IN THE COURT OF APPEAL, FIJI
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. CAV0027 OF 2022
[Court of Appeal No: AAU0133 of 2016]
[Lautoka High Court: HAC 181/11]

BETWEEN: **PRAVEEN CHAND**

Appellant

AND: **THE STATE**

Respondent

Coram: The Hon. Mr. Justice Terence Arnold, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court
The Hon. Mr Justice Alipate Qetaki, Judge of the Supreme Court

Counsel **:** Petitioner in Person
: Ms.Latu.L.L. For Respondent

Date of Hearing : 7 August 2024
19 August 2024
20 August 2024

Date of Judgment: 29 August 2024

JUDGMENT

Arnold, J

[1] I have read the judgment of Justice Qetaki in draft and agree that the petition should be dismissed.

Young, J

[2] I agree with Qetaki, J that the petition should be dismissed.

Qetaki, JA

Background

[3] The Petitioner had been indicted in the High Court at Lautoka on one count of rape committed at Lautoka in the Western Division by penetrating the vagina of SO (name withheld), aged 11 years and 11 months, with his fingers between 01 and 30 June 2011 contrary to section 207(1) and 2(b) and (3) of the Crimes Act 2009.He is appealing against his conviction only .His application for leave against sentence was allowed by a single judge on 31 July 2018, however, the full Court of Appeal subsequently disallowed the Petitioner's appeal against sentence in its judgment delivered on 28 September 2022. The sentence leave application was not renewed before this Court.

[4] The Petitioner was the uncle of the complainant who was 26 years old at the time of the offending. He, the complainant, and other family members lived together in a small house which had no separate rooms. He slept on the sofa while the complainant victim was sleeping on the bed with her mother on the particular night of the incident. The sofa and the bed were joined together. He allegedly started touching SO's body and then inserted his finger into her vagina while she was sleeping. He told her not to tell anyone or there will be a lot of problems. The Petitioner opted to remain silent and not lead any evidence at the trial.

[5] The assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge agreed with the assessors and in his judgment, convicted the Petitioner. He sentenced the Petitioner on 8 February 2016 to 14 years of imprisonment with a non-parole period of 12 years.

[6] The Petitioner's application for leave to appeal against conviction was refused by a learned single judge (Chandra, RJA) in a Ruling delivered on 31 July 2018. The appellant had not renewed his application for leave against conviction before the full Court of Appeal in terms of section 35(3) of the Court of Appeal Act. However, the

Supreme Court Record at pages 25- 27 indicate that the Chief Registrar was in receipt of a Notice of Renewed Conviction Grounds of Appeal and Renewal Application For Leave To Appeal Conviction from Chief Corrections Officer, Officer In Command Medium Corrections Centre on 15 January 2020, to the Court of Appeal, with a handwritten Notice purportedly from the Petitioner containing the Renewed Conviction Grounds of Appeal, signed by the him, but undated. Significantly, the full Court of Appeal had noted in paragraph [5] of its judgment dated 29 September 2020, that, "*That the appeal records had been prepared by the Legal Aid Commission with the concurrence of the State without trial transcripts as the appeal before this court involves only the sentence appeal."* That seems to explain the absence of the Petitioner's renewed grounds of appeal before the full Court of Appeal for its consideration.

[7] The full Court of Appeal having heard the Petitioner's sentence appeal on 16 September 2022, in a judgment delivered on 29 September 2022, dismissed it, holding that the sentence is well within the tariff and no sentencing error has been established. That the ultimate sentence is not harsh and excessive.

[8] On 28 October 2022 a letter from the Assistant Superintendent Correction, OIC Minimum Corrections Center, addressed to the Chief Justice, enclosing a handwritten letter purportedly from the Petitioner, dated 18 September 2022, titled *"Re: Appeal In The Supreme Court Against The Decision of The Fiji Court Of Appeal".* This letter raise issues directly related to the judgment, although it pre-dates the judgment. It raises other complaints, for example, the Petitioner not receiving transcripts from the High Court (HAC 181/2011) and the Fiji Court of Appeal Copy and transcript records (AAU 113of 2016).

[9] Also, on 28 October 2022 a letter from the Assistant Superintendent Corrections, OIC Minimum Corrections Center, addressed to The Supreme Court of Fiji, enclosing a handwritten Notice purportedly from the Petitioner, dated 18 September,2022, titled *"Re: Notice of Application for Special Leave To Appeal Against Conviction"* , with 5 grounds of appeal. The handwritten letter also pre-dates the judgment of the Court of Appeal dated 29 September 2022.

Grounds of Appeal Against Conviction

[10] Below are the handwritten grounds of appeal against conviction initially filed by the Petitioner.

Ground 1: That the learned trial judge erred in law in relying on the confession supposed to be made by the petitioner in the caution interview statement, yet not adequately and properly directing the assessors on how to assess on such confession before convicting the Petitioner without any other evidence.

Ground 2: That the learned trial judge erred in that he failed to properly and adequately direct the assessors on the Turnbull Guideline since the identification of the perpetrator was disputed.

Ground 3: That the learned trial judge erred in fact and in law when he failed to warn and explain to the assessors that the evidence of the victim witness was referred by law as suspect evidence. Failing to do so prosecuted my right to a fair trial causing a miscarriage of justice.

Ground 4: That, the learned trial judge erred in law when his Lordship did not give a clear direction to the assessors that the evidence of the victim/prosecution witness should be viewed with caution on the basis that the evidence given at the trial was based on her recollection and memory of events that she had contemplated some 5 years ago when she was only 11 years 11 months old.

Amended Grounds of Appeal Against Conviction Filed on 10th July 2024

[11] The Petitioner filed his Amended grounds of appeal on 10 July 2024, as set out below:

Ground 1: That the learned trial judge erred in law and fact when he did not put the case of the appellant to the assessors in fair and balanced and objective manner.

Ground 2: That the learned trial judge erred in law and fact when he did not highlight my counsel the section 133 of the CPD for the Doctor to witness the medical report.

Ground 3: That the appellant erred in law and fact when forced to allow the deficiencies court record to be proceed in the Court of Appeal.

Ground 4: That the learned trial judge erred in law and fact when he did not gave regard to the amount of fact contained in the disclosure and relied on the sworn evidence given by the victim, where not taking into account that her recollection and memory events that observed some 5 years when she was only 11 years 11 months old, when need to take fact of her age at the time of incident, here evidence was suspect.

Ground 5: That the learned trial judge miscarriage in grave injustice when the DPP did disclosure the victim full interview statement to the defence in typing and in the carbon copy of the original.

Ground 6: That the admissibility of complaints by the victim and the direction of the learned judge on the effect of recent complaint on the assessment of the complainant's evidence.

[12] The petitioner filed further papers on 17th July 2024 and submitting 7 grounds of appeal against conviction , 6 of whom are the same grounds as those filed on 10th July 2024 (Grounds 1-6) ,whilst Ground 7 is new, it states:

Ground 7: That the learned trial judge miscarriage in grave injustice when he misdirection and non-direction the assessors to relied on the sworn evidence of the victim for the identification of the accused by Radio light and the voice.

Supreme Court Jurisdiction

Constitution

[13] Section 98(3) of the Constitution affirms that the Supreme Court:

(a) Is the final appellate court;

(b) has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine appeals from all final judgments of the Court of Appeal; and

(c) has original jurisdiction to hear and determine constitutional questions referred under section 91(5) of the constitution.

[14] Sections 98(4) and (5) state:

"(4). An appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

(5). In the exercise of its appellate jurisdiction, the Supreme Court may-

(a) review, vary, set aside or affirm decisions or orders of the Court of Appeal, or

(b) make any other order necessary for the administration of justice including an order for new trial or an order awarding costs."

Special Leave Requirements

[15] The special leave requirements are set out in section 7 of the Supreme Court Act, which states:

"(1) In exercising its discretion under section 98 of the Constitution of the Republic of Fiji with respect to leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case –

(a) refuse to grant leave to appeal;
(b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders the circumstances of the case require; or
(c) grant leave and allow the appeal and make such other orders as the circumstances of the case require.

(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless:

(a) a question of general legal importance is involved;
(b) a substantial question of principle affecting the administration of criminal justice is involved, or
(c) substantial and grave injustice may otherwise occur."

[16] The threshold for granting special leave by this Court is very high as set out in: **Likunitoga v State** [2018] FJSC 26; CAV0005.2018 (1 November 2018) and **Livai Lili Matalulu & Another v Director of Public Prosecutions** [2003] FJSC 2, where the Court stated, as follows:

> *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principles or in the criminal jurisdiction, substantial and grave injustice."*

[17] The above passage was cited with approval in **Sharma v State** [2017] FJSC 5; CAV0031.2016 (20 April 2017) , wherein at paragraph [15] of its judgment, this Court observed as follows:

> *"Thus it is clear that the Supreme Court, in exercising its powers vested under section 7(2) of the Supreme Court Act, is not required to act as a second court of criminal appeal, but will only consider as to whether the question of law raised is one of general legal importance or a substantial question of principle affecting the administration of criminal justice is involved or whether substantial and grave injustice may occur in the event leave is not granted."*

[18] In the recent case of **Korodrau v State** [2023] FJSC 6; CAV0022/29 (27 April 2023), this Court emphasized the following:

> *"[23] Section 7(2) (b) and (c) of the Supreme Court Act 2016 ordinarily applies to two categories of cases, one substantive, the other procedural. Both can be said to fall within the class of miscarriages of justice. Special leave may be granted in the categories to which subsections (b) and (c) applies because the judgment under challenge is inconsistent with the proper administration of justice.*
>
> *[24] It is worth mentioning here that in dealing with applications for special leave to appeal in criminal cases, the High Court of Australia first adopted the principle laid down by the Privy Council in Re Dillet (1887) 12 App Case 459 at 467, that special leave to appeal will not be granted unless it is shown that by disregard of forms of*

legal process or by some violation of the principles of natural justice or otherwise substantial and grave, injustice has been done."

New Grounds Not Raised in Court of Appeal

[19] Although the Supreme Court has powers to entertain fresh grounds of appeal which were not raised in any court below, it will not be entertained *"unless its significance upon the special leave criteria was compelling" :***Eroni Vaqewa v The State** [2016] 12;CAV0016.2015(22 April 2016.

[20] In considering whether new issues should be allowed to be argued in the appellate court when it was not raised in the trial court, Justice L'Heureux-Dube in **R v Brown** [1993] 2 SCR 918 ; 1993 Can Lii 114(SCC) in her dissent said:

"Courts have long frowned on the practice of raising new arguments on appeal. Only in those exceptional cases where balancing the interests of justice to all parties leads to the conclusion that an injustice has been done should courts permit new grounds to be raised on appeal. Appeals on questions of law alone are more likely to be received, as ordinarily they do not require further findings of fact. Three prerequisites must be satisfied in order to permit the raising of new issues…….for the first time on appeal: first there must be sufficient evidentiary record to resolve the issue; second, it must not be an instant in which the accused for tactical reasons failed to raise the issue at trial, and third, the court must be satisfied that no miscarriage of justice will result."

***Voir Dire* Ruling on 3rd February 2016**

[21] A *voir dire* hearing was conducted on 3rd February 2016 due to the objection registered by the accused to the State's intention to give in evidence the accused's Caution Interview Statement. The accused's objection was based on two grounds, namely;

i. At the time of his interview the accused was coerced by WDC Asenaca to admit the alleged offence,

ii. The accused was forced to comply with the questions put to him and also to endure his signature.

[22] The prosecution called one witness at the hearing, while accused did not call any witness. Having considered the parties submissions, the learned trial judge, in a Ruling discussed the law applicable to admissibility of disputed evidence as established in **Wong Kam-Ming v The Queen** (1982) AC 247 at 261 and in **Shiu Charan v R** (FCA, Crim.App.46/83.In the earlier case, which discussed the basic control over admissibility of statement, it was held:

> *"The basic control over admissibility of statement are found in the evidential rule that an admission must be voluntary i.e. not obtained through violence, fear or prejudice, oppression, threats and promises or other improper inducements. See decision of Lord Summer in **IBRAHIM v R** (1914-15) AER 874 at 877.It is to the evidence the court must turn for an answer to the voluntariness of the confessions."*

[23] In **Shiu Charan v R,** on the applicable test of admissibility of caution interview of the accused person at the trial, it was held:

> *"First, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practice such as the use of force, threats or prejudice or by inducement by offer of some advantage-what has been picturesquely described as "flattery of hope or the tyranny of fear" Ibrahim v R (1914-15) AC 599;DPP v Pin Lin (1976) AC 574.Secondly, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment: Regina v Sang (1980)AC 402,436 …."*

[24] WDC Asenaca denied that she forced the accused to sign the caution interview. The accused did not give evidence. It was held that the accused was neither coerced nor forced to answer or endorse his signature. At paragraph 9, 10 and 11 of judgment on *voir dire*, the trial judge stated:

> *"9. The accused did not give evidence, I am mindful of the fact it is the burden of the prosecution to prove beyond reasonable doubt that the caution interview was properly and fairly recorded. However, the questions asked by the learned counsel for the accused are not evidence. Hence, there is no evidence from the defence that the*

accused was coerced and forced to answer by the interviewing officer.

10. Having considered the evidence given by WDC Asenaca and the manner she gave her evidence, I am of the view that her evidence is true and trustworthy. Hence, I accept her evidence.

11. In my conclusion, I am satisfied that the accused neither coerced nor forced to answer or endorsed his signature by the interviewing officer. I accordingly hold that the caution interview of the accused person is admissible in evidence at the hearing."

Judgment of High Court

[25] Paragraphs 6 to 21 of the High Court Judgment are set out below:

"6. The prosecution alleges that the accused who is the uncle of the victim inserted his finger into the vagina of the victim while she was sleeping in the night. It was a small house and has no separate rooms. The evidence of the victim revealed that the sofa and the bed were jointed. She slept with her mother on the bed while the victim was sleeping on the sofa.

7. In view of the cross examination of the learned counsel of the accused, it appears that the defence tried to discredit the consistency and the reliability of the evidence of the victim on two main grounds, they are that;

i) The inconsistency nature of her evidence with her statement made to the police.

ii) The absence of recent complaint.

8. The inconsistency nature of her evidence given in court with her statement made to the police is founded on the ground that the victim stated in her evidence that the radio was switched on and had a light. She was able to recognized the perpetrator as her uncle from that light. However, she has stated in her statement to the police that the lights were off at that time.

9. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that is considering. If it is significant, it needs to consider whether there is an acceptable explanation for it.If there is an acceptable explanation, for the change, then it could conclude that the underlying reliability of the evidence is unaffected. If the inconsistency

is so fundamental, then it is for the court to decide as to what extent that influence the judgment of the reliability of such witness.

10. *The learned counsel for the accused in her closing address urged that the inconsistency nature of the evidence in respect of the lighting condition in the house has created a doubt about the identity of the perpetrator. During the cross examination, the victim explained that she told the police that the radio was switched on and it had a light. The other lights were off when the house was closed. She was able to recognize her uncle from the light came from the radio. Apart from that explanation on the nature of the lighting condition in the house, she stated that her uncle told her that not to tell anyone of this, if not there will be a lot of problems.*

11. *The explanation given by the victim and the evidence that she heard that the accused told her not to tell anyone, confirm that she has properly recognized the perpetrator as her uncle. Accordingly, I find that the inconsistence of her evidence in court with the statement made to the police in regard to the lighting condition has not adversely affected the reliability and consistency of her evidence.*

12. *I now turn to the evidence of recent complaint. The learned counsel for the defence in her closing address submitted that there is no evidence of recent complaint in order to support the version of the victim.*

13. *Hon. Chief Justice Gates in **Anand Abhay Raj v the State** (2014) FJSC 12; CAV0003.2014 (20 August 2014) has discussed the effect and the test of the evidence of recent complaint in an inclusive manner, where his lordship stated that;*

> *"In any case evidence of recent complaint was never capable of corroborating the complainant's account; **R v Whitehead** (1929) 1 KB 99.At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness… (para.33)*
>
> *The complaint is not evidence of facts complained of, not it is corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant."(para.38)*

14. *His Lordship in **Anand Abhay Raj** (supra) went further and discussed the applicable test of reliability and consistency of the evidence of the victim in respect of recent complaint where his lordship held that;*

"Strict dicta to the contrary in Peniasi Senikarawa v The State, Crim. Appeal AAU0005/2004S 24 March 2006 may have been setting too inflexible a rule. A complainant's explanation as to why a report was not made immediately, or in its fullest detail, to be expected. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it."

15. *……I now draw my attention to discuss that whether the absence of evidence of recent complaint has discredited the consistency and credibility of the evidence of the victim.*

16. *It was revealed during the cross examination of the victim , that one of the teachers in her school has overheard this incident, when she was telling her friends about what her uncle did to her. The victim stated in her evidence that she neither complained to her mother nor any other family members.*

17. *I am mindful of the fact that a sexually molested and traumatized child may not openly discuss such issues of sexual matters with others as freely as adults. Various reasons such as shame and fear, family name, cultural taboos, the control that the perpetrator had towards her in her life or within her domestic environment etc. may have prevented her complaining about this incident.*

18. *The victim stated in her evidence that the accused told her not to tell anyone otherwise there will be a lot of problems. Those who have been victim of rape react differently. The victim was eleven years old at the time and the perpetrator was her uncle. The incident took place in the night while she was sleeping. Having considered the circumstances of this offending. I find that the reaction of the victim during the time of this offence was committed is probable. She has given an explanation why she has not complained to her mother or any other close family member. Accordingly, it is my opinion that the absence of the evidence of recent complaint has not discredited the consistency and reliability of the evidence of the victim. Hence, I accept the evidence of the victim as true and credible testimony.*

19. *I now turn to the confessionary statement made by he accused in his caution interview. WDC Asenaca in her evidence stated that though she has over sighted to put her signature on the caution interview, the accused had put his signature in order to confirm that the answer were given by him. The questions asked by the counsel during cross examination are not evidence, hence the court needs some form of evidence to discredit the version of interviewing officer in respect of the answers given by the accused. In the absence of such evidence before the court and the manner WDC Asenaca gave her evidence, I am satisfied that the contents in the caution interview are true and credible.*

I accordingly accept the confessionary statement of the accused in his caution interview as true and credible evidence.

20. *In view of the reasons discussed above, I am satisfied that the prosecution has proved that the accused is guilty for this offence beyond reasonable doubt. Hence, I do not find any cogent reason to disregard the unanimous verdict of guilt by the three assessors.*

21. *In my conclusion, I find the accused person is guilty for the offence of rape contrary to Section 207(1) and (2) of the Crimes Decree and convict for the same."*

Leave Stage-Ruling (31st July 2018)

[26] The appellant sought an extension of time to appeal against his conviction and sentence on 5 grounds, two against conviction and 3 against sentence, which were considered by a learned single judge.

Conviction grounds

[27] Ground 1, relates to the inadequacy of direction to the assessors by the learned trial judge in that there had been no direction to consider the remaining evidence was sufficient to prove the charges against the appellant. This is in the context of paragraph 30 of the summing up where the learned judge had drawn the assessor's attention to the direct evidence led by the prosecution. This is suggesting that the summing up in paragraph 30, was not sufficient. The learned judge did not consider the summing-up to be inadequate, referring also to paragraph 36 and considering the totality of the summing up, or that any prejudice had been caused to the appellant. This ground of appeal fails. On Ground 2, regarding the identity of the appellant on the basis that there was none or no sufficient light by which the victim could identify the appellant, it was not disputed that the appellant slept in the same room as the victim and her mother. In the circumstances, the identity of the appellant cannot be said to have been disputed. There was no need to refer to the Turnbull principles.

Sentence grounds

[28] On Ground 3, relating to the starting point of the sentence as being high. The trial judge took the starting point as 12 years which is arguable considering the tariff to be

between 10 to 16 years. On Ground 4, on the failure to take account of the period the accused was in jail. There was no mention of this by the trial judge-it is arguable. On Ground 5, in sentencing the learned judge failed to consider the age of the appellant and his previous good record. These were considered, however, it is arguable whether sufficient discount was made.

[29] Extension of time to appeal against sentence was granted. Leave to appeal against conviction was refused.

Judgment of Court of Appeal

[30] Court dismissed the 3 grounds of appeal against sentence.

> *"The appellant's sentence is well within the tariff and no sentencing error has been established. The ultimate sentence is not harsh and excessive. Therefore, none of the appeal grounds succeeds and the appellant's sentence appeal should stand dismissed."*

Discussion

[31] **Ground 1:** The petitioner alleges that the trial judge failed to put his case (defense) before the assessors in a fair, balance and objective manner. This ground was not placed before the Court of Appeal however, the records show that the accused had renewed his grounds of appeal against conviction, although not taken up.

[32] In a situation where the accused had chosen not to give evidence, as in this case, it is challenging for a trial judge when summing up, in particular on what to present to the assessors by way of directions that would be deemed fair, balanced and objective by the accused, apart from the standard summing up and directions related to the elements of the offence, the standard of proof, and the fact that the accused had exercised his right to remain silent, and the onus and duty on the prosecutions to prove all the elements of the offence beyond any reasonable doubt, as there is no burden on the accused to prove anything. That there is no burden on the defence must not be taken against the accused to his disadvantage.

[33] The prosecution had led the evidence of two witnesses, the child complainant and the police officer. The petitioner chose not to give evidence.

[34] There were Agreed Facts which are admitted on the agreement of both parties. There was no direction required, and the petitioner has nothing to prove. The burden of proof does not shift to the petitioner.

[35] Overall, I believe the summing up was fair and balanced, bearing in mind that there was no evidence adduced by the accused, except for the not guilty plea.

[36] The learned trial judge had in summing up appropriately drawn the attention of the assessors to the burden of proof (paragraphs 10 to 12); Information (paragraphs 13 to 21); summary of the Agreed facts when he stated that the assessors are allowed to consider them as proven facts beyond reasonable doubt against the accused by the prosecution (paragraph 22); summary of evidence by the prosecution and the defence during the trial (paragraphs 24 to 28); admission of caution interview and medical report (paragraph 30); recent complaint evidence (paragraphs 32 and 33); and inconsistencies (paragraphs 34 and 35).

[37] In my view, considering the summing up and the circumstances, there was nothing in the summing up that was unfair, not balanced or subjective, that would possibly be prejudicial to the Petitioner. There was no request for redirections by counsel for the Petitioner after the summing up. This ground appears to be misconceived and not arguable. The ground is not within the purview of section 7(2) of the Supreme Court Act.

[38] **Ground 2:** The ground is not clear. It seems the petitioner is complaining against the doctor for not signing off the medical report under section 133 of the Criminal Procedure Act, and was not in attendance at the trial to present the medical report and be examined and cross-examined on its contents. This ground was not placed before the Court of Appeal.

[39] At the trial, the petitioner was legally represented, and the parties had filed Agreed facts (Summing Up of High Court Judge at pages 97 - 102 Record of Court of Appeal), where it was admitted the complainant was medically examined by Dr. Tieri Konrote Waqanicakau and the Medical Report was admitted and proven facts beyond reasonable doubt. Also, corroboration is not required in sexual cases.

[40] Paragraph 30 of the summing up explains the admission of Medical Report:

> *"30. The prosecution presented the evidence of the victim and the interviewing officer as direct evidence and tendered the caution interview of the accused and the medical report of the victim as documentary evidence. As I mentioned above, you are allowed to consider the contents of the Medical Report as proven facts beyond reasonable doubt as it was agreed by the parties. In respect of the record of caution interview of the accused person, you are allowed to take into account of it if you are satisfied with the truthfulness of the content of the caution interview."*

[41] Having considered the summing up and the totality of the evidence, I am convinced it was adequate and it is not likely to prejudice the petitioner. There was no error seen in this exercise, either at the trial or at the Court of Appeal. The ground does not raise an issue coming within section 7(2) of the Supreme Court Act.

[42] **Ground 3:** This ground relates to the alleged deficiencies of the Record available to the Petitioner at the Court of Appeal proceedings.

[43] Although the respondent argues that there are no particulars or supporting arguments on this ground, it concedes that there were deficiencies in the Record below. Note ought to be taken of the fact that the Petitioner had raised complaints in writing in a letter addressed to the Chief Justice on the deficiencies in the record and lack of access to the record in proceedings below.

[44] The Petitioner has not raised issues on the effect of that on this proceeding before this Court, and whether, it has caused prejudice to him and how. The Petitioner has not repeated his complaint in this Court at the hearing, and he had the opportunity to do

so. However, no complaint was raised then. The ground is unarguable. The ground is not within the scope of section 7(2) of the Supreme Court Act.

[45] **Ground 4:** In this ground, the Petitioner complains that the learned trial judge failed to consider the other evidence in the disclosures but only relied on the sworn evidence of the 11-year-old 11 months complainant.

[46] The Petitioner has not specified the "*other evidence*" referred to, that are in the disclosures. I accept that the learned trial judge had summed up the evidence adequately for the assessors.

[47] The sworn evidence of the complainant, was one only of the evidence that the learned trial judge relied on. There were other evidence, including from a senior police officer, the Medical Report, the Caution interview and the Agreed facts that the learned trial judge relied on.

[48] I accept that the trial judge had correctly considered and relied on the totality of the evidence before him. The ground is misconceived and unarguable. The trial judge will only rely on the evidence adduced by the prosecution in the course of the trial and this is evident in the summing up and judgment. The ground has no merit and unarguable. It is outside the ambit of section 7(2) of the Supreme Court Act.

[49] **Ground 5**: The petitioner complains about the statement of the complainant that was allegedly not properly disclosed to the defence.

[50] It appears that the complainant statement was part of a bundle of disclosures filed on 13 October 2011 (High Court disclosures at pages 37-72 of the Record of the Court of Appeal.) At the summing up the trial judge had made directions on the credibility and reliability of the witnesses. If there was inconsistencies whether it was relevant and material and the weight it must give, this is reflected at paragraphs 9 and further at paragraphs 34, 35 and 36 of the Summing up. This ground is misconceived and unarguable .It has no merit. It does not satisfy the requirement under section 7(2) of the Supreme Court Act.

[51] **Ground 6:** The Petitioner's complaint is on the direction on the effect of recent complaint, and the assessment of the complainant's evidence. Recent complaint only goes to the consistency, reliability and credibility of the complainant. Prosecution argues that the direction on recent complain was not required, as the prosecution did not call any recent complaint witness.

[52] However, the trial judge, in accord with his duty, was required to give a direction on this issue and this is reflected at paragraphs 32 and 33, as follows:

> *"32. The learned counsel for the defence in her closing submissions discussed the issue of recent complaint. The victim has neither informed this incident to her mother nor any other close family members of her. It was revealed during the cross-examination of the victim that one of the teachers at her school overheard her, when she was telling her friends about what her uncle did to her. There was no evidence regarding when that was happened. No evidence regarding when the matter was reported to the police. The prosecution did not call the teacher who overheard the victim when she was telling her friends about this incident to give evidence."*
>
> *33. The evidence of recent complaint does not have the capacity to collaborate the evidence of the victim .However, it will affect the consistency and reliability of the evidence of the victim. The victim stated in her evidence that the uncle told her not to tell anyone about this incident. You must bear in mind that a sexually molested and traumatized child may not openly discuss such issues of sexual matters with others as freely as adults. Various reasons such as shame and fear, family name, cultural taboos, the control that the perpetrator has towards her in her life or with her domestic environment etc. may have prevented her complaining about this incident. As the judges of facts, it is your duty to consider these issues and decide what weigh you will give to the credibility and consistency of the evidence of the victim. However, it is important to be mindful that speculation has no part in this process."*

[53] I agree with the respondent that the direction was adequate and does not prejudice the petitioner. This ground is misconceived and without merits. The ground is not within the scope of section 7(2) of the Supreme Court Act.

[54] **Ground 7:** The Petitioner complains that the trial judge failed to direct the assessors on sworn evidence of the victim regarding his identification by radio light and the voice. This ground was argued before the learned single judge in the Court of Appeal. The ground was not renewed in the Court of Appeal, however, it has been noted that, the Petitioner had given notice of renewed Grounds of Conviction Appeal, but that was not presented as part of the grounds before the full Court of Appeal. I accept that the issue was well covered by the learned single judge, at paragraphs 13 to 16 of his Ruling dated 31st July 2018, as follows:

> *"[13] The second ground of appeal is regarding the identity of the Appellant on the basis that there was none or no sufficient light by which the victim could identify the Appellant.*
>
> *[14] It was not disputed that the appellant slept in the same room as the victim and her mother. The lights had been turned off but the victim had given evidence to the effect that the radio light was on and that she clearly identified her uncle as the perpetrator. She had also stated in evidence that the Appellant had told her that she should not tell anyone about the incident.*
>
> *[15] In those circumstances the identity of the Appellant cannot be said to have been disputed and there was no need to refer to the turnbull principles."*

[55] This ground has no merit, and is unarguable. The ground does not meet the criteria set under section 7(2) of the Supreme Court Act.

Contentions raised in the affidavit in incompetent counsel

[56] Any complaints that the Petitioner wishes to make against his previous counsel , who assisted him at the trial, must follow the guidelines set in **Nilesh Chand v State** FJCA 254; AAU0078.2013 (28 November 2019) .

Conclusion

[57] Special leave is refused and the conviction is affirmed.

Order of Court:

1. Special Leave is refused.

2. Conviction affirmed.

Hon Justice Terence Arnold
JUDGE OF THE SUPREME COURT

Hon Justice William Young
JUDGE OF THE SUPREME COURT

Hon Justice Alipate Qetaki
JUDGE OF THE SUPREME COURT