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

CRIMINAL APPEAL NO.AAU 079 of 2021
[In the High Court at Suva Case No. HAC 206 of 2019]

BETWEEN	:	**VILIKESA RAWAMILA**	
			Appellant
AND	:	**THE STATE**	
			Respondent
Coram	:	**Prematilaka, RJA**	
Counsel	:	**Appellant in person**	
	:	**Ms. S Shameem for the Respondent**	
Date of Hearing	:	**03 October 2023**	
Date of Ruling	:	**04 October 2023**	

RULING

[1] The appellant had been charged in the High Court at Suva on five counts of rape spanning for 02 year. The victim, aged 14, SS was the appellant's biological daughter. The charges are as follows.

'FIRST COUNT

(Representative Count)

Statement of Offence

Sexual Assault: *contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

VILIKESA RAWAMILA, *between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, unlawfully and indecently assaulted* ***SS*** *by touching her breasts and fondling her vagina.*

SECOND COUNT

(Representative Count)

Statement of Offence

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

Particulars of Offence

VILIKESA RAWAMILA, *between the 1st of January 2016 to the 31st December 2016, at Vuisiga, Vunidawa, in the Eastern Division, had carnal knowledge of* ***SS****, without her consent.*

FOURTH COUNT

(Representative Count)

Statement of Offence

Rape: *contrary to Section 207 (1) & (2) (a) of the Crimes Act 2009.*

Particulars of Offence

VILIKESA RAWAMILA, *between the 1st of January 2017 to the 31st December 2017, at Vuisiga, Vunidawa, in the Eastern Division, had carnal knowledge of* ***SS****, without her consent*

[2] The assessors had opined that the appellant was guilty of the first, second and fourth counts and not guilty of the third count. Having agreed with the majority opinion, the trial judge had convicted the appellant accordingly and sentenced him on 30 October 2020 to an aggregate sentence of 18 years' imprisonment with a non-parole period of 15 years. The effective sentence was to be 17 years and 06 months with a non-parole period of 14 years and 06 months after deducting the remand period.

[3] The appellant had lodged in person lodged a timely appeal against conviction and sentence. 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] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

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

> *2. The victim in this case is your daughter. She was born on 12/05/02. Her mother, your wife, passed away in 2010. One night during the first term of school in 2016, you came after a drinking session and had your dinner. By that time the victim, your daughter was sleeping in the living room of the house along with your mother and your 11 year old son. You went to your daughter who was at that time below the age of 14 years old and you carried her to your bedroom.*
>
> *3. As you enter the bedroom, upon your daughter looking at your face, you told her to shut up and not to say a word. You placed her on the bed and removed her clothes. Your daughter did not do anything because you were her father and because you were drunk. You then started to touch her breasts and while touching her breasts from one hand you started touching her vagina from the other. Then you inserted your hand inside her vagina. Your daughter did not know what to do, again, because it was her father who was doing this to her. Thereafter you inserted your penis into her vagina. Your daughter said that it was painful to her and also she felt ashamed of what you did to her. The next day, she observed blood stains in her vagina.*
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> *4. Thereafter on one night in the first term of school in 2017, when your daughter was 14 years old, you found her sleeping in your room when you came home after drinking. You removed her clothes, touched her breasts and licked her vagina. Then you inserted your penis inside her vagina. During the same school term, you raped her by inserting your penis inside her vagina again. Your daughter said that you had threatened her that you will cut off one of her ears, if she tells someone about what you were doing to her.*

[6] The prosecution had called the complainant and another witness (PW2) and the appellant and his *alibi* witnesses (DW1-DW4) had given evidence on his behalf.

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

> ***Conviction:***
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> ***Ground 1***
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> *THAT the learned trial Judge erred in law and in fact when he found the complainant's evidence to be credible and reliable despite the inconsistencies and that the evidence must be scrutinized with great care before a guilty verdict is brought in.*
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> ***Ground 2***
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> *THAT the learned trial Judge erred in law and in fact when he did not provide sufficient consideration to the Defence's alibi witnesses.*
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> ***Ground 3***
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> *THAT the learned trial Judge erred in law in failing to direct the assessors at all, the courses open to them, in evaluating the delay in the complaint and the relevancy in assessing the credibility of the complainant's evidence in terms of consistency and plausibility, particularly in the appellant's matter where the complaint was neither timely nor voluntary but prodded out of the complainant after series of questions by PW2.*
>
> ***Ground 4***
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> *THAT the conviction is unsafe and the contradictory verdicts of the assessors and that of the learned judge would indicate fatal misdirection.*
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> ***Sentence:***
>
> ***Ground 1***
>
> *THAT the sentence imposed in this matter giving due consideration to all circumstances is harsh and excessive.*

Ground 1

[8] The appellant complains that the trial judge had not given Murray direction to the assessors. Murray direction is derived from **R v Murray** (1987) 11 NSWLR 12 where Lee J said at 19(E):

> *In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived*

at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

[9] The High Court has held that a Murray direction should be given in appropriate cases where there is a perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinise the evidence of a complainant with care before arriving at a conclusion of guilt[1]. The direction emphasises that, if the Crown case relies upon a single witness, then the jury must be satisfied that the witness is reliable beyond reasonable doubt[2]. This does not mean that the direction is automatically required where there is one principal witness in the Crown case. If that witness' evidence is corroborated by other evidence in the trial, such as documentary evidence, forensic evidence or other physical evidence (for example, DNA results implicating the accused) there is no basis for a direction[3]. However, Murray direction should be understood in the context of jury trials and not a trial by the judge with the assessors only expressing an opinion like in Fiji.

[10] Further, The Murray Direction is specifically prohibited in prescribed sexual offences. Section 294AA Criminal Procedure Act provides: (1) A judge in any proceedings to which this Division applies must not direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses. (2) Without limiting subsection (1), that subsection prohibits a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant. (3) Sections 164 and 165 of the Evidence Act 1995 are subject to this section.

[11] Therefore, lack of specific Murray Direction in this instance has not caused any miscarriage of justice and in fact Murray Direction may not have been even appropriate as allegations involved multiple acts of serious sexual abuse of the biological daughter by her biological father. On the other hand, it is clear from the summing-up that the trial judge had taken all possible precautions to make sure that the assessors understood the standard and burden of proof and how they should evaluate

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[1] **Robinson v The Queen** (1999) 197 CLR 162 at [25]–[26]

[2] **Smale v R** [2007] NSWCCA 328 at [71] per Howie J

[3] **Gould v R** [2021] NSWCCA 92 at [134], [136]; cf **Ewen v R** [2015] NSWCCA 117 at [104]

the evidence in terms of reliability and credibility of the prosecution evidence. His directions on the appellant's evidence is most fair.

[12] The appellant has not highlighted the so-called inconsistencies in SS's evidence which would have persuaded the trial judge not to have found SS's evidence credible and reliable. However, the trial judge has adequately addressed the assessors at paragraphs 10-15 on the credibility and reliability and inconsistency of witnesses and highlighted some omissions with regard to SS's evidence when compared with her police statement (see paragraph 26(m) of the summing-up). However, in my view those omissions are not capable of shaking the very foundation of SS's evidence [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)] and SS had anyway explained why she could not come out with some the things that she said in evidence.

Ground 2

[13] According to SS, the first incident relevant to counts one and two took place during the first term of school before the appellant left for Vanua Levu (and before her grandfather died in March 2016). With regard to count three where SS's evidence was that the relevant incident took place in the third school term in 2016 and given her evidence that the appellant left the village for Vanua Levu only once, and her evidence during cross-examination that he returned in March 2017, the trial judge correctly directed the assessors that the defence of *alibi* as it was raised is relevant only to counts three and four.

[14] In any event, the trial judge had addressed the assessors on *alibi* evidence at paragraphs 38-44 and 70 & 71 of the summing-up and those directions are quite adequate. The trial judge independently considered the alibi evidence at paragraphs 9, 10, 17, 18 and 19 and rejected the alibi.

Ground 3

[15] The appellant complains of delayed reporting. SS had for the first time divulged the acts of sexual abuse to PW2, her uncle whose wife and the appellant were siblings. SS

had first come to PW2's house to attend school in December 2017 and when his wife heard a rumor where a 'love-bite' was found on SS's neck, both he and his wife questioned SS on several occasions regarding it and it seemed to PW2 that PW1 was hiding something. Finally, when he got an opportunity to speak to SS one-on-one, he asked her *'who is the first guy that had touched you?'* He was shocked to hear from her that it was her father. Then he also asked her *'who is the first guy that did it to you?'*, and again, SS said that it was her father. Two days after, PW2 went to the police station with SS to report the matter. Therefore, SS had not been forced to come out with the acts of sexual abuse though she had been reluctant and hesitant for obvious reasons. In any event, the prosecution had not relied on PW2's evidence as recent complaint evidence. The delay is about 01 year and 08 months.

[16] 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.

[17] A Bench of 05 judges of the Supreme Court of Philippines including the Chief Justice in **People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant** G.R. No. 202122[4] quoted the following observations from **People v. Gecomo**, 324 Phil. 297, 314-315 (1996)[5] (G.R. No. 182690 - May 30, 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*

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

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

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'

[18] 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.'*

[19] 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.

[20] 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."*

[21] The trial judge had referred to the complainant's explanations for the delay at paragraphs 26(d), (f) and (i) of the summing-up namely that the appellant asked her not

to tell anyone lest he would be arrested and that he would cut off her ear and there would not be anyone to look after her education if the appellant was arrested, which the assessors and the judge had accepted as reasonable explanations for the delay. The trial judge had drawn the attention of assessors at paragraph 34 to the issue of delay and addressed himself on it at paragraph 6 of the judgment.

Ground 4

[22] The appellant's complaint could be summarised to state that the verdict is unreasonable and cannot be supported having regard to the evidence.

[23] On reading the detailed summing-up and the judgment, I am satisfied that despite the alleged inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence and in light of defence evidence, the assessors, acting rationally, ought not to have entertained a reasonable doubt as to proof of the appellant's guilt. To put it another way upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt (see **Rainima v State** [2023] FJCA 190; AAU011.2019 (28 September 2023) at [43] & [44]). Thus, it cannot be said that the verdict is unreasonable and cannot be supported having regard to the evidence.

Ground 5 (sentence)

[24] The appellant submits that the sentence is harsh and excessive. The trial judge had arrived at the sentence after applying sentencing tariff applicable for juvenile rape *i.e.* 10-16 years of imprisonment [vide **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) and **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014). However, the trial judge should have applied the tariff of 11-20 years of imprisonment set in **Aicheson v State** [2018] FJSC 29; CAV0012.2018 (02 November 2018)] and sentenced him accordingly. The error had favoured the appellant.

[25] Be that as it may, the trial judge had given clear reasons as to why he was imposing a sentence outside the ***Raj*** tariff but it is within ***Aicheson*** tariff. If I were to adopt the

approach suggested by the Supreme Court in **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and in [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)] in dealing with the sentence appeal *i.e.* when a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered and whether in all the circumstances of the case the sentence is one that could reasonably be imposed, I have no doubt that given the extreme gravity of the offending the ultimate sentence is appropriate.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused

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