

**IN THE SUPREME COURT OF FIJI**  
**[CRIMINAL APPELLATE JURISDICTION]**

**CRIMINAL PETITION NO: CAV 0024.2016**  
**(On Appeal From Court of Appeal No: AAU 0049.2012)**

**BETWEEN** : **RAHUL RAVINESH KUMAR**

**Petitioner**

**AND** : **THE STATE**

**Respondent**

**Coram** : Hon. Mr. Justice Sathya Hettige, Judge of the Supreme Court  
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court  
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

**Counsel** : Mr. M. Yunus for the Petitioner  
Ms. P. Madanavosa for the Respondent

**Date of Hearing:** 13 October 2016

**Date of Judgment:** 27 October 2016

**JUDGMENT**

**Hettige, J**

I agree with the reasoning and conclusion of the judgment of Keith J.

**Chandra, J**

I agree with the reasoning and conclusion of the judgment of Keith J.

**Keith, J**

*Introduction*

1. There are some categories of evidence which have in the past been regarded as too unreliable to form the basis of a safe conviction without the reassurance provided by corroboration. The evidence of women who complained that men had taken sexual advantage of them used to be one of those categories. We now live in more enlightened times, and corroboration is no longer required in such a case. But suppose the evidence is that of a child, whether in a case in which the defendant is being tried for an offence of a sexual nature or in any other case. The law at present requires corroboration of the child's evidence if that evidence was given unsworn. The question which arises on this appeal is whether that requirement is consistent with the Constitution. There are other issues, but that is the principal one.
2. However, a preliminary point arises. The petition for special leave to appeal to the Supreme Court was lodged well out of time. An extension of the time to lodge it is therefore needed before the merits of the appeal can be considered. That is what I address first.

*The application for an extension of time*

3. The petitioner is Rahul Ravinesh Kumar. I trust that I will be forgiven for referring to him as Kumar for the sake of brevity and convenience. He was charged with the rape of a girl aged 7, but who was 8 at the time of trial. He had pleaded not guilty. His trial took place in June 2012. The assessors unanimously expressed the opinion that he was guilty of the charge, and the trial judge convicted him. Kumar was subsequently sentenced to 10 years' imprisonment with a non-parole period of 8 years. His appeal against his conviction was dismissed by the Court of Appeal on 4 March 2015.
4. Kumar's petition for special leave to appeal to the Supreme Court had to be lodged within 42 days, ie by 15 April 2015. It was not lodged by then. It was not lodged until 21 July 2016. It was therefore over 15 months out of time. Kumar has sworn an affidavit purporting to set out why that was. He said that he had been represented privately by lawyers both at his trial

and in the Court of Appeal, but his family had not had any more money to spend on his legal representation, and to use his own language, he “dropped the idea” of appealing against the decision of the Court of Appeal. He added:

*“Nevertheless, sometimes [in] early July 2016, I met with a counsel from the Legal Aid Commission and asked whether the Commission would assist me to appeal the Decision of the Court of Appeal.”*

It was following that discussion that his petition was lodged.

5. I have no reason to doubt Kumar’s claim that the money to fund further representation had run out, but his affidavit is silent as to why he had not applied for assistance from the Legal Aid Commission before July 2016. Mr. Yunus, his counsel, wrote in his written submissions that it was “only this year” that Kumar “came to know about the Legal Aid Commission”. What was being said was that Kumar had not known before then that he could apply for legal aid. When we pointed out to Mr. Yunus that Kumar had not said that in his affidavit, Mr. Yunus accepted that the responsibility for that had been entirely his. Kumar, he said, had told him that he had not known until July that free legal assistance was available in deserving cases, and that it was his, Mr. Yunus’, mistake in not including that in the affidavit which he had drafted for Kumar to swear.
6. I accept entirely what Mr. Yunus has told us about what Kumar had told him, but I am extremely sceptical that Kumar was telling Mr. Yunus the truth. Once you get into the criminal justice system, it is difficult to remain ignorant of your right to apply for legal aid if you do not have the funds to pay for a lawyer. That is especially so if you are in prison. It is almost inevitable that you will hear on the prison bush telegraph about the availability of assistance from the Legal Aid Commission if you have not done so already. Kumar’s claim that he only discovered that in July is less than credible.
7. The five factors which the Supreme Court said in Kumar v The State [2012] FJSC 17 should be taken into account when considering whether the time for lodging a petition for special leave to appeal should be extended are too well known to be repeated here. Although the delay has been substantial and almost certainly not truthfully explained, I have not discerned



any disadvantage which the State would be under if we proceeded to consider Kumar's petition on its merits 15 months or so later than it would have been considered if the petition had been lodged in time. In the circumstances, I would extend Kumar's time for lodging it if there is a ground of appeal which will probably succeed.

The facts

8. In the light of the issues which the appeal raises, it is unnecessary to set out the facts in any detail. Kumar was a family friend, and the girl's evidence was that on the day in question her parents had gone out leaving Kumar in charge of her and her younger sister. She had come out of the shower wearing only a towel. Kumar had pulled the towel away and taken her into a bedroom where he raped her. She acknowledged that she had not complained about what had happened when her parents got home, saying that she had been too scared to do so, though her father's evidence was that he had sensed that she had wanted to say something to him. Eventually she was to tell a relative what had happened, and when her parents heard about it, the police were informed. A medical examination of the girl a month or so after the day in question revealed that her hymen was ruptured.
9. Kumar's defence was that none of this happened. His evidence was that he had never been alone with either of the girls. When their parents had gone out, they had left the girls in the care of their landlady, Parwati Nair. She was called as a witness for the defence. She talked of a day when she had given the girls lunch while their parents had gone shopping for groceries. She said that that had been the day when the family had moved into her house. She was not sure of the date, but she said that it had been a Saturday. That could have been important because the girls' father's evidence had been that it was on a Saturday that the family had moved into the house, but that it was on the following day that he and his wife had gone shopping leaving the girls in Kumar's care.
10. There was no dispute that there was no independent evidence to connect Kumar with the rape of the girl. The medical evidence supported the girl's evidence of penetration, but that did not implicate Kumar. However, the trial judge directed the assessors that corroboration of the girl's evidence was not required. He said:

*"Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. Corroboration is to have some independent evidence to support the victim's story of rape. The case can stand or fall on the testimony of the victim depending on how you are to look at her evidence."*

The judge's reference to "in a rape case" shows that he had in mind the previous requirement for corroboration in cases of a sexual nature rather than such requirement as there was for a child's evidence to be corroborated whatever the charge was. At all events, the principal issue which the appeal raises, as I have said, is whether the judge was right to direct the assessors that corroboration was not required.

#### The statutory framework

11. The requirement for corroboration in cases of a sexual nature was abolished by section 129 of the Criminal Procedure Decree 2009, which provided:

*"Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration."*

However, the requirement for the corroboration of the evidence of children who give unsworn evidence has remained part of the law of Fiji. The relevant statutory provision is section 10(1) of the Juveniles Act, which provides (so far as is material):

*"Where in any proceedings against any person for any offence ... any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth; ..."*



*Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated."*

That provision is still in force.

12. It is important to note that section 10(1) is concerned only with the *unsworn* evidence of children. It does not purport to address how the *sworn* evidence of children should be treated. Since witnesses are required to give sworn evidence (whether on oath or by affirmation), section 10(1) provides for an exception to that requirement in the case of children "of tender years". They may give unsworn evidence if they do not understand the nature of the oath, provided that they have sufficient intelligence to justify the reception of their evidence and to understand the duty of speaking the truth.
13. The proviso to section 10(1) applies "where evidence is admitted *by virtue of this section* on behalf of the prosecution" (emphasis supplied). Since section 10(1) is concerned only with the *unsworn* evidence of children, and is intended to validate the evidence of children even if it is unsworn, evidence is only admitted "by virtue of this section" if the evidence which the child gives is unsworn. In other words, corroboration of the child's evidence in a criminal case where the child is called by the prosecution is required only when the child has given *unsworn* evidence. That was treated as axiomatic by the House of Lords in Director of Public Prosecutions v Hester [1973] AC 296, a case on section 38(1) of the Children and Young Persons Act 1933 on which section 10(1) of the Juveniles Act was modelled.
14. Section 10(1) served one other purpose. That related to the nature of the inquiry which the judge has to conduct before a child can be regarded as competent to give evidence at all. At common law, the test was whether the child was capable of understanding the nature of the oath. If the child was not, the child could not give evidence. Section 10(1) provided, as Lord Diplock said in Hester at p 322G in respect of the equivalent English provision, a less rigorous test. The test had become whether the child had sufficient intelligence to justify the reception of their evidence and to understand the duty to tell the truth. In that event, the

child could give unsworn evidence, but could only give sworn evidence if he or she understood the nature of the oath.

15. One thing needs to be added to all that. Assessors have to be warned by the trial judge of the danger of convicting a defendant on the uncorroborated evidence of a child, whether the child's evidence is sworn or unsworn. That is not required by section 10(1). It is a requirement of the common law.

What happened in this case

16. In this case the girl gave sworn evidence. We know that because that is what the court record says. It even refers to the holy book on which her oath was taken. What we do not know is whether the trial judge asked the girl any questions to determine whether she understood the nature of the oath or had sufficient intelligence to justify the reception of her evidence and to appreciate the need to tell the truth. The record is silent on matters of that kind. That is, of course, not conclusive. The court record is based on the trial judge's notes, and they do not purport to be a verbatim record of everything which was said.
17. In the light of that, we have looked at other ways of finding out what was said. We have been told that the proceedings were not audio-recorded, and neither counsel who appeared at the trial are available to give us their recollection of events. Mr. Yunus told us that Kumar's instructions to him were that nothing was said along these lines, though I am reluctant to rely on that – not only because Kumar may think that it is in his interests to say that, but also because his credibility is questionable in the light of the reason he gave for his petition not being lodged in time.
18. Having said all that, it would not be surprising if the trial judge had not embarked on an inquiry to determine whether the girl understood the nature of the oath or had sufficient intelligence to justify the reception of her evidence and to appreciate the need to tell the truth. Three years earlier Goundar J had held in *The State v AV* (Criminal Case No: HAC 192/2008, 2 February 2009, unreported) that section 10 of the Juveniles Act discriminated against children on the ground of their age and deprived them of their right to equality



before the law guaranteed by section 38 of the 1997 Constitution. He held that section 10 had to be “considered as stricken” from the Act. He continued at [36]:

*“If a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has is to remind the child of the importance of telling the truth before receiving his or her evidence and that evidence should be assessed like the evidence of any other witness without the need for corroboration or a warning.”*

If the trial judge had Goundar J’s decision in mind, that would explain why he had not conducted the kind of inquiry which section 10(1) required. On the other hand, it is questionable how well known Goundar J’s judgment in AV had become by 2012. It had not been reported, and it is unlikely to have been referred to the trial judge, because if it had been, one might have expected there to have been some reference to it in his notes.

19. In these circumstances, I think that we should proceed on the basis most favourable to Kumar. That means that we should assume that before the girl gave evidence the trial judge did not conduct an inquiry to determine whether she understood the nature of the oath or had sufficient intelligence to justify the reception of her evidence or to appreciate the need to tell the truth. On the other hand, the trial judge would have seen her taking the oath, and he would have been observing her carefully throughout her evidence, bearing in mind that he would have been alive to the need on his part to assess her credibility and accuracy as a witness. If during her evidence he had thought it possible that she had not understood the nature of the oath she had taken or that she did not have sufficient intelligence to justify the reception of her evidence or to appreciate the need to tell the truth, it is at least possible that he would have intervened. It has not been suggested that he did anything of the kind, and there is nothing in his notes to suggest that he did. So although we are having to assume that he did not conduct an inquiry before she gave evidence of the kind which section 10(1) required, it may be that the trial judge ultimately had no doubt that she understood the nature of the oath. It should also be noted that the trial judge did not warn the assessors of the danger of convicting Kumar on the girl’s uncorroborated evidence.



