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

CRIMINAL APPEAL NO: AAU 0149 of 2014
[High Court Case No: HAC 54 of 2013]

BETWEEN	**:**	**SAKARAIA BULIVAKARUA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Hon. Mr. Justice Daniel Goundar**
Counsel	**:**	**Mr. M. Yunus for the Appellant** **Mr. S. Vodokisolomone for the Respondent**
Date of Hearing	**:**	**6 April 2017**
Date of Ruling	**:**	**11 April 2017**

RULING

[1] Following a trial in the High Court, the appellant was convicted of one count of sexual assault and one count of rape. He was sentenced to 5 years' imprisonment for sexual assault and 12 years' imprisonment for rape with a non-parole period of 10 years, to be served concurrently. This is a timely application for leave to appeal against conviction only.

[2] The appellant's right of appeal is governed by section 21(1) of the Court of Appeal Act, Cap. 12. The appellant has a right of appeal on any question of law alone. On questions of mixed law and fact, or fact alone, the appellant is required to obtain leave. The test for leave is whether there is an arguable ground of appeal (*Naisua v State* unreported Cr App No CAV0010 of 2013; 20 November 2013).

[3] On 11 May 2016, counsel for the appellant filed the following amended grounds of appeal:

i. The learned trial judge failed to direct the assessors and himself in terms of the weight to be given to the admissions contained in the caution interview.

ii. The learned trial judge caused the trial to miscarry when he considered the medical report examination of the complainant conducted a few months after the alleged complaint as circumstantial evidence despite the complainant only stating she was touched.

iii. The learned trial judge erred in law and fact in accepting the suggestion by State Counsel at paragraph 12 of his judgment with reference to the level of understanding of the complainant when no expert opinion was rendered on the subject.

[4] The victim was an eight year old girl. The alleged incident occurred at her home. The appellant was living with the victim's family at the time. The victim gave evidence that one night while she was in her bed, her uncle (the appellant) touched her breast, stomach, bum and private parts. She said he put his hand inside her clothes. The incident was later reported to her school teacher. The school teacher gave evidence of the complaint made to her by the victim. On 26 October 2012, the victim was medically examined. The examining doctor found that the victim's vaginal orifice was open. The doctor gave evidence that the vaginal opening of the orifice was consistent with penetration of vagina with a blunt object. Under caution, the appellant admitted sexually assaulting the victim by touching her.

[5] At the trial, the appellant retracted his admissions. He said his admissions were extracted by police using force and the allegation of sexual assault was fabricated by the victim's father. However, in cross-examination, the appellant admitted touching the

victim (because of a bad thing inside him on that particular night) when the victim's father confronted him.

Lack of direction on the appellant's caution interview

[6] In his caution interview, the appellant made incriminating admissions. He challenged the admissibility of those admissions on the ground that the police used force to extract them. The admissibility was determined in a voir dire. The admissions were held to be admissible.

[7] At the trial, the appellant continued to challenge the weight of the admissions. The trial judge apart from summarizing the evidence surrounding the making of the admissions gave no direction in his summing-up as to how the assessors were to assess the weight of the disputed admissions contained in the appellant's caution interview. In paragraph 6 of his judgment, the trial judge considered the appellant's incriminating admissions and said 'the court has already ruled that the accused was not forced and gave his answer in caution interview voluntarily'. This statement of the trial judge shows he directed his mind only to the issue of voluntariness and not the truth or weight of the admissions made by the appellant in his caution interview. Such an omission was held to be fatal to a conviction in *Chand v State* unreported Cr. App No AAU0015 of 2012; 27 May 2016. Ground one is arguable.

The medical evidence

[8] Since the victim was under the age of 13 years, she did not have the legal capacity to consent to any sexual acts. In her evidence, she said the appellant touched her private parts. Her evidence did not prove penetration which is an essential element of rape. The trial judge relied upon the medical evidence to make a finding that there was a penetration of the victim's vagina. The appellant's contention is that the medical evidence was inconclusive. The medical examination was conducted 3 months after the alleged incident and the evidence did not implicate the appellant. The question is whether it was open on the evidence for the trial judge to find that the element of penetration had been proven beyond a reasonable doubt. This issue is arguable.

The use of the Prosecutor's Closing Submissions

[9] The appellant's third ground of appeal is that the trial judge made impermissible use of the prosecutor's closing submissions regarding the victim's age and level of understanding to infer guilt. In paragraph 12 of the judgment, the trial judge made reference to the prosecutors' closing submissions, but he did not adopt the submissions as evidence to infer the appellant's guilt. Ground three is unarguable.

Result

[10] Leave granted on grounds one and two only.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the State