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

CRIMINAL APPEAL NO.AAU 0071 of 2018
[In the High Court at Suva Case No. HAC 142 of 2016]

BETWEEN	:	**POKITI NALEBA**	
			Appellant
AND	:	**STATE**	
			Respondent
Coram	:	**Prematilaka, JA**	
Counsel	:	**Mr. M. Fesaitu for the Appellant**	
		Mr. S. Babitu for the Respondent	
Date of Hearing	:	**16 March 2021**	
Date of Ruling	:	**17 March 2021**	

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of rape contrary to section 207(1) and 207 (2) (a) of the Crimes Act. 2009 committed at Nadi in the Western Division on 08 December 2015.

[2] The information read as follows.

> ***'Statement of Offence***
>
> ***RAPE:*** *Contrary to Section 207 (1) and Section 207 (2) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***POKITI NALEBA*** *on 8th day of December, 2015, at Nadi in the Western division, penetrated the vagina of* ***RANJEET KAUR*** *with his penis, without her consent.*

[3] At the conclusion of the summing-up on 21 June 2018 the assessors' opinion had been unanimous that the appellant was guilty of rape. The learned trial judge had agreed with the assessors in his judgment delivered on 25 June 2018, convicted the appellant and on 09 July 2018 sentenced him to 08 years and 11 months of imprisonment on with a non-parole period of 06 years.

[4] The appellant's lawyers had filed a timely notice of appeal against conviction and sentence on 06 August 2018. The appellant had filed additional grounds of appeal and submissions and an application for bail pending appeal in person. The appellant had tendered an abandonment notice in Form 3 regarding his sentence appeal on 18 September 2020. Thereafter, the Legal Aid Commission had filed an amended notice of appeal only against conviction and written submissions on 19 November 2020. The state had tendered its written submissions on 24 December 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.

[6] The sole ground of appeal urged on behalf of the appellant against conviction is as follows.

> *'The learned trial judge had erred in law and in fact having not properly assessed and/or evaluated the evidence of a belated report.'*

[7] The learned trial judge had summarized the evidence led by the prosecution in the judgment as follows.

9. The Complainant said that the Accused came to her house on the 2nd of December, 2015, her father-in-law's birthday, and massaged her husband Pradeep's leg since it was paining. The Accused then promised that he will buy some herbal medicine from Rakiraki and took $50.00 and went. He brought the medicine on the 7th December, 2015 and gave it to Pradeep to drink. The Accused again visited them on 8th of December, 2015, and while talking to Pradeep under a tree, he asked Pradeep, if he had ever dreamt about anything. When he said 'no', then he asked her wife to come and asked the same question. Then he wanted to talk to her more because she seemed shy and took her to the porch. In the meantime, Pradeep fell asleep under the tree.

10. When the Complainant went inside her room, the Accused followed her to the room and started touching her. She told him to leave. When she was trying to leave the room the Accused closed the door. When the Complainant tried to call her daughter the Accused pressed her mouth. The Accused then removed her clothes and panty and raped her. She said that the Accused used his body part into her body part to have sex. She refused to name those body parts. But she drew Accused's body part on a piece of paper and gave a good description about her body part.

[8] The appellant's sole ground of appeal is based on the alleged belated reporting of the act of rape. He relies on **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) where it was held

> '[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 **Tuvford** 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.'

[9] The appellant submits that the incident had allegedly happened on 08 December 2015 but it had been reported to the police only on 27 February 2016 about 02 months later. The complainant had explained that he did not report the matter to her husband immediately because the appellant had threatened to kill them if she informed of the incident to anyone which made her scared. According to her, she had informed her husband of what the appellant had done two weeks later but her husband Pradeep had testified that she made the complaint to him about a week later but could not recollect the exact date. The appellant's argument is that there is no explanation for not reporting the matter to the police even after the lapse of two weeks or one week of the incident, as the vase may be, after Pradeep got to know of it.

[10] The appellant's defense had been one of denial and that he was elsewhere namely Cavucavu settlement on 07th, 08th and 09th December 2015. He had not given evidence but called three witnesses to testify to the above fact but the trial judge had treated them to be totally unreliable as none of the witnesses had been able to confirm that the appellant was at Cavucavu settlement at the material time. The appellant had also attributed a motive for the complainant and her husband to have implicated him in the rape allegation as being his refusal to join then in worshiping and his having taken the major share of the honey they had collected. The complainant and Pradeep

had denied both assertions. The trial judge too had rejected the sinister motive alleged by the appellant for fabrication of the allegation of rape.

[11] On a reading of the summing-up and the judgment it does not appear that the appellant had challenged the testimony of the complainant and her husband on the basis of delay in reporting the matter to the police.

[12] The counsel for the state submitted that the appellant did not raise the issue of delayed reporting at the trial. It was the paramount duty on the part of the trial lawyers to challenge the evidence of the prosecution on the ground of belated complaints at the appropriate stage of the trial itself so as to enable the witnesses to explain, if possible, why their complaints were delayed.

[13] The credibility of a witness is not diminished simply because his or her complaint is late until and unless he or she is impeached on the footing that either he or she has complained belatedly due to the sinister motive of implicating the accused falsely or the delay enabled fabricating false allegations, embellishments or afterthought as a result of deliberation and consultation. Delayed reporting should be a trial issue for the judge to address the assessors and himself on. It should not be simply taken up as an appeal point for the first time for want of any other legitimate grounds of appeal. If the delayed complaint is made a live issue at the trial it has be assessed by using "the totality of circumstances test" as expressed in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) and appropriate directions should be given to assessors. If not, it has to be assumed that the defense has no issue with the complaint being late and seeks no explanation for the delay.

[14] I dealt with a similar complaint by an appellant in **Bulago v State** [2020] FJCA 94; AAU084.2016 (2 July 2020) as follows.

> *'[25] However, the delay in reporting the acts of sexual abuses does not feature in the summing-up or the judgment. It appears that the appellant had not challenged the credibility of the complainant on the basis of delay thus preventing the learned trial judge from addressing the assessors in the summing-up and himself in the judgment on that issue. The appellant was defended by counsel at the trial. Lack of any motive attributed to the complainant to have falsely implicated the appellant in a series of acts of sexual abuses over a long period of time is also intriguing. Had the defense*

counsel raised the question of delay even at the very last stage of closing addresses that would have prompted the trail judge to have directed the assessors on the issue of delay in the summing-up. The fact that the complainant had not been confronted with the question as to why she had not reported these acts of sexual abuses going on since 2010 until 2014 may have prevented her from presenting an explanation for the assessors and the trial judge to consider whether it was satisfactory and credible.

[26] Therefore, it appears that the complainant had not been afforded an opportunity, either deliberately or otherwise, from explaining whether she made the complaint at the first available opportunity within a reasonable time (according to the appellant's written submissions the last sexual act was said to have occurred in October 2014 and the complaint was also made in October 2014) or if not whether there was a reasonable explanation for the delay since February 2010.

[28] The appellant has not refereed to me any authority to buttress his argument that in a situation such as this the trial judge has a duty or is obliged as a matter of law to raise the issue of delay in reporting with the assessors and take it up himself on his own in the judgment. Perhaps, if the appellant decides to renew his appeal before the full court he may attempt to convince the court of any merits of his argument with legal authorities."

[15] I also dealt with the matter of delay in complaints of sexual abuse cases morefully in **Vulaono v State** [2020] FJCA 209; AAU0004.2018 (28 October 2020) where I further said

'[32] As far as the appellant's case is concerned there is nothing to indicate in the summing-up that he represented by counsel had challenged the victim's credibility on the basis of delayed reporting of the incidents relating to first to third counts. If the appellant had wished to discredit the victim on the basis of fabrication of allegations as a subsequent reflection as evidenced from the late complaint the victim must have been confronted with that line of defense in cross-examination. Only then could the victim have explained reasons for not making a prompt complaint regarding the incidents in 2006, 2007 and 2008. Otherwise, the appellant's argument based on 'delay' in reporting remains only an afterthought taken up simply as an appeal point.'

[16] The trial had nevertheless directed the assessors on the delay in making a complaint as follows.

'[24] In testing the credibility of a witness, you may consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that

usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.

25. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when complainant did eventually complain, whether it was genuine.'

[17] The trial judge had given his own mind to the same issue in the judgment as follows.

'[12] The Complainant did not make a prompt complaint either to her husband or police. The reason she has given for the delay is reasonable and acceptable. The Complainant said that she was scared because the Accused had told her that if she told the incident to anybody he would kill them. I observed Complainant's demeanour and her manner of giving evidence in Court. She is a very shy lady. She was even reluctant to name the sexual organs in Court. I am satisfied that the complaint she ultimately made to police on the 27th February 2016 was genuine.'

[18] In addition, the trial judge had observed the complainant's distressed condition while she was giving evidence at the trial and addressed the assessors on that as follows.

'[28] Evidence was led through Complainant's husband that the days immediately after the alleged incident, Complainant looked distressed and different that she did not talk much and did not conduct herself the way she used to be. If you believe that she was in distressed condition, you must be satisfied beyond a reasonable doubt that the Complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred and it does not connect the Accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.

[19] In his judgment also the trial judge had considered the complainant's distressed condition in the following words.

'[13] Complainant's distressed condition supported Complainant's consistency in her conduct. I am satisfied that the Complainant was in a

distressed condition after the alleged incident and that distressed condition was not artificial and was only referable to the alleged rape and not any other cause.'

[20] Thus, at the end of the trial neither the assessors nor the trial judge had reason to doubt the credibility of the complainant's evidence on the basis of the 'late' complaint to the police.

[21] In Fiji, the assessors are not the sole judge of facts. 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 and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Mava v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).'

[22] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take when it considers whether verdict is reasonable or can be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> *.....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.....*

[23] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[24] In **Kaivum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is **whether the trial judge could have reasonably convicted on the evidence before him** (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

[25] In my view the evidence led by the prosecution satisfies tests in both **Sahib** and **Kaivum**. Therefore, there is no reasonable prospect of success of the sole ground of appeal at all.

[26] Therefore, obviously the appellant's appeal does not reach the threshold of *'very high likelihood of success'* as required for bail pending appeal and his application for bail pending appeal too is refused.

Orders

1. Leave to appeal against conviction is refused.
2. Bail pending appeal is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL