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

CRIMINAL APPEAL NO.AAU 121 of 2020
[In the High Court at Suva Case No. HAC 150 of 2018]

BETWEEN : **METUISELA MATAYALEWA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. Unaisi M. Tamanikaiyaroi for the Respondent**

Date of Hearing : **03 August 2023**

Date of Ruling : **04 August 2023**

RULING

[1] The appellant had been charged in the High Court at Suva on five counts of rape spanning for 02 year. The charges are as follows.

'***COUNT 1***

Statement of Offence

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

Particulars of Offence

METUISELA MATAYALEWA *between the 1st day of January 2016 and the 31st day of December 2016 at Navolau Village, Naitasiri in the Eastern Division had carnal knowledge of* ***SD****, a child under the age of 13 years.*

COUNT 2

Statement of Offence

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

Particulars of Offence

METUISELA MATAYALEWA *between the 1st day of January 2016 and the 31st day of December 2016, at Navolau Village, Naitasiri in the Eastern Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of* ***SD****, a child under the age of 13 years.*

COUNT 3

Statement of Offence

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

Particulars of Offence

METUISELA MATAYALEWA *between the 1st day of January 2017 and the 31st day of December 2017 at Navolau Village, Naitasiri in the Eastern Division had carnal knowledge of* ***SD*** *without her consent.*

COUNT 4

Statement of Offence

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

Particulars of Offence

METUISELA MATAYALEWA *between the 1st day of January 2017 and the 31st day of December 2017 at Navolau Village, Naitasiri in the Eastern Division, on an occasion other than that mentioned on Count 3 had carnal knowledge of* ***SD*** *without her consent.*

COUNT 5

Statement of Offence

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

Particulars of Offence

METUISELA MATAYALEWA *between the 1st day of December 2017 and the 31st day of December 2017 at Navolau Village, Naitasiri in the Eastern Division had carnal knowledge of* ***SD*** *without her consent.*

[2] The two assessors had opined that the appellant was guilty of the first two counts of child rape in 2016, but not guilty of the three remaining counts of rape in 2017. However, they found the accused guilty of three alternative counts of defilement of young person between 13 and 16 years of age. The third assessor in her opinion had said that the appellant was guilty of all five counts of rape.

[3] Having agreed with the majority opinion, the trial judge had convicted the appellant accordingly and sentenced him on 14 January 2020 to an aggregate sentence of 13 years' imprisonment with a non-parole period of 11 years. The effective sentence were to be 12 years and 06 months with a non-parole period of 10 years and 06 months after deducting the remand period.

[4] The appellant had lodged in person an untimely appeal against conviction.

[5] 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? (vide **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).

[6] The delay is over 07 months which is substantial. The appellant has stated that he handed over the appeal within time to Suva Correction Centre but thereafter got relocated to Maximum Correction Centre where he waited for the outcome. However, upon inquiries made, he found that the CA registry had not received his timely appeal and therefore lodged the second appeal. There is no way that these assertions could be verified by this court. Nevertheless, I would 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.

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

> 5. *The prosecution alleges that the accused had forcefully penetrated into the vagina of the complainant on five separate occasions during the period between 2016 to 2017. The defence denies the allegation, claiming that the first two incidents in 2016 never happened. However, the accused admitted that he had sexual intercourse with the complainant on three occasions in 2017, first at Naitaga, then at Moala and lastly at his home, with the consent of the complainant.*
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> 6. *It is alleged that the accused had penetrated into the vagina of the complainant with his penis on two occasions in 2016. Both incidents had taken place inside the toilet when the complainant came home for lunch from school. The grandmother of the complainant was in the kitchen on the both occasions. However, the complainant had not either called out for help or told the grandmother about any of these two incidents. According to the complainant, she was afraid that grandmother would tell her uncle.*
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> 7. *The accused admitted in his evidence that he had been a frequent visitor to the house of the complainant during the year 2016. According to him, he had ignored one of her sexual advancement in 2016.*

[8] The trial judge had said in the sentencing order as follows

> *'3. It is proved during the hearing that you have taken the complainant to the toilet on two separate occasions in 2016 and penetrated into her vagina with you penis. The complainant is your cousin and she was 12 years old in 2016. On three separate occasions, you had sexual intercourse with the complainant when she was a young girl between 13 and 16 years old.'*

[9] The prosecution had called the complainant and the appellant had given evidence on his behalf. He was defended by counsel at the trial. The appellant had admitted the acts of sexual intercourse in 2017 but asserted that they were consensual. He denied the allegations of rape in 2016.

[10] The grounds of appeal urged by the appellant are as follows.

Conviction:

Ground 1

THAT the learned trial judge erred in law and facts when he failed to fully and properly consider the delayed reporting of the complainant thus questioning

the credibility of the victim and the veracity of her complaint in regards to counts 1 and 2 because counts 3 and 4 were found to be insufficient to the Charge of Rape where by it was acquitted accordingly.

<u>Ground 2</u>

<u>THAT</u> the learned trial Judge erred in law and in facts when he misdirected the assessors in his summing up at paragraph 57 when he stated "Apart from that you are not required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case". This misdirection has made the individual opinions of the assessors to be perverse making the judgment to convict the appellant on the 1st and 2nd counts of Rape to be unsafe in light of the other misdirection's taken up by the trial judge.

<u>Ground 3</u>

<u>THAT</u> the learned trial judge erred in law and in fact by failing to consider the defence of consent made by the appellant in relation to the allegations of events in 2017. It casts doubt and a real danger on the conviction because the complainant after going though the rape in 2016 still went back to the appellant house even after he tried to close her mouth and pull her when she went their earlier on her way to the canteen.

Ground 1

[11] It is generally recognized that the timing of a complaint, whether immediate or delayed, does not inherently determine its truthfulness or falsehood. Each case must be evaluated on its individual merits, taking into account the available evidence, credibility of witnesses, and other relevant factors. The credibility of a complaint is typically assessed based on the totality of the circumstances, including the consistency of statements, corroborating evidence, and other factors that may support or undermine the complainant's account.

[12] A Bench of 05 judges of the Supreme Court of Philippines including the Chief Justice in **<u>People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant</u>** G.R. No. 202122[1] quoted the following observations from **<u>People v. Gecomo</u>**, 324 Phil. 297, 314-315 (1996)[2] (G.R. No. 182690 - May 30,

[1] https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html

[2] https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65

2011) in relation to why a rape victim's deferral in reporting the crime does not equate to falsification of the accusation.

> *'The failure of complainant to disclose her defilement without loss of time to persons close to her or to report the matter to the authorities does not perforce warrant the conclusion that she was not sexually molested and that her charges against the accused are all baseless, untrue and fabricated. Delay in prosecuting the offense is not an indication of a fabricated charge. Many victims of rape never complain or file criminal charges against the rapists. They prefer to bear the ignominy and pain, rather than reveal their shame to the world or risk the offenders' making good their threats to kill or hurt their victims'*

[13] The Court of Appeal in **R v D (JA)** [2008] EWCA Crim 2557; [2009] Crim LR 591 held that judges are entitled to direct juries that due to shame and shock, victims of rape might not complain for some time, and that *'a late complaint does not necessarily mean it is a false complaint'*. The court quoted with approval the following suggested comments in cases where the issue of delay in, or absence of, reporting of the alleged assault is raised by a defendant as casting doubt on the credibility of the complainant.

> '*Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that 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. That is a matter for you.'*

[14] In as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare to direct the jury or assessors that similarly an immediate complaint does not necessarily demonstrate a true complaint. Thus, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint.

[15] The Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) adopted the 'totality of circumstances' test to assess a complaint of belated reporting.

> '*[24] 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."*

[16] The trial judge had referred to the complainant's explanations for the delay at paragraphs 31, 36, 40 and 43 of the summing-up which the assessors and the judge had accepted as a reasonable explanation for the delay.

Ground 2

[17] The basis of this appeal ground is paragraphs 57 and 59 of the summing-up.

> '57. *In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.*
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> 59. *Moreover, you must bear in your mind that 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.'*

[18] It appears from his written submissions that the appellant had completely misread the sentence '…*you are required to consider.. .'* at paragraph 57 as '…*you are not required to consider..'*. There is nothing wrong or objectionable in stating to the assessors that '*Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.'*

[19] The statement at paragraph 59 is based on divisibility of credibility which is an accepted proposition of law. At paragraph 56 the judge had directed the assessors that evaluation of the reliability and credibility of evidence will assist them to determine what evidence they may accept and what part of the evidence they may refuse and in doing that, they may accept or reject such parts of the evidence as they think fit.

[20] In **Narayan v State** [2017] FJCA 70; AAU107.2016 (16 June 2017), late Mr. Chandra, RJA did not find anything objectionable with the following direction by the trial judge.

> *"You may decide that the entire evidence of a particular witness can be believed; or you may decide to believe only a part of the evidence and reject the other part or you may reject the entire evidence of a witness if you decide that the entire evidence of that particular is not capable of being believed".*

[21] I may also quote two Sri Lankan decisions in this regard. On the maxim 'Falsus in Uno Falsus in Omnibus' (he who speaks falsely in one point will speak falsely upon all), it was held that *"In applying this maxim it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment, must be distinguished from deliberate falsehood. Nor does it apply to cases of conflict of testimony on the same point between different witnesses…."* (vide **R vs. Julis** 65 NLR 505 at 519). *"When false evidence has been introduced into the case for the prosecution, it is open to the jury to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth"* (vide **Gardiris Appu vs. The King** 52 NLR 344)

Ground 3

[22] The majority assessors' opinion and the trial judge's judgment is quite rational in finding the appellant guilty of the first two counts of rape in 2016 but not guilty on the three counts in 2017.

[23] As far as the first and second counts were concerned, consent was not in issue. Even if the complainant had consented it would not have mattered as she was under 13 years of age. It is sufficient for the assessors and the judge to have believed the act of sexual intercourse.

[24] However, both the assessors and the trial judge seem to have been of some doubt about lack of consent in respect of the third, fourth and fifth counts. Hence, the

decision to acquit the appellant of rape on those counts. But given his own evidence of consensual sex and the complainant's evidence of sexual intercourse coupled with the fact that she was above 13 but under 16 years of age, the proper verdict was defilement on counts 3 to 5.

[25] It appears that the appellant had strategically taken up the defence of total denial on counts 01 and 02 but the defence of consensual sex on counts 3-5.

[26] There is no real prospect of success in any of the grounds of appeal.

Order

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

COURT OF APPEAL
FIJI

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