The case advanced on Kumar's behalf

20. The principal argument advanced on Kumar's behalf in the Court of Appeal was that the abolition of the requirement for corroboration in cases of a sexual nature had not affected the requirement for corroboration of the unsworn evidence of children in section 10(1) of the Juveniles Act. Section 10(1) was said to have survived the abolition in the Criminal Procedure Decree of the requirement for corroboration in cases of a sexual nature by virtue of section 3(2) of the Criminal Procedure Decree, which provides (so far as is material):

*"The provisions of this Decree shall be subordinate to, and shall be read and applied subject to the provisions of another Act making specific provision in relation to- ...*

*(b) the procedures to be applied to the hearing of criminal proceedings involving juveniles ..."*

I do not think that section 3(2) advances the argument deployed on Kumar's behalf. The phrase "criminal proceedings involving juveniles" in section 3(2) relates to proceedings in which a juvenile is a defendant, not to proceedings in which a child of tender years is a witness. But that does not militate against Mr. Yusuf's argument. It is plainly correct. The fact that corroboration is no longer required for one category of evidence (evidence of the complainant in cases of a sexual nature) does not mean that corroboration is no longer required for another category of evidence (the unsworn evidence of children).

21. I did not understand the State to argue otherwise. It relied on Goundar J's judgment in AV. Its contention was that section 10(1) had been held to be inconsistent with section 38 of the 1997 Constitution and was therefore invalid. The Court of Appeal accepted that contention, and held that section 10(1) was inconsistent with the equivalent section in the 2013 Constitution, namely section 26. At first sight, the Court of Appeal did not have to go that far. Even if section 10(1) had been consistent with the Constitution, no corroboration of the girl's evidence would have been required as her evidence had been sworn. However, if the trial judge had inquired into the girl's competence to give evidence, whether sworn or unsworn, he may have concluded that she should only give unsworn evidence. In that event,

section 10(1) would have required the girl's evidence to be corroborated. That is why the Court of Appeal had to address the consistency or otherwise of the requirement for the unsworn evidence of the girl to be corroborated with the Constitution, even though she had in the event given sworn evidence.

22. It was also contended on Kumar's behalf that the trial judge had still been required to inquire into the girl's competence to give evidence, whether sworn or unsworn, and to warn the assessors of the danger of convicting Kumar on the basis of the girl's evidence without corroboration. The State's case was that, to the extent that that had been what section 10(1) had required, that was no longer necessary as the Court of Appeal should follow *AV* and hold that the trial judge had rightly disregarded section 10(1) on the basis that it was inconsistent with the girl's constitutional right to equality and freedom from discrimination.

*The reasoning of the Court of Appeal*

23. The principal judgment in the Court of Appeal was that of Goundar JA. It is a most impressive judgment. Basnayake JA agreed with it. Their reasoning proceeded from section 26(7) of the Constitution, which provides:

*"Treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be established that the difference in treatment is not unfair in the circumstances."*

Since one of the grounds prescribed by subsection (3) was age, it followed that treating children differently from adults amounted to discrimination (which infringed their right under section 26(1) of the Constitution to equality before the law); unless it could be shown that the difference in treatment was not unfair in the circumstances. That turned on whether treating a child differently from adults when they gave evidence advanced a legitimate purpose.

24. Goundar JA did not spell out what the purpose for the various requirements under challenge were. In my opinion, the rationale for requiring a judge to inquire into the competence of a



child to give evidence and what form that evidence should take is that evidence should only be permitted to be given if it is reliable, and some children may simply be too young to give reliable evidence. The rationale for requiring the unsworn evidence of a child to be corroborated whereas the sworn evidence of a child did not have to be must have been that it was thought inappropriate for a defendant to be convicted on the basis of unsworn evidence only. The rationale for requiring a judge to warn the assessors of the danger of convicting a defendant on the uncorroborated evidence of a child is that without such a warning the danger might not be obvious. It needs to be spelt out.

25. Goundar JA noted that many jurisdictions had abolished the need for the unsworn evidence of a child to be corroborated. In that context, he referred to section 52(2) of the Criminal Justice Act 1991 in England which repealed section 38(1) of the Children and Young Persons Act 1933 (on which, as I have said, section 10(1) of the Juveniles Act was modelled). He noted also the repeal of a similar statutory provision in Canada. When it came to the requirement in section 10(1) on a judge to determine the competence of a child to give evidence, Goundar JA noted that what he called “the presumption of incompetence” had also been repealed in England by section 52(2) of the Criminal Justice Act 1991. On that issue, Goundar JA referred in AV to what the Court of Appeal in England had said in R v Hampshire [1995] 2 All ER 1019 at p 1025f-j:

*“In our view, the effect of the recent statutory changes has been to remove from the judge any duty to conduct a preliminary investigation of a child’s competence, but to retain his power to do so if he considers it necessary, say because the child is very young or has difficulty in expression or understanding ... Whether he conducts such a preliminary investigation, he has the same duty as in the case of an adult witness, namely to exclude or direct disregard of the evidence, if and when he concludes that the child is not competent.”*

Goundar JA did not say anything about the requirement at common law for a warning about the danger of convicting a defendant on the uncorroborated evidence of a child, although he did say that some judges in Canada continued to give such a warning. However, he could

have added that the position in England is clear: section 34(2) of the Criminal Justice Act 1988 abolished such a requirement.

26. Goundar JA then went on to consider what lay behind this significant shift in the way child witnesses are dealt with. He noted that the previous thinking had been based on outmoded attitudes about children. He referred to what he had said in 4V at [33] and [34]:

*“[33] Section 10 of the Juveniles Act is clearly based on myths and stereotypes about children, that is, they fabricate stories based on ulterior motives. The requirement for a preliminary investigation into the child’s competence before the child can testify is to justify the need for corroboration or a warning if the child’s evidence is to be accepted. In my view, myths and stereotypes have no place in a rational system of law, as they jeopardize the courts’ truth-finding function. The belief that children fabricate stories based on ulterior motives and are therefore less capable of belief is not supported by judicial experience or social science research. I cannot find any rationale for discriminating against children who are subjected to the restrictions imposed by section 10 of the Juveniles Act. The impact of the discrimination has been grossly unjust to children who were violated but denied access to justice. Due process is not a concept that is only available to an accused. Due process is also available to the victims of crime.*

*[34] Children below the age of 14 years are the most vulnerable victims, and therefore, the need for protection of law is greater. A law that prohibits prosecution and conviction of persons, who commit crime against children regardless of their age, deprives the children the due process of law. Such law has no place in our criminal justice system. This interpretation is consistent with the Convention on the Rights of the Child which Fiji ratified in 1993. By ratifying the Convention, the State is obliged to take all appropriate legislative measures to protect the children of this country from all forms of physical or mental violence, injury or abuse, or exploitation or sexual abuse. The*



*Convention also allows for judicial involvement to carry out the protective measures for children."*

27. Finally, Goundar JA noted the rights which the Constitution affords to children. He referred to section 41(1) (d) of the Constitution which affirms the right of every child to be protected from abuse, and he noted the requirement placed by section 41(2) on anyone – and that includes the legislature – having to consider matters concerning children to treat the “best interests” of the child as their “primary consideration”. He concluded at [32]:

*"In our judgment, any law that restricts child victims of sexual abuse or violence from testifying about their victimization cannot be regarded as being in the child's best interests and is inconsistent with the children's right to equality before the law. There is a growing recognition that child sexual abuse is often perpetrated by family members, close family friends or trusted community figures. In these circumstances, corroboration, that is, independent evidence implicating the accused to the alleged sexual abuse will rarely exist. The competency inquiry and the requirement for corroboration for child witnesses have no legitimate purpose in criminal proceedings involving children as victims of sexual abuse. Both the competency inquiry and the requirement for corroboration for child witnesses in criminal proceedings are invalid under section 2(2) of the Constitution."*

That did not just apply to the requirement for corroboration and the “competence inquiry” in section 10(1). At [33], Goundar JA said that it also applied to the warning which the common law required to be given to the assessors about the danger of convicting a defendant on the uncorroborated evidence of a child. Goundar JA did not think that the loss of these protections infringed the defendant’s right under section 15(1) of the Constitution to a fair trial. In the circumstances, he concluded that this ground of appeal should fail because (a) the trial judge’s omission to direct the assessors that the girl’s evidence needed to be corroborated, or (b) his omission to hold a “competence inquiry”, or (c) his omission to give

the common law warning, was not unlawful, since the laws requiring him to have done all or any of those things were inconsistent with the Constitution.

28. Calanchini P approached the case differently. He did not say in so many words whether the appeal should be allowed or whether he agreed that the appeal should be dismissed. He acknowledged that the girl's evidence did not have to be corroborated, but he said that a warning about the danger of convicting a defendant on the uncorroborated evidence of a child should still be required if the child does not understand the nature of the oath. Having said that, he did not think that such a warning had been necessary in this case, so since the girl's evidence had not been corroborated, Calanchini P must have proceeded on the assumption that the girl had understood the nature of the oath – a fair assumption in the light of the trial judge's decision to allow the girl to be sworn. However, Calanchini P concluded his judgment by saying that "children, especially young children, are still young children with all the frailties that are associated with childhood". He did not spell out what he meant by that, but I assume that he thought that for one reason or another a child's evidence may not be as reliable as that of an adult.
29. Apart from adopting what Calanchini P had said, Mr. Yunus did not engage at all with the reasons Goundar JA gave for his conclusion. For her part, Ms Madanavosa for the State was content to rely on Goundar JA's judgment, though she brought to our attention
  - (i) section 15(9) of the Constitution which provides: "If a child is called as a witness in criminal proceedings, arrangements for the taking of the child's evidence must have due regard to the child's age";
  - (ii) the Child Welfare Decree 2010 which reinforces the need to promote the health and welfare of children; and
  - (iii) the measures which the courts now take, such as those set out in *The State v Nadruguca* [2005] FJHC 31, to make court proceedings less intimidating for child witnesses.



The approach to be adopted

30. There is an irony at the heart of all this. Constitutional challenges are usually brought by non-State parties. In this case, it is the State which is asserting the inconsistency of section 10(1) and the common law warning with the Constitution. Indeed, that was what the State was advancing in *AV* many years ago, and the State could have brought forward legislation to abrogate the common law warning and to repeal section 10(1), or at least to amend it so as to remove the inconsistency. Against that background, I turn to the issues which need addressing.
31. As I have already said, section 10(1) draws an important distinction between a child's evidence which is sworn and a child's evidence which is unsworn. It is only in the case of the latter that the child's evidence needs to be corroborated. There was little or no discussion about the distinction between the sworn and unsworn evidence of children either in Goundar J's judgment in *AV* or in the judgments of the Court of Appeal in the present case. The court's focus in both cases was on the fact that the evidence came from a child, and not on the way the evidence was given. That is not altogether surprising. In other jurisdictions, a child's evidence is given unsworn. That has been the position in England in respect of children under the age of 14 since 1988: see section 33A (1) of the Criminal Justice Act 1988. That recognizes that the form in which the evidence is given is far less important than the child's ability to understand the questions they are being asked, to give answers which can be understood, and to appreciate the need to tell the truth. Giving evidence in court can be an intimidating experience even for adults, and requiring a child to take the oath could serve to increase their discomfort. In my opinion, therefore, it is far more appropriate for a child to give evidence unsworn, and for the distinction in section 10(1) of the Juveniles Act between the sworn and unsworn evidence of a child to be abolished, as has occurred in England. However, I can only give effect to that thinking if the distinction is inconsistent with the Constitution. That is because what the law is on a particular topic which is governed by statute is not what I think the law should be. If Fiji's legislature has provided the law to be X, it is not for me to say that the law should be Y. I can only say that the law is Y if the law enacted by Fiji's legislature is inconsistent with the Constitution.

32. The same applies to the existing requirement for a judge to conduct a “competence inquiry” before the child gives evidence to ascertain whether, to use the language of section 10(1), the child “is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth”. I can see how in some cases it may well be apparent to the judge that the child simply lacks the maturity to give evidence, but I suspect that in many cases that assessment may be difficult to make initially, and that it will only be in the course of the child giving evidence that their ability to understand the questions asked of them, their ability to give answers which can be understood, and their appreciation of the need to tell the truth will be apparent. That, no doubt, was what lay behind the legislation in England which caused the Court of Appeal in England in *Hampshire* to conclude that the law in England no longer required a judge to conduct a *preliminary* investigation into the child’s competence as a witness. If the judge concludes that the child is not competent to be a witness, the judge should exclude the evidence or direct that it be disregarded. In my opinion, the more appropriate course is to follow what has been the practice in England for almost 30 years, and to leave it to the judge to decide whether to conduct a “competence inquiry” before the child gives evidence, and for the requirement in section 10(1) of the Juveniles Act that the judge must do so to be abolished, although again I can only give effect to that view *if* that requirement is inconsistent with the Constitution.
33. 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.

34. That the law treats child witnesses differently from adult witnesses cannot be denied: section 10(1) applies only to child witnesses and not to adults. The question is whether the difference in treatment between the evidence of adults and children serves a legitimate purpose. The purpose of requiring corroboration of a child's evidence is to ensure that the defendant is not convicted on evidence which may be unreliable. Goundar JA thought that this was an illegitimate purpose because there was no basis for thinking that the evidence of a child was more likely to be unreliable than that of an adult, and that was where Calanchini P disagreed with him. But even if Calanchini P's view is to be preferred, the need for the evidence of a child to be corroborated is outweighed – in my view by a considerable margin – by the disadvantage of such a rule. That is that it may well result in many guilty people not being prosecuted or being acquitted if they are. As Goundar JA rightly said, independent evidence implicating a defendant in the sexual abuse of a child will very often not exist. It will invariably be the child's word against that of the defendant. So long as there is a rule requiring that a child's unsworn evidence be corroborated, children will be less protected from sexual abuse. The constitutional imperative in section 41(1) (d) of the Constitution will be thwarted, and the legislature will be treated as regarding the defendant's right to a fair trial as its "primary consideration", whereas its primary consideration, critically important though a defendant's right to a fair trial is, should be the best interests of the child. So although the rule requiring that the unsworn evidence of a child be corroborated serves a purpose which Calanchini P regards as legitimate, that purpose ceases to be legitimate when balanced against the need to protect children from sexual abuse. Accordingly, I would declare that the requirement in section 10(1) of the Juveniles Act for the unsworn evidence of a child to be corroborated is inconsistent with the Constitution and is therefore invalid. For that reason, the trial judge's direction to the assessors that corroboration of the girl's evidence was not required was correct.

35. On the other hand, I do not see how children are less protected from sexual abuse by the need for the judge to decide whether a child in a particular case can give sworn evidence or whether they should give their evidence unsworn. I do not believe that the assessors are less likely to accept the child's evidence if it is unsworn than if it is sworn. Indeed, once the requirement for the unsworn evidence of a child to be corroborated has been declared to be invalid, the need for the distinction between the sworn and unsworn evidence of a child disappears.
36. The same is true of the inquiry which the judge is required to conduct to determine, before the child gives evidence, whether the child can give unsworn evidence, namely whether the child "is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth". I do not see how such a requirement discriminates against children. Whether the witness is a child or an adult, the judge always has to assess the witness' competence to give evidence. A child may not be mature enough to give evidence, in just the same way as an adult may have a mental disorder which makes him incompetent as a witness. So the need for the judge to determine whether a particular witness understands the questions they are asked, or is able to answer those questions in a way which can be understood, or appreciates the need to tell the truth, applies just as much to adults as it does to children. Section 10(1) does no more than to emphasize the need for that when the witness is a child.
37. The same is also true of the requirement at common law for the judge to warn the assessors of the danger of convicting the defendant on the uncorroborated evidence of a child. I do not see how children are less protected from sexual abuse by the need for the judge to give such a warning. The warning does not result in less defendants who should have been convicted from being convicted. At most it makes it more likely that defendants who should be acquitted are acquitted. It does no more than tell the assessors what should have been obvious to them anyway.
38. It follows that I do not think that the distinction which section 10(1) draws between the sworn and unsworn evidence of children is inconsistent with the Constitution and is therefore invalid, save to the extent that it requires the unsworn evidence of a child to be



corroborated. It also follows that I am in respectful disagreement with Goundar JA's judgment in the Court of Appeal that the "competence inquiry" which the judge is required by section 10(1) to conduct before a child can give evidence, and the requirement at common law for a warning of the danger of convicting a defendant on the uncorroborated evidence of a child, are inconsistent with the Constitution and therefore invalid. However, whether the requirement for a warning of this kind should remain part of the common law is another matter. 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 as 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. Having said that, there may be some cases in which the trial judge thinks that a warning of this kind is desirable. That may have something to do with the nature of the child's evidence, or the way it was given, or it may have something to do with the assessors themselves. The trial judge is in the best position to assess that. So although there should no longer be any *requirement* on trial judges to give a warning of this kind, they *may* do so if they think that it is appropriate in a particular case.

39. I shall return to what impact the trial judge's failure to conduct a "competence inquiry" should have on Kumar's conviction when I have considered the other grounds of appeal, though I should add just one thing. It is good practice for a judge to tell the child that he or she must tell the truth. I have not considered whether that rule of practice could be said to have been elevated to a rule of law, but even if it has, I do not think that the trial judge's omission to say that affects the safety of Kumar's conviction. Such a contention was not advanced by Mr. Yunus, and in any event it would be inconsistent with what the Court of Appeal held in *Sachend Chand v The State* [2016] FJCA 20, albeit in reliance on what was said in *AV* and by the Court of Appeal in the present case.

#### The other grounds of appeal

40. The other grounds of appeal both relate to the evidence of Parwati Nair. In his summing-up, the judge said:

*"In deciding on the evidence of Parwati, you may consider whether a lady of her age could remember minute details such as date of [the girl's father's] coming into her house on rent. You may also consider whether she was an interested witness."*

It was submitted to the Court of Appeal that there was no evidence that Parwati Nair's memory was impaired or that she was a witness who had her own interests to serve. Calanchini P did not address this contention, but the other members of the Court of Appeal concluded that the trial judge had "misdirected" the assessors. I think that it would be more accurate for them to have said that these were inappropriate comments to make, though it is unclear whether they thought that both comments had been inappropriate or just the comment that Parwati Nair may have been an interested witness. For my part, I think that the comment which the trial judge made about Parwati Nair's age was not inappropriate, but his comment that she may have been an interested witness was.

41. The members of the Court of Appeal who dealt with this issue took the view that on whichever day the girl's rape was supposed to have occurred, Parwati Nair did not say that the girl had been in her care *at all times*, or that Kumar did not have access to her while her parents were out. In the circumstances, they concluded that Parwati Nair's evidence was of limited assistance to Kumar, and that despite the "misdirection", no substantial miscarriage of justice had occurred. I agree.

*The impact of the omission to conduct a "competence inquiry" on Kumar's conviction*

42. For the reasons I have given, the trial judge should have determined before the girl gave evidence whether she could give sworn evidence. If he had decided that she could not, he should then have determined whether she could give unsworn evidence. Does his failure to do those things mean that Kumar's conviction has to be quashed?
43. As Goundar J noted in both his judgment in *AV* at [19] and in his judgment in the Court of Appeal in the present case at [22], there have been many cases in which the failure of the judge to inquire into the competency of the child to give evidence, whether sworn or unsworn, has resulted in the conviction being quashed. With some diffidence, I question



this line of authority – at any rate in its application to this case. I do not believe that the assessors were less likely to accept the girl's evidence if it had been unsworn than if it had been sworn. And if it had been apparent to the trial judge in the course of the girl's evidence that she did not satisfy the conditions for giving even unsworn evidence, he would have directed the assessors to disregard her evidence. The fact that he did not do that means that he must have thought that she was intelligent enough to understand that she had to tell the truth. In the circumstances, despite the trial judge not having done what section 10(1) required him to do, no substantial miscarriage of justice occurred.

### Conclusion

44. I have no doubt that Kumar's principal ground of appeal was sufficiently arguable to justify extending Kumar's time for lodging his petition for special leave to appeal. I would therefore extend his time for doing so by the 15 months and 6 days necessary to validate it. I would give him special leave to appeal on that ground as it raises far-reaching questions of law. In accordance with the Supreme Court's usual practice, I would treat the hearing of the application for special leave as the hearing of his appeal. However, for the reasons I have endeavoured to give, I would dismiss his appeal.



.....  
Hon. Mr. Justice Sathya Hettige  
**Judge of the Supreme Court**



.....  
Hon. Mr. Justice Suresh Chandra  
**Judge of the Supreme Court**



.....  
Hon. Mr. Justice Brian Keith  
**Judge of the Supreme Court**