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

CRIMINAL APPEAL NO. AAU0015 OF 2019
[Lautoka Criminal Action No: HAC 182/16]

BETWEEN : **SILAS SANJEEV MANI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**
Qetaki, JA
Andrews, JA

Counsel : **Appellant in Person**
Ms R Uce for the Respondent

Date of Hearing : **6 February 2024**

Date of Judgment : **28 February 2024**

JUDGMENT

Mataitoga, RJA

[1] I concur with the reasons and conclusions.

Qetaki, JA

Background

[2] The appellant had been charged in the High Court of Lautoka for having committed an offence of rape contrary to section 207(1) and (2)(a) and (3) of the Crimes Decree No.44 of 2009 by inserting his penis into the vagina of the victim who was 9 years old at the time the offence was committed.

[3] The particulars of the offence stated that the Silas Sanjeev Mani between the 30th day of April, 2016 to 11th day of July, 2016 at Sigatoka in the Western Division, inserted his penis into the vagina of KR, a 9 year old girl.

[4] After the trial, the assessors expressed a unanimous opinion of guilt on the count of rape on 15 October 2018. The learned trial judge in the judgment dated 17 October 2018 had agreed with the assessors, convicted the appellant and sentenced him on 16 November 2018 to imprisonment of 18 years with a non-parole period of 15 years. Aggrieved by the decision, the appellant appealed against his conviction.

[5] The following documents were filed:

(a) The appellant in person signed an application for enlargement of time on 21 January 2019. A delay of approximately one and half months.

(b) The appellant's additional grounds of appeal and an application for bail pending appeal had been received on 15 January 2020.

(c) Legal Aid Commission had filed an application for enlargement of time, amended grounds of appeal against conviction and written submissions. Although in the written submissions filed on behalf of the appellant, the Legal Aid Commission had sought enlargement of time and leave to appeal against conviction and sentence, no grounds of appeal submissions have been filed against sentence.

(d) The respondent had filed its written submissions on 19 May 2020 dealing with the application for enlargement of time against conviction.

(e) Renewal Notice of Appeal and Renewal Grounds against Conviction file on 15 July 2020.

(f) Further grounds of appeal filed on 15 July 2020.

(g) Further grounds of appeal filed on 1 December 2023.

(h) Additional grounds of conviction & Belated grounds filed on 30 January 2024.

Renewal Notice of Appeal and Renewed Grounds Against Conviction (Filed on 15 July 2020)

[6] A Renewal Notice of Appeal and Renewed Grounds against Conviction was filed on 15 July 2020 after the learned single judge refused the appellant's application for leave for enlargement of time against conviction on26 June 2020. The grounds are:

> **Ground 1:** *That the learned trial judge erred in law and fact when he failed to fully and properly consider the issue of delayed reporting of the complaint thus questioning the credibility of the victim and the veracity of her complaint.*
>
> **Ground 2:** *That the learned judge erred in law and in fact when he failed to fully consider that there was a reasonable doubt in the State's case with the victim's admission that a boy from school had inserted his finger where she used to urinate from.*
>
> **Ground 3:** *That the learned trial judge erred in law and in fact when he failed to fully and properly consider the issue of delayed reporting and the apparent weaknesses in this evidence in light of the victim's aunt Noelene not being called to confirm that such a complaint was made to her.*

Additional and Further Grounds of Appeal Filed After 15 July 2020

[7] Since the filing of the renewal notice of appeal and renewal grounds of conviction the appellant had filed further grounds of appeal on a continuing basis, as follows:

(a) On 12 February 2021(received), filed on 26 February 2021 alleging that proper direction be given with respect a juvenile giving evidence and taking Oath - pages78 and 79 of record.

(b) On 26 November 2021, notice of additional ground (pages 69 to 71 of records) as follows: "*The learned trial judge erred in law when he failed to direct himself and the assessors on the evidence of the complainant who was a juvenile and as such proper direction ought to have been given regarding*

taking of oath thus, failure to do so caused a substantial miscarriage of justice."

(c) On 25 November 2021, Additional grounds of appeal(pages 63 to 68 of record) against conviction: "*Ground One-That the learned trial judge erred in law and in fact in the exercise of his discretion in allowing the State to lead evidence of the appellant's mother, Sundar Kaur and the appellants wife Gita Devi -are in prison for the murder of the appellants half-sister, the admittance of such highly prejudicial was fatal to the appellants case and the failure to 'warn' the assessors to disregard or give any weight to the evidence constitute a substantial miscarriage of justice. Ground Three-The learned trial judge erred in law and in fact when he failed to warn the assessors that since the complainant is the only witness giving direct evidence to the commission of the crime, that the complainants evidence must be scutinised with great care before a guilty verdict is brought in, in line with the principles found in R v Murray 11 NSW LR.12."*

(d) On 7 January 2022, Supplementary grounds against conviction (pages 55 to 62) of record). This document sets out the proposed supplementary grounds of appeal on the issues of Conviction, Recent complaint, Directions, Sworn evidence/Competency test and Circumstantial evidence.

(e) On 15 December 2022, additional grounds against conviction (pages 36 to 39) proposing three additional grounds of appeal: *Ground One – "That the learned trial judge erred in law and in fact when he failed to fully consider that there was police report and medical done before the matter was reported by the victim and her father according to the summing up at paragraph 47; Ground 2 - The flagrant incompetence of the appellants counsel for not submitting the medical and police reports has caused serious miscarriage of justice; Ground 3 - The trial judge had overlooked the formal defect in the information and failed in law to make an amendment (ie) the case of technical team bolstering the prosecution case before the prosecution had proved the prima facie and the elements of the offence charged; Ground 4 - The learned trial judge had erred in law when he did not direct himself and/or the assessors, to what extent had the penetration occurred when the medical report was never produced in court to ascertain the second element and whether such omissions raises doubt in the State case."*

(f) On 1 December 2023 an affidavit was filed where the appellant states that the grounds were not raised before the single judge of appeal: The further grounds of appeal is a "*Documentary Evidence*" on the face of the record such as: (a) the Statement of the complainant;(b) The Statements of the complainant's father and mother; (c) the confirmation of medical report of the complainant; (d) Ruling of child custody and Affidavit of Rohan Singh, Sanjay Rakish Singh, Sonam Chand and Rosleyn Nisha. The appellant states that the further ground is proof that the *'appellant was fabricated by the complainant':*

Ground: Previous inconsistent statement of the complainant and the other prosecution witness gave up two different versions which is contradicting to each other.

(g) On 30 January 2024 Additional Grounds of Appeal Against Conviction & Leave For Belated Ground - Grounds:

"1. That the learned trial judge erred in law and in fact in the exercise of his discretion, in allowing the state to lead evidence of the appellants mother Sandaur Kaur and the appellants wife Gita Devi- are in prison for the murder of the appellants half-sister: the admission of such highly prejudicial was fatal to the appellants case and the failure to 'warn' the assessors to disregard or give any weight to the evidence constitute a substantial miscarriage of justice.

2. That the learned trial judge erred in law and in fact in failing to direct the assessors at all the proper basis of PW2 Avinesh Reddy's evidence and the courses for them in evaluating his evidence. Without proper legal directions, there's a high likelihood the assessors may have used PW2s evidence as corroborating the complainant's evidence. Such failure constitute a serious miscarriage of justice.

3. That the learned trial judge erred in law and in fact when he failed to warn the assessors that since the complainant is the only witness giving direct evidence of the commission of the crime, that the complainants evidence must be scrutinized with great care before a guilty verdict is brought in, in line with the principles found in R v Murray (1987) 11 NSWLR 12."

[8] These grounds will be considered in accordance with the legal principles applicable to their acceptance and admission of additional grounds of appeal, but after the renewed application for enlargement of time is considered formally. There have been no responses filed and received (and placed in the record) from the respondent on the additional grounds of appeal filed over time by the appellant.

Fresh Evidence Applications

[9] The appellant had filed applications to adduce fresh evidence, as follows:

(i) On 26 November 2021 (at pages 72 to 77) - Requesting the Court for the production of the Sigatoka Police Station Diary, Victims Statement given at Sigatoka Police Station, and Medical Report from Sigatoka Hospital.

(ii) On 11 August 2022 (at pages 53 and 54) - An affidavit in support of the application to produce fresh evidence.

(iii) On 11 August 2022 (at pages 49 and 50) - Notice of Motion to produce fresh evidence: Station Diary Sigatoka Police Station, Victims' Police Statement at Sigatoka Police Station, Medical report of Victim at sigatoka Hospital, Child custody documents, Nadi Family Court Registry.

(iv) On 11 April 2023, Notice of Motion to Adduce Fresh Evidence (pages) 1 to 31) - a blanket set of affidavits and submissions on previous requests made in (i) to (iii) above.

[10] The Motions and Applications to Adduce Fresh Evidence are best resolved with the input of the State. There was no such input. Whether the application is to be considered will be determined after consideration of the appeal grounds, and only if, enlargement of time is allowed.

The Facts

[11] The brief facts on which the prosecutions' case was based are stated in paragraphs 5 to 9 of the learned High Court judge's sentencing order, which are reproduced below:

> *"5. The accused is the brother of the victim. She was living with her mother and siblings in Kulukulu. They are from a broken family and shared the same father. Victim's mother went to prison after being convicted of murdering her own daughter. The deceased in the murder case is victim's elder sister. Accused's wife (victim's sister in law) also went to prison with the victim's mother in the same murder case. The victim went through all the agonies and bitter experiences of her household.*
>
> *6. After her mother and sister in law went to prison, the victim had to be relocated in several places. Firstly, she was taken by Suman, one of her aunties. Suman could not keep the victim for long as she had a dispute with her husband and had to leave her own house. The victim had to be relocated again. Finally the victim was taken care of by the accused.*

7. *When the incident occurred, the victim was living with the accused and his two children in a two bedroom house owned by another aunty, Jocelyn. The victim shared a double bunk bed with the accused and his children. The victim slept on the top bunk and the accused and his children slept on the bottom bunk.*

8. *On the day of the incident, the accused woke the victim up and told her to come down to the bottom bunk. Accused smelled of liquor and was drunk at that time. The victim refused to come down. She was then slapped and forced to come down. She finally complied and came down to the bottom bunk. Accused then carried his both children up and put them on the top bunk. Accused then came to the bottom bunk. He lifted victim's dress, took off her panty and inserted his penis into her vagina. It was a painful experience for her. She screamed. She was slapped and told to keep quiet. She started crying. When the accused heard somebody knocking the door he stopped and went away.*

9. *The victim complained to her aunty Roselyn on the following day. When Roselyn noted blood in victim's vagina, she slapped the victim and gave her a pad and was told to go to school."*

Appeal in Criminal Cases

[12] Section 21(1) of the Court of Appeal Act *("the Act")* states:

''21(1). A person convicted on a trial held before the High Court may appeal under this part to the Court of Appeal-

(a) against conviction on any ground of appeal which involves a question of law alone;
(b) with leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case of appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be sufficient ground of appeal; and
(c) with leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

[13] Section 23 of the Act states:

"23(1) The Court of Appeal-
(a) On any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is

unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

(b) *……*
Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.

(2) Subject to the provisions of this Act, the Court of Appeal shall
(a) if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interest of justice so require, order a new trail; and
(b) if they allow an appeal against acquittal……."

[14] The evidence as seen by the learned trial judge are set out in paragraphs 5 to10 of the judgment and these are reproduced below. The learned judge stated:

"5. Prosecution called two witnesses, the victim KR and her father Avinesh. Prosecution case is substantially based on the evidence of the victim. The victim gave evidence under oath. She is 11 years old at the time of giving evidence. The court was satisfied that she understood the nature of oath and her obligation to tell the truth.

6. Victim's mother had gone to prison murdering her daughter. After her mother had gone to prison, the victim was taken by her aunty Suman. Suman could not keep the victim for a longer period of time because of the dispute she had with her husband. Suman had asked the accused to take the victim with him to Roselyn's place.

7. The victim said that she informed aunty Roselyn the next morning of what had happened. However, Roselyn denied having received such complaint but admitted seeing blood in victim's vagina. Roselyn also admitted giving a pad to the victim when she received the complaint of bleeding.

8. Roselyn was called by the Defence. She appeared to give evidence to save the accused. However she admitted receiving a complaint and therefore, there is no dispute that the victim was bleeding from her vagina when Roselyn received a complaint. Roselyn advanced several propositions to

show that the blood noted in victim's vagina had nothing to do with this rape allegation.

9. Roselyn said that she thought the victim was having menses. She also said that the victim had informed her that something had hit her while playing at school. She also tried to attribute injuries to scratching by a comb and self-fingering.

10. The victim denied all those propositions. She however admitted having told Roselyn and the Head Teacher that a boy from her school used his finger where she used to urinate from. The victim explained why she had to tell such a story. She said that she had to tell this story because the accused taught her to do so. The victim's evidence that no boy from her school was brought before the Head Teacher regarding such an allegation further confirmed that this story was planted by the accused."

Enlargement of Time

[15] The guiding principles for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **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**.**

[16] In **Kumar** the Supreme Court held:

"[4] Appellate courts examine five factors by way of a principled approach to such applications. These factors are:

(i) The reason for failure to file within time.
(ii) The length of the delay.
(iii) Whether there is a ground of merit justifying the appellate courts 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?"

[17] In **Rasaku**, the Supreme Court further held –

"These factors may not necessarily be exhaustive, but they are certainly convenient yardsticks to assess the merit of the application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always

endeavoring to avoid or redress any grave injustice that might result from the strict application of the rule of court."

[18] The test now is distilled from the third and fourth factors in **Kumar's** formulation that is real prospect for successes**.** In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said-

*"[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a ''real prospect of success" (see **R v Miller [2002]** QCA 56 (1 March 2002) on any of the grounds of appeal…."*

[19] The appellant submits that the delay is not overwhelming and is excusable for the reasons stated in his affidavit, and there is merit in his appeal. He prays that time be enlarged for his appeal to be considered by this Court on its merits.

Appeal Grounds

Appellant's Case (Filed on 15 July 2020)

[20] **Ground 1-**The appellant is challenging the learned trial judges' approach to the delayed reporting of the complaint as it affects the credibility of the victim and the veracity of her complaints. The appellant submits there had been some time lapse from the time of the said offending to when she raised complaint to Aunt Noelene.

[21] It is alleged that Roselyn confirmed that the victim had complained to her in the morning. She noticed blood. The victim has made this complaint together with another complaint of a stone or something hitting her while she was playing in school. As such, what exactly was complained of remained in doubt - See paragraph 40 of summing up which states simply: *"KR said that she informed aunty Roselyn the next morning of what had happened…."* The appellant contends that the Court failed to fully consider the discrepancies in the above evidence and that the same raises questions as to the credibility of the victim and the veracity of her complaint.

[22] In **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), on this point of delay, stated:

> *"[24] The mere lapse of time occurring after the injury and the time of complaint is not the test of 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 of the delay."* (Citing **Tuyford** 186, N.W. 2nd at 548).
>
> ...
>
> *"[27] The delay in lodging a complaint more often than not results in embellishment and exaggeration which is creature of an afterthought. That a delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story. As a result of deliberations and consultations, also creeps in issues casting a serious doubt in the veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained. Resultantly, when the substratum of the evidence given by the complainant is found to be unreliable, the prosecution's case has to be rejected in its entirety."* (Underlining added) Citing **Sahib Singh v State of Haryana,** AIR 1977 SC 3247; **Shiv Rama Anr v State of UP AIR;** 1998 SC 49; **Munshi Prasad & Others v State of Bihar,** AIR 2001 SC 3031).

[23] It was also submitted that the approach taken by the court in the case of **Kumar v State** [2018] FJCA 65; AAU0126.2013 (1 June 2018) is relevant:

> *"[8] The ground of appeal which was allowed by a single judge of appeal was regarding the manner in which the learned trial judge had dealt with recent complaint. In allowing the ground of appeal, the learned single judge of appeal had stated in his ruling that:*
>
> *[11] In sexual cases, evidence of recent complaint is admissible as an exception to the rule against previous consistent statement only as evidence of the consistency of the complainant's conduct. In R v Islam [1998] 1 Cr.App.R2 and R v NK [1999] Crom.LR 980 the English Court of Appeal stated the need to direct the jury on the evidential significance of a complaint in a sexual case. In the present case, the learned trial judge gave no direction on the significance of the recent complaint evidence. Whether the lack of direction on the significance of the recent complaint caused injustice to the appellant is a matter for the Full*

Court to consider. As far as this application is concerned, the issue is arguable."

The appellant submits this ground has merit.

[24] **Respondents Reply to Ground 1**

This relates to late reporting of the complaint to the police. In summing up (paragraphs 16 and 17) the learned trial judge directed the assessors as follows:

"16. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.

17. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report an incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion relating to sex, with elders. It takes a while for self-confidence to re-assert itself. There is, in other words, no classic or typical response by victims of Rape. It is a matter for you to determine whether, in this case, complaint victim made to police is genuine and what weight you attach to complaint she eventually made."

[25] On paragraph 40 of the summing up, the appellant alleges that the substance of the complain remained in doubt as to what exactly was complained. The respondent suggests that the preceding paragraph of the summing up (paragraph 39), clarifies any doubt on the substance of the complaint. Paragraphs 39 and 40 of the summing up are as follows:

"39. KR said she was wearing a long dress. Silas then lifted her dress, took off her panty and tights and inserted his 'urinating thing' into her 'urinating thing'. She said that it was painful. She said she screamed. Then she was slapped and told to keep quiet. She started crying. Silas stopped it when

somebody was knocking the door. She went to the top bunk and went to sleep, letting the nephew and nieces come down to the bottom bed.

40. KR said she informed Aunty Roselyn the next morning of what happened. Aunty Roselyn slapped her and gave her a pad when she said the place, she used to urinate from was bleeding. Roselyn told her to put the pad on and go to school. Roslyn told her that she knew what was going on."

(Underlining added)

[26] In view of paragraph 39, there is no doubt as to what exactly was complained by the victim. Roselyn confirmed that the victim complained to her in the morning and that she noticed blood. However, Roselyn claimed that the victim had made this complaint together with the complaint of a stone or something hitting her while she was playing at school. There is no discrepancy in the victim's evidence during her cross-examination. The learned trial judge had accepted the victim's evidence. In the judgment the learned trial judge said:

"8. Roselyn was called by the Defence. She appeared to give evidence to save the accused. However, she admitted receiving a complaint and therefore there is no dispute that the victim was bleeding from her vagina when Roselyn received a complaint's advanced several propositions to show that the blood noted in the victim's vagina had nothing to do with the rape allegation.

9. Roselyn said she thought the victim was having menses. She also said that the victim had informed her that something had hit her while playing at school. She also tried to attribute injuries to scratching by a comb and self-fingering."

[27] **Ground 2 -** The appellant alleges that there the learned judge failed to fully consider that there was a reasonable doubt in the State's case, arising from the fact that the victim had admitted that a boy from school had inserted a finger where she used to urinate from .The victim also stated in evidence that the appellant taught her to say so. It is also her evidence that her aunty Roselyn and Silas had gone to school to meet the Head Master, which evidently questions the truthfulness of the victim's account which the learned trial judge did not fully consider.

Respondent's Reply to Ground 2

[28] The respondent says that the victims admission that a boy from school had inserted a finger where she used to urinate from, does not affect the truthfulness of the victims account. In paragraph 44 of summing up, the trial judge said:

> *"44. She denied telling aunt Roselyn that her stomach was paining. She also denied telling Aunty Roselyn that she used a comb to scratch herself. She admitted telling aunt Roselyn that a boy at school had inserted a finger where she used to urinate from because Silas had taught her to say so. When Roselyn and Silas went to meet the Head Teacher, she told that one of the boy from school had done bad stuff. But the boy was not brought in front of her by the Head Master."*

[29] The victim had said that she had been taught by the accused to say such things to her aunt Roselyn. Also, neither the accused nor her aunt Roselyn who were witnesses for the Defence mentioned anything about going to school and speaking with the Head Teacher. The learned trial judge had considered the victims evidence in its entirety and accepted her evidence.

[30] **Ground 3 - T**he appellant alleges that the learned judged erred in law and in fact in failing to consider the issue of delayed reporting and apparent weakness in this evidence in light of the victim's aunt Noelene not being called to confirm that such a complaint was made to her. This ground is linked to ground (1) above. Paragraph 42 of summing-up indicates that the victim complained to Roselyn, and the complaint was brought to police attention. Paragraph 42 of the summing up states:

> *''When she was taken to her dad's place in Malolo in July 2016 she told aunty Noelene of what happened to her. Noelene took her to the Nadi Police Station and then for a medical.*

The appellant submits that due to the delay in reporting made to the Police, and in light of there being no evidence lead to fully explain the complaint made by the victim, it creates a doubt in the State's case.

[31] Noelene was not called as a witness by the State. The appellant submits that due to unavailability of evidence from her, there was no conclusiveness as to the contents of the

complaint made, nor could there be any verification of the evidence as to the delayed reporting. It is submitted that the State lacks evidence to substantiate the delayed reporting. That raised reasonable doubt in the State's case. That the ground is arguable and has merit.

Respondent's Reply to Ground 3

[32] This ground relates to the issue of delayed reporting and the concern that the victim's aunt Noelene was not called as a witness by the prosecution. In paragraph 40 of summing up it is confirmed that Noelene reported the matter to the Police and took the victim for a medical examination. The fact the Noelene was not called as a witness for the prosecution, does not of itself create a doubt in the State'case.The prosecution had called the victim's father, Avinesh, to show how the incidents came to light and reported to the police as it should be. In the judgment, it is stated:

> *"12. ... Victim's father Avinesh said that he received information that something bad was happening to the victim at Roselyn's place. He had taken custody of the victim and asked his wife Noelene to make inquiries. The victim had relayed the incident to Noelene and later given a statement to police. This is how the sexual abuse came to light. There are no material contradictions between victim's previous statement and her evidence in court. I am satisfied that the complaint victim eventually made to police is genuine."*

Analysis

[33] With respect to **Grounds 1 and 3,** the evidence reveals that the victim had in fact promptly complained about the appellant's criminal conduct on the morning after it occurred. The victim had reported the matter to Roselyn. However, Roselyn had treated the complaint with disdain. The Summing up at paragraphs 40 and 41 stated:

> *"40. KR said that she informed aunty Roselyn the next morning of what happened. Aunty Roselyn slapped her and gave her a pad when she said that the place where she urinate from was bleeding. Roselyn told her to put the pad on and go to school. Roselyn told her that she knew what was going on.*
>
> *41. She said that Silas did the same thing to her many times after she moved to Malaqereqere. She complained to aunty Roselyn only to be slapped."* (Underlining added)

[34] The victim had done the right thing and she informed Roselyn her aunty the next morning. Roseleyn had admitted at the trial that the victim had complained to her in the morning and she noticed blood. Her attitude and approach to the victim's plight may have been influenced by her own relational circumstance's *vis a vis* the perpetrator. Her evidence was summerised in paragraph 58 of the summing up as follow:

> *"68. Under cross-examination, Roselyn said that KR had complained to her in the morning and she noticed blood in the morning. She admitted that she gave a pad and asked KR to go back to school. She admitted that KR was only 8 or 9 years old when she came to her....."*

At paragraph 69 of summing up:

> *"69. There is no dispute that the victim was bleeding from her vagina when she complained to her aunty Roselyn about her injury in her vagina. Defence witnesses advanced several propositions in this regard and the defence wants you to believe that the blood noted in the victim's vagina had nothing to do with this rape allegation.*
>
> *70. Roselyn said that she thought that the victim was having menses. She also said that the victim had informed her that something had hit her while playing at school. She also attributed injuries scratching by a comb and self-fingering."*

[35] As evident, the first real opportunity to have the incident reported to the police, was in 2016 after the victim's father Avinesh brought the victim to his home from the appellant and Roselyn's place. The trial judge dealt with the circumstances of the victim's relocation to her father's custody at paragraphs 46 and 47 of the Summing Up. How the matter got reported to the police was captured by the learned trial judge in paragraph 42 of Summing up as follows:

> *"42. When she was taken to her Dad's place in Malolo in July 2016 she told aunty Noelene of what happened to her. Noelene took her to the Nadi Police Station and then for a medical."*

[36] The learned trial judge dealt with the same issue at paragraph [12] of the judgment as follows:

> *"12. ... Victim's father Avinesh said that he received information that something bad was happening to the victim at Roselyn's place. He had taken custody of the victim and asked his wife Noelene to make inquiries. The victim had relayed the incidents to Noelene and later gave a statement to police. That is how sexual abuse came to light. There are no material contradictions between victim's*

previous statement and her evidence in court. I am satisfied that the complaint victim eventually made to police is genuine."

[37] It cannot be said, and it is quite wrong to suggest, that there had been an intentional delay in reporting the matter to the police, or that the victim was not prompt in reporting the incident. The complaint, although a belated one, was only made possible after the victim was back in the custody of her father in July 2016. The learned trial judge, had in summing up, specifically addressed the issue of delay in the following paragraphs:

"16. You can consider whether there is a delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.

17. Bear in mind, a late complaint does not necessarily signify a false complaint, anymore than an immediate complaint necessarily demonstrates a true complaint. Victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response by victims of rape. It is a matter for you to determine whether, in this case, complaint victim made to police is genuine and what weight you attach to the complaint she eventually made."

[38] At paragraph 68 of the summing up, it is stated:

"You will find that there is a delay in reporting the matter to police. You heard what the Prosecution witnesses had to tell about the delay. The victim said that she was slapped and told to keep quiet. She further said that when she reported the matter to Roselyn she was slapped. In light of the directions I have given in the Summing Up, you consider whether the complaint the victim eventually made to the police is genuine."

[39] The learned trial judge also turned his mind to the delay in the judgment:

"12. There is a delay in reporting the matter to police. However there are reasonable explanations for the delay. The victim was in a vulnerable situation

at Roselyn's house. Roselyn had slapped the victim when the incidents were reported to her. Accused had also slapped the victim and told her to keep quiet."

[40] The suggestion for consideration of whether there are reasonable explanations for the delay (see victim's and father Avinesh's evidence) is supported by an observation in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018), a decision of this court:

*"24. In law the test to be applied on the issue of delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford**186, N.W.2nd at 548 it was decided that:-*

> *"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."*

[41] The complaint was made at the first suitable opportunity within a reasonable time. It was only after the victim's father had taken custody of the victim, that the opportunity to report the matter to the police presented itself. Grounds 1 and 3 are dismissed. The grounds have no real prospects of success in an appeal. They have no merit.

[42] On **Ground 2** it is argued that the learned trial judge had failed to consider that there arose a reasonable doubt in the prosecution case on account of the victim's admission that a boy from school had inserted a finger where she used to urinate from. This aspect did not escape the attention of the learned trial judge. He dealt with it in the summing up at paragraphs 44 and 71. However at paragraph 10 of the judgment the learned trial judge directed himself on the matter and implicated the accused on what the he had taught her to do:

> *"10. The victim denied all those propositions. She, however admitted having told Roselyn and the Head Teacher that a boy from her school used his finger where she used to urinate from. The victim explained why she had to tell such a story. She said she had to tell this story because the accused taught her to do so. The victim's evidence that no boy from school was brought before the*

Head Teacher regarding such an allegation further confirmed that this story was planted by the accused."

There are no doubts raised in the prosecution case as alleged. The ground is dismissed. It has no real prospects of success. It has no merit.

[43] **Conclusion**

In the circumstances of this case, leave for the enlargement of time against conviction is refused. The grounds have no real prospects of success in an appeal. The appeal on the merits is dismissed. No miscarriage of justice occurred as a result. The appellants' conviction are affirmed.

Andrews, JA

[44] I agree with the judgment and orders of Qetaki, JA.

Orders of Court:

1. *Enlargement of time to appeal is refused.*
2. *Appellant's appeal against convictions dismissed.*

COURT OF APPEAL FIJI

Hon. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL