

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

CRIMINAL APPEAL NO. AAU 0011 OF 2024
[Suva High Court: HAC 233 of 2021]

BETWEEN : **NETANI MATASAU RACOVEA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Mataitoga P**

Counsel : **Ratidara L, for the Appellant**
Kumar R, for the Respondent

Date of Hearing : **22 January, 2025**

Date of Ruling : **4 March, 2025**

RULING

[1] The appellant [Netani Racovea] was charged with one count of rape, two counts of common assault and a count of criminal intimidation. The Complainant is his wife. The Prosecution alleges that on 30 March 2021, the appellant had carnal knowledge of the Complainant without her consent and then unlawfully assaulted her by punching her on her head, face, chest and ribs, threatened to kill her with intent to cause her alarm, and then unlawfully assaulted her by strangling her neck with his hands.

[2] The appellant pleaded not guilty to all four counts and the matter proceeded to trial. There were agreed facts admitted in evidence. The prosecution only called the complainant as witness at the trial. The appellant gave evidence at the trial.

[3] In the judgement dated 27 October 2023, the appellant was found guilty and was convicted of the four charges. On 30 October 2023, the appellant was sentenced to 7 years imprisonment 8 months with a non-parole period of 6 years imprisonment.

The Appeal

[4] The appellant being dissatisfied with the High Court Judgement filed a timely Notice of Appeal against conviction dated 27 November 2023. In support of that Notice 4 grounds of appeal against conviction was filed.

[5] The appellant was thereafter represented by the Legal Aid Commission [LAC]. In the Amended Notice of Appeal filed by LAC [Ms Ratidara. L] on 19 November 2024, there is now only 1 ground of appeal and that is:

“the trial judge erred in law and in fact in convicting the appellant, when the conviction cannot be sustained on he totality of he evidence pertaining to the credibility and reliability of he complainant’s evidence.”

Leave to Appeal – Legal Requirements

[6] The single ground of appeal involves questions of law and facts. Section 21(1)(b) of the Court of Appeal Act requires leave to appeal on grounds of appeal involving question of law and facts. The test for a timely appeal under this provision of the Court of Appeal Act is: reasonable prospect of success on appeal: **Caucou v State [2018] FJCA 171**; **Navuki v State [2018] FJCA 172** and **State v Vakarau [2018] FJCA 173**; and **Sadrugu v The State [2019] FJCA 87**.

[7] The appellant through counsel submits that the test for assessing whether on the totality of the evidence pertaining to credibility and reliability of the complainant’s

evidence the case is established beyond reasonable doubt. In perusing the judgement in this case; the following issues are not adequately (i.e. with reasons) covered:

- i) Issue of consent by the complainant
- ii) Delayed complaint
- iii) Adequacy of the trial judge's assessment of the complainant's evidence.
- iv) Relevance of the Doctor's evidence

Did the complainant consent to having sexual intercourse with the appellant?

[8] At paragraph 12 and 13 of the judgement, it states:

*“12. She woke up to the Accused with half his body on top of her, asking for sex. **She told him yes, but after she slept off the tipsiness. The Accused agreed and said he would wait.** He went out of the bedroom as she fell off to sleep again. The lights were still on in the house.*

13. She woke up again when she felt something in her vagina and someone on top of her, breathing heavily onto her face. She felt a penis in her vagina, penetrating and moving in and out very fast and in a rough motion. She felt sperm outside her vagina. The room was dark and all the lights were off. She felt she could not breathe. She pushed the person off, turned sideways and used her legs to kick him off. She was naked and knelt to turn the light on. When the light came on, she saw the Accused sitting naked on the mattress, grabbing a sheet to cover his penis. She asked him why he did that to her but he swore and told her to go to sleep and then to go wash herself.”

[9] In the analysis of this evidence of consent, which is a crucial element of the offence of Rape, the judgement at paragraph 34 states:

*“I believe her when she says the while she lay asleep, she woke up to someone lying on top of her, penetrating her vagina with his penis and she felt semen on her hand. When she turned the light on, the accused was sitting naked on the mattress, trying to cover his penis with a sheet. **I feel sure that the penetration was without her consent** as she had been asleep when it happened. **I feel sure that the accused had known she did not consent when he penetrated her in her sleep.**”*

[10] There is no discussion in the judgement by the trial judge about the complainant's evidence where she said she agreed to sex after she sleep off her tipsiness and how

that translate to “*I feel sure*” test applied in this case. This issue of consent informs the delayed complainant by the complainant and her refusal to report the appellant to the police or to the doctors. To not discuss it in why that makes logical sense suggest that the conclusion is unreasonable and not supported from the evidence in the case.

Delayed Complaint

[11] In **State v Serelevu [2018] FJCA 163 (AAU141/2014)**, the Court of Appeal set out the principle for applicable totality of circumstances in deciding reliability of the complainant evidence. At paragraph 24 to 27:

“[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 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.”

[25] This is a matter that operates between promptness and veracity. According to learned authors on the subject, the fresh complaint rule evolved from the Common Law requirement of “*Hue and Cry*” test which was based on the expectation that victims of violent crimes would cry out immediately and which required proof of the details of the victim’s prompt complaint as part of the prosecution’s evidence.

[26] However, if the delay in making 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 Naidu**; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can

lead to embellishment or after thought 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 course 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 injuries 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.”

(see: 1973 AIR 501; [1972] INSC 64; 1972 (3) SCR 622; 1972(3) (SCC) 393).

[27] In the case of **State of Andhra Pradesh v M. Madhusudhan Rao** (2008) 15 SCC 582;

*“The delay in lodging a complaint more often than not results in embellishment and exaggeration which is a 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”. (See: *Sahib Singh v State of Haryana, AIR 1977 SC 3247; Shiv Rama Anr. v State of U.P AIR 1998 SC 49; Munshi Prasad & Ors v State of Bihar, AIR 2001 SC 3031).*”*

[12] It is unclear when and to whom, was the complaint of rape made at the first available opportunity. The Dr Shackley’s evidence was relied upon by the prosecution and the trial judge but there is no clarification as what is the Doctor’s evidence for. He did not personally examine the complainant, there whatever she said as evidence that was relayed to her by the complainant is hearsay and is not admissible evidence. At best it may only be evidence of the assault and intimidation charges in counts 2 and 3.

- [13] The trial judge said the report of the incident by the complainant was not made until October 2021 – 7 months later. The delay in the report, according to the complainant was because the appellant had promised not to do it again. The delay, questions the veracity of the complainant’s evidence.

Adequacy of Trial Judge’s Reasoning

- [14] The Court of Appeal in **Matasavui v State [2016] FJCA 118**, stated the following guideline for assessing witnesses:

“[23] *Before acting upon the testimony of a witness the following questions should be posed by court. Both go to the credibility of the witness.*

- (i) Is the witness truthful?*
- (ii) Is the witness’s testimony reliable?*

[24] *A truthful witness could sometimes be unreliable or his or her version could be distorted due to the intervention of extraneous factors. Therefore both tests are important. In determining whether a witness is truthful and reliable the court would be assessing the testimonial trustworthiness of the witness. Such assessment would have to be based on an objective application of several tests of credibility, such as the tests of promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/ omissions (inter se & per se), interestedness/disinterestedness/bias, the demeanour and deportment in court, and the availability of corroboration where relevant.*

- [15] When the court’s analysis of the evidence is considered the following is evident. This has been referenced above in not discussing the issue of consent in paragraph 9 and 10 above. The following analysis from the judgement on why the trial judge believe the complainant: **State v Racovea HAC Case No: 233 of 2021:**

“32: *I accept as true the evidence of the complainant who struck me as a truthful witness*

33. *I believe her when she says that she did not report the incident until October.*

34. I believe her when she says that while she lay asleep.
35. I believe the complainant's evidence that the when accused ...
36. I believe the complainant's evidence that the accused cursed and swore at her...
38. I am sure of his guilt on all four counts..."

[16] This was a case where the only witness for the prosecution was the complainant. It is clear from the above that the trial judge believed the complainant's evidence. What is lacking is the evidential basis for believing the complainant, who had said that she agreed to have sex with the appellant after she slept off of the tipsiness. The evidence of the unidentified Fijian doctor who said that the complainant told him/her husband assaulted and raped her. The lack reference as to how the trial judges linked the evidence that relate s to them to the 4 charges against the appellant, including rape.

[17] At paragraph 21 of the judgement, reference to Dr Shackley's evidence was:

"Dr. Tracey Shackley saw the Complainant at the Lami Health Centre on 31 March 2021. She said the Complainant had presented with bruising claimed to have been caused by her husband but did not want the matter reported to the Police. Dr. Shackley said she and another female doctor had spoken with the Complainant but the Complainant was not sure whether she should report or not. She noted bruising on the patient's neck and arm but could not say how old they were. She took photographs of the Complainant's bruises in case they would be called to Court and also because she was concerned about the Complainant. She said the patient had refused a personal examination."

[18] It is critical in terms of the veracity of the complainant's evidence, that if the other female doctor that Dr Shackley's refers to in her evidence, is the unidentified Fijian Doctor, that she [Dr Shackley] did not say anything about the complainant's telling them that she was raped by her husband. At paragraph 17 of the judgement it states:

"A Fijian doctor also asked her questions about what happened but she only cried and could not say anything. She was afraid and after observing her, the doctor took pictures of her throat, face and head. She told the doctor she

was assaulted and raped by her husband. When the doctor asked if she wanted to inform the authorities, she said no, because her husband had threatened to kill her if she told the authorities.

[19] On the basis of the **Matasavui** (supra) guideline the analysis of the evidence in this case, especially as it relates to the rape charge may not supported by evidence at the trial. It is best that on this issue the court of appeal should review the trial judge's analysis of the evidence and whether the conclusion reached in reasonable.

[20] On my review of the judgement, in light of the grounds of appeal by the appellant. I am satisfied that there is reasonable prospect of success on the ground submitted.

ORDER:

1. Application for leave to appeal is granted.

 

Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL