked at the entire evidence and Doctor Om's evidence was one of it to support the allegation.

43. I will turn to the evidence of the mother and her case theory which did not at any point impeach the allegation and the evidence by the father and his witnesses that it was more probable than not that the child was abused when he was with the mother from 25 to 28 November 2016.

44. The mother gave evidence that she had the child for 4 days before the father picked him up on 29 November 2016. She had the child on 25, 26, 27 and 28 November 2016. She had

picked the child up at 9am on 25 November 2016 from his school and then took him to the West.

45. She testified in her evidence in chief that she did not see any injury on the child's back when he left her place on 29 November 2019. However, in cross- examination, the mother's counsel put it to Doctor Om that the injury was as a result of the child rubbing himself with a ruler. Doctor Om had stated that if the child or someone else rubbed him with a ruler then the area would show an abrasion and not a hematoma.

46. If the mother had not seen any injury on the child then how can she suggest in her case theory that the mark on his back was as a result of the rubbing by the ruler. The suggestion put in the cross-examination by the mother's counsel was their case of how the child sustained the injury. It contradicted the mother's statement that there was no injury and it also did not address the issue of hematoma.

47. It was therefore open to the court to attach weight to the evidence of Doctor Om and arrive at a finding on the 4th allegation of child abuse. I do not find that the court had made any error in arriving at that finding.

48. The 4th and 5th grounds of appeal concerns the evidence of Ms. Selina Kuruleca. The mother's counsel argued that in the trial court, no objections were taken in regards the qualifications of Ms. Kuruleca. Despite that, it is submitted that the Court should not have qualified Ms. Kuruleca as an expert because apart from tendering her Curriculum Vitae, she did not tender or produce any other documentary evidence to verify her qualifications as an expert, and that there was no evidence of the skills and knowledge of Ms. Kuruleca in the area she claims to be an expert.

49. The mother's counsel further argued that it is the duty of the court to be satisfied that a witness is indeed an expert irrespective of whether or not a party has taken objection on a witness being classified as an expert witness.

50. I find that is important to lay down the principles applicable in admitting a witness as an expert witness. For that I turn to the case of ***Paino v. Paino 40 Fam LR 96***. This is a New South Wales Case and it states:

"[60] In his seminal exegesis on expert evidence in Makita (Aust) Pty Ltd v. Sprowles (2002) 52 NSWLR 705; [2001] NSWCA 305 (Makita), Heydon JA, as his Honour then was, summarized the principles applicable to permit expert evidence to be admitted as follows (at [185]):

[85] In short, if evidence tendered as expert evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialized knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness had become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it' and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialized knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applied to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialized knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialized expert knowledge, but, to use Gleeson CJ's characterization of the evidence in HG v R (1999) 197 CLR 414, on "a

combination of speculation, inference, personal and second – hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise (at [41])…

[63] *Heydon JA's summary of the conditions of admissibility of an expert report was considered in Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd (2002) 55 IPR 354; [2002] FCAFC 157 (Branson, Weinberg and Dowsett JJ). Branson J (at [7]) observed that his Honour's approach reflected "a counsel of perfection" and that reading his Honour's reasons as a whole revealed he recognized "that in the context of an actual trial, the issue of the admissibility of evidence tendered as expert opinion evidence may not be able to be addressed in the way outlined". ... the test of admissibility is whether the court is satisfied on the balance of probabilities that the opinion is based wholly or substantially on that knowledge,….*

[64] *Weinberg and Dowsett JJ also analysed Heydon JA's summary. Dealing with his Honour's expression "strictly speaking", they observed:*

[87] The use of the phrase "strictly speaking" …should not be overlooked. It may well be correct to say that such evidence is not strictly admissible unless it is shown to have all the qualities discussed by Heydon JA. However many of those qualities involve questions of degree, requiring the exercise of judgment. For this reason it would be very rare indeed for a court at first instance to reach a decision as to whether tendered expert evidence satisfied all of his Honour's requirements before receiving it as evidence in the proceedings. More commonly, once the witness's claim to expertise is made out and the relevance and admissibility of opinion evidence demonstrated, such evidence is received. The various qualities described by Heydon JA are then assessed in the course of determining the weight to be given. There will be cases in which it would be technically correct to rule, at the end of the trial, that the evidence in question was not admissible because it lacked one or other of those qualities, but there

would be little utility in doing so. It would probably lead to further difficulties in the appellate process.

[65] *Giles JA (with whom Mason P and Beazley JA agreed) approved the Full Federal Court's analysis of Makita in Adler v Australian Securities and Investments Commission [2003] NSWCA 131 saying (at [63]):*

> *[63] Whether an opinion has been shown to be based on the specialized knowledge is a question of fact,….What is required by way of which Heydon JA spoke in Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305 at [85] will depend on the circumstances. The disconformity in HG v R (1999) 197 CLR 414; 160 ALR 554; [1999] HCA 2 to which his Honour referred was gross, in that the psychologist's evidence went to when the complainant was abused and who abused her, outside the psychologist's expertise and based on matters other than a psychologist's expertise. Other circumstances will be quite different. And, as was said in Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157, absolute certainty that the opinion is based on the specialized knowledge is not required (at [14]) and many of the stated qualities of the opinion evidence by Heydon JA 'involve questions of degree, requiring the exercise of judgment (at [87]). [Emphasis added.]*

[66] *It is inherent in the process of preparing many expert reports that the factual basis for the opinion expressed is third party information. Courts emphasize the necessity that the factual bases of opinions be clearly laid out so that the opinion can be tested. An expert is rarely the source of all the factual information in his or her report. It may be garnered from a party (the typical illustration from a medical report), from empirical investigations (engineering reports for example), or in the case of valuations, from data relating to the properties about whose value and opinion is to be expressed.*

[67] *Consistent with that reality, it is accepted that an expert need not amass all the factual data on which an opinion is to be expressed. The task can be delegated to*

another. As Austin J said in Australian Securities & Investments Commission (ASIC) v Rich (2005) 190 FLR 242; 53 ACSR 110; [2005] NSWSC 149 at [329]:

[329] ... There is nothing in the law to prevent such delegation from occurring. But it is necessary for the expert who is the author of a report to apply his or her mind to the analysis and reasoning processes that his or her subordinates have developed, so that when the report is finalized, the whole of the reasoning and conclusions that it contains have been adopted as the expert's own reasoning and conclusions. Were that not the case, the expert should not claim to be the author of the report".

51. I gather from the records that the witness Ms. Kuruleca filed an affidavit which she deposed on 2 November 2017. That affidavit contained her curriculum vitae and her report dated 2 November 2017. A copy of the affidavit was served on the mother's counsel on the same day. By an email dated 10 September 2018, the father's counsel advised the mother's counsel that the father will be relying on the affidavit of Ms. Kuruleca of 2 November 2017.

52. By an email dated 11 September 2018, the mother's counsel queried whether Ms. Kuruleca will be giving evidence and whether she was the father's expert witness. The father's counsel then responded via an email dated 11 September 2018 that Ms. Kuruleca will give evidence as an expert witness.

53. At the hearing, the mother's counsel advised the court that they had no objections about her qualifications and her curriculum vitae. No one challenged her qualifications and experience and no one has provided sufficient basis to say that she is not a trained and qualified psychotherapist who specializes in that field. She has a Masters in Counselling and Psychology. Based on her experience and qualification, she has the specialized knowledge in psychology to give evidence of her analysis of the child's behavior in relation to the abuse.

54. Further, although Ms. Kuruleca was treated as an expert witness, her evidence was not used solely to make a determination in this case. Her evidence was amongst the many evidence before the court to arrive at a conclusion of child abuse. Even if the witness was not to be

treated as an expert, there are other remaining evidence based on which it was open to the court to arrive at the finding of child abuse.

