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

CRIMINAL APPEAL NO.AAU 0091 of 2018
[In the High Court at Suva Case No. HAC 222 of 2015]

BETWEEN	:	**JONE DAMU**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. S. P. Gosai for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**21 August 2020**
Date of Ruling	:	**26 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on three counts of rape committed at Vunisea, Kadavu in the Eastern Division from January to December 2013 contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.

[2] The information read as follows.

Count 1

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.*

***JD** between the 1st day of January 2013 and the 31st day of December 2013 at Vunisea, Kadavu in the Eastern Division penetrated the vagina of **AR** with his finger, without her consent.*

Count 2

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.*

***JD** between the 1st day of January 2013 and the 31st day of December 2013 at Vunisea, Kadavu in the Eastern Division had carnal knowledge of **AR** without her consent.*

Count 3

Statement of Offence

***RAPE**: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.*

***JD** between the 1st day of January 2013 and the 31st day of December 2013 at Vunisea, Kadavu in the Eastern Division had carnal knowledge of **AR** without her consent.*

[3] At the conclusion of the trial on 16 August 2018 the assessors' unanimous opinion was that the appellant was guilty of all counts as charged. The learned trial judge had agreed with the assessors in his judgment delivered on 17 August 2018, convicted the appellant and sentenced him on 20 August 2018 to 13 years and 11 months of imprisonment as an aggregate sentence for all three counts with a non-parole period of 11 years and 11 months.

[4] The appellant's timely application for leave to appeal against conviction had been filed on 17 September 2018. His written submissions have been tendered on 08 July 2020 and the state had tendered its written submissions on 10 July 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and

Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

1. That the Learned Trial Judge erred in law and in fact by not considering the fact that there were no reasonable explanations for the delay in reporting the matter by the complainant.

2. That the learned Trial Judge erred in law and in fact when he failed to determine the lateness of the complaint and what relevant weight was attached to the late complaint.

3. That the Learned Trial Judge erred in Law and in fact when the conviction against the Appellant, taken as a whole, was unsafe and untenable given that the evidence adduced did not prove beyond reasonable doubt the guilt of the Appellant in respect of all 3 counts.

4. That the Learned trial Judge erred in Law and in fact in convicting the Appellant on the charges of rape when there were so many contradictions and discrepancies in the testimony of the complainant and her evidence was not credible against the appellant.

5. That the learned trial Judge erred in law and in fact when he failed to consider the fact that the complainant completely changed her story to being raped in contradiction to the narration given to her mother.

6. That the Learned trial Judge erred in law and in fact to consider that the complainant had consented to the acts of touching her body even though she had denied the suggestions by the defence in view of the fact that the complaints were lodged after a long lapse of time.

7. That the learned trial Judge erred in law and in fact when he failed to consider the fact that the complainant was medically examined on 19th March 2015 when in comparison, the alleged offence took place between the 1st day of January 2013 to the 31st day of January 2013 which lateness of the complaint was not addressed by the learned trial Judge in his summing up.

8. That the learned trial Judge erred in law and in fact when he did not consider the medical report and its contents that the hymen remained intact making it impossible for rape or even penetration to have occurred.

[7] The learned trial judge has summarized the facts as follows in the judgment.

> *6. The prosecution alleges that the accused came into the room when the complainant was sleeping with her two siblings. He had then inserted his fingers into the vagina of the complainant, without her consent. Afterward, he had inserted his penis into her vagina without her consent. The parents of the complainant were not at home as they have gone to Suva in that night.*
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> *7. In respect of the third count, the accused had come into the room, when the complainant was sleeping with her siblings. Having approached her in that manner, the accused had inserted his penis into her vagina without her consent. The mother of the complainant was sleeping in the other room in that night. Her father had gone to Suva for work.*
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> *8. The defence suggested to the complainant during the cross examination, that the accused only put his penis on top of her vagina and the complainant had agreed for that. The complainant denied this proposition. In respect of the third count, the defence suggested to the complainant that it was the complainant that came and sat on the accused and rubbed her body against the accused's.*
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> *9. According to the evidence adduced during the hearing, the defence did not dispute that the accused was present in the house of the complainant during these two nights. The defence neither disputed nor suggested otherwise that the complainant has mistakenly identified the accused as the person who came to her in the night and committed these crimes.*
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> *10. The Complainant in her evidence explained the lighting condition of the room, which allowed her to clearly recognise the person who came into the room as the accused. Furthermore, the complainant explained the reason for not shouting or screaming for help when the accused came and committed these crimes. Moreover, she explained the reasons for not informing anyone about the second incident.*

01st and 02nd grounds of appeal

[8] The basis of the appellant's contention is the alleged delay in reporting the sexual acts by the complainant. The appellant seems to argue that given his defense was that of consent the unexplained delay was due to the fact that the sexual acts had taken place with the consent of the complainant.

[9] The summing-up describes how the first two acts of rape had happened in paragraphs 28 and 29 of the summing-up.

'28. The complainant could recall that one night in 2013, she felt that something heavy was on her back, while she was sleeping in her parents' room with her two siblings. On that day, her parents had gone to Suva with her younger sibling. Only the complainant, her two siblings and the accused were in the house. She slept in her parents' room with her two siblings. Two siblings slept on the bed, while she slept on the floor beside the bed. The accused was sleeping in the kid's room. She closed the door, but did not lock it. She had left the light in the room on as she gets scared in the dark. The room had four windows and all of them had curtains. The light on the front porch was on. She was sleeping on her stomach when she felt that something heavy was on her back. She tried to turn back, to see what was it. The light of the room had been switched off at that time. However, the room had sufficient light for her to recognise what was it. From the light came through the windows, she recognised that it was the accused who was behind her. He turned her to upward and told her to keep still and do not shout. She was scared and frightened. She tried to free herself and move away from the accused. He then put one of his hands under her clothes and touched her breasts. With his other hand, he has touched her tights up to her vagina. He had removed her undergarment and then tried to insert his fingers into her vagina. The complainant said that she felt that the fingers of the accused inserted into her vagina as she felt pain. The fingers went into her vagina little bit. She had not done anything and just tried to stay away from the accused. The accused had told her to keep still and not to say anything. The complainant had told the accused that it was painful.

29. Her two siblings were sleeping at that time and did not see what was happening to her. Esther, one of her siblings, said something in her sleep, but did not wake up. After inserting his fingers into her vagina, the accused had tried to insert his penis into her vagina. While he was trying to insert into her vagina with his penis, the penis of the accused went into her vagina little bit. She felt pain in her stomach and vagina when it went in. She was just lying down and tried to move away from the accused. She did not want to see him. The accused did not say anything when he tried to insert his penis into her vagina. The complainant in her evidence, said that she did not allow the accused to insert his fingers or the penis into her vagina on that night. While he was trying to insert his penis into the vagina of the complainant, Esther moved in her sleep, with that, the accused got up and walked out. The complainant explained that she did not shout for help as the houses in the area are far apart and no adult person was in her house apart from the accused and her two siblings on that night.

[10] The complainant's first complaint had been made on 19 March 2015 whereas the offences are alleged to have taken place in 2013. Regarding the first two acts of rape which had happened on the same day, it appears that the complainant had left a note after a week to the mother explaining what had happened. The summing-up contains the following account of it.

'30. Just a week after this incident, the complainant had written down a note to her mother, stating what the accused had done to her and left it in the drawer for her to read. ***The complainant said that she was comfortable in writing that note than telling it to her****. (inconsistency about the content about the note).*

31. Having read the said note, her mother had gone to the accused and inquired from him. She had then called and asked the complainant what she had written in the note was true. The mother had then warned the accused and told the complainant that this must be the first and last occasion. The accused had sought forgiveness from the complainant.'

[11] The complainant's mother Merewalesi Sivo had by and large confirmed the above account (see paragraph 40 of the summing) and added that on the first occasion the appellant had requested her not to divulge the incident to her husband and the father of the complainant. Therefore, it is clear that there had been a reasonably prompt compliant with regard to what happened on the first day. Account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them (vide **Peter Campbell v Regina** [SCCA No. 17/2006 dated 16 May 2008 and **Valentine** [1996] 2 Cr App R 213 at 224]. *Experience shows that people react differently to the trauma of a serious sexual assault. There is no classic response .... some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint* (per Latham LJ in **D** [2007] EWCA Crim 2556).

[12] The second incident relating to the third count had happened a few months after the first incident in the following manner.

'32. Few months after the first incident, the accused had come to the room of the complainant in the night, while she was sleeping with her two siblings in their room. Her mother was sleeping in the other room. Her siblings were sleeping in the bunk bed while she was in the other bed. She had felt that someone had entered into the room and closed the door. The light of the room had been switched off. She had recognised that it was the accused from the light that came into the room from the street lights. The room has two windows, where one was facing the street. Moreover, the complainant said that she recognised the accused from his voice and he was the only person in the house, apart from her mother and her siblings. Her father had gone to Suva for work on that night.

33. The accused came and laid down beside her in the bed. She was facing the wall when he came. He turned her and told her not to shout and keep still. He then put his hand inside her clothes and touched her breast. He had then removed her underwear and tried to insert his penis into her vagina. He had tried to slide his penis into her vagina. While he was trying to do it, the penis had gone into her vagina little bit. She had felt the pain in her stomach and vagina when it went into her vagina. He tried several times to insert into her vagina with his penis. He then stood up and went away. She was scared and frightened when he came as she had thought that he would never come back after her mother warned him.

[13] The appellant's explanation as to why she did not complain promptly is at paragraph 34 of the summing-up.

'34. The complainant in her evidence explained that she tried to scream and shout for help from her mother, but the accused had told her stay still and do not shout. She had not alarmed her siblings who were sleeping in the bunk bed. The complainant had decided that she would solve this issue this time as her mother had solved it for her at the first instance. Moreover, the complainant did not want to inform her mother, as she was afraid that she will report this to the police and then her friends would point finger at her. She said that if it reported to the police, it will bring bad image to her family. The complainant had not informed anyone about this second incident until it came out in 2015.

35. In 2015, she was sent for counselling at school and the counsellor had asked her many questions. During that questioning, she had accidentally told the counsellor about this second incident.'

[14] The appellant's counsel had suggested to the complainant in cross-examination that on both occasions, the alleged sexual acts had happened with her consent and admitted putting the appellant's penis on top of her vagina in the first instance as stated in paragraphs 37 and 39 of the summing-up.

[15] The trial judge had not only placed the above versions before the assessors but also had addressed them on the issue of delay in reporting as follows.

61. You have heard that the complainant had not immediately informed her mother about the first incident. She had waited for a week and then wrote a note, explaining what had happened to her. The complainant explained the reason for writing a note than telling it verbally. Moreover, the complainant had not informed anyone about the second incident. It came out accidentally from her, when she was questioned by the school counsellor in 2015. The complainant explained the reasons why she decided not to tell anyone about

the second incident. You have further heard that the complainant had tried to alert her mother, when the second incident was taking place, but the accused had told her not to shout and stay still.

62. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the court is that, victims of sexual offences can react to the trauma that they have faced in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion or cultural taboos, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.'

[16] In addition, the trial judge had given his mind to the issue of delay in the judgment in paragraph 10.

'The Complainant in her evidence explained the lighting condition of the room, which allowed her to clearly recognise the person who came into the room as the accused. Furthermore, the complainant explained the reason for not shouting or screaming for help when the accused came and committed these crimes. Moreover, she explained the reasons for not informing anyone about the second incident.

[17] The appellant has cited **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) where the guidelines were suggested on how to deal with a delayed complaint. It was held in ***Serelevu***:

'[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.'***

[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."*

[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).

[18] The learned trial judge cannot be faulted for not having strictly followed ***Serelevu***, for it was decided in October 2018 and the trial in this case had been concluded in August 2018. Nevertheless, the Court of Appeal now has to evaluate the case in the light of its own decision in ***Serelevu***.

[19] Therefore, whether the complainant's evidence can withstand the totality of circumstances test formulated in ***Serelevu*** is a question of mixed law and facts. In the circumstances, I am not convinced that there is a reasonable prospect of success in the appellant's appeal at this stage, particularly without the benefit of the complete appeal record.

03rd ground of appeal

[20] The appellant's submission under this ground of appeal is based on the trial judge having not considered in full or given cogent reasons for accepting the complainant's evidence. This is a wrong premise regarding a trial judge's duty when agreeing with the assessors.

[21] When the trial judge affirms the opinion of the assessors the ensuing scenario is described by the Court of Appeal in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) where it was held

> *'[4] .....Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under* ***section 237(3) of the Criminal Procedure Act*** *2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See:* ***Mohammed –v- The State*** *[2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[22] In **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014) the Supreme Court having examined several decisions remarked

> *'[32] An appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court.'*

[23] Referring to **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012), the Court of Appeal in **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014) said of the trial judge's duty under section 237 of the Criminal Procedure Act, 2009 as follows:

*'[13] While we accept that in **Ram** the Supreme Court did state that an independent analysis of evidence by the trial judge was necessary to ensure the verdict is supported by evidence, the remark is only an obiter dicta. We say this because the remark was made in the course of formulating the test when a guilty verdict is challenged on the basis that it is unreasonable or cannot be supported having regard to the evidence (see, section 23 (1) (a) of the Court of Appeal Act). In subsequent cases, the Supreme Court has clarified that where the trial judge agrees with the opinions rendered by the assessors, section 237 of the Criminal Procedure Decree does not require the trial judge to carry out an independent analysis of evidence before pronouncing judgment. But the Supreme Court has endorsed that "a short written judgment, even where conforming with the assessors' opinions is a sound practice" **(State v Miller (unreported CAV 8 of 2009; 15 April 2011, Mohammed v State (unreported CAV 2 of 2013; 27 February 2014)**.*

[24] I have said in a number of previous rulings as to what a 'judgment' consists of under section 237 of the Criminal Procedure Act, 2009.

'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use).

[see **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020), **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Tikoigiladi v State** [2020] FJCA 86; AAU138.2016 (23 June 2020), **Kumar v State** AAU185 of 2016 (22 July 2020), **Raitekiteki v State** AAU 011 of 2017 (29 July 2010), **Qio v State** [2020] FJCA 119; AAU057.2016 (31 July 2020), **Vasu v State** AAU0118 of 2016 (11 August 2020)] and **Fabiano v State** [2020] FJCA 133; AAU077.2017 (14 August 2020)]

[25] In any event, the test in Fiji is not whether a conviction is unsafe or untenable. The remarks in **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 by the Court of Appeal sets out the correct criteria.

'The whole summing up put the case properly and the assessors were left in a position to make up their own minds.

We feel there was no misdirection by the learned trial Judge.

That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?

Section 23(1)(a) of the Court of Appeal Act sets out our powers:

"23-(1) The Court of Appeal -

> *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."*

The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.

It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.

Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion'

[26] Therefore, the trial judge's judgment dated 17 August 2018 is in compliance with the legal requirements. This ground of appeal has reasonable prospect of success.

04th and 05th ground of appeal

[27] The appellant's contention here is that due to several contradictions and discrepancies the complainant was not a credible witness. The appellant has not specified what these contradictions and discrepancies are except to state that her versions to the doctor, her mother and the police are different to her testimony in court. In the absence of any details of the items of the so called contradictory evidence I cannot examine these grounds.

[28] If alleged inconsistencies had been pointed out they could have been examined in accordance with the guidelines stated by the Supreme Court in **Swadesh Kumar Singh v The State** [2006] FJSC15 and by the Court of Appeal in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) which sets down the law on inconsistencies as follows:

> *'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

06th ground of appeal

[29] This cannot be treated as a separate ground of appeal but only a submission coming under the first and second grounds of appeal already considered.

07th and 08th ground of appeal

[30] Belatedness of the complainant's formal complaint to the police has already been examined previously. The appellant contends that the fact that the complainant's hymen was still intact when she was medically examined on 19 March 2015 shows that there had been no penetration constituting rape. This argument is misconceived as pointed out by the Court of Appeal in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) where the court stated that the medical distinction between vulva and vagina becomes immaterial in the light of section 207(2)(b) and any penetration of vulva, vagina or anus is sufficient to constitute the *actus reus* of the offence of rape. In ***Volau*** it was held

> *'[13] ..... It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.*
>
> *[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina..... It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.*
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> *[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape..... Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established.....'*

[31] Cox J in the Court of Appeal of South Australia said in **Glen Thomas Randall** (1991) 53 A CrimR 380 that *'In fact, it would appear that, at least for the last 150 years, the common law, for obvious practical reasons, had made no attempt to distinguish for this purpose between penetration of the vulva, as denoted by the labia majora, or outer lips, and penetration of the vagina itself.'*

[32] In the light of the above discussion, I do not think that there is any reasonable prospect of success of the appellant's appeal on these two grounds of appeal.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL