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

CRIMINAL APPEAL NO. AAU 81 OF 2019
High Court Criminal Case No. HAC 137 of 2017

BETWEEN	:	**NACANIELI NATADRA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, RJA** **Andrews, JA** **Clark, JA**
Counsel	:	**Appellant in person** **Ms. L. Latu for the Respondent**
Date of Hearing	:	**8 November 2023**
Date of Judgment	:	**29 November 2023**

JUDGMENT

Mataitoga, RJA

[1] The appellant was indicted in the High Court at Suva with one count of Abduction of Young Person contrary to section 285 of the Crimes Act, 2009, one count of Sexual Assault contrary to Section 210 (1) (a) of Crimes Act, 2009 and one count of Rape, contrary to section 207(1) and (2) (b) of the Crimes Act, 2009, committed at Lautoka in the Western Division on 03 July 2017.

[2] The information read as follows.

'***FIRST COUNT***

Statement of Offence

ABDUCTION OF YOUNG PERSON: *Contrary to section 285 of the Crimes Act, 2009*

Particulars of Offence

NACANIELI NATADRA *on the 3rd day of July, 2017 at Lautoka in the Western Division, unlawfully took* ***SJDM****, being under the age of 18 years, out of the possession and against the will of her parents.*

SECOND COUNT

Statement of Offence

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

Particulars of Offence

NACANIELI NATADRA *on the 3rd day of July, 2017 at Lautoka in the Western Division, unlawfully and indecently assaulted* ***SJDM****, by licking her vagina.*

THIRD COUNT

Statement of Offence

RAPE: *Contrary to section 207 (1) & (2) (b) of the Crimes Act, 2009.*

Particulars of Offence

NACANIELI NATADRA *on the 3rd day of July, 2017 at Lautoka in the Western Division, inserted his tongue into the vagina of* ***SJDM****, without her consent.*

[3] At the conclusion of the summing-up on 15 May 2019 the assessors' unanimous opinion was that the appellant was guilty of all three counts as charged. The learned trial judge agreed with the assessors and in his judgment delivered on the same day, convicted the appellant and sentenced him on 17 May 2019 to 14 years and 11 months with a non-parole period of 12 years and 11 months.

[4] The appellant was aggrieved of the High Court trial outcome. He submitted timely application for leave to appeal against conviction and sentence had been signed his submission on 3 June 2019 (which reached the CA registry on 18 June 2019). Legal Aid Commission (LAC) had filed amended grounds of appeal only against conviction and written submissions on his behalf on 26 October 2020 and the State [Respondent] had tendered its written submissions on 30 October 2020. On 30 October 2020 the counsel for the appellant indicated that the appellant was to abandon his sentence appeal and therefore, he was directed to tender his abandonment notice in Form 03 on the next date. Both parties relied on their respective written submissions at the leave to appeal hearing.

Summary of the Facts

[5] The learned trial judge had summarized the prosecution evidence in the summing-up.

> *31. The complainant had gone to the shop to buy bread in the evening of 3rd of July 2017. On her way to the shop, she had seen a black colour twin cab, which was parked on the road. It has a black pipe fixed at the front of the vehicle. The complaint had not given much attention and went pass it. She could recall the number of the vehicle as HV 510. While she was walking towards to the shop, the complainant had felt that someone was behind her back. Suddenly the person who came from behind of her, had covered her mouth from one of his hands and grabbed her waist from his other hand. He had then thrown the complainant into the back seat of the said twin cab. He then tied her hands and legs with clothes. That person then went and get into driver's seat and drove the car forward.*
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> *32. According to the complainant, he had driven the twin cab down to the Field 40, then reached the Total Service Station near Navutu and then drove into the roundabout opposite the service station and parked the car. He then came and open the back door which is near to the place where the complainant was seated. He then untied her legs and pulled her basketball pants and her undergarment. The person had told the complainant not to worry and it's okay. He had separated her legs by using his two hands and started to lick her vagina. He used his tongue to lick inside her vagina. The complainant felt that he was licking inside her vagina. The complainant told him to stop but he kept on doing it. He licked it for half an hour. The complainant had screamed but nobody was there. According to her, only two of them were at that place.*

33. Having licked her vagina and inside of it, the person had thrown the pants and the underwear to the complainant. He then forcefully took her to the front passenger seat. She was still naked and her hands were still tied up. The person then untied her hand, letting her to dress up her pants and undergarment. He then drew vehicle near to the Mariamman Temple and pushed her out from the vehicle.

