

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

**CRIMINAL APPEAL NO. AAU 061 OF 2024**  
**[Lautoka High Court: HAC 112 of 2021]**

**BETWEEN** : **ASAELI LESU** *Appellant*

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

**Coram** : Qetaki, RJA

**Counsel** : Ms. S. Daunivesi for the Appellant  
Mr. S. Seruvatu for the Respondent

**Date of Hearing** : 14 August, 2025

**Date of Ruling** : 30 September, 2025

**RULING**

**(A). Background**

[1] The Appellant had been charged with the following offences as stated in the Information filed by the Director of Public Prosecution:

**Count One**

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

Asaeli Lesu between the 1<sup>st</sup> day of June, 2019 and the 31<sup>st</sup> day of November, 2019 at Nadi, in the Western Division, had unlawful carnal knowledge of “M.N”, without her consent.

**Count Two**

**Indecent Assault:** Contrary to section 212(1) of the Crimes Act 2009.

Asaeli Lesu between the 1<sup>st</sup> day of June, 2019 and the 31<sup>st</sup> day of November 2019 at Nadi, in the Western Division, unlawfully and indecently assaulted “M.N.”

**Count Three**

**Indecent Assault:** Contrary to section 212 (1) of the Crimes Act 2009.

Asaeli Lesu between the 1<sup>st</sup> day of January, 2020 and the 31<sup>st</sup> day of June 2020, at Nadi, in the Western Division, unlawfully and indecently assaulted “M.N.”.

**Count Four**

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

Asaeli Lesu between 1<sup>st</sup> day of January, 2020 and the 31<sup>st</sup> day of June, 2020 at Nadi, in the Western Division, penetrated the vagina of “M.N”, with his tongue, without her consent.

**Count Five**

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

Asaeli Lesu between the 1<sup>st</sup> day of January, 2020 and the 31<sup>st</sup> day of June, 2020 at Nadi, in the Western Division had unlawful carnal knowledge of “M.N”, without her consent.

**Count Six**

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

Asaeli Lesu between 1<sup>st</sup> day of January, 2021 and the 31<sup>st</sup> day of March, 2021 at Nadi, in the Western Division had unlawful carnal knowledge of “M.N”, without her consent.

**Count Seven**

**Attempted Rape:** Contrary to section 208 of the Crimes Act 2009.

Asaeli Lesu on the 25<sup>th</sup> day of September, 2021 at Nadi, in the Western Division, attempted to have unlawful carnal knowledge of “M.N”, without her consent.

[2] The Appellant pleaded not guilty to all the counts. The matter proceeded to trial from 9<sup>th</sup> to 12<sup>th</sup> April 2024 at the Lautoka High Court, before Justice Sunil Sharma.

- [3] On 16<sup>th</sup> of April 2024 the Court delivered its judgment and convicted the Appellant for two Counts of Rape (Counts 1 and 6) and one Count of Indecent Assault (Count 2). The Court acquitted the Appellant for two counts of Rape (counts 4 and 5) and one Count of Indecent Assault (count 7).
- [4] On the 7<sup>th</sup> of May 2024, the Court sentenced the Appellant to an aggregate sentence of 16 years, 5 months and 15 days imprisonment with a non-parole period of 13 years.
- [5] Aggrieved by the conviction and sentence, the Appellant decided to appeal against them. There appears to be a question on whether the notice of appeal was timely. According to the Respondent, the notice for leave to appeal was untimely by 84 days, relying on the fact that a Notice of Appeal against the conviction and sentence (typed) was received by the Court Registry on 30<sup>th</sup> August 2024.
- [6] However, in file, is a hand-written Notice of Appeal dated 28<sup>th</sup> May 2024 and signed by the Appellant, which was attached to Notice of Appeal of 30<sup>th</sup> August 2024. That is within time. An Amended Notice of Appeal was filed on 08 July 2025. The Appellant had not filed an application for enlargement of time.
- [7] The Court accepts that the Appellant In- person had prepared and forwarded to the Corrections authorities a handwritten Notice and Grounds of Appeal dated 28<sup>th</sup> May 2024, which did not reach the Registry until around 30<sup>th</sup> August 2024 and was not “Filed” until around 10 September 2025, going by the Registry stamp. The application is accepted as timely, for the reason that the delay was not caused by the Appellant. Secondly, the Appellant was acting In Person.

**(B). Facts**

- [8] There were admitted facts, which are part of the evidence and were accepted by the Court as accurate, truthful and proven beyond reasonable doubt. The evidence /facts are fully set out in the Judgment under “Prosecution Case” at paragraphs 24 to 55 of the judgment

**(C). Grounds of Appeal (Amended Notice of Appeal filed on 08 July 2025)**

[9] **Against Conviction**

**Ground 1:** That the learned trial Judge erred in law and fact in convicting the Appellant when the evidence in totality does not support the conviction.

**Ground 2:** That the learned trial Judge erred by failing to properly consider the issue of delayed reporting of the complainant.

[10] **Against sentence**

**Ground 3:** That the learned sentencing Judge erred in law and in fact when it considered certain aggravating factors when it is already integrated in the tariff thus enhancing the sentence and thereby making the sentence harsh and excessive.

**(D). The Law**

[11] Section 26 of the Court of Appeal Act allows the Appellant to appeal to this Court on giving notice of his/her application for leave to appeal in such manner as may be directed by rules of Court within thirty days of the date of conviction.

[12] The test for leave to appeal against conviction and sentence is “*reasonable prospect of success*”- **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018) and in line with similar authorities on “*arguable grounds*”: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU 10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013).

[13] The principles of sentence appeal is discussed in **Kim Nam Bae v State** Criminal Appeal No. AAU0015, as follows:

*“The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles below. For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of success in appeal. The aforesaid guidelines are as follows:*

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failure to take into account some relevant consideration.*

**(E). High Court (Judgment delivered on 16 April 2024 per Sunil Sharma Judge)**

[14] The learned trial Judge delivered a lengthy judgment, containing 124 paragraphs. Paragraphs 1 to 23 deal with the Offences/Counts, Burden of Proof and Standard of Proof, Elements of the Offence, and Admitted facts. Paragraphs 24 to 55 contain and set out the Prosecution Case. The issue of Recent Complaint Evidence is discussed in paragraphs 56 to 62, and Previous Inconsistent Statement is discussed in paragraphs 63 to 72 of the judgment.

[15] The Defence Case is set out in paragraphs 73 to 77 and the Analysis are in paragraphs 78 to 93 of the judgment. The Determination, which also include discussions on Late Reporting and the Conclusion are at paragraph 94 to 124 of the judgment

**(F). Appellant's Case**

**Ground 1 (Totality of evidence does not support the conviction)**

[16] The Appellant submits that the lingering question is whether it was reasonably open for the trial Judge to be satisfied beyond a reasonable doubt of the Appellant's guilt given the evidence adduced which was relied on to convict the appellant, That the test for this Court on whether the verdict is unreasonable and not supported by the evidence was discussed in a plethora of authorities: { **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 (27 May 2021), **Koli v State** [2021] FJCA 97, AAU.116.2015 927 May2021), **Balak v State** 2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA.1212, **Libke v R** [2007] HCA 30; (2007) 230 CLR 559, **M v The Queen** [1994] HCA 63; (1994) 181 CLR 487, 493].

[17] The Appellant submits that the Court had considered the evidence of the complainant to be truthful and reliable. The Court held that the complainant was consistent and comprehensive in her evidence and was able to withstand cross examination-see

paragraph 101 of judgment. The Court had rejected the version of events put forth by the defence.

[18] The Appellant submits that from reading the judgment and the analysis of the Court in reaching its decision on this aspect, it is evident that the Court did not analyse the evidence before it. In its analysis the Court seems to be regurgitating the evidence.

[19] In **Qaqaturaga v State** [2024] FJSC 52; CAV0043.2023 the Court stated as follows:

*“As has been said before, the weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant’s guilt has been proved, are matters for the trial Judge, and any adverse view about it taken by the trial Judge can only be made a ground of appeal if the view which the trial judge took was one which could not reasonably have been taken.”*

[20] The Court has taken the view that the complainant was a credible and trustworthy witness. The Appellant submits that the Court’s view on this point was adverse because it lacked proper analysis and consideration of the evidence and as such, the result is unfair. That the “Analysis “in the judgment contains a regurgitation of the evidence rather than the analysis of it. Had a proper analysis been carried out, the Court would have found that the totality of the evidence does not support the conviction of the Appellant.

[21] The Appellant submits that the complainant had alleged that the Appellant had raped her in a drinking occasion at Wailoaloa Beach. Thereafter she alleges that the appellant had forced her to go to the shop and then thereafter he forced her to go to Masimasi by car with him, where he then allegedly raped her for the second time.

[22] The appellant submits that it would seem from the evidence that the complainant/victim was comfortable with the Appellant’s company on her own, which further bolsters the Appellant’s accounts of events that the complainant and him shared a sexual relationship, be as it may and incestuous one.

[23] The Appellant submits that taken in its totality the evidence does not support the conviction of the Appellant.

**Ground 2(Failure to properly consider the issue of delayed reporting of the complainant)**

[24] The Appellant relied on the principles enunciated in State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018) where Justice Gamalath had extensively discussed the issue of delayed reporting. His Lordship found the “*totality of circumstances test*” as the correct approach in evaluating the delay in reporting in order to determine the credibility of the evidence. Based on Gamalath J’s decision, the Appellant submits that an unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful or not depends on the facts and circumstances of the particular case. Under such circumstances, the Court needs to evaluate all the evidence presented during the hearing to determine whether the evidence given by the complainant is true. Therefore, the explanation for the delay is essentially material in assessing the credibility of the evidence presented by the complainant.

[25] The totality of circumstance test require the Court to consider: (i) whether the complaint was made at the first available opportunity? and, (ii) whether there was an explanation of the delay?

[26] The Respondent made reference to paragraph 43 of the judgment, where the learned trial judge stated that the complainant did not tell anyone about the rape incident because she was scared of the Appellant’s threat to kill her.

[27] The Appellant submits that the delay was more than 2 years, and the complainant continued to reside with the Appellant under the same roof which suggests that the complainant was not scared or intimidated by the alleged threats, had there be any. Further, it is submitted that it is noteworthy that the complainant’s family had met on more than one occasion to discuss what her uncle and her were doing or their sexual relationship, and even after that, the alleged threats did not eventuate and neither did she take any reasonable steps to raise any complaints to any authorities.

[28] The Appellant submits that, despite the first incident and leading up to the second incident at Masimasi, the complainant did not raise any alarm to the family members

at her house, who could have helped her out of the situation leading up to the alleged rape. The complainant chose not to. It is the Appellant's further submission that, the only plausible conclusion for that, is in fact that there was never a need to because she shared a sexual relationship with the Appellant, her uncle.

[29] The Appellant submits that the complainant did not complain at the first ever opportunity and there was no reasonable explanation for the delay, as such the complainant did not meet the test of circumstances as required in **State v Serelevu** (supra).

[30] The Appellant submits that the complainant did not raise any complaint at the first available opportunity and her explanation for the delay is not satisfactory, which brings her credibility into question. Further, the Appellant submits that leave should be granted to allow the Full Court with the benefit of the court records to further deliberate on the issue.

### **Ground 3 (Double-counting which makes the sentence harsh and excessive)**

[31] The Appellant discussed **Kim Nam Bae v The State** (supra), on principles of sentencing, and **Kumar v State** [2018] FJSC 30 on the differences in judicial opinion on sentencing, and the methodology adopted by appellate judges in sentencing appeals.

[32] The Appellant submits that out of the 6 aggravating features of the case (paragraph 6 of sentence) 2 are not aggravating features, namely: that Victim was vulnerable and Prevalence of the offending. These features are either subsumed into the starting point or are subsumed into the tariff. That the Court was mistaken in principle in including the 2 features as aggravating factors which may have led to the enhancement of the Appellant's sentence.

### **(G). Respondent's Case**

[33] The Respondent submits that ground 1 has no merit. The learned trial Judge conducted a thorough and balanced assessment of the evidence. He gave due weight to the credibility and reliability of the prosecution witnesses and defence witness. The complainant's evidence was consistent, detailed and corroborated by the evidence of

Mereseini Teresia, who testified as to the complainant's prior complaint of sexual abuse, as well as Semisi Qoro, who confirmed the Appellant's admissions during family meetings.

[34] The Respondent submits that the learned Judge correctly applied the principles set out in **Liberato v The Queen** and **Matasauni v State**, ensuring that the prosecution's burden of proving guilt beyond reasonable doubt was properly discharged.

[35] On ground 2, the Respondent submits that, the Appellant's argument that the learned trial Judge failed to adequately consider the delay in reporting is misconceived. There was no error in the learned trial Judge's analysis of the issue of delayed reporting. At paragraph 112 to 115 of his judgment, he expressly addressed this issue, applying the well-established *totality of circumstances test* as articulated in **State v Serelevu** (*supra*). The Appellant's defence was rightly rejected as implausible in light of the complainant's clear evidence of force, threats, and lack of voluntary consent. As such, there was no misdirection or failure to consider the evidence in its proper context.

[36] The delay was convincingly explained by the complainant's fear of the Appellant who had threatened her with violence if she reported the abuse, as well as by the familial and cultural dynamics that often deter victims of sexual violence from immediate reporting. The Respondent submits that the learned trial Judge rightly observed that delayed reporting does not, in itself, undermine credibility, particularly where the complainant was a minor at the time of the offences and the accused was a person of authority within the household. The reasoning was consistent with the principles in **R v Jovanovic**, which caution against drawing adverse inferences from delay where a plausible explanation exists.

[37] On ground 3 (sentence ground) the Respondent concedes that certain aggravating factors, such as the victim's vulnerability and the prevalence of the offending, may have been partially subsumed within the sentencing tariff, the final sentence of 16 years remains well within the permissible range and is justified.

[38] The Respondent submits that, the sentence imposed is neither harsh nor excessive when viewed against the objective seriousness of the offences. The Appellant

committed two counts of rape and one count of indecent on a vulnerable 16 years old victim, his own niece, in a gross breach of trust. The offending involved premeditation, threats with a weapon, physical force, and psychological intimidation, compounding the victim's trauma and the prolonged nature of the abuse.

[39] The respondent submits that, the 16 years sentence, with reduction for time in remand, is proportionate to the extreme culpability of the Appellant and the need for deterrence, particularly given Fiji's societal imperative to protect children from sexual violence.

[40] The State submits that the Appellant's appeal against conviction and sentence have no reasonable prospect of success and therefore, leave to appeal should be refused.

#### **(H). Analysis**

##### **Ground 1 (Totality of the evidence does not support the conviction)**

[41] The Appellant is challenging the conviction on counts one (Rape) and six (Rape), and on Indecent Assault (count two) on the ground that the learned trial judge was mistaken in law and fact in convicting the Appellant when the evidence in totality does not support the conviction.

[42] According to the Appellant, the learned judge did not in his "Analysis" analyse the evidence, or weigh and evaluate the evidence adduced at the trial. Rather, it is argued that the learned judge was simply regurgitating the evidence, without proper and thorough analysis. One cannot in the context of this judgment look only at the "Analysis" segment of the judgment but look at the judgment in its totality. If the learned Judge did not carry out any analysis of the evidence and the law, how then could he conclude that due to lack of evidence the prosecution was not able to satisfy the burden of proving beyond reasonable doubt and that the accused was not guilty and therefore acquitted of one count of indecent assault (count three), two counts of rape (counts one and six), and one count of attempted rape (count 7)?

[43] The learned trial judge had fully considered, weighed and evaluated the evidence of the prosecution and the defence, and commented on:

- (i) Burden of Proof in paragraph 3.

- (ii) Elements of the Offence of Rape in paragraphs 4 to 13.
- (iii) Elements of the Offence of Indecent Assault, in paragraphs 14 to 21.

[44] The learned trial judge discussed the evidence as follows:

- (a) Prosecution Case- paragraphs 24 to 55.
- (b) Recent Complaint evidence- paragraphs 56 to 62.
- (c) Previous Inconsistent Statement – paragraphs 63 to 72.
- (d) Defence case- paragraphs 73 to 77.
- (e) Analysis – paragraphs 78 to 93.
- (f) Determination- paragraphs 94 to 111.
- (g) Late Reporting – paragraphs 112 to 119.
- (h) Conclusion – paragraphs 120 to 124.

[45] These parts are interconnected and they all feature in the learned judge's consideration, assessment, evaluation and weighing of evidence, which leads to the determination and conclusion.

[46] In paragraph 94 - 101 of judgment the learned judge had made a determination based on the analysis of the evidence and law:

*“ 94. I would like to once again remind myself that the burden to prove accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.*

*95. The issue in this trial is whether the complainant had consented for the accused to have sexual intercourse with her and massage her breast.....*

*96. There are two different versions, one given by the prosecution and other by the defence. This court must consider all the evidence adduced to decide whether the prosecution had proven beyond reasonable doubt that the accused committed the offences alleged. It is not for this court to decide who is acceptable between the complainant and the accused.*

97. *The court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/ improbability, consistency/inconsistency, contradiction/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in court.....*

98.....

99. *The defence has also raised that the complainant did not tell the truth in court when she denied consent. In respect of the above contention, I have directed my mind to the Javonavic direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.*

100.....

101. *After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegations.”*

[47] The totality of evidence does support the conviction. This ground is not arguable.

**Ground 2 (Failure to properly consider the issue of delayed reporting)**

[48] Late Reporting is covered in paragraphs 112 to 119 of the judgment. It is alleged by the appellant that the learned trial judge was mistaken by failing to properly consider the issue of delayed reporting of the complainant. The learned trial judge, in paragraph 112 of the judgment stated:

“Furthermore, it is obvious that there is an issue of late reporting by the complainant to the police. The delay in reporting to police is nearly 2 years from the date of the allegation in 2019. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in **State v Serelevu** (2018) FJCA 163;AAU 141 of 2014 (4<sup>th</sup> October 2018) had explained this issue as follows:

“[24] In law the test to be applied on the issue of the 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. 2d 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 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.”*

“[26] However, if the delay in making a complaint can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Nadu; 1973 AIR.501; 1972 SCR (3) 622:

*“A prompt first information statement serves a purpose. Delay can lead to embellishment or afterthought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common cause of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injury sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered..”*

[49] In this case: (i) the accused was a person of authority (a matured adult) in the house and he is the maternal uncle of the complainant and both were living in the same

house. (ii) The accused had threatened the complainant that if she told anyone he will kill her-This in my judgment had instilled fear in the kind of the complainant who did not tell anyone about what the accused was doing to her until she could not take it anymore. (iii) The late reporting was beyond the control of the complainant she was afraid of the accused and as time went by when the opportunity presented itself the complainant opened up and expressed herself to her cousin sister Mereseini.

[50] The Court accepted that the complainant was a victim of circumstances which resulted in delayed complaint to the police (paragraph 116 of judgment). The Court on the other hand said that the defence witness gave a version of events which is not tenable or plausible on the totality of the evidence (paragraph 117 of judgment).

[51] The test of totality of circumstances was met in this case. This ground is not arguable.

### **Ground 3 (Double counting leading to harsh and excessive sentence)**

[52] The Appellant contends that the sentence imposed is harsh and excessive, and submits that two factors identified as aggravating factors, namely, that the Victim was vulnerable and the Prevalence of the offending are either subsumed into the starting point or are subsumed in the tariff may have led to the enhancement of the Appellant's sentence. On the contrary, one has to also look at the offences in their proper perspective, that is, the circumstances and facts of the commission of the offences. The Appellant was convicted on two counts of rape (Count 1 and 6) and one count of indecent assault (Count 2). The victim was 16 years old and is the Appellant's niece. This amounts to a gross breach of trust.

[53] The offending involved premeditation, threats with a weapon, physical force and psychological intimidation, compounding the victim's trauma and prolonged nature of the abuse. It may be argued that the sentence of 16 years under the circumstances is not harsh nor excessive, as it remains well within the permissible range. It is proportionate to the extreme culpability of the Appellant, and also meets the need for deterrence. However, **Kumar v State** [2018] FJSC 30, had cautioned that "double counting" is a trap which many judges had fallen into. Similar sentiments are expressed in other cases including **Naikelekelevesi v State** [2008] FJCA 11, especially at paragraphs 22 and 23.

[54] This ground is arguable.

**Order of Court**

1. *Application for leave to appeal against conviction is refused.*
2. *Application for leave to appeal against sentence is allowed.*



A handwritten signature in black ink, appearing to read "Alipate Qetaki", is written over a horizontal line.

**Hon. Justice Alipate Qetaki**  
RESIDENT JUSTICE OF APPEAL

**Solicitors**

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent