

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 118 OF 2011
(High Court No. HAC 079 of 2010)

BETWEEN : **PETERO BAI**

Appellant

AND : **THE STATE**

Respondent

Coram : Basnayake JA
Gamalath JA
P. Fernando JA

Counsel : Mr. M. Yunus & Mr. A. Chand for the Appellant
Ms. P. Madanavosa for the Respondent

Date of Hearing : 14 November, 2016

Date of Judgment : 29 November, 2016

J U D G M E N T

Basnayake JA

1. I agree that this appeal should be dismissed.

Gamalath JA

2. The Appellant is relying on five grounds of appeal in assailing the conviction pronounced against him in the High Court of Suva on 30 – November 2010, and they are as follows;

Grounds of Appeal

- I. The Learned Trial Judge erred in law and in fact when he did not properly direct the assessors about the Appellant's disputed confession including the issue of weight to be given.
- II. The Learned trial Judge erred in law and in fact when he did not direct the assessors about the circumstantial evidence.
- III. The Learned Trial Judge erred in law when he did not clearly put all the elements of the offences to the assessors hence causing a substantial miscarriage of Justice.
- IV. The Learned Trial Judge erred in law and in fact to accept the assessors' verdict of guilty for the offence of Rape when there was no material evidence of penetration to the vagina.
- V. The fifth ground of appeal, which was filed a few hours before the commencement of the hearing of the appeal goes as follows;

“The Learned Trial Judge erred in law and in fact when he failed to warn the assessors on the danger of convicting the appellant on uncorroborated evidence of child witnesses”.

3. The Indictment

The Appellant was indicted in the High Court – Suva, under the following charges of the Crimes Decree No 44 of 2009;

Count 1: Attempted Murder, Contrary to Section 44(1)(2) and Section 237 of the Crimes Decree No 44 of 2009.

Particulars of Crime

Petero Bai on the 25 March 2010 at Suva in the Central Division Attempted to Murder Ulamila Kean.

Second Count

Rape contrary to Section 207(1)(2) of the Crimes Decree No 44 of 2009.

Particulars of Offence

Petero Bai, on the 25 day of March 2010 at Suva in the Central Division had carnal knowledge of Ulamila Kean, without her consent.

4. At the conclusion of the trial the assessors returned a unanimous opinion of guilty of the Appellant for the offences of Rape and doing an act intending to cause grievous bodily harm.
5. The Learned Trial Judge agreeing with the assessors' opinion passed the following sentences against the Appellant on 30-November-2010;
Rape – 15 years and offence of violence – 10 years, and sentences are to run concurrently; the non-parole period was decided to be 12 years.
6. This appeal is against that conviction. After a considerably long delay of almost eleven months the Appellant moved to invoke the appellate jurisdiction of the Court by way of an application for enlargement of time. Depending on its success only the appellant expects to prosecute his appeal against the conviction fully.
7. **The Single Judge's Ruling**
On 8-May -2014, Honorable President of the Court of Appeal dismissed the application for leave to appeal against conviction for want of merits. I find that the Learned President of the Court of Appeal had dealt with the grounds of appeal extensively before arriving at the decision.
8. Consequently, on 14-October-2016, the amended notice to renew leave to appeal against the conviction has been lodged. Based on that move the present appeal is coming up for hearing.

9. **The facts of the Case**

At the very outset I must make a general observation that could be the common feeling of empathy of many who would become acquaint with the tragic story arising out of the facts of this case; that is the extremely pitiful plight of the child victim of this case, (UK from now), and it should not be surprising that the incident relating to this case shall shock the conscience of any right thinking member of civilized society. As a matter of fact the evidential mosaic relating to this appeal portrays the scenario in which the victim UK, a school girl of just eight years had been ravaged by a man of whom she never had any prior knowledge. The attacker carried out his sinister plan by taking cover under the darkness of the school toilet at Annesely Primary school. The victim had been completely taken by unawares by the attacker. The attacker who had been hiding behind a toilet cubicle had set upon UK from behind. It seems that the way the attack was carried out was such that it did not leave room for the victim to identify the attacker. Such was the meticulous preparation of the plot to commit the sin. The victim received fatal injuries including severe injuries to her genital area. The picture further portrays the manner in which the victim was forced to lie on the ground of the toilet cubicle with severe bleeding injuries. The attack rendered her unconscious. If not for the timely intervention of the school staff who was alarmed by the students who noticed something unusual going on behind the locked up toilet cubicle where UK was laying unconsciously, the complexion of the indictment would have been different. At times there are miracles do happen and this is one such instances where UK had the fortune of being rescued in time by the school staff members. As far as the exact location of the place of the incident was concerned it took place in one of the toilet cubicles of the Annesley Infant School into which UK had gone at around 10.30am to answer a call of nature.

The medical evidence lead in the trial demonstrates the degree of virulence to be attributed to the incident; UK received multiple injuries as described earlier ;the head injury was confirmed by medical evidence as being fatal. Further, there were injuries to her gentile area suggesting a serious sexual attack.

10. In describing the multiple injuries to the victim, the doctors of the Pediatrics department has the following to state :

- I. Severe head injury – cerebral edema with brain stem bleeding needing ventilation.

- II. Bilateral periorbital edema and ecchymosis and conjunctival edema.
- III. Right maxillary fracture.
- IV. Broken hymen & trauma to hymen and labia majora at 5-7 o'clock position.

11. According to the evidence, the perpetrator having ravaged the victim had locked her up in the toilet cubicle from behind and made good his escape by scaling the wall of the toilet.
12. Later, in the midday when other students went towards the toilet area they heard the groaning of the victim coming from inside the toilet where she was lying unconsciously. Having been informed the teachers have to force open the door of the cubicle to find the victim with bleeding injuries. She was, thereafter dispatched to the hospital where she was treated for a long time.
13. It is based on such material the prosecution had constructed its case.
14. **The Evidence**
Apart from the confession of the Appellant, which was admitted in evidence after a voir dire inquiry, the other evidence that connects the Appellant to this crime comes mainly from the two students of the Dudley School located adjacent to Annesley Primary School and they are one Jone Soko and Aca Simolo. The significance of their evidence is that on the day of the incident in the morning at around eight thirty, they saw the appellant loitering around the area, where the toilets of Annesley Primary School was located.
15. These two students provide valuable strands of circumstantial evidence in relation to the conduct of the Appellant in the dreadful morning. It is based on such evidence and some other supporting evidence the trial in the High Court proceeded against the appellant.

16. **The Trial**

The High Court Trial in to this crimes commenced in Suva on 15 November 2010. The victim's evidence was innocuous for she did not see the perpetrator. Her version of the incident was confined only to the incident in the toilet, which I have already described earlier.

17. I have already referred to the evidence of the two students who saw the appellant hanging around in the area of the scene of crime in the morning of the day of the incident. One of the students was nearly 14 years of age whilst the other was over 15 years when testified at the trial. With reference to the evidence of the younger student witness the Learned Counsel for the appellant takes umbrage at the manner in which it had been dealt with in the summing up .He strenuously urged that the failure on the part of the Learned Trial Judge to caution the assessors on the danger of acting on the evidence of the children without any independent corroborative evidence has been a misdirection. In the sense the main thrust of the complaint is that since one of such students, Jone Aca, and the victim were still children below the age of fourteen when they testified at the trial, adhering to Sec10 proviso of Juveniles Act, the Learned High Court Judge should have caution the assessors on the danger of acting on such evidence without independent evidence of corroboration. However, there is no complain raised against the evidence given by the other student Aca Simolo. Quite interestingly the difference in their ages apart, the two students corroborate each other's evidence completely insofar as the presence of the appellant at the scene of the crime is concerned.

18. **The 5th Ground of Appeal**

What is arising out of this grouse provides the basis for the fifth ground of appeal. It is in that back ground I consider this to be the opportune time to deal with the 5th Ground of Appeal .Although it may be seen as out order to deal with the fifth ground first, suffice it to state that since this ground is to deal with the issue of receiving the uncorroborated evidence of child witnesses, I am of opinion this is the opportune time to be engaged in the discussion on the 5th ground. In this way it makes it easy to deal with the evidence and the relevant legal issues together.

19. The total effect of the evidence of Jone Soko and Aca Simolo was as follows;

They were both pupils at Dudley School and on 25 March 2010 went by bus to school as usual. Being friends they travelled together and dropped Akai's small sister Mimi at the Annesley Infants School. Thereafter, on their return to Dudley School, whilst passing by the toilet area, they saw the appellant, who had been known to them prior to this incident, carrying a black backpack, idly standing around the area where the toilets situated. Even the silver color necklace that the Appellant was wearing had not escaped the sharp eyes of the young boys. Regarding the identity of the appellant, both these witnesses had known him well. They had known not only him but also his wife and it was not just an acquaintance so to say, but they have known the appellant very well. So much so they even knew his name for a long time before this incident. The certainty with which the witnesses had narrated the facts will leave no room for the entertainment of any doubt about the identity of the appellant.

20. As then can be seen, both Jone's and Aka's evidence, whilst squarely bringing the appellant to the closest proximity to the scene of crime, provides a strong strand of circumstantial evidence with which the prosecution case had been buttressed. Although they were school children, they had testified in a forthright manner without any prevarications. Each ones evidence is coterminous with the other. In this backdrop the Learned Trial Judge's analysis of the evidence is quite accurate and cogent.
21. Dealing with the evidence of the victim UK would make it clear that her testimony at the trial was an innocuous narration of the facts relating to the terrible plight into which she was plunged by the perpetrator of the crime. As already discussed, she neither knew the perpetrator nor that there was any occasion to see him whilst the episode was unfolding. However, it is her evidence that the male voice of the attacker made her realized the gender of the attacker. In the circumstances, I find it difficult to fathom the accuracy of the complaint that the learned Trial Judge should have warn

the assessors to be cautious in acting on her uncorroborated evidence. In the circumstances I see no merits in this argument.

22. Moreover, as it is reflecting in the transcript, according to the agreed facts date 18th November 2010, both parties had accepted the entirety of her version with no contention whatsoever. Particular attention may be drawn to the 6, 7, 8, of the agreed facts which are completely compatible with her testimony at the trial.
23. In the circumstances, the complaint against the manner of receiving the evidence of UK is devoid of any merits.
24. What is now left to be looked at is the complaint against the evidence of Jone Aka one of the schoolboy witnesses in the case. I for a moment do not wish to subscribe to the contention that his evidence shouldn't have been acted upon without any independent evidence to corroborate it in its material parts. However, even if some merit is accorded to that contention, the identical evidence of the other witness Aca Simolo, who is over 14 years of age, renders ample independent corroboration of the evidence of Jone Aca. In light of that, this argument shall not hold water and cannot be supported having regard to the evidence of this case.
25. **The decision of Rahul Ravinesh Kumar v. The State, (unreported) Criminal Petition No; CAV 0024. 2016, on Appeal from Court of Appeal No: AAU 0049. 2012, Date of Hearing 13 October 2016 – Date of Judgment 27 October 2016**
The Learned Counsel for the Appellant has placed heavy reliance on the dicta coming from the above decision of the Supreme Court. Based on the decision he strenuously urged that there is a serious miscarriage of justice, for the Learned Trial Judge had failed to warn about the inherent weakness of the evidence of the child witness Jone Soko's uncorroborated evidence.

26. At the outset, I must state that going by his evidence at the trial it is my understanding that Jone Aca was not the typical child witness who could be brought under the definition of the child witness as per the provisions of the Juvenile's Act. The transcript reveals that he was born on 6 May 1995, and that makes him almost 14 years of age when he testified at the trial on 15-November 2010.
- A close look at his testimony would make it abundantly clear, that he was a very matured student with a clear mind and facing the rigorous cross examination of the learned counsel for the appellant at the High Court trial, who to my mind had left no stone unturned and who had stretched the cross examination of this young witness for hours if not for days, the witness had stood his ground firmly and with no prevarication what so ever he had testified clearly to the fact, that he had also seen and recognized the Appellant loitering in the toilet area in that morning.
27. Demonstrating his ability to comprehend the cross examination correctly and showing his sharpness in responding to them, Jone the school boy was impressive as a witness;

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Q. Did you see Petero or did Arther see Petero?

