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

CRIMINAL APPEAL NO.AAU 159 of 2019
[In the High Court at Lautoka Case No. HAC 09 of 2012]

BETWEEN	:	**USAIA LUTUNAIVALU VUNISA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**25 November 2021**
Date of Ruling	:	**26 November 2021**

RULING

[1] The appellant had been indicted in the High Court at Lautoka with four counts of indecent assault ccontrary to section 212 (1) of the Crimes Act, 2009 and two counts of rape contrary to section 207(1), (2)(a) and (3) and section 207 (1), (2)(b) and (3) of the Crimes Act, 2009 committed at Ba in the Western Division against two child victims aged 04 and 06.

[2] The information read as follows:

'***Statement of Offence***

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA , on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **KN,** in that **USAIA LUTUNAIVALU VUNISA** licked the vagina of **KN,** a 4 year old.

COUNT 2

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA , on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **KN,** in that **USAIA LUTUNAIVALU VUNISA** rubbed his penis against the vagina of **KN,** a 4 year old.

COUNT 3

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA , on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **CB,** in that **USAIA LUTUNAIVALU VUNISA** licked the vagina of **CB,** a 6 year old.

COUNT 4

Statement of Offence

RAPE: Contrary to Section 207 (1), (2)(a) and (3) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA , on the 1st day of January 2012, at Ba in the Western Division, raped **CB,** in that **USAIA LUTUNAIVALU VUNISA** used his penis to penetrate the vagina of **CB,** a 6 year old.

COUNT 5

Statement of Offence

RAPE: Contrary to Section 207 (1), (2) (b) and (3) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA , on the 1st day of January 2012, at Ba in the Western Division, raped **CB,** in that **USAIA LUTUNAIVALU VUNISA** used his right fore-finger to penetrate the anus of **CB,** a 6 year old.

ALTERNATE COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212(1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA , on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **CB,** in that **USAIA LUTUNAIVALU VUNISA** rubbed his right fore-finger along the anus of **CB,** a 6 year old.'

[3] At the end of the summing-up, the assessors had opined that the appellant was guilty of all counts. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 28 October 2013 to a final sentence of 15 years and 02 months of imprisonment (after the remand period was deducted) with a non-parole period of 13 years.

[4] The appellant's initial appeal papers against conviction and sentence (22 November 2019) is out of time. He had sought enlargement of time to appeal only against conviction and tendered written submission on 20 November 2021. The state had tendered its written submissions on 05 and 23 November 2021.

[5] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC

17. Thus, the factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced?

[6] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[7] The delay of the appeal (almost 06 years) is very substantial. The appellant had pleaded his ignorance of the law and procedure applicable to appeal process and the stigma, pain and humiliation for the delay. These are not acceptable explanations for the extraordinary delay. However, I would still see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

> ***'Grounds of Appeal***
>
> ***Ground 1***
>
> *THAT the finding of guilt is perverse and unreasonable given the grave inconsistency between the medical evidence of the complainant and the totality of the evidence adduced at trial.*
>
> ***Ground 2***
>
> *THAT the admissibility of caution interview statement is unreasonable given the surrounding circumstances in which it was obtained.*

Ground 3

THAT the finding of guilt is perverse and unreasonable given the contradiction and confusion surrounding the consistency per se and inter se.

Ground 4

THAT there is no evidence of consistency of recent complaint between the complainants and their guardians.

Ground 5

THAT there is deficiency in the prosecution's case in terms of matrial witnesses and documentary evidence.'

[9] The trial judge in the summing-up had summarized the prosecution evidence against the appellant as follows:

33. Prosecution called Doctor Ana Maisema as the first witness. She is a doctor with 7 years' experience. She gave evidence on two medical reports of the victim prepared by Doctor Shalendra Nath, who had resigned and now lives in New Zealand. According to report of KN she was examined on 2.1.2012 at 6.45 p.m. at Ba Mission Hospital. There was redness on her vaginal opening and hymen was not intact. This could have been result of licking and putting finger to vagina. Also rubbing penis against vagina could cause the same. The medical report was marked as P1.

34. Same doctor had examined CB on same day at 7.00 p.m. Medical finding were redness in the vaginal orifice, hymen torn at 9 0'clock to 4 o'clock position, redness in the anal orifice. Penile penetration or penetration of other thing to vagina is compatible with these findings. There is high possibility of penetration of vagina and anus. The injuries were fresh. Medical report was tendered marked P2.

37. Prosecution called KN as the third witness. She was 4 years old at the time of the incident. She was living in Vesaru with her family. She stated that Usaia (Accused) came to her, Waisake and CB and asked them to go and have a bath. At the river they have removed the cloths. The accused had told her one with big hole will eat Pineapple and one with small hole will not get Pineapple. The accused rubbed his balls in her fish. Fish is between her thighs. He also put his finger in her fish. Accused had put his tongue into her fish. There were no others at the river. She saw the accused rubbing his balls on CB's goat. She had told about this to mom. She identified the accused as Usaia.

40. The next witness for the prosecution was the mother of the victim KN. On 1.1.2012 she had invited the accused's family to have lunch at her house.

After lunch they were watching movies and fell sleep. She woke up when Inise's mother is calling Inise to go and look for children. Inise had told her to heat the food for dinner and she will go and look for children. She had seen them coming back. She had scolded KN for going out without asking her. KN had told her that she went to bath with accused, CB and Waisake. When she was about to have dinner CB came and told her that her grandmother wants to see her. When she went there Grandmother had asked her whether KN told anything to her. She said 'No'. Then Grandmother had told her that CB had told her that Usaia did something bad to them at the river.

41. *She had asked the victim KN what Usaia did to her at the river. The victim had replied that Usaia made her lie down, he used his tongue on her vagina and rubbed his penis on her vagina. KN had referred to vagina as fish. She had gone home and had called Inise and Usaia. She had told Usaia about what two kids told her. Usaia had denied doing such thing. She had asked him to wait and called the police. By the time police came Usaia was gone.*

44. *The next witness for the prosecution was CB. She was 7 years at the time of the incident. She said that she went to watch movies at KN's house and then went to play with toys at Guava tree. Waisake too had come there. Usaia had called them. They have gone to river for a bath. Usaia had asked them to remove cloths. Usaia had told that whoever with a big hole will get Pineapple and whoever with small hole will not get Pineapple. Then Usaia had used his finger and his tongue on her fish. He had rubbed his balls as well. It was painful and she had cried. She had seen Usaia licking KN's fish. Usaia had touched her bump with his hands. She identified the accused in court. After going home she had told mom about this.*

47. *Prosecution called mother of CB as the next witness. On 1.1.2012 after lunch CB had requested whether she could go and watch movies at KN's house. She had allowed. She had come back after 5.00 p.m. When inquired she had told 'something big happened.' She had further told that 'at the river Usaia had made her to lie down, lifted her thigh and used his tongue and finger on her fish and rubbed his penis on her fish.' She had called KN's grandmother and inquired about this. Then they have told Inise about this and called police. Usaia had gone missing after that.*

52. *Prosecution called WDC Miriama as next witness. She was the interviewing officer. She had conducted the caution interview at the crime office of the Ba Police Station. It was commenced at 12.30 p.m. on 4.1.2012 and was conducted in I-Taukei language. The accused was given his rights. He was not assaulted, threatened or intimidated before, during or after the interview. There was no complaint from the accused. A reconstruction was done during the interview. There were no visible injuries on the accused. She identified the original notes of the interview, the translation and the accused.*

[10] The appellant had given evidence and he had called his wife as a witness. Their evidence has been summarized as follows:

> *57. The Accused elected to give evidence. His position was that he took Waisake for a bath after 4.00 p.m. The two victims who were playing with Waisake had joined him. He had told them to remove clothes and swim. He had gone home to get his fishing material. As he could not find those he had come back in 30 minutes. They were still bathing in the river. Fifteen minutes later his wife Inise had come. She had taken children home. He had gone to his house to change clothes.*
>
> *62. The accused called his wife Inise to give evidence. She said when she came to river after 4.00p.m the two victims, the accused and Waisake were there. The children were swimming in the swallow part of the river and the accused was swimming in top of the river. The two victims did not tell her anything when she took them home. She further stated that there was no bad feeling between her and the families of the two victims.*

01st ground of appeal

[11] The gist of the appellant's argument is that if the medical evidence were to be accepted it was highly improbable for the two victims to be seen to be swimming, playing, climbing and running right after the alleged sexual encounters.

[12] As per medical evidence, there was redness on KN's vaginal opening and her hymen was not intact and this could have been the result of licking and putting a finger to the vagina and rubbing penis against the vagina also could have caused the same. Medical findings relating to CB were redness in the vaginal orifice, hymen torn at 9 0'clock to 4 o'clock position and redness in the anal orifice. Penile penetration or penetration of other things to vagina was compatible with the findings with a high possibility of penetration of vagina and anus.

[13] The doctor's evidence that the injuries could have had an impact on the victims does not mean that they were injured or so physically and emotionally handicapped to such an extent that they were unable to perform any of the acts they were seen to be doing as children. These are trial issues and not appeal points.

[14] I do not see any real prospect of success in this ground of appeal.

02nd ground of appeal

[15] This ground of appeal is on the voluntariness of the appellant's cautioned interview. He submits that after he was locked inside the cell he was assaulted before and after the recording of the cautioned interview. He also alleges that he was assaulted during the reconstruction of the scene with a 3 inch stick and not given meals as recorded in the cell book entries. His narrative includes the police putting something from a bottle into his private parts using a stick wrapped in a cloth, making him take off cloths and force him to remain naked in handcuffs. His witness Peni Roka has spoken to seeing a police officer putting chilies on the appellant's face with his hands.

[16] Given the ferocity and brutality of the alleged attack on him as described by the appellant and Peni Roka, the appellant must have received severe injuries. However, according to him he had no injuries but only vomited blood. However, the appellant had not made any complaint to the Magistrate and not sought medical treatments.

[17] The learned High Court judge had analysed the appellant's evidence *vis-à-vis* the issue of voluntariness of his cautioned interview and held it to be admissible as the appellant was held to have made it voluntarily in the *voir dire* ruling on 14 October 2013. I do not see errors in the High Court judge's analysis or reasoning.

[18] Accordingly, I do not see any real prospect of success in this ground of appeal. In any event, even if the cautioned interview is disregarded there is ample evidence to sustain the appellant's conviction.

03rd ground of appeal

[19] The main contention of the appellant under this ground of appeal is that there are inconsistencies between answers given by him during the cautioned interview and the evidence of CB and KN and there are also inconsistencies between the evidence of CB and KN.

[20] If what the appellant had admitted in the cautioned statement does not exactly tally with the evidence of victims in terms of what he had done to them, it only shows that the appellant had freely answered the questions by the police who had not forced him to admit what the victims had told the police. It looks as if that the appellant had in some instances admitted more than what the victims had described. Secondly, given the tender ages of the two victims it is inconceivable if there had not been some discrepancies between their respective evidence as to what the appellant did to them and what each saw the appellant doing to the other.

[21] 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 [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280)].

[22] I do not think there are such material discrepancies or inconsistencies between the evidence of CB and KN as to render their testimonies incredible.

[23] I do not see any real prospect of success in this ground of appeal.

04th ground of appeal

[24] The appellant challenges the recent complaint evidence and the direction by the trial judge as to how the assessors should approach recent complaint evidence.

[25] The recent complaint evidence had come from the mothers of two victims. I do not see any serious issue of the evidence of two mothers being treated as recent complaint evidence as per the principles set out in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) and **Conibeer v State** [2017] FJCA 135; AAU0074.2013 (30 November 2017).

[26] However, the trial judge had erred in his directions on how to approach recent complaint evidence in that he had informed the assessors that such evidence could

corroborate the victims' evidence. It is trite law that the recent complaint is not evidence of facts complained of, cannot be used to prove the truth of the allegation; nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant [see **Raj v State** (supra) and **Conibeer v State** (supra)]

[27] The question is whether due to that error on the part of the trial judge the whole conviction is liable to be set aside. The answer is in the negative, for despite the erroneous direction the test is whether upon the whole of the evidence it was open to the assessors and the trial judge to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence. (see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493).

[28] The ultimate test at this stage is whether as a whole the appeal has a real prospect of success against conviction [vide **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019)] despite the error on the part of the judge. I think not.

05th ground of appeal

[29] The appellant submits that the doctor who examined the victims and prepared the medical reports should have been summoned and similarly DC Manoa and DC Ashwin should have been called as witnesses.

[30] Needless to state that these are pure trial issues that should have been canvassed at the trial stage. The appellant does not appear to have joined issues with these matters at all.

[31] I do not think that there is any real prospect of success in this ground of appeal.

[32] Since the appellant had initially canvassed the sentence and not abandoned sentence appeal later I shall deal with it too.

[33] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows:

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[34] The trial judge had correctly taken the tariff for juvenile/child rape as 10-16 years at the time of sentencing which was later confirmed by the Supreme Court in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[35] The trial judge had picked the starting point at 12 years for rape charges and added 03 years for aggravating features and reduced 01 year for mitigating factors. After deducting the remand period the sentence became 12 years and 02 months. Since the rape sentence was ordered to run consecutively to the sentence of 03 years on sexual assault charges the final sentence was fixed at 15 years and 02 months.

[36] Nevertheless, when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do

not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[37] I see no real prospect of success in the appellant's appeal against sentence which given the seriousness of the crime and the number of victims committed by the appellant cannot be called disproportionate, harsh or excessive.

[38] The current sentencing tariff set in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) is 11-20 years and if canvassed before the full court it can revisit the sentence to see whether it fits the gravity of the crimes. If not, the full court may even enhance the sentence.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL