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

CRIMINAL APPEAL NO.AAU 0157 of 2014
[High Court Criminal Case No. HAC 41 of 2012)

BETWEEN : **WAISEA RAMASIMA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Nawana, JA

Counsel : **Mr. Waqainabete S for the Appellant**
Mr. Jack D for the Respondent

Date of Hearing : **11 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath, JA

[1] I have read the content in draft form of the Judgment and the conclusions therein of Prematilaka, JA. I agree with them.

Prematilaka, JA

[2] This appeal arises from the conviction of the appellant on 06 counts of having had carnal knowledge of E.V. (name withheld) alleged to have been committed at Vuci Road, Nausori in the Central Division under section 207 (1) and 207 (2) (a) of the

Crimes Decree, 2009 (now the Crimes Act, 2009). The information reads the counts as follows.

*'**First Count***
[Representative Count]

Statement of Offence

***RAPE**: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

***WAISEA RAMASIMA** between the 1st day and 30th day of April 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.*

Second Count
[Representative Count]

Statement of Offence

***RAPE**: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

***WAISEA RAMASIMA** between the 1st day and 30th day of June 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.*

Third Count

Statement of Offence

***RAPE**: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

***WAISEA RAMASIMA** on the 20th day of July 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.*

Fourth Count
[Representative Count]

Statement of Offence

***RAPE**: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

WAISEA RAMASIMA *between the 1st day and 30th day of September 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of* ***E.V.*** *without her consent.*

Fifth Count

Statement of Offence

RAPE*: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

WAISEA RAMASIMA *on the 7th day of October 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of* ***E.V.*** *without her consent.*

Sixth Count

Statement of Offence

RAPE*: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

WAISEA RAMASIMA *on the 8th day of October 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of* ***E.V.*** *without her consent.*

[3] After trial the assessors expressed a unanimous opinion that the appellant was not guilty of all counts. The learned High Court Judge disagreed with their opinion and convicted the appellant in his Judgment on 17 April 2014. On 23 May 2014, the learned Judge imposed a sentence of 09 years, 10 months and 03 weeks imprisonment with a non-parole period of 07 years of imprisonment (*i.e.* the mandatory period to be served before the appellant becomes eligible for parole) to run from the date of the sentence of the appellant.

Preliminary observations

[4] The appellant had filed an application for enlargement of time and submitted 03 grounds of appeal against conviction and 04 grounds of appeal against sentence for consideration. However, at the hearing before the single judge grounds of appeal against sentence had not been pursued. Therefore, the single judge had considered only the grounds of appeal against conviction in terms of merits and accordingly, extension of time had been allowed and leave to appeal had been granted in respect of only the 01st ground of appeal consisting of three sub-grounds. The counsel for the Legal Aid Commission appearing on behalf of the appellant indicated at the hearing of the appeal that he would urge only the first ground of appeal against conviction and rely on the written submissions filed at the leave stage. The State had addressed the said ground of appeal in its written submissions filed for the appeal hearing.

Ground of Appeal

[5] Therefore, the ground of appeal that would be considered by this Court is as follows.

> *' The Learned Trial Judge erred in law and in fact when he did not consider the totality of the evidence led which would only raise more than a reasonable doubt to the case of the prosecution and are as follows:*
>
> *a. The delay of 9 months in reporting the matter to the police only supported the position of the Appellant that the complainant had freely consented to having sex;*
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> *b. The evidence stated by Ms Luisa who was the elder sister of the complainant's father when the complainant said when being questioned that the allegations against the appellant about rape are not true and she implicated him because she was afraid of Ms Luisa; and*
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> *c. The evidence of Appellant where he said that the complainant had consented to sex in all those occasions.*
>
> *d. The Complainant sought forgiveness from the wife of the Appellant.'*

Summary of evidence

[8] The complainant was around 18 years of age and a virgin at the beginning of the series of alleged offences in 2011. The accused was 46 years, married and having four children at that time. She was the appellant's niece, being his wife's brother's daughter. The complainant lived in Kadavu Islands and her mother had passed away when she was 03 years old and it was Luisa Adi, the elder sister of the appellant's wife (and the complainant's father as well) who had looked after her since then. The complainant and her younger sister had come to Viti Levu from Kadavu Islands to pursue their studies in 2011 along with Luisa and stayed with the appellant, his wife and their 04 children.

[9] The complainant's sexual experiences with the appellant had commenced in April 2011 and lasted till October 2011 as alleged in the information. Her testimony covered the incidents forming the basis for all six charges. The complainant had said that she surrendered to him in all the instances due to the authority and the control he had over her and her sister's lives with his contribution to their living expenses and education. According to the complainant, the accused had threatened to simply make her and her sister destitute if she divulged these sexual activities to anybody. According to the complainant she was worried about their future, especially the education and where to find shelter, if they were to be chased away by the appellant who had already chased Luisa out of the house earlier.

[10] When the complainant was sick on 19 December 2011 Luisa had come to see her and while massaging the complainant she had realised that the complainant was pregnant. When questioned, the complainant had told her of what had been happening and both of them had then reported the matter to the police. The medical examination of the complainant had found her to be 16 weeks into her pregnancy. Later Luisa had come with a prepared letter seeking to withdraw the police complaint and pressurised the complainant to sign it and she had obliged under compulsion.

[11] The appellant while admitting the acts of sexual intercourse with the complainant had taken up the position that they were consensual. He had cited the letter signed by the appellant as evidence of such consent.

[12] In **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) the Supreme Court held on the role of assessors and the judge as follows.

> *'58.'In Noa Maya v. The State [2015] FJSC 30; CAV 009. 2015 (23 October 2015] his Lordship Sir Keith, J said at paragraph 21:*
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> *"...in Fiji...the opinion of the equivalent of the jurors – the assessors – is not decisive. In Fiji, although the judge will obviously want to take into account the considered view of the assessors, it is the judge who ultimately decides whether the defendant is guilty or not".*
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> *59.The observation of the Court of Appeal on an equivalent provision in Ram Dulare, Chandar Bhan and Permal Naidu v. Reginam [1956-1957] 5 FLR 1 (21 January 196) is pertinent:*
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> *"...It is clear that the legislature has given a trial judge the widest powers to accept or reject the opinions of the assessors sitting with him. These powers are discretionary. From the terms of the judgment, the learned trial judge made it quite clear why he came to his decision in this case and why he was unable to accept the opinion of the assessors...*
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> *In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Cases 215 the Privy Council pointed out that the assessors have no power to try or convict and their duty is to offer opinions which might help the trial judge. The responsibility of arriving at a decision and of giving judgment in a trial by the Supreme Court sitting with assessors is that of the trial Judge and the trial Judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...".*

[13] Section 237 of the Criminal Procedure Act, 2009 makes it clear that the Judge is not bound by the opinions of the assessors. It also states that if the Judge does not agree with the opinion of the assessors, the Judge shall give reasons for differing with the majority opinion of assessors. The section further states that the reasons shall be written down and pronounced in open court.

[14] In **Rokonabete v The State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) the Court of Appeal held

"In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts..."

[15] In **Naisua v State** [2016] FJCA 24; AAU0088.2011 AAU0096.2011 AAU0057.2011 (26 February 2016) the Court of Appeal opined

> *'7. In the case of **Ram Dulare, Chandare, Chandar Bhan and Permal Naidu v Regina** [1956-57] FLR, Vol 5 page 1 the Court of Appeal stated: "....It is clear that the legislature has given a trial Judge the widest powers to accept or reject the opinions of assessors sitting with him. These powers are discretionary. From the terms of the judgment, the learned trial Judge made it quite clear why he came to his decision in this case and why it was that he was unable to accept the opinion of the assessors." I would venture to go further to state so long as the record of the proceedings bear out a strong case against the accused, which makes it clear to this Court as to why the learned Trial Judge had decided to reject the opinion of the assessors it would not matter if all the reasons have not been itemized in the judgment. To hold otherwise would mean that what is on appeal is not the correctness of the conviction of the accused but the correctness of the judgment of the Trial Judge.*

[16] I shall now consider the learned High Court Judge's reasons to find out whether he had addressed his mind to the issue of delay of 09 months as set under sub-paragraph a) of the ground of appeal in disagreeing with the assessors and convicting the appellant.

[17] Having fully summarised the evidence led at the trial, the learned trial judge has come out with the following paragraphs in the judgment which are most relevant regarding the appellant's complaint of delay in making the first complaint.

> *'06. The crucial factor which echoes against the complainant is the 'belatedness' to bring these alleged sexual activities to the attention of anybody for almost 9 months. It has to be decided now whether her explanation for the said belatedness, though a long delay in any context, justifies her silence or not. If not, it has to be agreed with the defense suggestion that she did not want to divulge her experiences to anybody as she was a willing participant and she had to credit the blame to 'somebody' with the emerging pregnancy.*

'09. It is in this background of facts one has to analyze the "belatedness" of the complainant to report the alleged incidents to a third party. Indeed, there is no disagreement at all that a delay of around nine (9) months to disclose her experiences to 'somebody' is fatal to the case of the prosecution, if not explained and justify in a plausible manner.

[18] Then the trial judge goes on to address the issue of delay in the following terms

'10. What was the exact time where she could have broken up the silence? Being adults, who are matured enough to assess things in a much more relaxed environment, it is easy for us to look back at the sequence of events which took place between Ms. E.V. and the accused and formulate opinions as to the available or missed opportunities which could have utilized to break the silence. We do speculate in such a manner from the perspective of grown adults and not in the perspective of a baffled, psychologically isolated or abandoned and frightened child or a teenager.

11. Therefore, a proper assessment on the events has to be made after stepping into the shoes of a girl of Ms. E. V.'s age and psychological background. It is after such a consideration that this court is of the view that the existed environment in the accused's compound justifies the 'silence' of Ms. E.V. to maintain the whole episode as a 'top secret'. It carries a lot of 'weight' when she said that she had to think not only about her, but her sister's future as well, if the accused seized his assistance and asks them to leave his house.

12. It is quite understandable, even for an older teen of Ms. E.V.'s age, that she cannot hide the pregnancy from the eyes of the public forever. Still for all, she did not come forward to break the shackles. That itself is evident of the pressure she underwent in that environment. On the other hand, she had witnessed, as revealed in evidence, the way aunty Luisa was chased out of the house by the accused because of the differences with the accused. In such a situation, when the accused told her that he will chase both Ms. E.V. and her sister out of his house and there will be no one to look after them, it is something that bothers a girl of Ms. E.V.'s age and background.

13. Ms. E.V. went on to say that she did not tell even her aunt the experiences that she was undergoing as she thought, even her aunt, being the wife of the accused, would take his side and disbelieve her.

14. The feeling of being disbelieved by the others, may it be the relatives or close associates, could be something very painful, which adds insult to the injury. When analyzing the events which took place after Aunty Luisa came to know her plight, one could hardly disagree with Ms. E. V. 's speculations……'.

[19] I am in full agreement with the reasons given by the learned High Court Judge in accepting the complainant's evidence despite the delay. In her evidence the complainant had clearly said that every time the appellant had sex with her he reminded that if she was to divulge it to anyone she and her sister would lose his support for their education and wellbeing and because she wanted to continue her education and leave the appellant's place she had remained silent. This explanation had not been challenged in cross-examination. Given that she and her sister were totally dependent on the appellant for their very existence in Vitilevu having come from Kadavu Island one can understand the sense of insecurity that had surrounded her and to make it worse the appellant had made it a point to remind her of it on every occasion he exploited her sexually. Her anxiety would only have heightened having seen how the appellant had chased away Luisa earlier from his house. She obviously did not wish to suffer a similar fate at the hands of the appellant. It had clearly been a form of sexual slavery or servitude. Therefore, in the circumstances of this case the alleged delay of 09 months cannot be regarded as fatal to the conviction at all.

[20] Delay in the legal sense is not a numerical concept that can be mathematically counted. The legal concept of delay and whether there is delay in the first complaint depends very much on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. Neither can a universal formula be invented to measure delay.

[21] The learned trial judge had dealt with the argument that the said delay is evidence of consent on the part of the complainant in a very comprehensive manner as follows

> *'15. Rape is all about power and not sex.The perpetrators use variety of ways and means to take over the control of their victims, ranging from actual physical force or violence or threats to emotional assaults and even intellectual bribes. Whatever the mode of 'power' it may be, the rape victims have to go through an act of life threatening violent experience.*
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> *16. In a given scenario, where the 'consent' to have sexual intercourse is disputed, the burden of disproving that there was no such 'consent' is on the prosecution. Blackstone's Criminal Practice 2011; page 283 says that "Consent covers a range of behavior from whole hearted enthusiastic agreement, to reluctant acquiescence". But, such an 'agreement' should be 'free' from any kind of 'interference' and simply because the alleged victim*

freezes with no protest or resistance does not say that she consented to the physical act. Therefore, it is highly essential to recognize the difference between 'consent' and 'submission' to the sexual acts.

*17. In the case of **Kirk**[2008] EWCA Crim. 434, a rape conviction was upheld by the England Court of Appeal even with the absence of any pressure, threats or deception on the victim, a 14 years old vulnerable and destitute girl, who was submitted to have sexual intercourse with the accused for money to buy food. Lord Justice Hallett in **Hysa** [2007] EWCA Crim 2056 said that simply because the complainant did not say 'NO' at the moment of initial penetration, it is not fatal to the prosecution case. In Malone [1998] 2 Cr App R 447 the English courts went on to say that there is no requirement that the absence of consent has to be demonstrated or communicated to the accused. (Blackstone; supra page 285)*

18. It is clear from section 206 (2) (d) of the Crimes Decree No. 44 of 2009 that 'consent' is not freely and voluntarily given if it is obtained by 'exercise of authority'.

19. Having considered the factual and legal background relevant to the matter before hand, this court concludes that the narration of the complainant did convince the court beyond reasonable doubt that she did not consent freely and voluntarily to have sexual intercourse with the accused in any of the given instances, but simply submitted herself to the accused due to her sheer vulnerability.'

[22] No complaint can be made of the manner in which the trial judge had dealt with the arguments relating to the alleged delay and the nexus between the purported delay and consent which was the appellant's defence at the trial.

[23] Therefore, I conclude that sub ground a) of the sole ground of appeal is devoid of any merits.

[24] I will now turn my attention to the submission under sub-ground b). It is based on Luisa's evidence. The appellant contends that Luisa had given evidence that the complainant had told her when being questioned that the allegations against the appellant about rape were not true and she had implicated him because she was afraid of Luisa. The statement that '*The charges of Rape against Waisea are not true'* is Luisa's own evidence and not based on anything uttered by the complainant. However, Luisa had said that the complainant had said that she was afraid of her and therefore told about the appellant to the police. Under cross-examination, Luisa had said that the complainant told her that she was not raped by the appellant.

[25] The learned High Court Judge in paragraph 6(v) of the summing up specifically refers to the above evidence of Luisa as *'Finally she said that when she questioned Ms. E.V. she said that the allegations against the accused about rape are not true and she implicated him because she was afraid of Ms. Luisa'* and further refers the assessors to Luisa's evidence in paragraph 7(iii) of the Summing up. Needless to say that in terms of section 237(5) of the Criminal Procedure Code what the trial judge had said in the summing up is also part of the judgment.

[26] However, the crux of the matter is that the appellant never disputed the acts of sexual intercourse with the complainant. His defence was that of consent. The defence had not confronted the complainant with what she was alleged to have told Luisa in cross-examination. When suggested that the sexual acts took place with her consent, the complainant flatly denied and said that she simply surrendered due to the threats of the appellant of withdrawing his material support to her and her sister. Thus, Luisa's evidence does not carry much weight. Yet, if one were to assume that the complainant had in fact told Luisa what was attributed to her by Luisa then she would have been referring not to the acts of sexual intercourse (they have been admitted mutually) but that such sexual acts had happened with her consent. Then, as already pointed out the learned judge has dealt with question of consent very comprehensively and no more needs to be said of lack of consent. In any event it is pertinent to point out that the defence never even suggested any possible reason as to why she had taken up the position that the acts of sexual intercourse were done without her consent.

[27] Reading between lines it is clear that there had been a clear attempt to suppress the matter and Luisa had been at the forefront of it. She had got the complainant to sign a letter withdrawing the complaint to the police against her will and there had been some sort of family gathering where the appellant claimed to have sought forgiveness from and apologised to the relatives and offered Kava in order to avoid disrepute to the family. Yet, the complainant had been steadfast in her position that all sexual acts were against her consent. I have no doubt at all about the veracity and credibility of the complainant.

[28] In the circumstances, I hold that there is no merit in the appellant's complaint under sub-ground b).

[29] The appellant under sub-ground c) joins issue with the trial judge for having not considered the appellant's evidence that the complainant had consented to have sex on all occasions. It appears that paragraph 6(i) to (iv) of the summing-up has been devoted to deal with the appellant's evidence. Paragraph 6(ii) is as follows

> *'The accused told court that by the way Ms. E.V. behaving with him he knew that 'she wanted something' and therefore he told her to come to his room in a night somewhere in April 2011. He said Ms. E.V. simply consented to have sexual intercourse with him and they had 'sex' many a time after this first night in April. He had not noticed any bleeding from Ms. E.V. after their first sexual encounter.*

[30] In paragraph 7 (ii) of the summing up once again the learned trial judge had touched upon the defence evidence in the following manner.

> *'On the other hand, the defense argued that for all this time Ms. E. V. did not tell these alleged forceful sexual activities to anybody as she was a willing participant to all the acts. The accused said that every time he called her to have sexual intercourse, she came to him without any fear and everything happened with the consent of both. The accused once said that their relationship would be still continuing had Ms. E. V. did not get pregnant. Now madam assessor and gentlemen assessors you have to decide whether Ms. E. V. did actually surrender to the authority of the accused and maintained the secrecy of their relationship or she was compelled to put the blame on the accused after her pregnancy was revealed. Or else, you have to consider the belatedness in the part of Ms. E. V. to report her grievances to somebody is justified by the prosecution to your fullest satisfaction or not.*

[31] The law as stipulated in section 237(4) of the Criminal Procedure Code does not require the trial judge to repeat the contents of the summing up in his judgment. It only requires the judge who differs with the majority of the assessors to give reasons and those reasons should be written down and pronounced in open court. According to section 237(5), the summing up and the reasons of the judge make up the judgment of the court.

[32] Therefore, there is no merit to the appellant's complaint under sub-ground c) as the learned trial judge has amply dealt with appellant's evidence but obviously not believed it.

[33] The final submission of the appellant under sub-paragraph d) is that the trial judge had not considered that the complainant had sought forgiveness from the appellant's wife.

[34] When the complainant gave evidence there was no suggestion that she had sought forgiveness from the appellant's wife. The suggestion was that she had sought forgiveness when the appellant was in prison. The appellant in his evidence did not say that the complainant sought forgiveness from his wife. The appellant's wife did not give evidence at the trial. It is only Luisa who said that she had come back with the complainant to seek forgiveness from the appellant's wife and the appellant had apologised to the complainant. The appellant's evidence was to the effect that he had sought forgiveness from all relatives including the complainant's father which the complainant denied.

[35] The learned trial judge had referred to the appellant's evidence on seeking 'forgiveness' from relatives in paragraph 6(iv) of the summing up and Luisa's evidence of the complainant coming back to seek forgiveness from the appellant's wife in paragraph6 (v). They are part and parcel of the judgment by virtue of section 237(5) of the Criminal Procedure Code. However, in the light of what I have pointed out above the credibility of Luisa's evidence on this point is in serious doubt.

[36] Therefore, I see no merit on sub-ground d) as well.

[37] Accordingly, I see no reason to disturb the learned High Court Judge's finding of guilty of the appellant on all counts of rape. Therefore, the appellant's appeal should stand dismissed and the conviction should be affirmed.

Nawana, JA

[38] I agree with the reasons, conclusions and the orders proposed by Prematilaka, JA.

***T*he Orders of the Court are:**

1. *Appeal is dismissed.*
2. *Conviction is affirmed.*

Hon. Mr. Justice S . Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL