IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 071 OF 2018
Lautoka High Court No. HAC 142 OF 2016

BETWEEN : **POKITI NALEBA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Kumarage, JA
Bull, JA

Counsel: **Appellant in person**
Ms S. Shameem *(Office of the DPP)* for the Respondent

Date of Hearing : **08 May, 2023**
Date of Judgement : **06 June, 2023**

JUDGEMENT

Mataitoga, JA

[1] I have reviewed the judgment of Kumarage JA and I support his reasons and conclusions.

Dr. Kumarage, JA

[2] This appeal arises from the conviction of the Appellant on a single count under Section 207 (1) and Section 207 (2) (a) of the Crimes Decree No. 44 of 2009 (now the Crimes Act, 2009) alleged to have been committed on 8th of December 2015. The Information dated 29th day of September 2016 describes the particulars of the count as the Appellant having penetrated the vagina of **Ranjeet Kaur** with his penis, without her consent.

[3] After trial the three assessors had expressed a unanimous opinion that the Appellant was guilty of the said count. The Learned High Court Judge on 25th June 2018 concurred with their opinion in the Judgment and convicted the Appellant. On 09th of July 2018 the Learned Judge imposed a sentence of 08 years and 11 moths of imprisonment with a non-parole period of 06 years.

[4] The Appellant had invoked the appellate jurisdiction of the Court of Appeal against the said conviction and sentence by way of Notice of Appeal pursuant to Section 21 (1) of the Court of Appeal Act tendered to the Court of Appeal Registry by the Solicitors of the Appellant on 06th of August 2018. Amended grounds of appeal and the submissions for the Appellant had been submitted later by the Appellant in person. Written submissions on behalf the Respondent had been tendered on 24th December 2018. Thereafter, the appellant had submitted a Form 3 and abandoned his appeal against sentence.

[5] The single judge of the Court of Appeal, **Justice Prematilaka**, had delivered the leave to appeal ruling on 17th March 2021, where His Lordship has refused the leave to appeal application against conviction of the Appellant. Thereafter, the Appellant had filed in person and renewed his appeal against conviction, where he has rephrased his sole ground of appeal at the leave stage and raised fresh grounds that were not argued at the leave stage.

Summary of Evidence

[6] The Complainant had testified that the Accused came to her house on the 2nd of December 2015 for her father-in-law's birthday and massaged her husband Pradeep's leg since he complained it to be paining. The Accused then promised that he will buy some herbal medicine from Rakiraki, where he was given $50 by her husband Pradeep. On 7th December 2015 he brought the medicine 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 the Accused asked the Prosecutrix 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.

[7] When the Prosecutrix went inside her room, the Accused followed her to the room and started touching her, where she told him to leave. Since the Accused didn't leave, when she tried to leave the room herself the Accused closed the door. At that moment, when she tried to call her daughter, the Accused pressed her mouth with his hand. Thereafter, the Accused removed her clothes and panty and raped her. The Prosecutrix claimed that the Accused used his body that is used to have sex and put that into her body. She refused to name this body part in Court. But she drew Accused's body part on a piece of paper and gave a good description about her body part.

Grounds of Appeal urged by the Appellant at the hearing on 12/05/2023.

[8] When this matter was taken up for hearing on 12/05/2023, the Appellant appearing in person submitted to Court in i-Taukei language two grounds of appeal mentioning that he only wishes to challenge the conviction and sentence on those grounds. In this regard, the first ground of appeal was in relation to his sentence claiming that it was too excessive for a first offender. However, this ground of appeal was in his original application, which the Appellant subsequently withdrew following the proper procedure of Court, i.e., by filing Form 3 in the registry.

[9] The second ground of appeal tendered by the Appellant was in relation to the delay in formally charging him in Court by the Prosecution. In this regard, he mentioned that though

he was arrested on a complaint in this case, he was initially released without any charge. Thereafter, he was only charged in July 2016. This ground of delay in instituting action against him has been raised by the Appellant at the leave stage of this application and it is also mentioned as a ground in the renewed application filed by the Appellant in person after the leave stage for the consideration of the full bench.

First Ground of Appeal

[10] In considering the acceptance of the ground of appeal in relation to the sentence, which was tendered to this Court before and withdrawn, this ground now stands as a fresh ground before this Court. In deciding to accept the excessive sentence as a ground of appeal at this juncture, I intend to refer to the pronouncement made by this Court in the case of ***Sairusi Nasila v The State [2019]***[1], where the possibility of accepting new grounds was analysed, as below:

> *"Therefore, in my view, the most reasonable and fair way to address this issue is to act on the premise that the new grounds of appeal against conviction submitted by the LAC should be considered subject to the guidelines applicable to an application for enlargement of time to file an application for leave to appeal, for they come up for consideration of this court for the first time after the appellant's conviction. This should be the test when the full court has to consider fresh grounds of appeal after the leave stage. In other words, the appellant has to get through the threshold of extension of time (leave to appeal would automatically be granted if enlargement of time is granted) before this court could consider his appeal proper as far as the two fresh grounds are concerned. 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."*

[1] [2019] FJCA 84: AAU 0004 of 2011

[11] In the case of **Rasaku v State** [2013][2] referring to a decision of the **Privy Council** of the **Great Briton**, the **Supreme Court of Fiji** pronounced the rationale for allowing an enlargement of time for filling a belated application for leave to appeal, as below:

> *"The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in [1964] 3 All ER 933 at 935 at 935:*
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> > *"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step-in procedure requires to be taken there must be some material upon which the court can exercise its discretion."*

[12] In this matter, the Appellant has not informed this Court, either by way of an affidavit or during his submissions in Court, why he withdrew his contention on the sentence earlier. Therefore, the withdrawal of this ground by filing the F3 form in the registry and not providing adequate time for the State to respond to this claim in this Court vitiates a fair hearing of this ground at this appeal. This Court cannot accommodate litigants to submit and withdraw appeal grounds whenever they feel so without cogent reasons. Therefore, resubmission of this ground at the hearing state is not acceptable. Thus, I will not make any determination on the sentence imposed by the trial judge, since the Applicant has not fulfilled the required threshold for consideration of this ground at this stage.

Second Ground of Appeal

[13] The second ground of appeal that the Appellant expects this Court to consider is, *whether they learned trial Judge erred in law and in fact having not properly assessed and/or evaluated the evidence of delay in reporting and instituting action against the Appellant in this matter.* Though this ground was raised at the leave stage in this Court, at the single judge hearing leave was refused.

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[2] [2013] FJSC 4

[14 In considering whether the trial judge erred in law and in fact in assessing the delay of the complaint to the police by the victim, I have to consider what the trial judge informed the assessors about the delay in his Summing – Up. For this end, at the onset the trial judge had informed the assessors in **para 20** how the evidence of the witnesses should be evaluated in his Summing-Up, as below:

> *"In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence in court. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence."*

[15] Thereafter, in **para 21** of the Summing – Up, the trial judge had emphasised the delay in making a complaint in this matter and how the delay could be evaluated, as follows:

> *"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. 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."*

[16] As per the above pronouncement of the trial judge, it is perceptible that the assessors had been given sufficient warning about the delay of the complaint and how the delay could be considered. In this regard, the judge had warned the assessors that a delay may give an opportunity to make up a story and the need to consider a reasonable explanation for the delay.

[17] In this regard, the recommended approach to accept a delayed complaint of sexual abuse in the present day was well elaborated by the **Court of Appeal of Wellington, New Zealand** in the case of **R v H** [1997][3], where **Justice Thomas** stated, as below:

> *"(i) In the present context, the word "complaint" is itself archaic. Victims of rape seldom "complain" in the sense that that word is generally understood. Their "complaint" is almost invariably in the nature of a disclosure, a shared confidence, a "confession", a revelation, or the like. The recent complaint rule is applied regularly in the criminal Courts. Yet the rule is indefensible, the relic of the medieval requirement of the "hue and cry". The expectations of medieval England as to the reactions of an innocent victim of a sexual attack are no longer relevant. The assumption that there is a common inclination to talk about the incident to anyone must be expressly abandoned as it is without any evidential foundation.*
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> *(ii) There are many sound reasons why an innocent victim of rape may delay making a complaint for months or even years after the commission of the crime. There is simply no factual foundation for the premise underlying the recent complaint rule that a delayed complaint is any less reliable than a prompt complaint, or that a complainant who has delayed her complaint or not complained at all is any less trustworthy than a complainant who raises an immediate "hue and cry".*
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> *(iii) There is no evidential basis for the view that complaints of rape carry a special danger of fabrication which needs to be specifically guarded against in the criminal law. Nor is there any truth in the assertion that charges of rape are easily made.*
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> *(iv) If the Courts were prepared to accept the enlightened perception the legislature has exhibited in enacting s 23AC and s 23AB of the Evidence Act 1908, they would also have to accept that the recent complaint rule requires modification or even abandonment. As the rule is founded on false expectations, it would be logical to abandon it altogether. Strict logic should not necessarily prevail. Logic needs, perhaps, to be tempered by experience and a recognition of the reality that prejudice in respect of female complainants will continue to maintain a subtle presence in the courtroom. The preferable course would be to allow trial Judges to admit evidence of complaints where there has been a lapse of time, as well as prompt complaints, as an exception to the normal rules of evidence."*

[3] [1997] 1 NZLR 673

[18] In considering the evidence led at the trial, the complainant had explained that she 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.

[19] In this matter, the Appellant has not testified at the trial. Further, considering the Summing-Up and the Judgment, it does not appear that the Appellant who was represented by a counsel had challenged the testimony of the complainant and her husband on the basis of delay in reporting the matter to the police. Therefore, in considering this attenuate position, I consider it useful to refer to the determination made by **Justice Prematilaka** of this Court in dealing with a similar situation in the case of **Vulaono v State** [2020][4], as below:

> *"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."*

[20] In considering the above authorities and the Summing-Up made by the trial Judge in this matter succinctly analysing the evidence led in Court with necessary directions and warnings to the assessors, I find that this ground of appeal is without merit. At the trial, when the Appellant was represented by counsel, the Prosecution witnesses had not been questioned on this ground of appeal averred in this Court. There was no other Defence

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[4] [2020] FJCA 209; AAU0004.2018 (28 October 2020)

taken by the Appellant at the trial other than the total denial of the allegations made against him. In this background, I find that the trial Judge had adequately warned the assessors in relation to the delay in making the complaint of rape in this matter without leaving any room for doubt.

[21] Therefore, I find that this second ground of appeal is devoid of merit.

Bull, JA

[22] I have read the Judgment in draft and agree with the reasons and order of Kumarage JA.

Orders of Court

1) Leave to appeal against the conviction is refused;
2) Leave to appeal against the sentence is dismissed;
3) Appeal against the conviction is dismissed;
4) Appeal against the sentence is dismissed.

Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Thushara Kumarage
JUSTICE OF APPEAL

Hon. Justice Siainiu Bull
JUSTICE OF APPEAL