A. Both of us.

Q. Who saw him first?

A. Aca, then me.

Q. What did Aca tell you?

A. He told me that Petero is standing here.

Q. Who told you his name was Petero?

A. He used to come to Dauluvatu, that is how I knew his name.

Q. So you have seen him before?

A. Yes, My Lord.

Q. You recall what time this was Jone?

A. 8 o'clock, a little bit after 8.

Q. What was Petero doing when you walked past?

A. He was just standing there and looking around.

28. The most impressive part of his answers to the cross examination comes as follows;

Defence Counsel-: Who told you to tell the story to the police?

Answer-: My self

Defence Counsel-: So, you said I saw a person standing in the passage way to the toilet that morning – didn't you?

Answer-: Yes, My Lord.

Question-: Did you tell them right away?

Answer-: Yes, My Lord.

Question-: Who did you tell this to?

Answer-: Aca's mother.

Defence Counsel-: And you thought about it and little bit more and then you said, lets blame Petero, that's what happened isn't it?

Answer-: No, My Lord. He was the one standing there.

29. In my opinion, in the light of above it is not fair to describe this as a witness whose evidence should not be believed without independent corroboration. It is axiomatic that the children do possess the ability and intelligence to understand and respond correctly to what goes around them and there is nothing at the disposal of the adult's world to conclude that the childrens' sense of justice is inferior to any other segment of the human community.

30. I am grateful that the Learned Counsel for the Appellant has left us with a copy of the unreported judgment of **Rahul Ravinesh Kumar v. The State**. Having gone through the judgment I am afraid that the rationale of this judgment does not support the argument of the learned counsel and in my opinion, much to the contrary, the judgment views with disdain the need to pursue the anachronism associated with the insistence to look for corroboration of the evidence of witnesses of under ages.

31. It pronounces as follows :

“Accordingly, I would declare that the requirement in Section 10(1) of the Juvenile’s Act for the unsworn evidence of a child to be corroborated is inconsistent with the Constitution and therefore is invalid. For that reason, the trial Judge’s direction to the assessors that corroboration of the girl’s evidence was not required was correct”.

32. The Judgment continues and states, that “For the reasons given in [33] above, I believe that Fiji should follow the path taken in England many years ago, and treat that – requirement is no longer representing part of our common law.

Accordingly, the fact that the Trial Judge did not give the assessors that warning does not undermine Kumar’s conviction”.

33. The said paragraph [33] of the Judgment goes as follows:

“The same also applies, albeit with one refinement, to the warning to the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child. If the rationale for such a warning is that without it the danger might not be obvious, the reason for the abolition in England of the requirement for such a warning was, I assume, because it was thought that the danger is so obvious that it does not need spelling out. I agree with that. The important part played by assessors in criminal trials means that we must trust them to approach their task with care. Otherwise what is the point in having them? To suggest that it might not have occurred to them that the uncorroborated evidence of a child needs to be considered with particular care is almost an insult to their intelligence. If there is reason to think that the child might be lying or mistaken, those reasons will have been brought up in the course of the trial, and the assessors would have considered them. The more appropriate course is to follow what again has been the practice in England for almost 30 years, and for the requirement at common law for the judge to warn the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child to be abolished. In this instance I could give effect to thinking of that kind either if the requirement is inconsistent with the Constitution, or if I concluded that the requirement should no longer be part of the common law. [Rahul Ravinesh Kumar v. The State, paragraph 33].

34. For the completion of this discourse, I thought that it may be thought provoking and stimulating to examine the approach the English courts have adopted for well over last 30 years on this issue, particularly when the decision was taken to eschew the oft beaten, archaic path laid down by the force of the operation of Common Law which insisted on following the principle of law of evidence that compels on seeking the availability of corroborative evidence as a prerequisite to rely on certain category of evidence, including the children as witnesses;

Citing Archbold 2012, para 4-349 page 474;

“The matter was brought under the general principle of seeking the requirement of corroboration of evidence of accomplices or victims of sexual offences and likewise and the following observations came into existence with great persuasive force;

*Section 32 came into force on February 3, 1995. Its effect was considered in **R. v Makanjuola**; **R. v. Easton** [1995] 2 Cr. App R. 469, CA. Both cases involved applications for leave to appeal against convictions for indecent assault. It was argued on behalf of the applicants that the judge should in his discretion have given the full corroboration warning notwithstanding the abolition of any requirement to do so; the basis of the argument was that the underlying rationale of the common law rules could not disappear overnight. That argument was roundly dismissed by the court; any attempt to re-impose the “straitjacket” of the old common law rules was to be deprecated. It was held however, that the judge does have discretion to warn the jury if he thinks it necessary, but the use of the word “merely” in subsection (1) shows that Parliament did not envisage such a warning being given just because a witness complains of a sexual offence or is an alleged accomplice. Lord Taylor C. J., giving the judgment of the court, said that they had been invited to give guidance as to the circumstances in which, as a matter of discretion, a judge in summing up, ought to urge caution in regard to a particular witness and the terms in which that should be done. His Lordship continued:*

“The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving ‘discretionary’ warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness’s evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or

to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content". [at p. 472].

The conclusions of the court were then summarized. First section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or complainant of a sexual offence simply because a witness falls into one of those categories. Secondly, it is a matter for the judge's discretion what if any warning is appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case.

Thirdly, in some cases it might be appropriate for the judge to warn the jury to exercise caution before acting on the unsupported evidence of a witness. That would not be simply because the witness was a complainant of a sexual offence or an alleged accomplice. There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable. Such a basis did not include mere suggestions in cross-examination by counsel. (emphasis added).

Fourthly, if any question arises as to whether the judge should give a special warning, it is desirable that the question be resolved by a discussion with counsel in the jury's absence before final speeches.

Fifthly, where the judge does decide to give some warning in respect of a witness, it would be appropriate to do so as part of the review of the evidence and his comments as to how the jury should evaluate it, rather as a set-piece legal direction.

Sixthly, where some warning is required, it is for the judge to decide the strength and terms of the warning. It does not have to be invested with the florid regime of the old corroboration rules. (emphasis added).

The court said that they would have disinclined to interfere with the judge's exercise of his discretion save in a case where that exercise was Wednesbury unreasonable (Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 K. B. 223).

35. As can then be concluded the force of the modern legal thinking promotes the idea that the need to adhere to the age old common law requirement that compels a court

of law to search for corroborative evidence of certain distinct categories of witnesses should now be treated as non-binding and not absolute.

36. In the circumstance, I am unable to agree with the Learned Counsel for the Appellant that the 5th Ground of Appeal should succeed.

37. **On Circumstantial Evidence**

As can be gauged from the evidence adduced at the trial, apart from the confession made by the Appellant, there are several witnesses for the prosecution whose evidence signify the existence of important strands of circumstantial evidence, buttressing mostly the facts emanating from the incriminating portions of the caution statement of the appellant.

38. To illustrate them tersely would be the evidence of Jone and Aca, who testified to the presence of the Appellant closed to school toilet where the incident took place; the evidence of these children disclosed the fact that when they spotted him hanging around the school toilet he was wearing a “silver necklace” which was later found lying on the floor of the toilet cubicle in which UK was found; Kelera Bora, the defacto wife of the Appellant, in her testimony for the prosecution described the necklace as gold in color and she further stated that according to what she observed since the day of this incident the chain also had disappeared from the neck of the appellant.

Later at the police station she identified the chain found at the scene of crime as the one that belonged to the Appellant.

The combined effect of this “smoking gun” sort of circumstantial evidence has bolstered the case for the prosecution.

39. In his submissions on this ground of appeal the Learned Counsel for the Appellant had stressed the fact that despite the dicta in the case of **Senijieli Boila v. The State** Criminal Appeal No. CAV005 of 2006 (25 February 2008), the failure on the part of

the Learned Trial Judge in the instant case to leave the assessors with a special direction on how to evaluate circumstantial evidence has caused a miscarriage. Advancing a new proposition he asserts that in cases depending on circumstantial evidence, the “adequacy of a particular direction will necessarily depend on the circumstances of the case”.

40. I am afraid, I am unable to find any support to that proposition to conclude that this case contains some sort of particularly special circumstantial evidence to make it distinguishable from other cases. In that context I am unable to come to terms with the submission that the evidence in this case is special in contents and distinct in nature so that it becomes obligatory on the part of the learned trial judge, whilst departing from the well accepted path, to leave the assessors with a special direction as to the manner of evaluating such circumstantial evidence.
41. A close examination of the direction of the Learned Trial Judge as to the manner in which the evidence should be evaluated in this case will make it very clear that it had been done with a commendable precision. Apart from directing the assessors on general terms on the way of evaluating evidence, the Learned Trial Judge had pointed out specifically to every possible weakness that is contained in the evidence relating to the identity of the Appellant and left the assessors with the task of arriving at their own conclusions.
42. In the light of such direction, this Ground of Appeal does not seem to be holding water.
43. On the other hand, going by the well pronounced decided cases on this issue by the Courts of Common Law as well as the Supreme Court of Fiji we still set great store and therefore see no reasons to depart from such directions.

44. Reminding us of such directions would be that, “where the circumstantial evidence is the basis for the prosecution case, the direction to the jury need be in no special form, provided always that in suitable terms it is made plain to them that they must not convict unless they are satisfied beyond all reasonable doubt; a jury can readily understand that from one piece of evidence which they accept various inferences might be drawn, and it requires no more than ordinary common sense for a jury to understand that, if one suggested inference leads to a conclusion of guilt and another suggested inference leads to a conclusion of innocence, they could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the later suggestion; furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied beyond all reasonable doubt; equally, a jury can fully understand that if a fact that they accept is inconsistent with guilt or may be so they could not say they were satisfied of guilt beyond all reasonable doubt; (emphasis added).

McGreevy v. DPP [1973], W.L.R 270 HC.

45. In the instant Appeal the case for the Prosecution was based not only on the circumstantial evidence but also on the confession of the Appellant. Taking into account the totality of the summing up it is easy to discern that the Learned Trial Judge had directed the assessors accurately and in the circumstances this Ground of Appeal should also be considered as having no merits.
46. One another ground of appeal is that the Learned Trial Judge had erred in Law when he did not clearly put all the elements of the offences to the assessors and thereby he had caused a serious miscarriage of justice. This should be considered in the backdrop of the directions that the Learned Trial Judge had left for the consideration of the assessors in dealing with the ingredients of the offences of “Attempted Murder” and “Rape”.

47. In paragraphs 6 and 7 of the summing up the learned Trial Judge had dealt with the ingredients of the offences exhaustively. In fact, the Learned Trial Judge had quite correctly directed the assessors about the subtle distinction between the mere preparation to commit a crime and the attempt to commit a crime and along with other accurate directions on law he had drawn the attention of the assessors to evaluate the evidence of the case.

48. Furthermore, having referred to the medical evidence led in the Trial, the Learned Trial Judge had clearly explained to the assessors the manner in which the charge of rape should be understood by the assessors.

In the light of these directions I see no reason to entertain any doubt about the correctness of the summing up and therefore, this ground of appeal also cannot be sustained.

49. Turning to the other Ground of Appeal, that the Learned Trial Judge erred in law and in fact when he did not properly direct the assessors about the Appellant's disputed confession including the issue of what weight should be attached to it also cannot be sustained for in paragraphs 12 of the summing up the Learned Trial Judge had dealt with this subject quite satisfactorily.

It is the issue of the testimonial trustworthiness upon which the assessors had been invited to make a determination and the Learned Trial Judge, in clear and simple terms had explained the task to the assessors, quite accurately.

Further, it is an agreed fact in this case that the accused was arrested on 26 March 2010 and interviewed under caution "(See Agreed fact 211), and it is inevitable, the confession produced as an exhibit had been the outcome of that investigation.

In the light of such material, this Ground of Appeal shall also fail.

50. Raising a Ground of Appeal based on the medical evidence, the appellant alleges that “the Learned Trial Judge erred in law and in fact – to accept the assessors verdict of guilty for the offence of rape when there was no medical evidence of penetration of vagina”;
51. In relation to this Ground of Appeal all what one should do is to turn to the medical evidence at the trial where one Dr Romanu Turaganiwai had described the nature of the injuries found in the genital area of the eight years old school girl the victim, UV. Accordingly, the findings of the Doctor Romanu was that:
- (a) Presence of granules of sand around anus and Vulva none inside vaginal canal;
 - (b) Visible injury at 6 o’clock position on the vaginal intractors with broken hymen;
 - (c) Area of injury extends from about 5 – 7 o’clock vaginal walls intact, no injury around the anus and the surrounding area – no visible injury.

And the professional opinion at D14 states that based on the physical findings of the visible injury at the said location ,it is possible for one to suggest that some elements of penetration had taken place through the intractors.

52. In the summing up to the assessors, the Learned Trial Judge had accurately presented these facts for the consideration of the assessors.
53. The directions of the Learned Trial judge on the ingredients of Rape has to be considered along with the medical evidence adduced in this case. It is trite law, that having regard to all evidence and every circumstance, it is not for the medical expert to conclude that a victim in a case of sexual assault has in fact been raped or not. That task will be correctly fulfilled by leaving it in the hands of the trier of facts of a

trier. It is their task to consider all the evidence available and to arrive at a proper conclusion whether or not there has been sufficient evidence to prove beyond any reasonable doubt that the commission of the offence of rape has in fact taken place.

54. Having regard to the directions to the assessors on this issue I find that the Learned Trial Judge at the trial had carried out this exercise correctly and as such this ground of appeal should also fail.

55. **The ground of appeal on the issue of the extension of time**

At the conclusion of this discussion, I am now left with the most fundamental ground of all that is about the time factor. Clearly, the Appellant was out of time and it was by eleven long months after the statutory period to lodge the Appeal, meaning thirty days after the conviction. In order to be clear in my mind I inquired from the Learned counsel for the appellant the reason for the inordinate delay. According to the appellant the delay was due to the non availability of Legal Advice. This, in my view is not a plausible explanation. Going through the proceedings in the trial in the High Court, one can observe clearly the level of industry with which he was defended at the trial. There was ample opportunity for him to obtain advice on the need to invoke the jurisdiction of this court well in time. If he so wished he could have obtained the services of the Legal Aid Commission which is at the disposal of many in this country, whenever the need arises to obtain the legal0 counseling freely. There is nothing on the record to demonstrate that he availed himself of that facility. The well known Legal maxim states that “vigilanti bus et non doremientibus jura subveniunt” – meaning law aids the vigilant and not the indolent”.

56. I am further guided by the dicta of the case **Kumar v. State; Sinu v. State [2012] FJSC 17, CAV 0001. 2009 [21 August 2012]**. Applying the said dicta to the facts and circumstance of this case would mean that the application for extension of time cannot be granted either.

Decim -Accordingly, this appeal is dismissed.

P. Fernando JA

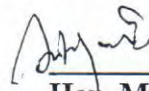
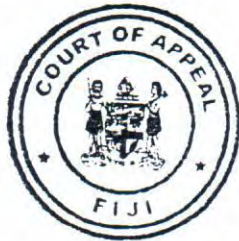
57. I agree that the appeal should be dismissed.

Order

1. *Appeal by Petero Bai is dismissed.*



Hon. Mr. Justice Basnayake
JUSTICE OF APPEAL



Hon. Mr. Justice Gamalath
JUSTICE OF APPEAL



Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL