

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

**CRIMINAL APPEAL NO. AAU 37(A) of 2022**  
**[In the High Court at Suva Case No. HAC 269 of 2020]**

**BETWEEN** : **SUDHIR KUMAR**

**AND** : **THE STATE**

**Appellant**

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Appellant in person**  
: **Ms. S. Shameem for the Respondent**

**Date of Hearing** : **16 October 2023**

**Date of Ruling** : **17 October 2023**

**RULING**

[1] The appellant had been charged and convicted in the High Court at Suva on five representative counts of rape. Counts one and two cover a period between 01 January 2014 and 19 October 2014, when the complainant was under the age of 13 years. Counts three, four and five cover a period between 20 October 2014 and 10 August 2020. Counts one, three and four allege digital rape using finger and tongue. Counts two and five alleges sexual intercourse, that is, penetration of vagina with penis. The victim was the appellant's step-daughter.

[2] After trial, the appellant had been found guilty of all counts by the trial judge who sentenced him on 06 May 2022 to an aggregate sentence of 18 years' imprisonment with a non-parole period of 12 years and 01 month with a non-parole period of 11 years. The final sentence became 16 years and 04 months due to the discount for the remand period of 01 year and 08 months.

[3] The appellant had lodged in person a timely appeal against conviction and sentence. However, the appellant had tendered an application for abandoning the sentence appeal in Form 03 on 09 June 2023.

[4] In terms of section 21(1)(b) 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 **Caucou 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 trial judge had summarized the facts in the sentencing order as follows:

*[1] The victim was about five years old when her parents separated. Her father abandoned her and had not been in contact with her since then.*

*[2] Soon after separation the victim’s mother entered in a de-facto relationship with the accused. The victim knew the accused was her stepfather but she addressed him as her father.*

*[3] The accused started to sexually abuse the victim at the age of 12 in 2014. She was in Year 7 then. She was at home after school when he touched her private parts when her mother was not around. On the same day he returned home late night and penetrated the vagina of the victim with his finger and penis (counts 1 and 2). Her mother was in a different room asleep. He subdued her using physical force. On this occasion she bled. She kept quiet. He convinced her that nobody will believe her if she complained.*

*[4] Thereafter the accused carried out a campaign of rape against the victim. The magnitude of the abuse is not reflected in the manner in which the accused was charged in this case. He was charged with representative counts but counts one and two reflect two types of sexual penetration*

*carried out in the same transaction. Similarly counts three, four and five reflect three types of sexual penetration carried out in the same transaction on a specific date.'*

- [6] The appellant submitted at the hearing that in addition to the grounds of appeal dealt with by the respondent in its written submissions, he would also urge the additional grounds of appeal (and written submissions) signed on 14 July 2023 and received on 04 August 2023. The grounds of appeal are as follows:

**Conviction:**

**Ground 1:**

*THAT the Learned Judge erred in law and in principle by failing to ascertain the veracity of the victims assertions of the threat and or her reason not lodging a recent complaint to her mother when the first incident occurred “during the taekwondo practice out in the porch”.*

**Ground 2:**

*THAT the Learned Trial Judge erred in law and in fact by failing to take into account that the victim never reported to her aunt of the alleged rape voluntarily and that she by all means was induced and or forced to lodge her report to the police and her aunt against the appellant. Therefore, the verdict was unsafe and unsatisfactory.*

**Ground 3 - filed on 23.06.2023**

*THAT the Learned Judge erred in law in failing to assess and thereby further erred in law in being satisfied that the evidence adduced was sufficient to establish the element of the offence of rape beyond any reasonable doubt and thereby further erred in directing and holding that he was convinced beyond reasonable doubt that the accused has committed the offence and rape and as a result thereof erred in law.*

**Ground 4 - filed on 04.08.2023**

*THAT the Learned Judge erred in law and in principle by failing to ascertain the veracity of the victim's assertions of the threat and/or her reasons for not lodging a recent complaint to her mother when the first incident occurred during the taekwondo in the porch.*

**Ground 5 - filed on 04.08.2023**

*THAT the Learned Judge erred in law and in fact by failing to consider that the victim said she had fear in her because the appellant told her that no one will believe her if she complained.*

### Ground 1, 4 & 5

- [7] The appellant challenges the evidence of the victim on the premise that she had not made a prompt complaint of acts of alleged sexual abuse which was going on from 2014-2020. The victim was 12 years of age and year 7 student in 2014. The matter was first reported to her aunt by the victim in 2020.
- [8] 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 v Cruz, Accused-Appellant** G.R. No. 202122<sup>1</sup> quoted the following observations from **People v. Gecom**, 324 Phil. 297, 314-315 (1996)<sup>2</sup> (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 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'*

- [9] 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*

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<sup>1</sup> [https://lawphil.net/judjuris/juri2014/jan2014/gr\\_202122\\_2014.html](https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html)

<sup>2</sup> [https://lawphil.net/judjuris/juri2011/may2011/gr\\_182690\\_2011.html#fnt65](https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65)

*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.'*

[10] In as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fair 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.

[11] 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.'*

[12] The trial judge had thoroughly ventilated the question of delay in reporting on the part of the victim at paragraphs 20, 24 and 28 of the judgment while disbelieving the victim's mother's evidence called on behalf of the appellant at paragraphs 37 and 51, and specifically held as follows at paragraph 48 as to why he accepted the victim's explanation for not promptly reporting the appellant's acts of sexual abuse.

*'[48] The complainant's explanation for not reporting the incidents to her mother or anyone else until 19 August 2020 is reasonable in the circumstances of the case. She was a child and a female. The accused was an adult male. He was an authority figure in the house. He had instilled fear in her that nobody will believe her if she complained. She feared of not being believed if she complained. She only brought the abuse to the attention of her aunt when her aunt assured her that she can confide with her.'*

[13] As for the first incident during the victim's practising taekwondo on the porch where the appellant had allegedly touched her vagina, it appears that it was an uncharged act and the prosecution had not led any evidence as to the reason for her not to inform her mother about it, who was at home but led evidence for her reasons for not informing her about the first time sexual penetration on the same day as highlighted earlier.

[14] It appears from the mother's subsequent conduct that the victim's fear of not being believed by her mother if she complained as told to her confidently by the appellant every now and then, had been well-founded as the trial judge had disbelieved the mother for the following reasons:

*'[51] I do not accept the complainant's mother as a credible witness. It is apparent that her loyalty lies with the accused from whom she now has three young children. She has cut off all her ties with the complainant and her sister, after they reported the accused to police. She tailored her evidence to support the accused.'*

[15] It also appears that the mother had cut off all ties with the victim after she disclosed the appellant's continuous sexual misdemeanours to her aunt and the matter was reported to police.

*'[29] The complainant said that on 12 August 2020 her mother was admitted to the hospital and the accused dropped her and her two siblings at her aunt, Kajal's place. Later that same night when her aunt questioned her whether something was happening between her and her stepfather she got emotional and nodded her head. She told her aunt that he has been doing since she was in Year 7. From that day she has been staying with her aunt and had not spoken to her mum.'*

## **Ground 2**

[16] The appellant submits that the victim's complaint to her aunt was not voluntary but coaxed out of her by the aunt.

[17] The circumstances that led to the victim revealing what was going on between the appellant and her are set out by the trial judge as follows:

*[29] The complainant said that on 12 August 2020 her mother was admitted to the hospital and the accused dropped her and her two siblings at her aunt, Kajal's place. Later that same night when her aunt questioned her whether something was happening between her and her stepfather she got emotional and nodded her head. She told her aunt that he has been doing since she was in Year 7. From that day she has been staying with her aunt and had not spoken to her mum.*

*[30] Kajal's evidence is that on 10 August 2020 the accused dropped his family (wife, mother-in-law, and two children) at her place. Kajal said that the accused told her that he will go and pick the complainant from school and then drop her at her place. When the accused did not bring the complainant to her place by 4 pm, she got suspicious and got her sister (complainant's mother) to follow up with the accused regarding their whereabouts.*

*[31] Kajal said that when her sister gave the accused a call on his mobile they learnt that the complainant was at her home with the accused and the accused was enquiring about the curtains so that the complainant could put them on. When the complainant was eventually brought to Kajal's place she appeared frightened.*

*[32] Kajal said that the complainant was dropped off at her place on 19 August 2020 when her sister went in labour with her third child from the accused. She said that at around 10 pm she had a conversation with the complainant when she came to assist her to pack some sweats that she had made. She said that the complainant was reluctant to speak but when she assured her that she can confide with her about anything happening between her and her stepfather, the complainant nodded her head and broke down in tears. Kajal said that she immediately called the complainant's mother but she was in labour at the hospital.*

*[33] Under cross examination Kajal denied instigating the complainant to fabricate the allegations against the accused because she was not happy with him for complaining to his wife about a drinking incident at his home. Kajal said that no such incident involving her ever took place at the accused's home.'*

*[50] I do not accept the defence case that the complainant's aunt instigated the complainant to fabricate the allegations because the aunt had a grudge against the accused arising from a drinking incident at his home. There is no logic in the defence case. I do not accept the denials of the accused.'*

[18] Therefore, I do not think that the aunt, Kajal had forced any complaint out of the victim against the appellant, for if she had any such animosity against him, the appellant would not have dropped his wife and other children at Kajal's place both on 10<sup>th</sup> and 12<sup>th</sup> August 2020.

[19] As for medical evidence, the trial judge had summarised it and concluded as follows:

*'[34] On 25 August 2020, Dr Losana Burua medically examined the complainant at Medical Services Pacific Clinic. Upon physical examination of the complainant's genitalia the doctor found that the complainant's hymen (a thin layer of tissue covering the opening of the vagina for girls) was not intact. The perforated hymen indicated that sexual contact had been made and in the case of the complainant a finger could be easily inserted into her vagina. The doctor also found an old healed hymenal tear at 10 o' clock position. The doctor said that the old healed injury indicated blunt force trauma by erect male penis.'*

*[49] When the complainant was medically examined, injuries were noted on her genitalia that were consistent with blunt force trauma. The medical evidence does not implicate the accused but the evidence is consistent with the complainant's account of being penetrated with a finger and penis.'*

[20] With regard to the defence evidence the trial judge had considered it at paragraphs 33-38 but rejected it at paragraph 51 for good reasons.

### **Ground 3**

[21] The appellant's arguments revolve around the victim's alleged inconsistent evidence and improbabilities of her accounts.

[22] However, the appellant had not specifically highlighted any material inconsistencies in the victim's evidence which are capable of shaking the very foundation of victim's evidence [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]. The trial judge had said:

*'[47] Overall the complainant struck to me as an honest and reliable witness. She gave evidence of events that took place over a period of seven years between 2014 and 2020. She was 12 years of age and in Year 7 in 2014.'*



*I do not expect her to remember details of every incident. Memories fade with time. She may be confused with times and dates. But she gave a consistent account of the sexual acts that were committed on her by the accused, without her consent.*

[23] In **People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja v Cruz, Accused-Appellant** (supra) it was held on human memory and inconsistencies as follows:

*'Besides, inaccuracies and inconsistencies in a rape victim's testimony are generally expected. As this Court stated in People v. Saludo:*

*Rape is a painful experience which is oftentimes not remembered in detail. For such an offense is not analogous to a person's achievement or accomplishment as to be worth recalling or reliving; rather, it is something which causes deep psychological wounds and casts a stigma upon the victim, scarring her psyche for life and which her conscious and subconscious mind would opt to forget. Thus, a rape victim cannot be expected to mechanically keep and then give an accurate account of the traumatic and horrifying experience she had undergone. (Citation omitted.)*

*Since human memory is fickle and prone to the stresses of emotions, accuracy in a testimonial account has never been used as a standard in testing the credibility of a witness. The inconsistencies mentioned by Pareja are trivial and non-consequential matters that merely caused AAA confusion when she was being questioned. The inconsistency regarding the year of the December incident is not even a matter pertaining to AAA's ordeal. The date and time of the commission of the crime of rape becomes important only when it creates serious doubt as to the commission of the rape itself or the sufficiency of the evidence for purposes of conviction. In other words, the "date of the commission of the rape becomes relevant only when the accuracy and truthfulness of the complainant's narration practically hinge on the date of the commission of the crime." Moreover, the date of the commission of the rape is not an essential element of the crime.'*

[24] As for the improbabilities in the victim's version of events at home as described at paragraphs 18-20 of the judgment, I do not see why they are so improbable as to be believed. In **People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja v Cruz, Accused-Appellant** (supra) it was held:

*'In People v. Ignacio, we took judicial notice of the interesting fact that among poor couples with big families living in small quarters, copulation does not seem to be a problem despite the presence of other persons around them.*

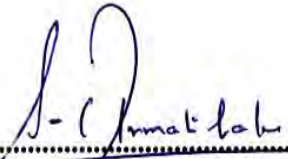
*Considering the cramped space and meagre room for privacy, couples perhaps have gotten used to quick and less disturbing modes of sexual congresses which elude the attention of family members; otherwise, under the circumstances, it would be almost impossible to copulate with them around even when asleep. It is also not impossible nor incredible for the family members to be in deep slumber and not be awakened while the sexual assault is being committed. One may also suppose that growing children sleep more soundly than grown-ups and are not easily awakened by adult exertions and suspirations in the night. There is no merit in appellant's contention that there can be no rape in a room where other people are present. There is no rule that rape can be committed only in seclusion. We have repeatedly declared that "lust is no respecter of time and place," and rape can be committed in even the unlikeliest of places.'*

[25] Contrary to the appellant's allegation that the victim was sexually active with someone else, as per paragraph 26 of the judgment it is the appellant who had told her to be careful and that she should have interests in other boys so that nobody will suspect him. On the other hand that it was her evidence that after the first incident of rape she went to the washroom when she noticed she was bleeding from her vagina.

**Order of the Court:**

1. Leave to appeal against conviction is refused.



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