

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

**CRIMINAL APPEAL NO. AAU 77 of 2021**  
**[In the High Court at Lautoka Criminal Case No. HAC 14 of 2017]**

**BETWEEN** : **LEVENI WAQA**

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

***Appellant***

***Respondent***

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

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

**Date of Hearing** : **20 October 2023**

**Date of Ruling** : **23 October 2023**

## **RULING**

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed one act of sexual assault, three acts of rape and one representative act of rape on Marica Ranadi, his biological daughter in 2014 & 2015 at Ba, in the Western Division contrary to Crimes Act 2009. The information read as follows:

### ***'COUNT 1***

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

***LEVENI WAQA***, on the 31<sup>st</sup> of May 2014 at Ba, in the Western Division, unlawfully and indecently assaulted Marica Ranadi.

**COUNT 2**

**Statement of Offence**

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

**Particulars of Offence**

**LEVENI WAQA,** *on the 06<sup>th</sup> June, 2014 at Ba, in the Western Division, had carnal knowledge of Marica Ranadi, without her consent.*

**COUNT 3**

**Statement of Offence**

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

**Particulars of Offence**

**LEVENI WAQA,** *on the 14<sup>th</sup> day of August 2014 at Ba, in the Western Division, had carnal knowledge of Marica Ranadi, without her consent.*

**COUNT 4**

**(Representative Count)**  
**Statement of Offence**

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

**Particulars of Offence**

**LEVENI WAQA,** *between the 01<sup>st</sup> day of July 2015 and the 7<sup>th</sup> day of September 2015 at Ba, in the Western Division, had carnal knowledge of Marica Ranadi, 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**

**LEVENI WAQA,** *on the 01<sup>st</sup> day of November 2015 at Ba, in the Western Division, had carnal knowledge of Marica Ranadi, without her consent.'*

- [2] The assessors had opined that the appellant was guilty of all counts and the trial judge had convicted him accordingly and sentenced him on 27 November 2020 to a below par 12 years with a non-parole period of 08 years (11 years and 08 months with a non-parole period of 07 years and 08 months after the remand period was deducted).
- [3] An untimely appeal only against conviction had been lodged in person by the appellant. 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).
- [4] The delay is about 11 months which is substantial. The appellant has stated that due to COVID 19 restrictions he could not forward his appeal in time to the Court of Appeal Registry. There is no way that this assertion could be verified by this court but it cannot be reasonably assumed that COVID restrictions on movements prevented him from lodging his appeal for 11 months. 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.
- [5] The grounds of appeal raised by the appellant are as follows:

**'Conviction:**

**Ground 1:**

*THAT the Learned Trial Judge erred in law and in fact by failing to direct the assessors at all, the basis of PW2 Ms. Raijeli Nailavi evidence and the proper courses open for them in evaluating her evidence. In failing to do so, there is high likelihood the assessors was drawn to consider PW2's evidence as*

*corroborating the complainants account. Such failure constitute a serious miscarriage of justice.*

**Ground 2:**

*THAT the Learned Trial Judge erred in law in failing to apply Markleski direction found in **R v Markuleski** [2001] NSW CCA 290 [2001] HCA 11 [2001] 206 CLR, particularly, in appellants matter where the appellant faced multiple counts. The failure to do so constitute a substantial miscarriage of justice.*

**Ground 3:**

*THAT the Learned Trial Judge erred in law and in fact in failing to warn the assessors that the delay in the complaint was not recent neither voluntary but prodded out of her by PW2 Rajjeli Nailavi, that these factors is relevant in assessing the complainants credibility. Such failure constitute a substantial miscarriage of justice.*

**Ground 4:**

*THAT the Learned Trial Judge erred in law and fact when he directed at paragraph 47 line; A person may lie as sometimes as it easier that telling the truth”, such direction engendered a risk that assessors may draw the impression that the accused denial was a lie, particularly when the prosecution was not relying on a proposition that the appellant lied or add to the case presented against the appellant.*

**Ground 5:**

*THAT the Learned Trial Judge erred in law and in fact by drawing conclusions at para 10: line 4 of the courts judgment “the evidence of PW2 “substantiates” Marica’s evidence as many of the material points”. Such conclusion meant that the Learned Trial Judge misdirected himself on a fundamental issue of law in Prasad’s (supra) thus causing serious miscarriage of justice.*

**Ground 6:**

*THAT the Learned Trial Judge erred in law in failing to consider the totality of the circumstances test the Court of Appeal had established vide: **State v Serelevu** FJCA 163 AAU 141/2014 [4 Oct, 2018] and in **State v Silas Sanjeer Mani** AAU 015/2019 [26 June 2020] at 19, dealing with delay in making a complaint.*

**Ground 7:**

*THAT the aggregate of errors of combination of errors consequences of fundamental omission during the Learned Trial Judges charge caused a substantial miscarriage of justice.*

**Ground 8:**

*THAT the Guilty verdict in unsupported having regards to the totality of evidence presented at the trial.*

**Ground 9:**

*THAT the Learned Trial Judge erred in law and in fact by not properly/adequately considering that there are material inconsistencies in the testimony of complainant and such was not capable of supporting her credibility resulting into substantial miscarriage of justice.*

**Ground 10:**

*THAT the Learned Trial Judge erred in law by failing to direct the assessors properly on the status of this kind of evidence about what Raijeli Nailavi (PW2) said resulting into substantial miscarriage of justice.*

**Ground 11:**

*THAT the Learned Trial Judge erred in law by failing to make an independent assessment of the evidence before conforming with the opinion of the assessors and affirming the verdict of guilt was unsafe, insecure and unsatisfactory resulting into substantial miscarriage of justice.*

**Ground 12:**

*THAT the summary of facts failed to disclose each element that the appellant was convicted for.*

**Ground 13:**

*THAT the Learned Trial Judge erred in law and in fact in misdirecting himself and the assessors on the probabilities improbabilities and falsehood of the complainant testimony resulting into substantial miscarriage of justice.*

**Ground 14:**

*THAT the Learned Trial Judge erred in law and fact by failing to direct the assessors properly on how to approach and weigh the evidence of the complainant resulting into substantial miscarriage of justice.'*

- [6] At the trial the complainant Marica Ranadi (PW1), and Ms. Raijieli Nailavi (PW2), the wife of the pastor to whom the PW1 has relayed the incidents first, gave evidence for the prosecution while the appellant had remained silent and abstained from calling any witnesses in defence. The complaint (PW1) is the appellant's biological daughter.

[7] According to the judgment the brief facts are as follows:

7. *The complainant, Marica Ranadi is the accused's biological daughter. Her mother has married and gone away. Her maternal grandparents could no longer maintain her. She had no one else other than her father to look up to.....*
8. *Marica Ranadi's evidence is clear. On the first night she was at her father's house she was allegedly sexually assaulted by her father. She explained how the accused put his hand underneath her t-shirt and touched her breasts and went down and touched her private part. Though she was asleep, she has awoken up and seen the accused touching her. The accused has signaled her to be quiet. The given evidence covers all the ingredients of the alleged 1<sup>st</sup> count of sexual Assault. The cross examination on behalf of the accused failed to create a reasonable doubt in the prosecution case.*
9. *The 2<sup>nd</sup> to 5<sup>th</sup> are counts of rape. It is apparent that the complainant was living with her paternal grandparents but the accused used to take her to his house from time to time. Most of the alleged incidents of rape has taken place either on the sugarcane field or on the tramline along the way between these houses.....'*

**01<sup>st</sup> and 05<sup>th</sup>, 10<sup>th</sup> grounds of appeal**

[8] The appellant submits that the failure to direct the assessors as to how to make use of the recent complaint made by PW1 to PW2 (Ms. Rajeli Nailavi) is a serious non-direction that may have led them to believe that the latter's evidence as corroborating PW1's evidence. He also complains that the trial judge's statement in the judgment (paragraph 10) that PW2's evidence substantiates PW1's evidence was also an error of law.

[9] In sexual cases, the evidence a recent complaint of the sexual assault made to another person by the complainant is allowed to show the consistency of the conduct of the complainant and to negative consent. The recent complaint is not evidence of facts complained of, nor is it corroboration of the complainant's evidence in court. It goes to the consistency or inconsistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility and reliability of the complainant [**Conibeer v State** [2017] FJCA 135; AAU0074.2013

(30 November 2017) & **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014)].

[10] Thus, there is merits in the appellant's arguments under both grounds of appeal amounting a miscarriage of justice. Yet, the trial judge had reminded himself that the law required no corroboration and the court could act on the evidence of a sole witness but cautioned himself of the credibility and the dependability of the evidence of the sole witness. According to him, it was obvious the assessors were sure that the complainant did not consent, freely and voluntarily as the judge had asked them to consider the option of defilement regarding the 2<sup>nd</sup> and 3<sup>rd</sup> counts but the assessors opined the appellant was guilty of rape as alleged. The trial judge had carefully observed the demeanor and also PW1's evidence and found no reason to deviate from the unanimous opinion of the assessors.

[11] Therefore, it is clear that the trial judge as the ultimate judge of facts and law [See **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015 and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)] had been satisfied with the evidence of PW1 alone to convict the appellant of all charges. The question is whether the assessors if properly directed on recent complaint evidence and the trial judge if properly self-directed on recent complaint evidence would have come to the same finding. If so, the proviso to section 23(1) of the Court of Appeal Act would be readily applied by the Full Court and affirm the conviction on the premise that no substantial miscarriage of justice had occurred.

[12] Where the assessors' verdict cannot be supported by the evidence or where an error or irregularity has occurred and the appellate court cannot be satisfied that the matter did not affect the outcome or where there has been a serious departure from the proper processes of the trial, there is substantial miscarriage of justice (vide **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 & **Nalawa v State** [2021] FJCA 188; AAU014.2016 (25 June 2021)].

[13] As to a complaint of substantial miscarriage of justice the test is the inevitability of the conviction. **Baini v R** (2012) 246 CLR 469; [2012] HCA 59 at [33] set down the test of inevitability as follows:

*‘...Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal.’*

[14] Put it another way, if the Court comes to the conclusion that, on the whole of the facts, a reasonable assessors, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso to section 23(1) of the Court of Appeal Act has occurred (vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)]. Whether the trial judge also could have reasonably convicted the appellant on the evidence before him is the test when a verdict is challenged on the basis that it is unreasonable (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)).

[15] This exercise is a matter for the Full Court and I am inclined to grant enlargement of time to appeal on these grounds of appeal.

**02<sup>nd</sup> ground of appeal**

[16] McHugh J said in **KRM v The Queen** (2001) 206 CLR 221 at [36]:

*It has become the standard practice in cases where there are multiple counts ... for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a “separate consideration warning”).*



[17] In **R v Markuleski** (2001) 52 NSWLR 82 at [186], [257] and [280], the court held that:

*... it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.*

[18] **R v Markuleski** at [188] and [191]. Spigelman CJ added at [189]–[191] that:

*On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.*

*Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.*

*The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case.*

[19] See **R v RAT** (2000) 111 A Crim R 360; **R v Robinson** (2000) 111 A Crim R 388. See also **R v GAR** [2003] NSWCCA 224) further for *Markuleski* direction which becomes relevant in 'word against word' cases *i.e.* cases in which the only direct evidence of the commission of the offences is that of the complainant. In Victoria, such a direction is not allowed. Any rule of common law under which such a direction could be given has been abolished (*Jury Directions Act* s44F-44G, as amended in 2017).

[20] However, a *Markuleski* direction should only be given if the complainant's credibility looms large in the trial and there is a risk that in the absence of a direction the accused would be denied the chance of an acquittal on all counts: **RWC v R** [2013] NSWCCA 58 at [80]; **Abdel-Hady v R** [2011] NSWCCA 196 at [125]–[133]. When determining whether such a direction should be given, the whole of the relevant or surrounding circumstances needs to be considered: **R v GAR** [2003] NSWCCA 224 at

[34]; **Oldfield v R** [2006] NSWCCA 219 at [24]–[25]; **Keen v R** [2020] NSWCCA 59 at [76].

[21] Thus, the question is whether the standard direction to the assessors – that they should consider each count separately, and may accept part of a witness’ evidence and not the other parts of the same witness’s evidence (the ‘separate offences direction’) – should be qualified in cases of sexual offences where the only direct evidence of the commission of the offences came from the complainant. In **HKSAR v C.T.** [2019] HKCFA 26 FACC No. 25 of 2018 where the prosecution’s case was that the appellant raped X on five occasions in a rental premise. In relation to the fifth count, his defence was one of alibi. The trial judge observed in her directions to the jury that this was a word-against-word case where the evidence basically consisted of the oral evidence of X against that of the appellant. The appellant was convicted on counts 1 to 4 and acquitted of count 5. The Court of Final Appeal in Hong Kong held that a *Markuleski* direction was not always necessary or desirable as a counterweight to the separate offences direction. The direction should only be given when necessary, and only where a risk of unfairness to the accused had truly arisen. The overarching consideration is the conduct of a fair trial.

