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

Criminal Appeal No. AAU 141 of 2014
(High Court Case No. HAC 228 of 2012)

BETWEEN : **THE STATE**

Appellant

AND : **WATISONI SERELEVU**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Fernando, JA

Counsel : **Mr. L. J. Burney with Mr. S. Tivao for the Appellant**

Ms. V. Narara for the Respondent

Date of Hearing : **14 and 24 September 2018**

Date of Judgment : **04 October 2018**

JUDGMENT

Gamalath, JA

[1] This is an appeal by the State against the acquittal of one Watisoni Serelevu, the respondent, against whom the Director of Public Prosecutions had instituted proceedings in the High Court of Suva on a "representative count" of Rape, contrary to Section 207(1), (2) (b) and (3) of the Crimes Act (Decree), 2009.

The Grounds of Appeal

[2] The four grounds of appeal advanced by the Appellant are as follows:-

> *"1. That the Learned Judge erred in not providing cogent reasons for departing from the opinions of the Assessors.*
>
> *2. That the Learned Judge misdirected himself on the evidence of the complainant when he stated that she only referred to one incident whereas she referred to one incident in her evidence in chief and a separate second incident in cross-examination.*
>
> *3. That the Learned Judge erred in taking into consideration irrelevant and/or inappropriate matters to cause himself to doubt the credibility of the complainant, a 14 year old girl (11 years old at the time of the offending) including that she had failed to provide a reason for a delay of several months in reporting the incident to the Police. It is material in this regard that the Respondent is her biological father.*
>
> *4. That the Learned Judge wrongly considered the date and location of the offence to be material considerations in all the circumstances of the case".*

However, the Counsel for the State at the very outset of his submissions informed this Court that his strongest ground of appeal is the first ground of appeal. Further, since the other grounds are inter-connected to the first ground of appeal, he wished to confine his submissions to the matters arising out of the first ground of appeal.

The Charge

[3] According to the particulars of the offence, the Respondent between 1 January 2011 and 31 December 2011, at Wailoku, in the Central Division, penetrated the vulva of one UL (name suppressed) a child under the age of 13 years, "with his fingers".

The Facts

[4] The Respondent is the biological father of UL. As it transpired in the trial, the victim is coming from a dysfunctional family background due to the estranged relationship between the father and the mother; the respondent and his wife.

[5] The intensity of the effect the estrangement has had on the victim and her siblings can be seen through the evidence of the victim, who in her evidence had stated that she did not know the present whereabouts of her parents. That was at the time when she testified at the trial in 2014. The victim and her siblings have been living at a place called St. Christopher's Home, Naulu.

[6] Be that as it may, when the alleged incident of rape took place in 2011, the victim was still living with her parents in New Town, Nasinu. Then, she was only 11 years old.

[7] On the alleged incident of digital rape, the evidence of the victim at the trial referred only to one incident of her being sexually interfered with by the father, whilst she was lying in the bed in her bedroom.

[8] On this issue of the exact place of the incident there is a contradiction between her evidence at the trial and her statement to the police, in which the victim had stated that the alleged incident of digital rape took place whilst she was sitting on a chair. I must point out that in my view these are not the kind of infirmities that would necessarily vitiate the credibility of the evidence of a witness, particularly in a case where the evidence is elicited from a minor. In making an assessment of the evidence of a minor in particular, the need is to be circumspective in applying the normal tests that are oft used in courts of law as yardsticks in determining the testimonial trustworthiness of witnesses.

[9] As regards the date of the incident, it was the evidence of the victim that the alleged incident took place on an unspecified date in 2011. However, her complaint to the police had been on 4 July 2012. On the matter of the delay in making the first complaint to the police, as I would be discussing later, it has become a moot point in this appeal that has impacted on the credibility of the evidence of the victim.

[10] After the victim's evidence, the prosecution called the evidence of the Doctor, who examined her on 4 July, 2012.

[11] According to the evidence based on the medical examination, there was an abrasion found on the left side of the orifice. The doctor had stated that the injury "could be as a result of rubbing or external fingering". "History is consistent with the fingering; "rubbing" of outer walls of her vagina. No injury except abrasion. The doctor in making an assessment of the age of the injury has opined "that the injury must have happened about two weeks prior to the conduct of the examination". Further, answering the cross examination, the doctor has stated that "it can be not a recent one, but one week old". Answering the cross examination further the doctor had stated "if the fingering happened in 2011, it could have been healed". This evidence was uncontroverted and that indeed has caused a doubt about the maintainability of the case for the prosecution.

Evidence of the Respondent at the Trial

[12] The evidence of Watisoni, the Respondent was to deny the allegation. According to his evidence, in 2012, he was not living with his family. By then he had moved to Wailoku from Newtown. When he was questioned for a reason as to why his own daughter was falsely implicating him, he was unable to attribute it to any particular reason.

The Conviction

[13] At the conclusion of the trial, the assessors were unanimous that the respondent, Watisoni was guilty as charged.

[14] The learned Trial Judge disagreed with this opinion and on 16 October 2014, he pronounced the judgment acquitting the respondent. In stating the reasons for his disagreement with the opinion of the assessors the Learned Trial Judge had stated at paragraph 7 of his Judgment as follows:-

> *"[7] After a careful consideration of the evidence presented by the prosecution, I find it contains serious contradictions and ambiguity which certainly affects the root of the case. This creates a serious doubt about the case and benefit of doubt must accrue to the accused person".*

[15] Before I make further comments on the Judgment, I need to state that according to my close examination of the summing up, I find it to be an objective, an unbiased presentation of facts, and an accurate analysis of the evidence.

[16] The learned Trial Judge had carefully guarded himself from usurping the role of the assessors in making a determination based on facts. Paragraphs 14, 15, 16 and 17 along with paragraph 22 bear testimony to that fact.

The Judgment

[17] As regards this appeal, the most pertinent paragraphs of the Judgment are found in the paragraphs [4] and [5];

> *"[4] In this case the victim gave evidence first. According to her the incident happened in 2011 but the complaint was lodged in the year 2012. The victim did not explain the reason why the complaint was lodged very late. In her complaint the victim said that she complaint to the police last week. According to the doctor the injury was very recent one. It is quiet consistent with the date of examination (07/07/2012). (Sic) But the victim's position is that the incident happened in 2011. According to the doctor if this incident happened in 2011 there would not be any injury in the victim's vagina. There is a contradiction with regard to the place of incident. In the information the place of incident mentioned as "Wailoku". But according to the victim the incident happened in New Town. The victim said when she went to the police to lodge the complaint, she saw*

her mother talking to the police officers. When she was at New Town her step father also stayed with them.

[5] The victim in her history to the doctor said that her dad put his finger in her vagina on two occasions last week. But in her evidence she only referred to one incident which was supposed to have happened in the year 2011. Her complaint was in the year 2012. Further in her evidence the victim said that the incident happened while she was sleeping in a bed. But in her statement she said that the incident happened while she was sitting on the chair in the house".

In the Appeal

[18] The Counsel for the State conceded in his submissions that the manner in which the prosecution had been conducted was without conforming to the required standards. He agreed that although the victim may have been referring to two distinct incidents of having been sexually attacked by the Respondent, her evidence at the trial did not lend support to that position. He correctly admitted in his submissions that there are contradictions, particularly between the evidence of the victim and the medical evidence.

Arguments in support of the Grounds of Appeal

[19] On behalf of the appellant, the strongest argument advanced in support of the appeal has been that the reasons of the Learned Trial Judge to overturn the opinion of the assessors are inadequate and not sufficiently cogent to fulfill the requirements laid down in law. Having regard to the cogent reasons (as had already been referred) adduced by the Learned High Court Judge in his Judgment, I am unable to agree with this contention. In my opinion, in light of the reasons given, particularly in the paragraphs that have already been referred to in this Judgment, the Learned High Court Judge is justified in arriving at the conclusion to acquit the respondent.

[20] In relation to the legal principles on the "test of cogency" applicable in situations where a trial judge refuses to be guided by the opinion of the assessors, this issue has been the subject of many judicial pronouncements for a very long time. Based on this issue there

are many judicial pronouncements made previously. As regards the interplay between the trial judge and the assessors, I find an interesting and incisive analysis , based both on the legal perspectives on the one hand and the historical perspective on the other hand in the article titled "The Evolution of Trial By Judge and Assessors in Fiji" by the learned writer, Professor Peter Duff; (Aberdeen University, UK) ;(The Journal of Pacific Studies, Volume 21, 1997, pp 189 – 213, [School of Social and Economic Development, Editorial Board, USP]).

[21] Dealing with the subject of the disagreements between the judge and the assessors the learned author has stated as follows;

> ***"Judge/assessor disagreements***
>
> *As noted above, the fundamental point of the assessor system is that the judge is not bound by the opinion of the assessors and is free to overrule them and return a verdict contrary to their opinions. Until recently, the legislation did not qualify in any way the judge's power to dispense with the advice of the assessors. The 1875 Ordinance stated: '. . . the opinion of each assessor shall be given orally . . . but the decision shall be vested exclusively in the judge'. Similarly, the relevant provision in the 1945 Laws of Fiji stated even more clearly: 'The judge . . . shall not be bound to conform to the opinions of the assessors'. Nevertheless, it became established through a series of cases in the 1950s and 1960s that the judge must give reasons for any decision that effectively overrules the opinions of the assessors. In Ram Lal, the Fijian Appeal Court stated that the judge must have 'very good reasons' for differing from the assessors. In Ram Bali, the court opined that in such cases, the judge should proceed on 'cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations'. This latter case went to the Privy Council, which observed that the trial judge was taking 'a strong course' by differing from the unanimous opinion of the assessors. Nevertheless, it thought that*

as the judge had paid 'full heed' to the views of the assessors, his decision was justifiable because it was based upon his own 'emphatic conclusions in regard to the evidence'. In Shiu Prasad, the Appeal Court repeated that the judge must have 'cogent reasons' for differing from the assessors". [See, Privy Council Appeal No. 18 of 1961; Shiu Prasad v R (1972)19 FLR 68 at 71.] and Ram Lal v R, (Crim.App.no 3 of 1958) and Ram Bali v R (1960)7FLR 80].

[22] In light of the aforementioned reasons based on facts and legal principles, I am unable to conclude that the ground of appeal advanced by the Appellant has any merits.

[23] At this point, I wish to refer briefly to another point of law on which the counsel for the DPP drew the attention of the Court. That relates to the issue of "the delays in making the first complaint by victims of crime". As I understood his submissions, the counsel for DPP must have made the submission on this point because of the belatedness of the first complaint of the complainant, meaning the victim has made the first complaint about the alleged sexual assault in 2012 whereas, it is her evidence at the trial that the said incident took place in 2011. It was sought to be advanced as an argument for the appellant, notwithstanding the delay, the evidence of the complainant should have been relied upon and the respondent should have been convicted based on her testimony.

[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-

"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is

whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."

[25] This is a matter that operates between promptness and veracity. According to learned authors on the subject, the fresh complaint rule evolved from the Common Law requirement of "Hue and Cry" test which was based on the expectation that victims of violent crimes would cry out immediately and which required proof of the details of the victim's prompt complaint as part of the prosecution's evidence.

[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of **Thulia Kali v State of Tamil Naidu**; 1973 AIR.501; 1972 SCR (3) 622:

"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."
(see: 1973 AIR 501; 1972 (3) SCR 622; 1972(3) (SCC) 393).

[27] In the case of **State of Andhra Pradesh v M. Madhusudhan Rao** (2008) 15 SCC 582;

> *"The delay in lodging a complaint more often than not results in embellishment and exaggeration which is a creature of an afterthought. That a delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story. As a result of deliberations and consultations, also creeps in issues casting a serious doubt in the veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained. Resultantly when the substratum of the evidence given by the complainant is found to be unreliable, the prosecution's case has to be rejected in its entirety".* (See: Sahib Singh v State of Haryana, AIR 1977 SC 3247; Shiv Rama Anr v State of U.P AIR 1998 SC 49; Munshi Prasad & Ors v State of Bihar, AIR 2001 SC 3031).

[28] In light of the above dicta and by assessing the evidence led in the prosecution of this case with regard to the delay in making the complaint by the victim, I find that the prosecution had not taken any endeavors to explain the reasons for the delay in making the complaint by the victim meaning, the time gap between January 2011 and the point of making the first complaint on 4 July 2012.

Conclusion

[29] In my opinion, the learned Trial Judge's reasons for not accepting the opinion of the assessors are based on cogent, well founded reasons and in his Judgment the Learned Trial Judge has spelt them out clearly.

[30] The contradiction between the description of the events as per the evidence of the victim and the evidence of the doctor who examined her in relation to the allegation of sexual assault is irreconcilable. The case for the prosecution is impregnated with inherent weaknesses. The prosecution had failed to explain the reasons for the delay in making the first complaint by the victim and that fact also has added to the inherent infirmities of the prosecution's case.

[31] In the light of these facts above, I find that this appeal is without any merits.

Prematilaka, JA

[32] I agree with the reasons and conclusions of Gamalath, JA.

Fernando, JA

[33] I agree with the reasoning and conclusion of Gamalath, JA.

The Orders of the Court are:

1. The Appeal is dismissed.
2. The High Court Judgment is affirmed.

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL