

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 192 OF 2008**

**BETWEEN:**

**THE STATE**

**Applicant**

**AND:**

**A. V.**

**Accused**

**Counsel: Ms. P. Madanavosa for the State**  
**Mr. T. Terere (Duty Solicitor) for the Accused**

**Date of Hearing: Friday 9 January, 2009**  
**Date of Judgment: Monday 2 February, 2009**

# **JUDGMENT**

**Background**

- [1] Following a trial in the Suva Magistrates' Court, the Accused was convicted on one count of rape.
- [2] The evidence led by the prosecution was that the complainant, Amy (not her real name) was born on 11 May 2003. At the time of the incident Amy resided with her grandparents in a village and was 4 years old. The Accused was their neighbour. Amy called the Accused, Tai Api, meaning grandfather.
- [3] On 12 October 2007, Amy was playing outside her home when the Accused called her into his house. He was alone. The Accused carried Amy to his bed and after fiddling

with her vagina, he placed his penis inside it. After this incident, Amy returned home. When Amy was bathing, she complained to her aunt about the incident that had occurred at the Accused's house. When Amy's grandmother learnt of the sexual assault, she confronted the Accused with Amy's complaint. The Accused denied the allegation.

[4] Amy was medically examined on the following day. She relayed the same complaint to the doctor. According to the doctor, Amy was in a state of fear. Medical examination revealed lacerations on Amy's vaginal opening. Her hymen was not intact. The doctor was of an opinion that the injuries were consistent with forceful penetration of vagina.

[5] At trial the Accused denied the sexual assault on Amy. The denial was consistent with his caution statement.

[6] The trial Magistrate found the Accused guilty. After entering conviction, he transferred the case to the High Court for sentencing pursuant to s.222 of the Criminal Procedure Code which provides:

- (1) Where –
  - (a) a person over the age of 17 years is convicted by a resident magistrate for an offence; and
  - (b) the magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has power to impose, the magistrate may, by order, transfer the person to the High Court for sentencing under Part VII.
- (2) ...
- (3) The High Court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.
- (4) A person transferred to the High Court under this section has the same right of appeal to the Court of Appeal as if the person had been convicted and sentenced by the High Court.

- [7] When the case was called in this Court, I noted after perusing the court record that that the Accused was prosecuted and convicted on uncorroborated evidence of a child witness which the law explicitly prohibits. The prohibition is contained in s.10 of the Juveniles Act and raises some constitutional issues. Since the Accused was unrepresented, the Court invited the Legal Aid Commission to assist him in making submissions.
- [8] Mr. Terere from the Legal Aid Commission filed helpful submissions. Counsel submits that s.10 of the Juveniles Act exists to ensure a fair trial for an accused, and therefore, the section is constitutionally valid. Counsel further submits that non-adherence to the procedure laid down in s.10 of the Juveniles Act is a procedural defect rendering the conviction unsafe.
- [9] I am also grateful to Ms. Madanavosa for her submissions on behalf of the State. The State concedes that the Accused was prosecuted and convicted on uncorroborated evidence of a child complainant. However, the State submits that s.10 of the Juveniles Act is unconstitutional because it discriminates against children of certain age and prevents equality before the law.

### **Jurisdiction**

- [10] The review of the constitutional issue presented in this case is carried out under the revisionary jurisdiction of the High Court which is set out in s.323 of the Criminal Procedure Code:

#### Revision Power of High Court to call for records

The High Court may call for an examine the record of any criminal proceedings before any magistrates' court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrates' court.

[11] Section 325(5) of the Criminal Procedure Code states:

Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

[12] In this case, the Accused do not have a right of appeal against conviction to the High Court. His right of appeal against conviction lies with the Court of Appeal pursuant to s.222 (4) of the Criminal Procedure Code. But, if s.10 of the Juveniles Act is held to be constitutionally valid, the conviction entered against the Accused cannot stand and it would be unjust to sentence the Accused on a prohibited conviction. Thus, a review is justified. The exercise of the revisionary jurisdiction is without prejudice to the Accused's right of appeal against conviction to the Court of Appeal.

### **The Constitution**

[13] To determine the validity of s.10 of the Juveniles Act, guidance must be sought from the Constitution.

[14] Section 2 of the Constitution states that it is the supreme law and any law inconsistent with it is invalid to the extent of the inconsistency. The Constitution protects the fundamental rights and freedoms of every person in this country and all judges are bound to uphold those rights (s. 21 (1) (a) of the Constitution).

[15] Every person has the right to equality before the law and must not be unfairly discriminated against, directly or indirectly, on the ground of his or her age (s. 38 (1) & (2) (a) of the Constitution). However, a law which appears to differentiate or discriminate will not be inconsistent with the equality clause if that law is reasonable and justifiable in an open and democratic society. The test for discriminatory law is whether it exists to advance a legitimate purpose (*Balkandali v UK* EHRR 28/5/85 applied by Shameem J in *State v Baleinabuli & Ors* Cr Case No. HAC106/06).

**Is s.10 of the Juveniles Act constitutionally valid?**

[16] Section 10 of the Juveniles Act states:

(1) Where in any proceedings against any person for any offence or in any civil proceedings 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; and the evidence though not given on oath but otherwise taken and reduced into writing so as to comply with any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force:

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.

[17] To understand the rationale behind s.10 of the Juveniles Act, it is important to look at its history which is linked to the Children and Young Person Act 1933 (UK). Section 10 is based on s. 38(1) of the Children and Young Person Act 1933 (UK). Most common law countries enacted similar laws. The Juveniles Act was enacted in Fiji in 1974.

[18] Under s.10 of the Juveniles Act, the trial magistrate or judge must first hold an enquiry as to the competence of a child witness who is below the age of 14 years using oath as a standard. If the child passes the oath test, he or she is permitted to give evidence. If the child does not pass the oath test, he or she is competent to give evidence provided he or she possess sufficient intelligence to justify reception of the evidence, but the evidence must be corroborated.

[19] A failure to hold an inquiry into the competency of a child witness has resulted in the conviction being quashed (*Lal Khan* (1981) 73 Cr App R 190, *Fazal Mohammed v the State* (1990) 91 Cr App R 256, C. A. Z. (1990) 91 Cr App R 203, *Suresh Chand v R* Ltk Cr App No. 77/83, *Kepueli Jitoko v the State* [1991] 37 FLR 14, *Mohammed Salim Nur Khan v The State* Cr App No. HAA004 of 2008)

- [20] The obligation to hold a preliminary enquiry into competency is not the only restriction for the reception of evidence of a child witness below the age of 14 years. The strength of the restriction to give evidence in court proceedings depends on whether the child gives evidence on oath or unsworn evidence. A child may give evidence on oath or unsworn, but in either case there is a need for corroboration of the evidence of a child.
- [21] There is a total ban on convicting an accused on the uncorroborated evidence of a child witness who gives unsworn evidence, whatever the nature of the charge. In effect if the prosecution cannot produce more than just the word of a child witness, no matter how convincing the child witness is, the prosecution must be stopped.
- [22] Corroboration is evidence independent of the witness to be corroborated which confirms in some material particular not only that the crime was committed but that the accused committed it (*R v Baskerville* (1910) 2 KB 658).
- [23] Then there is an additional requirement for a warning to act on a child's evidence even if the child is competent witness. This rule of practice is based on common law and was adopted in this country from England. In giving the warning, the Magistrate or Judge must use the word "dangerous", or some other word which is equally strong (*Trigg* [1963] 47 Cr. App. R.94). Merely approaching the evidence of a child witness with caution will not do (*Gammon* [1959] 43 Cr. App. R.155). A failure to give a warning to a child witness's sworn evidence will almost certainly result in the conviction being quashed on appeal no matter how strong was the evidence (*Trigg* (supra)).
- [24] Adult witnesses are not subject to similar restrictions as imposed on children by s.10 of the Juveniles Act. In criminal proceedings, evidence of a person may be received on oath or affirmation. This is a statutory right of every person which is contained in s.136 of the Penal Code. If evidence is received on affirmation, the evidence has the same force and effect as if it had been taken on oath (s.2 of the Oaths Act, Cap 42). The provision for reception of evidence on affirmation is consistent with the

constitutional right to freedom of conscience, religion and belief and the right not to be compelled to take an oath, or to take an oath in a manner, that is contrary to his or her religion or belief or that requires him or her to express a belief that he or she does not to hold (s. 35 (1) & (6) of the Constitution). Children under the age of 14 years are deprived of these rights by s. 10 of the Juveniles Act.

[25] These rules restricting the reception of evidence of child witnesses are based on the widespread belief that children are unreliable, particularly when they are testifying about sexual assault. Children are placed in the same category as women whose evidence required corroboration warning if they complained of sexual assault. In *DPP v Hester* (1972) 57 Cr App R 212, Lord Morris at p. 219 said:

“The accumulated experience of courts of law, reflecting accepted general knowledge of the ways of the world, has shown that there are many circumstances and situations in which it is unwise to found settled conclusions on the testimony of one person alone. The reasons for this are diverse. There are some suggestions which can readily be made, but which are only with more difficulty rebutted. There may in some cases be motives of self-interest, or of self-exculpation, or of vindictiveness. In some situations the straight line of truth is diverted by the influences of emotion or of hysteria or of alarm or of remorse. Sometimes it may be that owing to immaturity or perhaps to lively imaginative gifts there is no true appreciation of the gulf that separates truth from falsehood. It must, therefore, be sound policy to have rules of law or of practice which are designed to avert the peril that findings of guilt may be insecurely based. So it has come about certain statutory enactments impose the necessity in some instances of having more than one witness before there can be a conviction. So also has it come about that in other instances the Courts are given guidance in terms which have become rules. Included in such cases are those in which charges of sexual offences are made... Also included in the types of cases above referred to are those in which children are witnesses.”

[26] However, in 1991, England made major changes to the area of evidence of child witnesses in court proceedings by enacting the Criminal Justice Act 1991. The presumption of incompetence which applied to children of tender years was removed.

The Act allows children under the age of 14 to give unsworn evidence and to substitute a pre-recorded interview with a child witness for the child's evidence in chief in cases involving certain sexual offences and offences of violence or cruelty. Where this is done the child is still cross-examined in the conventional way at trial, using the line link where appropriate. These legislative reforms were inspired by the report of the Home Office's Advisory Group on Video Evidence, December 1989 (chairman Judge Pigot QC). Paragraph 5.13 of the report read:

“...we believe the competence requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced. Once any witness has begun to testify he or she may appear to be of unsound mind, become incoherent or fail to communicate in a way that makes sense. The judge is already able to rule such a witness incompetent and to advise the jury to ignore any evidence that may have been given. We think that this power, applied where necessary at the preliminary hearing or trial, is all that is needed...”

- [27] The Pigot Report at paragraph 5.15 suggested that instead of conducting an inquiry, the trial judge in the presence of the jury and the accused remind the child, of the importance of telling the truth, along the following lines:

Tell us all you can remember of what happened. Don't make anything up or leave anything out. This is very important.

- [28] In *R v Hampshire* [1995] 2 ALL ER 1019, the English Court of Appeal at p. 1025 made the following observations in relation to the effect of the legislative reforms in England:

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 or not 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.

- [29] The English Court of Appeal held that the object of the reforms was to apply to children the ordinary test of competence regardless of any real or notional additional test previously imposed on them if they gave evidence on oath, such as a requirement to determine whether the child understands the special importance of telling the truth in a court in addition to his or her duty to do so as part of normal social conduct.
- [30] Similar legislative reforms have taken place in most common law countries. Unfortunately, Fiji's legislature has not changed the law which stands contrary to the principle of equality before the law provided by the Constitution. However, the courts do not have to wait for the legislature to bring about changes to the laws that are inconsistent with the Constitution. If a law enacted by the Parliament is inconsistent with Constitution, the Constitution gives the courts mandate to strike down the law as being void.
- [31] In the case of *Seremaia Balelala v The State* Criminal Appeal No. AAU003 of 2004 the Court of Appeal in rejecting the notion that women in sexual assault cases have tendency to fabricate stories based on "ulterior motives" and therefore are less capable of belief, struck down the rule of practice which required corroboration, or a warning that it is dangerous to act on the uncorroborated evidence, in cases of sexual assault, so as to give full effect to the equality guarantee in the Constitution.
- [32] In a recent case of *Agnu v State* Cr App No. HAA067/08 (5 September 2008), the High Court made the following observations about the law on the evidence of children as it stands now:

The law of the evidence of children is that where a child gives unsworn evidence, corroboration is required as a matter of law. That means that without corroboration, a conviction is impossible. Where however a child gives sworn evidence, a corroboration warning should be given as a matter of practice on the basis that the evidence of children may be unreliable without some supporting evidence independent of the child and implicating the accused. This rule is left untouched by the Court of Appeal decision in *Seremaia Balelala v The State* [2004] AAU003.2004S, which dealt with corroboration in sexual cases. In that case, the court found that the law on corroboration as it impacted on women, was based on myths about female behaviour, and “a wide range of reasons, including a supposed tendency in women to engage in fantasy, to be fickle or spiteful in sexual relationships, to be prone to sexual neurosis, or to be unwilling to admit to consent out of shame.” The Court of Appeal held that these reasons and myths” ... reflected a flawed understanding of the world, they have been unfairly demeaning of women, and they have been discredited by law makers in more recent times.” At page 11 of the judgment the court held:

“...it would henceforth be a matter for discretion, in accordance with the general law, for a judge to give a warning or a caution, wherever there was some particular aspect of the evidence giving rise to a question as to its reliability.”

In sexual cases therefore the mandatory requirement for a corroboration warning was abolished in *Balelala*. However the common law rule that the sworn evidence of children requires a corroboration warning irrespective of the charge, was not the subject of the decision. There was a suggestion that a warning or caution might be given where the complainant “was shown by reason of age or mental disability to be questionable as to her veracity” but the court did not deal specifically with the sworn evidence of children. If this case before me, is referred to the Court of Appeal, it may be an opportune occasion to consider whether the sworn evidence of children requires a corroboration warning, and whether it is an inequality before the law to treat the evidence of children as inherently unreliable as the evidence of accomplices.

- [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 s.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.

[35] I hold that s.10 of the Juveniles Act discriminates against children because of their age and deprives them the equality before the law as guaranteed by the Constitution. I hold that s.10 of the Juveniles Act must be considered as stricken from the said Act. I further hold that the common law requirement for corroboration of evidence of children to be unconstitutional for the same reasons.

[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.

[37] For these reasons, I confirm the conviction entered against the Accused.

.....  
**Daniel Goundar**  
**JUDGE**

**At Suva**  
**Monday 2 February, 2009**

**Solicitors:**  
Office of the Director of Public Prosecutions, Suva for the State  
Legal Aid Commission, Govt. Buildings, Suva for the Accused