[22] In the current appeal, the assessors found the appellant guilty of all counts and there is no basis to suggest that a substantial miscarriage of justice had occurred as a result of lack of *Markuleski* direction and there was no risk of unfairness to the appellant by the omission, the overarching consideration being the conduct of a fair trial which had not been violated in any way. The trial judge had no reasonable doubt with regard to any of the counts either.

**03<sup>rd</sup> and 06<sup>th</sup> ground of appeal**

[23] The appellant complains of delay in the complainant’s reporting which according to him was not voluntary but prodded out of her by PW2.

[24] **The Doctrine of Recent Complaint: Anti-Feminist Narratives in Evidence Law**  
by **Eoin Jackson**<sup>1</sup> says:

*As noted by the academic Wigmore, the origin of the doctrine of recent complaint lies in the medieval expectation that a victim of rape would raise a 'hue and cry' in order to make the community aware that a violation had occurred. Stanchi, writing in the Boston College Law Review, discusses how this can be linked to the historical mistrust of female witnesses, with the promptness of the complaint being equated to an alleviation of some of this mistrust..... For example, Heffernan has noted how the doctrine continues to operate on the assumption that a victim will report an incident of sexual assault as soon as is reasonably possible. This ignores a myriad of factors a victim may be feeling, such as fear, humiliation, and intimidation..... A personal connection to the abuser will naturally hinder victims from promptly reporting the incident, given they may need to weigh up the effect reporting the assault has not just on them, but on the relationships within their broader social and familial circle.....The outdated perception that a victim will immediately report a traumatic incident does not take into account the various psychological and personal factors at play and other complexities, in particular those that arise where the victim is familiar with their abuser..... While it is logical for a victim to consult with someone they perceive to be knowledgeable about the matter at hand, yet the doctrine of recent complaint ignores this in favour of a blanket presumption that an immediate disclosure will be made..... The recent complaint doctrine strictly focuses on the idea of reporting as soon as reasonably possible in the context of the mind-set of the victim, as opposed to enquiring as to whether there are any excuses that would justify an otherwise 'unreasonable delay'.*

[25] According to Jackson in recent times, the doctrine has been modified to allow for a 'reasonable excuse' justification. This justification would allow for the prosecution to argue that the victim had a reasonable excuse for delaying in making a complaint. In assessing this excuse, the judge could take into account the emotional state of the woman namely that she was not in a psychological state to make a complaint at the first available opportunity, the nature of the relationship between the accused and victim, and the factual context of the charge itself. It would also account for cases where the victim consults with someone they know prior to making a complaint. This justification would allow for a more inclusive version of the doctrine of recent complaint to be embedded into jurisprudence. It would allow for a version of the

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<sup>1</sup> <https://eaglegazette.wordpress.com/2021/09/13/the-doctrine-of-recent-complaint-anti-feminist-narratives-in-evidence-law/>

doctrine grounded in an emphasis and understanding of the complexities that can arise in the aftermath of a sexual assault. It does not remove the time element, but merely adds nuance sufficient to prevent it from being the determining factor when considering the veracity of testimony.

[26] Australian Law Reform Commission<sup>2</sup> states that:

*'27.296 The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault. Significantly in the context of this Inquiry, the 'predictors associated with delayed disclosure' reveal differences in reporting patterns depending upon the victim's relationship with the abuser. For example, where the victim and defendant are related, research suggests there is a longer delay in complaint. Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, 'it is likely that evidence about a complainant's first complaint would answer the type of questions that jurors can be expected to ask themselves'.*

[27] For example, 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<sup>3</sup> quoted the following observations from **People v. Gecomo**, 324 Phil. 297, 314-315 (1996)<sup>4</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'*

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<sup>2</sup> <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/27-evidence-in-sexual-assault-proceedings-3/evidence-of-recent-and-delayed-complaint/>

<sup>3</sup> [https://lawphil.net/judjuris/juri2014/jan2014/gr\\_202122\\_2014.html](https://lawphil.net/judjuris/juri2014/jan2014/gr_202122_2014.html)

<sup>4</sup> [https://lawphil.net/judjuris/juri2011/may2011/gr\\_182690\\_2011.html#fnt65](https://lawphil.net/judjuris/juri2011/may2011/gr_182690_2011.html#fnt65)

[28] 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.’*

[29] 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.

[30] 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.’*

[31] I have no doubt that the victim had reported the matter at the first available opportunity and the delay is not due to any fabrication on her part but due to the warnings and threats from the appellant, her biological father. The degree of pressure on her could be gleaned from PE1, a letter written by the complainant exonerating the appellant which she was forced to do by the grandparents. Neither does it appear that PW2 had forced the complaints of sexual abuse out of PW1, for it was voluntary, reluctantly though, which was quite reasonable and understandable.

#### **04<sup>th</sup> ground of appeal**

[32] The appellant joins issue with the trial judge's statement at paragraph 47 of the summing-up that '*A person may lie as sometimes as it easier than telling the truth*'. The full paragraph is as follows:

47. *The Accused has indicated his stance through the cross examination and it was that he did not commit any of the alleged acts and he was framed by the complainant due to jealousy of him remarrying. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.'*

[33] The trial judge had given even more generous directions in paragraph 48 of the summing-up on the appellant's denial and possible motive for alleged fabrication. I do not think that the sentence at paragraph 47 taken by the appellant in isolation does not carry the prejudice ascribed to it when taken it in the complete context of paragraphs 47 and 48.

#### **07<sup>th</sup> and 13<sup>th</sup> grounds of appeal**

[34] The only significant omission on how to assess recent complaint evidence should be looked at by the Full Court to decide whether there has been a substantial miscarriage of justice or not and this aspect had been dealt with under the 01<sup>st</sup> , 05<sup>th</sup> and 10<sup>th</sup> grounds of appeal regarding the evidence of PW1 and recent complaint evidence of

PW2. The test for alleged inconsistencies, discrepancies, omissions, improbabilities is set out in **Kumar v State** AAU 102 of 2015 (29 April 2021).

**08<sup>th</sup> ground of appeal**

[35] The test to determine a ‘*verdict which is unreasonable or which cannot be supported by evidence*’ was laid down by the Court of Appeal in **Kumar v State** AAU 102 of 2015 (29 April 2021) namely whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt subject to the qualification that in Fiji the assessors are not the sole judges of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not. Thus, whether the trial judge also could have reasonably convicted the appellant on the evidence before him is equally important as a test when a verdict is challenged on the basis that it is unreasonable (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013)).

[36] This ground of appeal could be considered by the Full Court while considering the 01<sup>st</sup>, 05<sup>th</sup> and 10<sup>th</sup> grounds of appeal.

**09<sup>th</sup> ground of appeal**

[37] The trial judge had addressed the assessors on inconsistencies at paragraphs 8-10 of the summing-up at paragraph 37(vi). The trial judge had also given his mind to it at paragraph 10 of the judgment and considered the inconsistency to be immaterial as to impeach PW1’s credibility. In other words the trial judge had concluded that the inconsistency in PW’1 evidence was not capable of shaking the very foundation of prosecution case [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

**11<sup>th</sup> ground of appeal**

- [38] There is no merit in this submission. The trial judge had engaged in an independent analysis of the evidence of PW1 at paragraphs 7-11 of judgment.
- [39] 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)].

**12<sup>th</sup> ground of appeal**

- [40] There is no merit in this ground of appeal as well. The trial judge had set out the evidence of PW1 at paragraphs 19-32 the summing-up and paragraph 7-11 of the judgment which show that all the elements of the offences have been proved by PW1's evidence.

**14<sup>th</sup> ground of appeal**


- [41] There is no merit in this ground of appeal. The trial judge had properly directed the assessors on PW1's evidence at paragraph 36 & 37 of the summing-up and paragraphs 7-12 of the judgment.



**Order of the Court:**

1. Enlargement of time to appeal against conviction is allowed only on the 01<sup>st</sup>, 05<sup>th</sup> and 10<sup>th</sup> grounds of appeal.



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