34. The complainant had observed the person from the time they reached the Total Service Station until he licked her vagina and put his head up. She has seen his face from the lights came from the street lights when they were passing the service station. The vehicle was not traveling much fast. The complainant said that she could not jump out of the car, as her legs and hands were tied up. When he was licking her vagina, his face was so closed to her.'

36. When she went home, the complainant had related this incident to her mother. They then went to the police station and reported the matter. The police had taken her to the medical examination. The complainant made her statement to the police after the medical examination.

37. The complainant was summoned to the police post at the Lautoka market on the 5th of July 2017. She was asked to go into the market and check if the person who committed this crime to her was sitting in the market. She was accompanied by WPC Bulou. The complainant walked ahead of WPC Bulou. Once they reached to the last station of the market, where normally men drink grog, the complainant had identified the accused when he was sitting there. She had pointed out the accused as the person who committed this crime to her on the 3rd of July 2017. The complainant had later identified the said twin cab when it was parked at Coronation Church. The complainant identified the accused in the court, as the person that she identified at the market and also as the person who committed this crime to her on that particular night.

[paragraph Reference as set out in Page 46 Copy Record]

Court of Appeal

[6] Before the Judge Alone the appellant was represented by Counsel from Legal Aid Commission [LAC]. There were 2 grounds of appeal submitted on his behalf, as follows:

Grounds of Appeal against Conviction

(i) The appellant is prejudiced by the learned trial judge's direction on alibi at paragraph 64 of the summing-up, that the assessors are

informed 'you should bear in mind that sometimes an alibi is invented because the accused thinks it is easier than telling the truth'.

(ii) That the learned Trial Judge erred by not directing the assessors to consider recent complaint evidence only in relation to the offence of abduction of a young person in light of the evidence of the complainant's mother.

[7] This appeal was pursued pursuant to section 21(1) (b) of the Court of Appeal Act, which allows appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'**: **Caucau v State** [2018] FJCA 171, **Navuki v State** [2018] FJCA 172.

[8] In reviewing the trial record in the High Court, the Judge Alone noted that the appellant had remained silent but had called three witnesses on his behalf and a summary of his evidence by the trial Judge in his summing up as follows;

'46. The first witness of the defence is Ema Natadra. She is the wife of the accused. According to her evidence, the accused was at home when she came home from work at about 7.30 pm in the evening of 3rd of July 2017. They were having the evening devotion at home when she came home. The accused was seated on the settee with the daughter while few of them were seated on the floor. Her mother led the prayers and the accused also actively participated in the devotion. The devotion went on till 8 pm and then they had dinner.

47. During the cross examination, Ms. Ema Natadra said the accused is from Ra and they have a black colour twin cab with a pipe attached to the front bearing the registration number HV 510. The accused had told her when he left the office on the afternoon of 3rd of July 2017, that he was going to see Sam. According to her evidence, the accused had been driving the said vehicle on that day before he came home.

49. Miliana Natadra, the daughter of the accused in her evidence explained about the devotion that had at their home on the evening of 4th of July 2017.

50. The last witness of the defence is WDC Barbara, who has assisted WPC Bulou in this investigation. According to WDC Barbara, they have not taken any photos of the accused on the 5th of July 2017. She has further

assisted WPC Bulou in recording the statement of the complainant. The complainant was in a state of shock and most of the time she was crying. WDC Barbara had to calm her down during the recording of the statement.'

[Page 49-50 Copy Record]

Ground 1

[9] As regards ground 1 of the appellant's submission, Judge Alone reviewed the relevant case law and concluded that the judge's direction conforms to the principles of law on Alibi Directions set out in **Ram v State** [2015] FJCA 131 (AAU0087/2010) and later in **Mateni v State** [2020] FJCA 5 (AAU061/2014), which states:

> *'[29] When an accused relies on **alibi** as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the **alibi** and that even if they conclude that the **alibi** was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [1996] 1 Cr App R 39;'*

[10] The trial judge's comment at paragraph 64 of the summing-up may have left the assessors with the impression that the appellant was guilty.

> *'64. If you conclude that the alibi of the accused is true or may be true, then the accused cannot participate in this alleged crime and you must find the accused not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the accused's alibi is false, that is a finding of fact which you are entitled to take into account when judging whether he is guilty. But do not jump to the conclusion that because the alibi put forward is false the accused must be guilty. You should bear in mind that sometimes an alibi is invented because the accused thinks it is easier than telling the truth. The main question for you to answer is: are we sure that this alleged incident involving the accused actually took place as claimed by the prosecution.'*

[11] The Judge Alone assessed this sentence further in context of the trial judge's summing up, it is clear that the trial judge was trying to emphasize to the assessors that simply because they thought the *alibi* to be false, they should not find the appellant guilty as shown by the

preceding sentence. He stressed that, the paragraph in question should not be taken in isolation and made a ground of appeal though the trial judge could well have conveyed the idea differently. The rest of the judge's direction on *alibi* is as follows:

> *65. In respect of the defence of alibi, the accused is not required to prove beyond reasonable doubt his alibi defences. The burden of the accused to prove his alibi is evidential burden. It means that the accused has to adduce or point to evidence that suggests a reasonable possibility that he was at somewhere else when this alleged offence took place. Such evidence that could point or suggest that the accused was somewhere else, and not at the scene of the crime, has to be credible and reliable evidence.*
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> *66. Accordingly, if you believe or may be believe that there is evidence that suggest a reasonable possibility that the accused was not present at the scene of crime and he was attending at the family devotion at home, you can find the accused not guilty.*
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> *67. You have to take into consideration the evidence of the wife and daughter of the accused. As I mentioned before, the wife gave evidence about the event pertaining to the devotion in the evening of 3rd of July 2017. However, the daughter gave evidence about the event pertaining to the devotion in the evening of 4th of July 2017. You are allowed to taken into consideration the probability or possibility of evidence given by the wife and the daughter and how those evidence become relevant to the issue of alibi.*
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> *68. Moreover, you are allowed to take into consideration the time of this alleged incident took place. The wife only saw the accused after 7.30 pm of the 3rd of July 2017. According to the mother of the complainant, the complainant left to the shop at around 6.45 p.m. Half an hour later, one of the brothers in law of Kinisimere went in his car to look for the complainant. The house of the accused is located five to ten minutes' drive from Field 40.*

[12] We have no doubt that the trial judge's directions as a whole conforms to the principles of law on *alibi* directions set out in **Ram v State** [supra]) and later in **Mateni** (supra).

[13] In addition to the above, the Judge Alone noted that appellant's counsel should have not sought redirections in respect of this complaint at the trial after the summing up by the trial judge. The Supreme Court had stated as follows in **Varasiko Tuwai v State** [2016] FJSC 35:

"[28] Before I go any further I must say that the trial Judge had asked the parties if they needed any re-directions in the matter. The parties did not seek any re-directions on the grounds they alleged that the directions were inadequate. Was this done for a deliberate reason to find a ground of appeal? If that is so, the appellate courts approach must be stringent.

Litigants must not wait for trial judges to make mistakes to find a point of appeal The transparent nature of litigation requires that the trial judge be given an opportunity to correct any errors made. If the trial judge has asked the parties to seek re-directions and they do not and subsequently raise the issue in the appellate Court then in the absence of any cogent reason, it should be held against that party as having employed a deliberate tactic to find an appeal point."

[14] We reviewed the relevant submission by the appellant which asserts that alibi direction is defective. We are satisfied that paragraph 64 taken together with paragraphs 65-68 of the summing-up, clearly mitigated the appellant's claim that the summing-up [particularly paragraph 64] was suggesting to the assessors that the appellant was guilty if they do not accept the alibi evidence. In reviewing the Court Record of how the alibi evidence was handled during the trial, the relevant passages are set out in pages 219 to 238 of the court record, it was open to the assessors not to accept the evidence of alibi provided by the Ema Natadra, wife [DW1] and daughter Miliana Natadra [DW2] of the appellant.

[15] In **Munendra v State** [2023] FJCA 65 (AAU No: 0023/2018), the Court of Appeal reviewed the relevant principles applicable on alibi evidence in Fiji and gave practical guidance on how the prosecution challenge the credibility of the alibi evidence

"17] One way in which a prosecutor can try to refute an alibi defense is by showing that the accused never gave notice of alibi at all or there was no reasonable explanation for the "belated alibi notice. On a trial before any court the accused shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused has given notice in accordance with section 125 of the Criminal Procedure Act, 2009. The mere fact that the necessary information has not been given within the stipulated time does not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for alibi evidence to be called. However, non-compliance of the statutory period for alibi notice stipulated in section 125

of the Criminal Procedure Act, 2009 is a matter that goes to the weight of an alibi [vide ***Nute v State*** *[2014] FJSC 10; CAV0004.2014 (19 August 2014)]. Requiring the accused to file notice of alibi in advance is to give the prosecution time before trial to take steps, if it so wishes, and to check the veracity of alibi notice. If true, it may result in the prosecution not putting the accused to trial at all. If not, the prosecution has time to get ready to disprove the alibi.*

[18] The prosecution also can refute an alibi defense by questioning the accused's alibi witnesses and challenging their credibility. It can also lead evidence in rebuttal either before or at the discretion of the court after the defence evidence. The latter is a quasi-exception to the general rule that all the prosecution evidence must be adduced before it closes its case unless something arises totally ex improviso in the defence case which could not reasonably have been foreseen

[19] Further, if the prosecution establishes beyond reasonable doubt that the accused was present at the crime scene by its own evidence, then alibi evidence has obviously failed to create a reasonable doubt in the prosecution case and the alibi would not succeed.

[20] However, in proving beyond reasonable doubt that the accused was at the crime scene, the prosecution must remove or eliminate a reasonable possibility of him being somewhere else according to the alibi evidence. This could be considered the intermediary position with regard to an alibi the result of which is that if the fact finders neither reject nor accept the alibi but alibi evidence still make them regard it to be reasonably true, then the accused will have to be acquitted."

[16] We are satisfied that at the trial, the assessor having heard firsthand the evidence of alibi adduce on behalf of the appellant, must have found it to be unreliable. It was open to assessors to reach that conclusion. We have no basis to disagree. We therefore conclude that this ground of appeal has no merit and is dismissed.

Ground 2

[17] The second ground of appeal concerns the alleged failure of the trial judge to direct the assessors to consider recent complaint evidence only with regard to the charge of abduction of a young person as the complainant's complaint to her mother had revealed only that. The learned Judge Alone carefully reviewed the relevant portions of the mother's evidence that was summarized in the summing-up as:

> *39. You have heard the evidence of the mother of the complainant, in this case it is Kinisimere. According to Kinisimere, she had told her children at around 6.45 p.m. in the evening of 3rd of July 2017, that someone has to go to the shop to buy bread. The complainant had then insisted that she would go to shop and buy bread. Her husband was not at home at that time. The complainant is her eldest daughter. About half an hour after the complainant left home to the shop, one of Kinisimere's brothers-in-law had gone to the shop in a car to look for the complainant. He came home, saying that he could not find the complaint. Then her husband came home from work. When her husband was about to go and look for the complainant, Kinisimere saw the complainant was coming home with a plastic bag containing bread. She came to her mother crying and hug her. The complainant had told that she was feeling like to vomit. She then said that one old man kidnapped her. Kinisimere was afraid to listen or ask the complainant more details about this incident. They then left to the police station.'*
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> *74. You have heard that the complainant had told her mother about this incident when she reached home after encountering this incident in the evening of 3rd of July 2017. The mother of the complainant, in this case is Kinisimere, gave evidence explaining how the complainant related this incident to her and the subsequence steps that she took in this regards. This form of evidence given by the mother of the complainant is known as evidence of recent complaint. It is not evidence as to what actually happened between the complainant and the accused. The mother of the complainant was not present and witnessed what happened between the complainant and the accused.*
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> *75. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. The evidence of recent complaint assists you to determine the consistency of the*

complainant's evidence and also to assess the reliability and credibility of her evidence. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the complainant and the accused."

[18] In **Raj v State** [2014] FJSC 12; the Supreme Court set down the law regarding recent complaint evidence as follows.

*'[33] In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App. 12 of 1989; **Jones v. The Queen** [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*

*[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: **Kory White v. The Queen** [1999] 1 AC 210 at p215H. This was done here.*

[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.'

[19] After reviewing the court records and submissions made we agree that paragraph [39] of **Raj v State** (supra) expounds a proposition which is wide enough to encompass the complainant's recent complaint on abduction to her mother upon the overall consistency and credibility of her testimony on the other two charges of rape and sexual assault as well,

for her evidence on those acts are inextricably interwoven with that of the initial act of abduction and sexual assault and rape had immediately followed. It is clear that the abduction was only for the purpose of committing subsequent sexual acts on the complainant. Abduction not only facilitated the other two acts but they would also have not happened without the initial act of abduction. The complainant's evidence on all three acts speaks of one unbroken chain of events in the same transaction and it was not necessary for the acts alleged in the three acts to her mother to be covered in her complaint. It would be most artificial to restrict her complaint of abduction as constituting recent complaint evidence only regarding the abduction. In any event, the mother could not bear to hear the rest of her story upon hearing the abduction which may have prevented the complainant from narrating the rest of the story to the mother.

[20] We also noted that counsel for the appellant did not ask for redirections in respect of this alleged omission as well, as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; (AAU0030 of 2014) and **Alfaaz v State** [2018] FJSC 17 (CAV 0009 of 2018), if he thought it to be a material omission.

[21] This ground of appeal has no merit and is dismissed.

New Grounds Filed on 8 August 2023

[22] The three new grounds against conviction filed by the appellant on 8 August 2023 are new. They were not submitted before the judge alone at the Leave to Appeal stage and consequently it cannot classified as a renewed application under section 35(3) of the Court of Appeal Act. To engage the latter provision, a ruling of the judge alone on the grounds submitted is first made and refused, it may then be renewed to the full court.

[23] The summary of the new grounds submitted are as follows:

(i) Failure of the trial judge to warn assessors about the danger of ASP Maciu's evidence is arranging the identification evidence

(ii) Failure of the trial judge to fairly direct the assessors with regard to the medical report and the non-availability of medical officer who undertook the examination of the complainant to be examined

(iii) Inadequate direction made on the Turnbull Guidelines

[24] As was stated the Supreme Court recently in **Abdul Rashid v State** [2023] FJSC 17 (CAV 0010/2020) as follows:

> *[7] As regards the other two grounds, they are contextually new in nature and clearly fashioned in a way that carries no affinity to the ground for which leave had been granted by the single judge. Counsel for the appellant also conceded that fact in his submissions. The full court rejected the 2 new grounds of appeal proposed because there is no statutory provision in the Court of Appeal Act and Regulations [Cap 12] that would allow the Court to receive the new grounds without following proper procedures.*
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> *[8] Unlike the High Court, the Court of Appeal does not have inherent powers to assist in this situation. When new grounds are submitted for the first time at this stage without the clearance of the hearing before the judge alone, the Court of Appeal is constrained from dealing with them because of restrictions imposed by the law.*

[25] The Court was unable to address the three new grounds in Paragraph 22. They are not properly before the court and will be not be considered.

Andrews, JA

[26] I have read and agree with the judgment of his Honour Justice Mataitoga.

Clark, JA

[27] I concur in the judgment of Mataitoga RJA and the orders made.

ORDER

1. *Leave to appeal against conviction is refused.*
2. *Conviction and sentence passed in the High Court is confirmed.*

Hon. Mr. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL