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

CRIMINAL APPEAL NO. AAU 024 of 2017
[In the High Court at Suva Case No. HAC 234 of 2014]

BETWEEN	:	**MITIELI WAIVONO**
		Appellants
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Ms. S. Shameem for the Respondent**
Date of Hearing	:	**04 November 2022**
Date of Judgment	:	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] Having read in draft the judgment of Nawana, JA. I agree with his reasons and the orders proposed.

Gamalath, JA

[2] I have read in draft the judgment of Nawana, JA and agree with the reasons adduced and the conclusion.

Nawana, JA

[3] This is an appeal against the conviction of the appellant where he [the appellant] stood indicted on eight counts of rape under Section 207 (1) and (2) of the Crimes Act, 2009, before the High Court in Suva.

[4] The complainant, about whom the charges related, was an eighteen-year-old relative of the appellant, who was living in the vicinity of the appellant's home.

[5] The information, as presented by the Director of Public Prosecutions (DPP), disclosed the statements and the particulars of offences as follows:

> *"**FIRST COUNT***
> ***Statement of Offence***
>
> ***RAPE:*** *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***MITIELI WAIVONO*** *on the 9th day of July, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*
>
> ***SECOND COUNT***
> ***Statement of Offence***
>
> ***RAPE:*** *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***MITIELI WAIVONO*** *on the 14th day of July, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*
>
> ***THIRD COUNT***
> ***Statement of Offence***
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> ***RAPE:*** *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MITIELI WAIVONO *on the 19th day of July, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

FOURTH COUNT
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MITIELI WAIVONO *on the 4th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

FIFTH COUNT
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MITIELI WAIVONO *on the 5th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

SIXTH COUNT
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MITIELI WAIVONO *on the 6th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

SEVENTH COUNT
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MITIELI WAIVONO *on the 7th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent.*

EIGHTH COUNT
Statement of Offence

RAPE: *Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MITIELI WAIVONO *on the 8th day of August, 2014 at Taviya Village, Levuka in the Eastern Division had carnal knowledge of UNAISI NAIOBASALI without her consent."*

[6] At the trial, the prosecution presented only the evidence of the complainant. Upon the defence being called by the learned trial judge at the close of the prosecution case, the appellant gave evidence on his own behalf and called Maca Kayaga, the wife of the appellant; and, Saimoni Nailvalu, an unrelated neighbour of the appellant, in defence of the appellant's case.

[7] Acts of sexual intercourse, referred to in the eight counts, were accepted by the appellant. The defence case was that the appellant engaged the complainant in the acts of sexual intercourse with her consent.

[8] After trial, the assessors returned unanimous opinions of guilty, with which, the learned trial judge agreed. The appellant was, thereupon, convicted on 06 February 2017 and sentenced to a term of 12 year and 6 month-imprisonment in respect of each count of rape. The learned judge deducted a period of 3 months in order to set-off the period that the appellant had spent in remand. The ultimate operative term of imprisonment was 12 years and 3 months with a non-parole period of 9 years and 9 months. The sentences dated 07 February 2017 were ordered to run concurrently.

[9] The appellant made a timely application for leave to appeal. The grounds urged in appeal were:

> *"**Ground One***
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> *The Learned Trial Judge erred in law and in fact when he did not consider the opportunities that the complainant had to report the matter as soonest to the police and also to the people who were in authority in Taviya village to whom she knows has the power to protect her particularly the police thus questioning her credibility and also raising more than reasonable doubts to her claim of not consenting to sexual intercourse.*
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> ***Ground Two***
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> *That the Learned Trial Judge erred in law and in fact did not consider the opportunities that were available to the complainant to call the neighbours for help if she was about to be raped eight times but rather kept on going to the appellant house eight times despite of the alleged use of force and threats.*
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> ***Ground Three***
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> *That the Learned Trial Judge erred in law and in fact when he did not consider the evidence of the witnesses called by the defence especially by DW2 Maca, DW4 Saimoni Naivalu and DW3 Maca Ravulo who were very credible and truthful witnesses."*

[10] The single Justice of Appeal, who heard the application for leave, held that the second ground of appeal was not completely independent of the first ground but encapsulated in the first; hence, it could be broadly considered under the first ground. Leave to appeal was, accordingly, granted for the first ground of appeal only, while rejecting the third ground on the basis that it did not have a reasonable prospect of success.

[11] At the hearing before the Full Court, learned counsel for the appellant and the respondent relied on the written-submissions filed in support of their respective cases for leave to appeal. There was no application for renewal of the third ground of appeal. In the circumstances, this appeal will determine the appellant's case on the basis of the first ground of appeal, which stood so close in factual relationship to the second ground.

[12] Evidence revealed that the complainant, who was a daughter of a cousin of the appellant, was living in a house just *'five steps [away] from'* the appellant's house. The appellant, who got the complainant to take the lunch to the appellant's son in school, had sexual intercourse with the complainant on some days on her return to the appellant's house. Moreover, when the complainant was attending to some chores at home, the appellant had called her into the appellant's house and engaged in sexual intercourse.

[13] The prosecution, in support of its case, led the complainant in evidence in relation to the eight instances of rape on each day, as charged, commencing from 09 July 2014. The complainant stated in evidence that she had not consented to the acts of sexual intercourse with the appellant. Evidence, however, revealed that the appellant had engaged the complainant in the acts of sexual intimacy before culminating in the acts of sexual intercourse on each day.

[14] The complainant informed her mother of the alleged forcible acts of sexual intercourse only on 10 August 2014 resulting in a complaint to police on 12 August 2014. The statement of the appellant was recorded under caution, who had admitted acts of sexual intimacy and intercourse with the complainant with her consent on the dates mentioned in the eight counts except on 08 August 2014.

[15] The trial was conducted on the basis of agreed facts where the appellant specifically admitted acts of sexual intercourse on the dates specified in the information.

[16] The complainant, under cross-examination, admitted that she had got many an opportunity of complaining against the appellant but stated that she did not do so as she felt scared of the appellant. Those many opportunities were that she could complain to the mother, the village headman, vice headman, the chief in the community; the head teacher; a female teacher of the village school that she knew of; and, to the priest or the sister of the church.

[17] It was also put to the complainant that she could have raised cries and alarmed the neighbours in order to escape if the acts of sexual intimacy and intercourse were non-consensual. While admitting that she could do so, the complainant's position was that

she did not raise any voice because she had felt scared of the appellant. The complainant, nevertheless, admitted that the appellant did not make any threat after the matter was reported to police on 12 August 2014.

[18] Ms. Maca Kayaga, the wife of the appellant, testifying in defence of the appellant stated that she had confronted the appellant after seeing him drinking '*grog*' with the complainant on 08 August 2014. The appellant, later in the day, had admitted before his wife that he had had '*sex'* with the complainant in their house and asked for forgiveness. The complainant, too, around 9.00 in the night on the same day, had come and asked for forgiveness. On 10 August 2014, the complainant wanted to seek forgiveness from her parents, too, for which, the complainant wanted the witness to accompany her where both the complainant and the appellant admitted that they had 'sex' inside witness' house and begged for forgiveness.

[19] Saimoni Naivalu, a boy of seventeen years of age in 2014, giving evidence said that he had relayed messages of the complainant to the appellant for them to meet, from about 08 July 2014. This witness, in particular, said that the complainant had been seeing the appellant for 'sex' and that was where she had got money for her cigarettes.

[20] When the proceedings before the High Court is considered, it would appear that the contentious issue and the element of the offence, being the absence of consent, has to be considered in light of the sole testimony of the complainant; and, the evidence adduced on behalf of the appellant in his defence.

[21] The complainant, admittedly, did not make any complaint although many an opportunity were available for her to do so. The failure on the part of the complainant to make any complaint is required to be considered in this case in the context of multiple acts of sexual intimacy and intercourse over a period of around one month with close intermittent time gaps. This would lead to the establishing of a basis where it could be seen that the complainant had consensually submitted herself to the acts of sexual intimacy culminating in the acts of sexual intercourse with the appellant.

[22] It is in this context that this court has to consider the ground of appeal as urged by the appellant; and, its deep consideration by this court would essentially revolve around the issue of consent, the presence of which, will threaten the sustainability of the conviction. I would propose to consider how judicial precedents had dealt with the issue when a crime is not reported without delay.

[23] In **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), this court adopted a very important principle in dealing with the delay in making a complaint in relation to the commission of a crime. The principle operates with much vigour in cases of sexual offences because the element of consent, which forms the constituent element of the offence, is reflective of an agreement between the offender and the victim to the alleged wrongful conduct of the other party. The delay in making a complaint or failure to make a complaint at all promptly is, therefore, capable of creating a doubt as to the absence of consent in making-out the offence. The '*totality of circumstances test*', which was adopted in **Serelevu,** in my opinion, is a suitable principle to be applied in this case considering its facts and circumstances. In Serelevu, this court held:

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

[24] According to the complainant's own account of the story; the facts and, the circumstances of this case, there is no evidence, which suggests that the complainant had been subdued to any sexual invasion by the appellant against her free will or consent. Moreover, she had not admittedly made use of all available opportunities to make any complaint to anyone who were easily accessible within the community. In my opinion, these factors strongly militate against any assertion that there was no consent on the part of the complainant in submitting herself to the sexual intercourse with the appellant.

[25] The learned trial judge in his summing-up to the assessors had stated:

> *"49. You heard that the prosecution and the defence presented conflicting versions of events. The prosecution alleges Unaisi did not consent to have sexual intercourse with the accused. She claims that he forcefully pulled her inside the house whenever she went there to drop his son's lunch box and forcefully had sexual intercourse without her consent. The accused had threatened her that he will do something to her and her family if she tells this to anyone. She had believed that he would do such and did not tell anyone. She was scared of him. She was alone at home whenever he had called her to his place. She said that she had to go as she was alone at her house. If she did not go, he might come to her house and do something to her.*
>
> *50. In contrast, the defence claims Unaisi wanted the accused. She came to see him by herself. She made arrangements to see him through Saimoni. She willingly and actively participated in sexual intercourse with the accused.*
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> *51. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused is guilty for the offences as charged, you have to consider the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing."*

[26] The learned trial judge, having dealt with the principle of divisibility of credibility of a witness' testimony, appears to have placed an unnecessary emphasis on the credibility of the appellant's evidence on account of an inconsistency that the learned judge had perceived to have arisen between the appellant's evidence and the agreed facts.

[27] The appellant, in terms of the amended agreed facts presented to court on 29 July 2016, appears to have admitted having sexual intercourse on 08 August 2014 whereas he denied having sexual intercourse on that day as the complainant was having her menstruation. The learned judge dealing with this position had this to say in his summing up:

> *"59. In determining the evidence adduced by the defence, I must draw your attention to the evidence given by the accused and the agreed facts filed by the parties. As I directed you, you are entitled to consider the agreed facts as proven facts beyond reasonable doubt by the prosecution. The prosecution and the defence have agreed in the agreed facts that the victim came to the house of the accused to drop the lunch box of the accused's son on 9th, 19th of July 2014 and 4th, 5th, 6th, 7th, of August 2014 respectively. However, the accused in his evidence stated that the victim came to his house by her own and made plans prior to such visits through Saimoni. Moreover, the prosecution and the defence have agreed that the accused and the victim had sexual intercourse on the 8th of August 2014 at the house of the accused. However, the accused in his evidence said that he did not have sexual intercourse with the victim on the 8th of August 2014 as she was having her menstruation. You as judges of the facts, have to take that into consideration in your deliberation what weight you give to this inconsistence nature of the evidence given by the accused in order to determine the credibility and truthfulness of his evidence."*

[28] What is important to be noted is that, in the caution-interview statement, which formed part of the agreed facts, revealed that no sexual intercourse had, in fact, taken place on 08 August 2014 as asserted by the appellant in an answer to his direct questioning; and, in his evidence before court (RHC 125). Therefore, the formulation of agreed facts on the issue appears to have been founded on a wrong basis; and, the learned judge's direction to the assessors on this point was not accurate in light of the material before court.

[29] The legal question that this court is confronted with now is whether the error in the proceedings before the trial court was capable of causing a substantial miscarriage of justice. The House of Lords in **Stirland, Appellant v Director of Public Prosecutions** [1944] AC 315, laid down the guideline, which this court in **Navaki v State** [2019] FJCA 194; AAU0087.2015 (3 October 2019) suitably adopted. The House of Lords held in that case:

> *"When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, should be applied.*
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> *A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. ..."*

[30] It would appear that the statutory provisions of Section 23 (3) of the Court of Appeal Act of Fiji are identical in content to the applicable provisions of the English Criminal Appeal Act, 1907, by which the governing guideline has been statutorily enacted for court to consider whether there was a substantial miscarriage of justice surfaced on the proceedings.

[31] I am of opinion that the misstatement of the learned trial judge and consequential mis direction to the assessors resulted in grave prejudice to the appellant's case, which could have influenced the assessors to reject the appellant's evidence and that of his witnesses causing a substantial miscarriage of justice.

[32] I hold that the appellant's ground of appeal in conjunction with the substantial miscarriage of justice that was caused to the appellant in view of the learned judge's misdirection on facts and the law, as referred to above, justifies allowing this appeal. Appeal is, accordingly, allowed.

Orders of the Court:

(i) Appeal allowed;

(ii) Conviction quashed; and

(iii) Appellant acquitted.

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

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL