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

CRIMINAL APPEAL NO.AAU 29 of 2019
[In the High Court at Suva Case No. HAC 224 of 2017 LTK]

BETWEEN	:	**SHANEIL REDDY**	
			Appellant
AND	:	**THE STATE**	
			Respondent
Coram	:	**Prematilaka, RJA**	
Counsel	:	**Mr. I. Fa for the appellant**	
	:	**Ms. Tamani Kayaroi. U for the Respondent**	
Date of Mention	:	**15 June 2023**	
Date of Ruling	:	**06 September 2023**	

RULING

[1] The appellant had been charged in the High Court at Suva with two counts of rape (penile and oral) and one count of theft. Following the summing up, the majority opinion of the assessors had been that the appellant was guilty of the two charges of rape and the unanimous opinion was that he was guilty of the charge of theft.

[2] Having agreed with the assessors, the trial judge had convicted the appellant accordingly and sentenced him on 27 March 2019 to10 years' imprisonment to each count of rape and 06 months' imprisonment for theft. Since all three offences were committed as part of the same transaction, the appellant was ordered to serve the sentences concurrently. This, the total effective sentence was 10 years' imprisonment with a non-parole period of 07 years.

[3] The appellant had lodged a timely appeal against conviction. On 15 June 2023, both parties agreed to have a ruling only on written submissions once the respondent's written submissions on the ground of appeal concerning criticism of trial counsel were filed. The Registry had received the same on 13 July 2023 from the DPP.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction 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)].

[5] The prosecution, in support of its case, called only the complainant. The learned trial judge had summarized the evidence as follows in the summing-up.

> *'[29] The entire prosecution case is depended upon the evidence of the complainant. She is a young woman. Her first encounter with the Accused was on the evening of 30 November 2017 at Mecure Hotel in Nadi. She said she had been drinking liquor with her flat mates at their home when she decided to go and buy cigarettes. She walked down to a service station near her home. When she found out that the service station did not have an eftpos machine she walked down to the Mecure Hotel to withdraw cash from an ATM machine situated at the hotel. After withdrawing $30.00 she met some security officers at the hotel. She said she was depressed and suicidal because she was having problems with her boyfriend. While she was conversing with the security officers, the Accused joined in and invited her to accompany him. Initially, she was reluctant but when he returned with a woman described by the complainant as an European lady who was interested in listening to her problems, the complainant accompanied the couple to their room at the hotel. While inside the room, the Accused offered the complainant with a roll of marijuana and after taking two puffs she passed out. She said she knew it was marijuana because of its smell. She said she has seen people using marijuana.*

[30] She said she was taken to an unknown place in a vehicle by the Accused. When they arrived at the destination the Accused carried her to a room and put her to a bed. He then left and returned to the room and lie beside her in the bed. He touched her vagina. She stood up and told him that she was not that type of girl. When she told him to let her go he told her that she had to pay for what she did that night. He told her he would get his cousin from the military to escort her home. She felt ashamed and scared. He told her to take off her clothes. She took off her clothes. She said she had no other option but to comply so that she could go home. She heard noises from the next door. She started to scream. He choked her by smothering her face with a pillow. She lost consciousness. She felt his penis inside her vagina. He penetrated her and told her that she would be pregnant with his baby. He got up, had a shower and told her that he was going to the bar. He left the room with her clothes.

[31] Now Ladies and Gentleman Assessors, this particular incident of sexual penetration and the evidence of the Accused being a marijuana user, (which is an illicit drug) is not subject of the charges contained in the Information.....

[33] Now let me return to the evidence of the complainant as far as the charged acts are concerned. The complainant said when the Accused returned to the room, he forcefully told her to get down on her knees and to suck his penis. When she refused he pulled her hair and made her go down on her knees. He was forcing her to suck his penis. When she refused, he started hitting her in the face. She said she sucked his penis because he was hurting her. She said he was taking videos of her with his phone.

[34] The complainant said that the Accused after forcing her to perform oral sex on him, he pushed her to the bed and injected his penis into her vagina. She said she couldn't do anything or move. She felt weak. He was too heavy for her. After sexually penetrating her, he got up, had a shower, dressed up and told her that his mood was really off. He left the room telling her that he was going to the bar to get cigarettes. He took her clothes with him. She realized he did not go to the bar. She saw and heard him talking to the housekeeping lady on the corridors. She heard him saying to the lady that she (referring to the complainant) was after his money. He wanted the lady to come and see the complainant's face. He brought the lady inside the room but the complainant hid herself inside the bathroom. The complainant said she was not wearing any clothes but had covered herself with the bed sheet. The house keeping lady left without seeing her.

[35] The Accused told the complainant to have a shower. While she was in the shower, he made a video of her with his phone and told her not to leave the room, or he would leak the video on internet. He left the room, leaving her clothes behind this time. She put on her clothes. She noticed that her house key, bank cards and the $30.00 that she had withdrawn had gone missing. She said the Accused took the card to pay for the room which they were staying in that night. When the Court sought clarification from the complainant regarding her missing bank card and cash, she said the Accused took the card and cash from her saying she had to pay for what she did to him. When she

asked him what he meant, he said to her that "she was acting like a cheap slut".

[36] When the complainant heard a knock at the door saying housekeeping, she went into the bathroom. She saw the phone that the Accused used to take her videos. She went and opened the door for the housekeeping lady. She was told it was time to check out. She learnt that the Accused was no longer to be seen. She stepped out of the room with the phone. She came to know she was at Wailoaloa Beach Resort. She saw her videos were on the phone. She discarded the phone after taking out the battery. She walked from Wailoaloa to her home in Matintar.

[6] The appellant did not give evidence or call any witnesses. The complainant had been cross-examined on her reasons for not raising alarm or reporting the incidents when she was either left alone in the room or after she had left Wailoaloa Beach Resort. Thus, the defence has argued that the delay by the complainant in making a complaint to a person whom she might reasonably have expected to complain was inconsistent with the conduct of a truthful person who had been sexually assaulted. It had been suggested to her that the two alleged sexual acts, that is sexual intercourse and oral sex were consensual. Thus, the real issue for determination was whether the sexual intercourse and the oral sex were consensual.

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

Ground 1

*THAT the learned trial Judge erred in law and in fact in not analysing all the facts before him before he made a decision that the appellant was guilty as charged on the 2 counts of **RAPE** and one count of **THEFT***

Ground 2

*THAT the learned trial Judge erred in law and in fact in not analysing all the facts before him before he made a decision that the appellant was guilty as charged on 2 counts of **RAPE** and one count of **THEFT**. Such error of the learned trial Judge in law by failing to make an independent assessment of the evidence, before affirming a verdict which was unsafe and unsatisfactory giving rise to a grave miscarriage of justice.*

Ground 3

THAT the learned trial Judge erred in law and in fact in not directing himself and/or the assessors to refer to any summing up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.

Ground 4

THAT the learned trial Judge erred in law and in fact in not ordering a retrial/mistrial when it was a brought in evidence that the appellant was a marijuana user (which is an illicit drug) for which he was never charged and as such a substantial miscarriage of justice.

Ground 5

THAT the learned trial Judge erred in law and in fact in not directing to himself and/or assessors adequately failure by the complainant to make a complaint at the first reasonable opportunity and failure to do so caused substantial miscarriage of justice.

Ground 6

THAT the learned trial Judge erred in law and in fact whilst outlining the allegations against the appellant did not substantiate with evidence which proved beyond reasonable doubts such allegations against the appellant and hence caused a substantial miscarriage of justice.

Ground 7

THAT the learned trial Judge erred in law and in fact in not directing himself and /or the assessors the evidence of the complainant who was under the influence of alcohol to that extent that she could not remember what happened and this would have created serious doubts on the question of consent. Such failure constituted miscarriage of justice.

Ground 8

THAT the learned trial Judge erred in law and in fact in not directing himself and/or his assessors the evidence against each count separately and such failure to do so caused substantial miscarriage of justice.

Ground 9

THAT the appellant's trial counsel erred in conducting the trial to the extent those errors affected the outcome of the trial and contributed to a miscarriage of justice. Such errors or omissions were:

(i) Failing to cross examine the complainant and discrediting/putting the appellant's version of events that actually happened.

(ii) Failing to cross examine the complainant, the circumstances of the allegation of each incident of sexual interactions demonstrated consensual in nature.

(iii) Wrongly advising the appellant to remain silent after the prosecution case when serious damaging allegation was put against the appellant and which needed a response from the appellant by giving evidence on oath.

(iv) *Failing to advise the appellant the consequences of remaining silent to the evidence that was given by the complainant as his version would not be before the court and as such the complainant's evidence could have been taken un-contradicted and unchallenged.*

(v) *Failing to discredit the complainant's version of events by the appellant giving evidence of version on oath of the events that actually transpired on the alleged day of the incident.*

Grounds 1 & 2

[8] 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 [vide **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) at [23])

[9] A verdict being unsafe or unsatisfactory is not the test in Fiji. In terms of section 23(1) of the Court of Appeal Act, a verdict could be set aside only on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) & **Sami v State** [2022] FJCA 46; AAU0025.2018 (26 May 2022) at [52] to [57].

[10] The compliant is that the trial judge had not addressed his mind to the improbability of the complainant's testimony of her having been unconscious managed to witness the appellant taking her bank cards, house keys and cash away. It does not appear from the summing-up and the judgment that the complainant was fully unconscious at the second location, Wailoaloa Beach Resort though she had passed out at the earlier

place, Mecure Hotel, because she had come out with what the appellant did and said at Wailoaloa Beach Resort. Secondly, the trial judge had given his mind to the charge of theft at paragraphs 7 and having analysed the evidence at paragraphs 8-12, the judge had concluded at paragraph 13 and 14 that all charges including that of theft had been proved.

Grounds 3

[11] The appellant submits that the trial judge had not directed the assessors on possible defences based on various factual sceneries connected to the complainant. In summary, they relate to her state of intoxication, her demeanour, her having discarded the phone containing her nude pictures taken by the appellant, her failure to mention where the appellant's wife/partner was during the incidents, her failure to complain to the reception and the housekeeper at Wailoaloa Beach Resort.

[12] These were all trial issues and the summing-up and the judgement collectively deal with them adequately. If there was any inadequacy, the counsel for the appellant could have raised them with the trial judge for redirections which was not done and the appellant court will not look at such complaints sympathetically unless cogent reason are adduced for the failure (see **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

Grounds 4

[13] The appellant submits that the trial judge should have ordered a mistrial as soon as it was brought to the attention of assessors that the appellant was a marijuana user for which he was not charged. However, the appellant being a marijuana user was not connected directly or indirectly to the nature of the charges against him.

[14] The trial judge had addressed this issue at paragraph 31 & 32 of the summing-up adequately and the appellant has not demonstrated how this piece of evidence despite the clear detections had resulted in a substantial miscarriage of justice. The trial judge

had not relied on this impermissible evidence at all to convict the appellant. There was no reason to ordering a retrial or mistrial.

[15] In **King v State** [2019] FJSC 11; CAV0002.2016 (21 May 2019) where the evidence that the appellants had other cases was elicited (unlike the trial judge in the instant case), the learned High Court Judge in ***King*** not only failed to address this issue in his summing up but also, failed to disregard that evidence in his judgment. The Supreme court held that this prejudicial inadmissible evidence of bad character pertaining to both the appellants being included caused a miscarriage of justice but when considering the totality of the evidence in the case it cannot be considered as a substantial miscarriage of justice and the proviso to section 23(1)(a) of the Court of Appeal Act was applied.

Grounds 5

[16] 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)

[17] 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).

[1] https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html
[2] https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65

[18] 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.

[19] 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."*

[20] On the question of delay the trial judge had amply addressed the assessors at paragraphs 37 and 38 of the summing-up and at paragraph 13 of the judgment.

Grounds 6

[21] The submissions on this ground of appeal which is more or less the same as in the 01st and 02nd ground of appeal, is based on the improbability of the appellant having committed alleged acts of rape while his partner was around and the absence of injuries on the complainant if she was dragged by the appellant.

[22] There does not appear to be any evidence that the appellant's partner was anywhere in the vicinity of the crime scene and the complainant's evidence did not suggest that she was dragged by the appellant in a way to cause visible injuries. The evidence is that the appellant had carried her to Wailoaloa Beach Resort. In any event the trial judge had amply addressed the assessors on the material evidence from the complainant and the import of her cross-examination which was mainly on the premise that the acts of rape were consensual. The trial judge had also given his mind to the evidence again in

his judgment. He had obviously not seen any improbability in the prosecution evidence coupled with the defence stance.

Grounds 7

[23] The appellant touches on 'consent' due to her drunkenness and her inability tell whether she was raped as she passed out after taking two puffs of marijuana.

[24] Firstly, it was the appellant's position that the charged acts were consensual. The assessors and the trial judge had not believed that position. They accepted the complainant's evidence that those acts were without consent. On his own argument, since the appellant knew of her state of being drunk, he should have known that she was not in a position to give proper consent or was reckless as to her consent.

[25] Even where there is evidence of acceptance or acquiescence, it would be open to the assessors and the trial judge to infer that the victim unwillingly went along with the acts, which she did not in fact wish to engage in. The victims may be placed in a position where they are led to acquiesce rather than give proper or real consent (see **R v Robinson** [2011] EWCA Crim 916 and ***R v Olugboja*** [1981] EWCA Crim 2).

[26] In any event, the complainant taking two puffs of marijuana and passing out happened not at Mecure Hotel but at Wailoaloa Beach Resort where the charged acts took place. There the complainant was alive and she described as to what was happening around her and though she lost her consciousness after the appellant chocked her with a pillow, still she felt his penis in her vagina and him telling her that she would be pregnant with his baby. This evidence shows that she was not completely unconscious but was semi-conscious.

Grounds 8

[27] The trial judge had set out the elements of the two charges of rape at paragraphs 20 & 21 and on the charge of theft at paragraphs 22-27 of the summing-up and then the evidence relating each of the charges. The judge had repeated the same exercise in the judgment as well.

Grounds 9

[28] The appellant had raised an additional ground of appeal on 09 April 2021 based on his trial counsel's conduct. Subsequently, the appellant had tendered a waiver of solicitor-client privilege and an affidavit which had been served on his trial counsel who had filed an affidavit along with documents LD1-LD5 responding to the appellant's criticisms. The appellant had filed a reply by way of an affidavit and written submissions and the respondent too had filed written submissions on this ground of appeal. This process had been followed in compliance with the guidelines prescribed in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019).

[29] The appellant's complaints under this ground of appeal comprise of two strands. One is that the trial counsel failed to put his version of events to the complainant to demonstrate consensual sex. I find this criticism totally ill-founded. The questions asked in cross-examination of the complainant as demonstrated by LD2 (questions prepared in advance and answers in cross-examination) shows that the trial counsel had put unequivocal suggestions to the effect in vivid details that both penile and oral penetration were consensual. This is highlighted in the summing-up and the judgment too.

[30] The second aspect of the complaint is that the trial counsel did not advise him to testify under oath but advised him to remain silent but did not tell him the consequences of silence.

[31] It is clear that the appellant had initially with Messrs Gordon & Co. as his lawyers, wanted to run his defence on a denial of the allegations (vide LD5 - the Plea Declaration/18 March 2019). After the trail counsel from the Legal Aid Commission took over, his narrative to her had been on consensual sex as per LD 1- the Instructions Sheet (18 March 2019) and the appellant had also told his trial counsel that should there be a case to answer, he did not wish to give evidence although he was taking up the defence of consensual sex and though it may be better if he did so. He is also on record as having said that he was taking the full responsibility for his decision and he was explained that he could not change his position in appeal if he got

convicted (vide LD5). This position is consistent with the trial counsel's initial notes of what the appellant had told her (vide Record of Time Form – LD6) in that he had first told the trial counsel that he had never met the complainant but immediately reversed it to say that he had met her. The trial counsel had observed at the beginning that the appellant was not forthcoming with instructions in that the appellant had said that he was not able to recall but wanted time to think about it. On that occasion (18 March 2019), the appellant was seen to be very scared and decided not to give evidence as he thought that it may implicate himself. All the instruction notes to the trial counsel had been signed by the appellant.

[32] The trial counsel in her affidavit had stated that she advised the complainant that under the Constitution he was not obliged to give evidence and no adverse inference could be drawn from his silence though it may be best if he would give evidence to explain his side of the story. However, the counsel had advised that if the appellant were to give evidence he would be subject to cross-examination by the State. There is nothing wrong with these instructions. The appellant had insisted that he would remain silent as per his Constitutional rights. He had also informed the counsel that his wife was no longer with him and she was not present during the time of alleged offending. In that scenario the trial counsel had not wanted to insist on the appellant giving evidence as it would be construed as undue influence and pressure exereted on him against his wish.

[33] The appellant had also chosen to remain silent during the record of interview as well. Having examined the complainant fully with regard to the defence of consensual sex, there was no reason for the trial counsel to advise the appellant not to give evidence on the same lines unless he was not inclined to do so as stated by her and recorded contemporaneously in her notes which I have no reason to doubt for accuracy or authenticity.

[34] The trial judge had warned the assessors on the appellant's election not to give evidence as follows:

'[6] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact the he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.'

[35] Thus, the trial judge had not drawn any adverse inference from the failure of the appellant to give evidence. In general even a tactical election which turns out badly for the accused cannot, in itself, occasion a miscarriage of justice; it may only have contributed to the conviction of the guilty [**Silatolu v State** [2008] FJSC 48; CAV0002.2006 (29 February 2008)]. Sir Thomas Eichelbaum NPJ in Court of Final Appeal (Hong Kong) in **Chong Ching Yuen v Hksar** [2004] HKCFA 16; (2004) 7 HKCFAR 126; [2004] 2 HKLRD 681 said:

'48. It follows, almost inevitably, that ordinarily, a tactical decision by counsel which, in hindsight, ought to have been made differently, will not provide any ground for appeal, any more than if such decision had been made by the defendant personally. Nor will other forms of mere error of judgment.

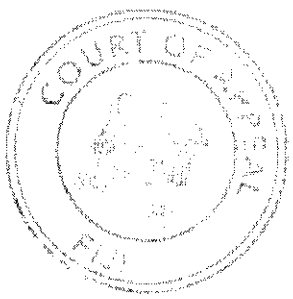
49. Nevertheless, the courts have recognised that in some exceptional instances, an error of sufficient proportion and consequence will enable the court to intervene and avert a miscarriage of justice. To describe this ground, the expression "flagrant incompetence" has generally been used ....' (emphasis added).'

[36] The same principles would apply to the conscious decision by the appellant not to give evidence and remain silent in the same way he did during the record of interview. Considering all material before me. I am of the view that his allegation that the trial counsel did not advise him to testify under oath but advised him to remain silent but did not tell him the consequences of silence have little credibility.

[37] This ground of appeal (and other grounds) have no reasonable prospect of success in appeal.

Order

1. Leave to appeal against conviction is refused.



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