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

CRIMINAL APPEAL NO.AAU 020 of 2021
[In the High Court at Suva case No. HAC 184 of 2020]

BETWEEN	**:**	**TAPARE REATORA**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Ms. K. Semisi for the Respondent**
Date of Hearing	**:**	**25 August 2023**
Date of Ruling	**:**	**28 August 2023**

RULING

[1] The appellant (TR), aged 34, had been charged and convicted on two counts of rape and one count of sexual assault committed at Lami in the Central Division between 01 January 2018 and 31 December 2018 under the Crimes Act, 2009. The female victim, KJ was 15 years old. The charges were as follows:

COUNT 1

Statement of Offence

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

Particulars of Offence

TR *between the 1st day of January 2018 and the 31st day of December 2018 at Lami in the Central Division had carnal knowledge of* ***KJ,*** *without her consent.*

COUNT 2

Statement of Offence

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

Particulars of Offence

TR *between the 1st day of January 2018 and the 31st day of December 2018, at Lami in the Central Division penetrated the vulva and vagina of* ***KJ****, with his tongue, without her consent.*

COUNT 3

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

TR *between the 1st day of January 2018 and the 31st day of December 2018 at Lami in the Central Division unlawfully and indecently assaulted* ***KR****, by sucking her breasts and kissing her mouth.*

[2] The majority of assessors had opined that the appellant was guilty. The learned High Court judge found the appellant guilty of rape and he was convicted accordingly. On 03 February 2021, the appellant was given 15 years' imprisonment (effectively 14 years and 10 months after pre-trial remand period was discounted) with a non-parole period of 12 years and 10 months.

[3] The appellant's appeal against conviction is timely. In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC

14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

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

> *'**Conviction:***
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> ***Ground 1***
>
> *THAT the learned trial judge erred in law and in fact in not evaluating and assessing the truthfulness of the victim's statement due to the inconsistencies of statements given from the victim on 2 separate dates on the 26/06/19 and 30/06/20 which have caused a grave miscarriage of justice against the appellant*
>
> ***Ground 2***
>
> *THAT the learned trial Judge erred in law and fact when he failed to direct the assessors and himself on how to approach the evidence of recent complainant as referred to in the case of **Anand Abhay Raj v State** (2014) FJSC 12; CAV 003.2014 (August 2014).*
>
> ***Ground 3***
>
> *THAT the learned trial Judge erred in law and fact when he failed to consider the defence case and the evidence adduced by the defence witnesses and found the complainant more reliable, credible and truthful resulting in a grave miscarriage of justice.*
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> ***Ground 4***
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> *THAT the learned trial Judge erred in law and fact when he failed to properly and adequately examine the medical report prepared by the medical officer in determining the age of the injury.*
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> ***Ground 5***
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> *THAT the learned trial Judge erred in law and fact when there was a delay in reporting, questioning the credibility of the complainant, causing a grave miscarriage of justice.*
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> ***Ground 6***
>
> *THAT the learned trial Judge erred in law and fact when he failed to independently assess and evaluate the evidence before agreeing with the majority opinion of the assessors and convicting the accused which resulted in grave miscarriage of justice.*
>
> ***Ground 7***
>
> *THAT the appellant was prejudiced at the trial as his legal representative failed to follow his instructions in presenting his evidence of alibi.*

Additional Grounds

Ground 8

THAT the trial judge erred in law and in fact by mis-directing the assessors and himself in para 31 of the summing up of the date when complainant lodged at Totogo Police Station which had caused a major miscarriage of justice and prejudice the applicant.

Ground 9

THAT the trial Judge erred in law and in fact to convict the appellant with two counts of rape contrary to section 207 [1] and [2] (a) of the Crimes Act 2009 and one count of sexual assault contrary to section 210[1][a] of the Crimes Act which is defective due to the Crimes Act 2009 were legislated or gazette by an unlawful Government [refer to] ***Qarase and Other's vs Bainimarama and the State*** *[2008] FJHC 241 and [2009] FJCA 9.*

Ground 10

THAT the trial Judge erred in law and fact for not directing the assessors and himself of the medical report of the complainant in the summing up dated 21st January 2021.

Ground 11

THAT the trial Judge erred in law and in fact in not entertaining a right to a fair trial and a right for equality to the appellant.

(i) The police statement of ***Cardine Campbell Joan*** *was not entertained by the court.*
(ii) The evidence on oath in court of ***Ms. Wilma Low*** *was not entertained by the trial judge.*
(iii) That the trial Judge failed to evaluate the medical examinations findings.

[5] The trial judge had summarised the evidence as follows in the summing-up.

28. According to the Complainant's evidence, she had gone to Vilma's canteen to buy some groceries in the morning of that particular day. Since the groceries she wanted to purchase were not available at Vilma's canteen, Vilma had told the Complainant to go back to her house. When the Complainant came out, she saw the accused was standing near the drain, in front of his house. The accused was standing about ten meters from the place where she was standing. She was standing near the pole of the clothes line. The accused had called the Complainant, but she had refused. The accused then approached her and blocked her mouth with his hand. He then dragged her towards his house from her hand. She had screamed, but the sound did not come out as her mouth was blocked by the accused.

33. The second witness of the Prosecution is Nikoia Rotan, the mother of the Complainant. One Baitepure came and told her about the rumours that she heard from Kaerua about her daughter and the accused. She then asked the Complainant about it. The Complainant explained everything that the accused did to her. The Complainant had told that this incident took place on the 29th of June 2018. They had then gone to Totogo Police Station and reported the matter. According to Ms. Rotan, she is unaware that Kaerua had gone and reported this matter to Lami Police Station. According to Ms. Rotan, the Complainant usually goes to the accused's house with her young siblings.

35. The accused, in his evidence, denied this allegation, stating that it is a false allegation. The accused explained about the dispute he and his wife had with Kaerua and his wife. The accused had first heard about this allegation from one police officer Toji, a neighbour of Kaerua. He had then gone and confronted Kaerua about this allegation.

37. The first witness of the Defence is Vilma Low. She is running a small canteen in the village since December 2019. Her house is situated about seven to ten meters away from the accused's home. The clothesline and the pole are located in front of her house. She could recall that in December 2019, the Complainant had come to her canteen several times. One of those occasions, she had told the Complainant that the items she came to purchase were not available.

Ground 1

[6] The trial judge had dealt with the inconsistency regarding the date of the incident at paragraph 56 of the summing-up. The first statement, made to the police, KJ had stated that this incident occurred on the 29 June 2018. However, in her second statement, she had said that she could not correctly recall the exact date of this incident. She had confirmed the second statement's position during her evidence, stating that she could not recall the precise date of this incident. The judge had directed the assessors how to approach contradictions and inconsistencies at paragraphs 57-59. She had been cross-examined heavily on this issue and the assessors and the trial had the opportunity to assess as to how she fared under such intense scrutiny. Their opinion and decision in this respect deserves highest regard in the absence of compelling reasons to disturb it in appeal.

[7] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise

judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [see paragraph [23] of **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors [see paragraph [25] of **Fraser v State** (supra]

[8] In complying with the above legal requirements, the trial judge had stated in the judgment that

> *'10. I found some contradictions and inconsistencies in the evidence of the Complainant. She initially said that she had never been teen to the accused's home and had never spoken to the accused. However, as she continued in her evidence, she said that she had visited the accused's house on a few occasions with her parents. The Complainant's mother said that the complainant usually accompanied her siblings when she visits the accused's house. Moreover, she said the accused dragged her to his home, but later explained that he carried her to the house from the drain.*
>
> *11. I do not find the inconsistent nature of her evidence regarding her visits to the accused's house and her communication with the accused as fundamental inconsistencies affecting the reliability and credibility of her evidence. The Complainant is consistent and coherent with her evidence regarding the crux of this allegation that is the sexual attacked by the accused. It was her first such a traumatic experience, and she was frightened and scared. Hence, she might not have observed or remembered all the minute details of this ordeal. Therefore, I do not find these inconsistencies and contradictions have affected the reliability and credibility of the Complainant's evidence.'*

[9] An undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses and therefore 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. Mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies

are bound to occur in the statements of witnesses (vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [14] & [15].

Ground 2

[10] Contrary to the appellant's assertion, the trial judge had correctly directed the assessors on recent complaint evidence of KJ's mother Ms. Nikoia Rotan at paragraphs 53 & 54 of the summing-up as prescribed in **Raj v State** (2014) FJSC 12; CAV 003 of 2004 (20 August 2014).

Ground 3

[11] The appellant's defence was a denial and his testimony had placed a great of emphasis on a dispute between his family and the family of Kaerua which did not involve KJ or her family. There does not appear to be any nexus between the allegation against the appellant by KJ and Kaerua's complaint to police on the matter. Kaerua may or may not have had a score to settle with the appellant but appears to have acted independently. The appellant's position under oath had been that there was no reason for KJ to make up this allegation due to the dispute his family had with the family of Kaerua. The defence witness Vilma Low' s evidence that one morning KJ came to her canteen to purchase certain items, but those items were not available at the canteen, does not affect KJ's evidence at all but in fact lends some support to her narrative.

[12] The trial judge had addressed the assessors on this aspect at paragraphs 50-52 of the summing-up and at paragraph 7 and 8 of the judgment. His address to the assessors on the defence evidence at paragraphs 46-49 is most fair.

Ground 4

[13] The prosecution had not relied on medical evidence to prove the charges against the appellant at all. Thus, there was no reason or legal foundation for the judge to have examined the same. If the appellant thought it useful for his defence he could have led the medical evidence as part of his case.

Ground 5

[14] The essence of the complaint is delay in reporting. The failure of complainants to disclose their defilement without loss of time to persons close to them or to report the matter to the authorities does not perforce warrant the conclusion that they were not sexually molested and that their charges against the appellant were 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 (see **People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant** G.R. No. 202122[1] & **People v. Gecomo**, 324 Phil. 297, 314-315 (1996)[2] (G.R. No. 182690 - May 30, 2011)

[15] 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'* (see **R v D (JA)** [2008] EWCA Crim 2557; [2009] Crim LR 591).

[16] 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.

[17] 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.*

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

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

> *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."*

[18] The trial judge had addressed the assessors on the aspect of delay and the reasons adduced by KJ for such delay at paragraphs 60-62 of the summing-up. He had further directed himself on the same at paragraph 13 of the judgment.

Ground 6

[19] I have already dealt with more or less a similar argument under the first ground of appeal. The trial judge while ageing with the assessors had briefly set out evidence regarding the contentious areas and reasons for his agreement with the assessors in a concise judgment to assist this court to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence. In doing so, he does not need to repeat himself on everything he addressed the assessors on in the summing-up because he had directed himself according to the summing-up.

Ground 7

[20] The appellant seems to suggest that he wanted to take up an *alibi* but his counsel did not follow his instructions. In order to do so the appellant must follow the procedure set down in **Chand v The State** AAU 78 of 2013 (28 November 2019) which he has not done. Thus, this ground of appeal cannot be even entertained at this stage.

Ground 8

[21] The trial judge had said at paragraph 31 of the summing-up that the statement given to the police by KJ states that this incident took place on 29 June 2018, however, she had made another statement on the 30 July 2018 saying that she could not correctly recall the date of this incident. The appellant submits that the trial judge had erred on the

dates of the reports lodged by KJ with the police and it has caused a miscarriage of justice.

[22] This complaint is interconnected with what the appellant urges under the 01st and 06th grounds of appeal. There is simply no reasonable prospect of success in this complaint. Had KJ been lying or fabricating the allegation (the appellant adduces no reason for her to do so against him) she need not have gone back on her own volition and informed the police that she was not sure of the date of the incident.

Ground 9

[23] The appellant argues that the Crimes Act, 2009 is defective as it was promulgated by an unlawful Government and refers to **Qarase and Other's vs Bainimarama and the State** [2008] FJHC 241 and [2009] FJCA 9 in support of his position.

[24] This ground of appeal was not among the grounds of appeal or amended grounds of appeal filed and responded to by the State prior to the date of hearing. It was among some additional grounds of appeal submitted to court during LA hearing and therefore the State had no opportunity of filing a written reply thereto.

[25] Therefore, this appeal ground cannot and will not be considered at this stage.

Ground 10

[26] This is similar to the 04th ground of appeal and I have already dealt with it.

Ground 11

[27] There is no indication at all that the trial judge had refused to let any witness giving evidence either for the prosecution or the defence. The court had indeed considered the evidence of Ms. Wilma Low called as a defence witness. No medical evidence was led by either party and therefore need not have been considered by the trial judge.

Orders

1. Leave to appeal against conviction is refused.