55. Ground 6 complains that the Court had not put sufficient weight on the reports of Empower Pacific of 23 October 2017, 1 May 2018 and 4 July 2018 when the reports were directed by the court and were all independent reports.

56. Mr. Rattan says that all the reports were prepared by Ms. Saral Chand who also gave oral evidence on her report. The counsel contends that at page 111 of the Ruling, the court found that Ms. Chand was a credible witness and so was her evidence. Mr. Rattan referred specifically to the court's remarks saying that *"Ms. Chand was very fair in her assessments and based on her sessions and the time she spent with the Child she made her conclusions"*. It was argued that in Ms. Chand's report there was no findings on any child abuse. Ms. Chand had reported that the child's statements were contradictory.

57. Mr. Rattan argued that if the court had found Ms. Chand a credible witness, it should have then provided sufficient weight to the contents of her reports.

58. I have gone through the reports and the evidence of Ms. Chand. There were 3 reports prepared by Ms. Chand. The report dated 23 October 2017 was tendered on 12 July 2019 as Exhibit CR1 and the report dated 1 May 2018 was tendered on 16 July as Exhibit CR2. The last report of 4 July 2018 was not a report that was requested pursuant to the child abuse application. It was prepared to ascertain the child's wishes on whether he wanted to spend more time with his mother. Therefore Ms. Chand did not refer to the 4 July 2018 report during her oral evidence at the hearing. The report was also not tendered in evidence.

59. The court had analysed both the written reports of Ms. Chand and her oral evidence too. The court could not look at the written report in isolation. Ms. Chand had stated in her report that from all the statements that the child made regarding the physical abuse, it could not be concluded if he was physically abused or badly smacked which could have affected him emotionally or physically to some extent. She also recorded in her written statement that it could not be ignored that the child had stated that his mother's friend had hit him on the

head. The child needed to be protected from the perpetrators although the child did not identify that person.

60. When Ms. Chand supplemented her written evidence with the oral evidence, it was very clear that Ms. Chand admitted that the reason why the child did not open up about abuse suffered by the mother was because he had been manipulated. The child was made to understand that if he spoke against his mother, he would lose contact with her. He was manipulated not to divulge details about the abuse that he had suffered.

61. Ms. Chand also testified that when it came to answering questions relating to the mother, the child would withdraw from answering any further. That puzzled her. She could not conclude why he showed withdrawal signs. The child talked about other issues though. That behavior of the child made her to note in the report that he is not mentioning things about his mother either due to the feelings he has for her or that he has a bad memory which he does not want to open up to.

62. Then Ms. Shamal Chand was shown videos submitted to the office of the Director of Public Prosecutions by the mother. Ms. Chand said that while she was interviewing the child, around the same time, the mother was manipulating and brainwashing the child. She said that the mother was asking him leading questions. She constantly sought reassurances from him that she had not assaulted him, put him in a room or put plaster on his mouth. That is the reason Ms. Chand said that the child was not opening up to her because the child had been subject to answering that kind of questions so many times.

63. Further, the video of 19 August 2017 showed that the mother promised him a reward of getting him a CD if he told that uncle did not assault him. Ms. Chand's oral evidence also emphasized that her report of 23 October 2017 mentioned that the child had stated that his uncle, mother and one other person had hit him and when he said that, the child's expression was serious. Ms. Chand went onto say that her report of 1 May 2018 states that the child mentioned that his mother was a bad mummy and on saying that, his expression was again serious.

64. The report dated 1 May 2018 by Ms. Chand again stated that the child had said that the uncle, meaning the mother's partner had hit him and when he said that his expression was serious.

65. Ms. Chand also said that she had noted in her report of 1 May 2018 that the child said that everyone had hit him and when he said that, he was not genuine. The child refused to elaborate on the "smacking" as he was scared.

66. Ms. Chand also testified that the child liked her even though she was a stranger for the child because she had not harmed him. On the contrary the video evidence showed that the child was reluctant to hug his mother's partner on 24 December 2017 which may be an indication that the child was scared of him for some reason. Ms. Chand did say that the child looked worn out. In another video, the child is seeking reassurance from his father that his uncle will not hit him again.

67. When Ms. Chand was shown the photos of the child's injury to his lower back, she said that it amounted to extensive abuse.

68. I have reflected on the evidence of Ms. Chand. There is nothing in her evidence collectively that favours the mother. The report could not come to a conclusion as to whether there was abuse by the mother because the child was not opening up and Ms. Chand could not conclude in her findings why the child was not opening up. When she became privy to all the information and evidence put to her during the cross-examination, she related the child's reluctance to comment about the mother abusing him as something that he did because of being manipulated by the mother owing to being asked the same question over and over again and owing to the offer of gifts if the child said things in a particular way.

69. I do not accept Mr. Rattan's submission that the report was not given the proper weight. The report was explained by the maker and the holistic evidence pointed to a serious case of child manipulation which led the child to bottle up instead of opening about the abuse at the hands of the mother causing the maker not to be able to come to a clear finding on whether there was abuse.

70. I will now address the final ground of appeal. It states that the court erred in law and in fact when it found that the mother's reply in the negative or with laughter to the father's allegations of child abuse was a demonstration of the evasiveness and lack of concern for the child.

71. The very issue before the court was whether the mother had been abusing the child by assaulting him and putting plaster on his mouth. To address this, the court, together with analysis of other evidence, went onto the text messages that the father had sent to the mother regarding the abuse and sought her response. The court also looked at the demenaour and deportment of the mother in court to assess her credibility.

72. It is not uncommon for courts to observe the demeanour and deportment of parties in court and also analyse their conduct in dealing with each other on matters in dispute to assess a person's credibility. I do not find that in the circumstances of the case, it was wrong to analyse the mother's conduct when faced with the allegations by the father.

73. The court arrived at the conclusion that the mother's attitude towards the father's concern showed lack of concern for the child and her attempt to evade the father's concern. This reinforced the courts findings that the mother had been abusing the child and when confronted did not show any regard for the child's well-being.

74. It was not only the evasiveness regarding the child's injury, the court also noted how evasive and careless her attitude was when confronted with serious questions at the trial about the child's welfare. Instead of wanting to address the issue, the mother would be difficult, would try and derail the line of questioning and avoid answering simple questions. All this conduct was relevant for the court to make a finding on whether the mother was a credible witness.

75. Having gone through the evidence again, I do not find any basis to disturb the findings of the court below.

76. I do not find any merits in the grounds of appeal and the appeal ought to be dismissed. However I wish to deal with other ancillary matters that Mr. Sharma has raised in the

proceedings for the benefit of the children of this country. I think that his concerns are valid and needs to be addressed.

Other Matters

77. The first concern that Mr. Sharma has addressed is in respect of the definition of child abuse in s. 42(1) (a) of the Family Law Act. The definition reads:

" "abuse" in relation to a child, means -

(a) An assault, including a sexual assault, on the child which is an offence under the law; or

(b) A person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person;…

78. Mr. Sharma says that the definition of abuse it too limited as it does not include "emotional abuse (including psychological abuse) and neglect of a child. Since the definition did not include neglect and lack of care, the father had to withdraw the first allegation.

79. It is my view that Mr. Sharma has chosen to limit the definition of assault in s. 42 (1) (a) of the Family Law Act. An abuse is an assault on the child. The assault can be physical, mental, psychological and spiritual. The term assault has to be defined to meet the international standard definition of assault specified in the Convention of the Rights of the Child (1989). By Article 19, any kind of physical or mental violence, injury, abuse, neglect, maltreatments or exploitation of a child is condemned and abhorred.

80. S. 26 of the Family Law Act states that a court exercising jurisdiction under this Act must, in exercise of that jurisdiction, have regard to the need to protect the rights of the children and to promote their welfare and the Convention on the Rights of the Child (1989). The domestic law has specifically required that rights of the children outlined in the Convention be promoted. How can then the definition of assault be only confined to physical assault?

81. Further, the rights of the children are clearly spelt out in the Constitution of Fiji. The Constitution of Fiji says that *"every child has the right to be protected from abuse, neglect, harmful cultural practices, any form of violence, inhumane treatment and punishment, and hazardrous or exploitative labour"*: ***s. 41 of the Constitution.***

82. Following the definition of the Constitution, no court can limit the definition of assault to only physical abuse. It has to include mental and spiritual assault on the child or any kind of neglect.

83. Not only the Constitution but the Family Law Act itself recognizes the need to protect the children from physical and psychological harm caused by being subject to or exposed to abuse, ill-treatment, violence or other behavior. This is clearly provided for in s. 121 (g) (i) and s. 114 (3) of the Family Law Act.

84. Given the above laws protecting the interest of the children, no court should narrow down the definition of assault to only physical assault. I will also urge the lawyers of this country to instead of looking for lacunas in the Family Law Act, impress upon international standards being observed as the domestic law demands that.

85. The second issue that Mr. Sharma has raised is that the Family Law Act does not make any provision for a sentence to be implemented on the party who has abused the child. He suggests that this must be corrected. Sentencing a person for child abuse does not come within the purview of the Family Law Act.

86. The Family Law Act, does however, impose sanctions if a party is found to have abused the child. The sanctions include but is not limited to supervised contacts, limited contacts, contacts with conditions, protection orders and monitoring conditions. The sanction must however reflect the best interest of the children. The issue of sanctions is left to the discretion of the court. Any sanction must not do more harm or prejudice to the to the child, for example, if there is a need for the child to maintain contact with the parent who has been found to have abused the child then the court has to make an order for the benefit of the child bearing in mind the need to protect the safety and well-being of the child.

87. When it comes to sanctions, I usually apply what I call the ***"protection versus the prejudice principle"***. Any sanction must not cause more prejudice than protect the child. A child's competing rights have to be balanced when the issue of sanctions are considered. No such sanction must have a long term impact on the welfare of the child.

88. The third concern of Mr. Sharma is that s. 4 of the Child Welfare Act 2010 states that *"where a professional becomes aware or reasonably suspects during the practice of his or her profession, that a child has been or is being, or is likely to be harmed; and as far as he or she is aware, no other professional has notified the Permanent Secretary under this section about the harm or likely harm, the professional must immediately give notice of the harm or likely harm to such a child to the Permanent Secretary in writing or by facsimile, email or other reliable means of communication, where necessary the professional may, subject to section 6 give oral notice under this section".*

89. Mr. Sharma says that the definition of professional does not include a judicial officer. At this stage I can only say that s. 113 and 114 of the Family Law Act comprehensively sets out the obligations on any court personnel to notify the child welfare authority of any child abuse cases. In this case, a Form 15 was filed and the first thing that the Family Court does upon receiving Form 15 is to serve a copy of the same to the child welfare authority. This is in line with the obligation in s. 113 of the Family Law Act. The Family Law Act has put the same onus on the family court personnel as the Child Welfare Act has on the other professionals. I see no reason to be alarmed.

Final Orders

90. In the final analysis, I make the following orders:

(a) The preliminary objection by the father on the amendment of the grounds of appeal is dismissed.

(b) The substantive appeal is dismissed. The decision of the Family Division of the Magistrate's Court is upheld.

(c) Each party shall bear their own costs of the appeal proceedings.

……

Hon. Madam Justice Anjala Wati

Judge

06.07.2023.

To:

1. ***Capital Legal for the Appellant.***
2. ***Victoria Chambers for the Respondent.***
3. ***File: Appeal Case Number: 20/Suv/0005.***