

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

**CRIMINAL APPEAL NO. AAU 007 OF 2021**  
**[Lautoka Criminal Case No. HAC 022 of 2019]**

**BETWEEN** : **NIRBHAI CHAND** *Appellant*

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

**Coram** : **Mataitoga, P**  
**Qetaki, RJA**  
**Morgan, JA**

**Counsel** : **Mr. Fesaitu and Ms. R Raj for the Appellant**  
: **Mr. Kumar for the Respondent**

**Date of Hearing** : **4 February 2026**

**Date of Judgment** : **27 February 2026**

**JUDGMENT**

**(A). Background**

[1] The appellant had been charged and found guilty in the High Court at Lautoka with two counts of Indecently Annoying Any Person contrary to section 213(1)(a) of the Crimes Act, one count of Indecent Assault contrary to section 212(1) of the Crimes Act, one count of sexual assault contrary to section 210(1) of the Crimes Act and one count of Rape contrary to section 207 (1) and (2) (a) of the Crimes Act committed in 2014 and 2015 at Yasiyasi, Tavua in the Western Division.

- [2] At the end of the summing up, the assessors had expressed a unanimous opinion that the appellant was not guilty as charged. The learned trial Judge had disagreed with the assessors' opinion. He found the appellant guilty of the 5 counts and sentenced him on 13 January 2021 (as an aggregate sentence for the 5 counts) to a period of 10 years of imprisonment with a non-parole period of 8 years.
- [3] In addition, the trial Judge had given an Order for a Domestic Violence Restraining Order with the standard non-molestation and non-contact orders to be imposed against the appellant for the complainant's protection.
- [4] The appellant had lodged a timely appeal against conviction and sentence urging six grounds of appeal against conviction and one ground against sentence. The application for leave to appeal against conviction and sentence was refused on all grounds in a Ruling by a Single Judge (Prematilaka, RJA), delivered on 16<sup>th</sup> March 2023.
- [5] Following the said Ruling, the appellant had engaged the Legal Aid Commission (LAC) whose counsel had filed the Renewal Notice of Appeal Against Conviction on one ground only.

### **(B). Facts**

- [6] The evidence (paragraphs 28-31 of summing up) are as follows:

*“28. The complainant explained in her evidence that she got married to the eldest son of the accused in 2014. The accused is her father-in-law. She had actually eloped with her husband against the will of her parents. The complainant had then started to live with the husband at the accused's house. During July 2014, the complainant and her husband had some arguments over making a child. The husband wanted to make a child with the complainant, but she failed to get conceived. One of the evenings, while she was at the living room with the accused, he had invited her to sleep with him and have sexual intercourse with him so that she can get conceived with a child. The complainant was shocked to hear that as she considered him as her father. She did not like what he said and got up and went to her room. The mother-in-law and sister-in-law were at the other end of the porch, waiting for the other two sisters-in-law to return home from work. Her husband had gone to a friend's place while the brother-in-law was not at home. The complainant explained that she did not tell any one of this incident as she thought this would end from there and never thought that it would go this far.*

*29. One afternoon in July 2014, when she was in the kitchen, the accused came from behind and held her breasts and pressed them. She looked back*

and found that it was the accused. The complainant did not like what he did. The complainant had complained to her husband about this incident. However, he had not taken any steps against the accused.

30. During the same month of July 2014, the accused had asked the complainant to open the bathroom door, when she was having her shower therein, telling her that he wants to see her naked without clothes. She did not see the accused but recognised him with his voice. The bathroom was situated close to the bedroom of the accused. All other members of the family were in their respective rooms. Her husband was at home that day. She came out of the bathroom when the accused went back to his room. She then told the husband about this incident. Her husband had informed her mother-in-law and sister-in-law about this incident, but nothing happened.

31. Between the 1<sup>st</sup> of May 2015 and 31<sup>st</sup> of September 2015, the accused had forced sexual intercourse with the complainant. He had forcefully dragged her from her hands to the visitor's room. He had then locked the door. No one was at home except her little son, who was sleeping in their room. The accused had threatened the complainant, telling her not to tell anyone about this incident. If she does that, then her husband will leave her. He then made her lie on the bed facing upwards. The accused then lifted her dress and removed her undergarment. He then started to fondle her breast using his hands and mouth. Afterwards, the accused had inserted the vagina of the complainant with his penis. She did not like what he did and told him not to do that as he is like her father. The accused had told her that his wife is not having sexual intercourse with him, therefore, she has to have sexual intercourse with the accused. After having sexual intercourse with her, the complainant then threatened her, telling her not to tell anyone at that time. She was scared that her husband would leave her. If then, she had no one to go with her little child. The complainant had finally told her husband in 2018 after she gave birth to her second child. The second child is a daughter, and she was afraid that her daughter would face the same fate as she had when she is grown up. Her husband had finally not taken any steps, so she had discussed with her sister-in-law. After that, she had reported to the police.”

### **(C). Ground of Appeal:**

#### **[7] Ground 1**

*The Learned trial Judge erred in law and in facts in convicting the Appellant as a result of failing to provide cogent reasons when differing with the unanimous opinions of the assessors expressed by the assessors that the Appellant is not guilty for all five offences, thereby has caused a substantial miscarriage of justice.*

### **(D). Law – Renewal Application**

[8] Section 35(3) of the Court of Appeal Act states:

*“If the judge refuses an application on the part of the appellant to exercise a power under subsection (1) in the appellant’s favour, the appellant may have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.”*

[9] Section 23(1)(a) states:

*“(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 a wrong decision of any question of law or that on any other ground there was a miscarriage of Justice, and in any other case shall dismiss the appeal; and*

*(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.”*

**(F). Appellant’s Case**

[10] The appellant submits that the complainant and the appellant gave directly contradictory evidence, the appellant being in complete denial of the charges against him, and is a “word for word” situation. He categorically denied all the allegations made against him and submits that, the assessors had not accepted the complainant’s account of the allegations occurring, although he does not know the reasons behind the assessor’s opinion. Further, the appellant submits that the trial Judge failed to provide cogent reasons as required by statute.

[11] The Act empowers a Judge to disagree with the majority opinion of the assessors, however, the Judges’ authority in this regard is subject to three important qualifications set out in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009), as follows:

*“[29] That the Judge must pay careful attention to the opinion of the assessors and must have “cogent reasons” for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the Judge’s view as to the credibility of witnesses: Ram Bali v Reginam [1960] FLR 80 at 83(Fiji CA), affirmed Ram Bali v The Queen (Privy Council Appeal N0.18 of 1961, 6 June 1962; Shiu Prasad v Reginam [1972] 18 FLR 70, at 73 (Fiji CA) Cases). In Setevano v The State [1991] FJA 3 at 5, it is emphasised that the reasons “must be cogent and they should be clearly stated. It must also be capable of withstanding critical examination in the light of all the evidence presented at the trial.”*

[30] Secondly, although a Judge is to pronounce his or her reasons in open court. Failure to comply with the statutory requirement, whether because the reasons are inadequate or because they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors.

[31] Thirdly, which is related to the other two points, a person convicted of a criminal offence in the High Court has the right of appeal on any ground which involves a question of law alone (section 21 (1) Court of Appeal Act, Cap 12. The convicted person may appeal to the Court of Appeal on any question of fact, provided he or she obtains the leave of the Court of Appeal or a certificate from the trial Judge. An appeal to the Court of Appeal (whether as of right or after a grant of leave or of a certificate) is by way of a re-hearing: Stevano v State at page 14. Thus, a decision by a trial Judge to disagree with the assessors' opinion that the accused should be acquitted is subject to an appeal (albeit by leave) in the nature of a re-hearing."

- [12] The appellant relies on the decision in Saudromo v State [2024] FJCA 45; AAU19.2019 (28 February 2024), to counter the trial Judge's observations and reliance on the complainant's demeanour that "the complainant to be a straight, consistent and coherent when giving evidence". On that issue, paragraph [33] states:

*"[33] The above shows that the trial judge had no doubt in his mind that the complainant told the truth because her demeanour was consistent with her honesty. What was the basis of making this determination? None was stated by the trial judge. It resulted in his unfairly assessing the evidence in this case by simply overlooking the inconsistencies in complainant's evidence on the basis that he believed her as credible. Often truthfulness and demeanour of a witness are not the best basis to accept once evidence, because many witnesses are firm in their demeanour but are liars. It begs the question to make that kind of assessment without clear basis on the evidence. In the Court of Appeal of Alberta (Canada) Mr Justice Anderson in R v McKay (2011) Alta 314 observed that: "skilled liars can present well."*

- [13] The appellant submits that in this case, there is no basis for trial Judge to have made such determination, when the trial judge had not considered material inconsistencies in her evidence.

- [14] The appellant further submits that, the reasons provided in paragraph 12 of the judgment, does not disclose any key elements in the complainant's evidence that led the trial judge to have concluded that prosecution had proven its case beyond reasonable doubt; and the trial Judge accepted the complainant's evidence as credible, reliable and truthful, without making any references to the elements of the offences that have been proven beyond reasonable doubt.

### *Inconsistencies*

- [15] The appellant submits that there were serious inconsistencies which were not considered by the Judge. Paragraphs 6 and 7 of the judgment (page 48 of Appeal Record) addressed the rape allegation, however when considering the totality of the complainant's evidence, the trial Judge had overlooked and did not consider the complainant's conduct towards her coming out with her complaints. The complainant's evidence shows that for every allegation she had informed someone mostly her husband. However, the explanations offered in how she comes out with her complaint is contradicting. These inconsistencies, are material and has an impact on her credibility.
- [16] In light of the inconsistencies, the appellant submits, the allegations in counts 1 to 3 are said to have happened in July 2014. In cross-examination, her evidence is that she did not tell her mother-in-law and sister-in-law regarding the first incident because she was told not to and she thought she had a husband and the appellant would have stopped what he had done [page 214 Appeal Record]. Upon cross-examination on second and third allegation the complainant's evidence is that she had informed her husband about both allegations, but, he did not take any action [pages 41 to 43 Court Record]. However, to the contrary, the complainant in her evidence regarding the shower incident which is the third allegation, her evidence is that she had informed her husband who, the husband had informed her mother-in-law and sister in-law [pages 193-194 of Appeal Record]. The appellant says that, for the three allegations in 2014, the complainant's explanation for coming forward with her complaint is contradicting.
- [17] With reference to the allegations in fourth and fifth counts, the appellant submits that they seem to be one transaction having occurred between May and September, 2015. The allegations are that the appellant fondled the complainant's breast and had sexual intercourse with her without her consent. The complainant's evidence (in relation to 4<sup>th</sup> and 5<sup>th</sup> allegation) is that she did not instantly tell anyone but she had informed her husband at a later time because he was supporting his family and not her. However, in her examination in chief at page 197 of Court Record, her evidence was she did not tell anyone about the incidents, was that she had a small child and was afraid that her husband would leave her

### **Delayed Reporting To Police**

[18] The appellant submits that the inconsistencies raised in the submissions, had an impact on the complainant's credibility. The 2015 incidents were not reported to the police until 2018 three years after the incidents were alleged to have occurred.

### **Trial Judge's Reasons In Rejecting Factual Issues (Paragraph 5 of Judgment)**

[19] The appellant submits that, there is no evidential basis to support the reasoning in paragraph 5, rejecting the appellant's contention, for the following reasons. Firstly, there is no direct evidence elicited from DW2. There was no question asked of DW2 on the disturbance caused by the complainant. The matter ought to have been raised at the trial. Secondly, DW2's evidence is that in 2018 he was working in Suva and he would visit home after one or two months' time (page 240 Appeal Record). The inference that can be drawn from this piece of evidence that DW2's absence from home would support DW2 not mentioning about the disturbance caused by the complainant. This could have been further explored at the trial. DW2's evidence in its entirety does not support the reasons provided in paragraph 5 of the judgment.

### **Proviso To section 23(1)**

[20] The appellant submits that the proviso to section 23(1) of the Court of Appeal Act is applicable, in that the lack of cogent reasons to overturn the assessors' opinions has caused a substantial miscarriage of justice. In **Saudromo v State** (supra), this Court had stated:

*“Does the proviso to section 23(1) Court of Appeal Act save the situation here? I am afraid not because the miscarriage in question, is about the lack of fair and balanced evaluation of the evidence given on both sides by the trial judge. Its prejudicial effect has severely affected the right of the appellant to a fair and impartial trial guaranteed under section 15(1) of the Constitution 2013.”*

[21] The above applies to this case as there is a substantial miscarriage of justice faced as a result of the lack of cogent reasons in overturning the opinions of the assessors.

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

[22] The respondent submits that, one should be mindful that in **Saudromo v State** (supra) the complainant only complained of rape after being confronted by the appellant's

wife, and, there does not appear to be any instance at trial where the defence counsel fell short of their duty to relevantly and fully cross-examine the complainant.

[23] It submits that, in this case the complainant was evidently in an unequal circumstance at all material times; having been disowned by her family, and since finding family with her husband and his kin. Her fears and reasons for delay in her complaint (reporting) which were mostly to her husband are not controversial at all, but in reality, the “*the sad truth of a world where those without economic resources are often stifled. Her fears were real and she managed to remain consistent in her complaint despite robust and somewhat aggressive cross-examination.*”

[24] The respondent submits that the trial Judge had provided cogent reasons for disagreeing with the assessor’s opinions, and he did not solely rely on demeanour of the complainant when giving her evidence. The learned Judge surgically evaluated the material issues and inconsistent parts of the complainant’s evidence and quite reasonably found her evidence credible.

[25] The respondent commends the approach taken in paragraph [19] of **Saudromo**, as containing “impressively forward thinking observations and of particular reference to this case”, as follows:

*“[19] What would amount to a perverse finding in a high court trial? In the Supreme Court of India in Arulvelu & Another c State [Public Prosecutor] 2009] AIR SCW 6593, in defining what may be a perverse decision, said:*

24. *We have carefully perused the judgment of the trial court and the impugned judgment of the High Court. The trial court very minutely examined the entire evidence and all documents and exhibits on record. The trial court’s analysis of evidence also seems to be correct. The trial court has not deviated from the normal norms or methods of evaluation of the evidence. By no stretch of imagination, we can hold that the judgment of the trial court is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it and consequently the judgment of the trial court is perverse.*

25. *We also fail to arrive at the conclusion that the discussion and appreciation of the evidence of the trial court is so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse and the findings rendered by the trial court are against the weight of evidence. The law is well settled that, in an appeal against acquittal, unless the judgment of the trial court is*

*perverse, the Appellate Court would not be justified in substituting its own view and reverse the judgment of acquittal.*”

[26] The respondent submits that while this case boils down to whether the complainant was a credible and reliable witness, the learned trial Judge transparently had cogently evaluated the evidence in his judgment. The judgment was based on “robustly tested, admissible, logical and clear evidence”. The trial Judge’s verdict was in no way perverse or unreasonable vis-à-vis the complainant’s forthright evidence which was indirectly supported in a limited manner by DW2’s own defence evidence.

[27] The respondent submits that given the above, the appeal against conviction may be properly dismissed with the appellant’s conviction affirmed.

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

#### **Duty of Trial Judge (Disagreeing with Assessors)**

[28] This Court, had, in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) summarised the duty of a trial Judge in disagreeing with the assessors, as follows:

*“[24] When the trial Judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give “cogent reasons” founded on the weight of the evidence reflecting the judge’s views as to the credibility of the witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial [vide **Lautabui v State** [2009] FJSC 7;CAV0024.2008(6 February 2009), **Ram v State** [2012]FJSC 12;CAV001.2011 (9 may 2012), **Chandra v State** [2015] FJSC 32;CAV21.2015 (10 December 2015), **Baleilevuka v State** [2019] FJCA 209;AAU58.2015 (3 October 2019) and **Singh v Singh** [2020]FJSC 1;CAV0027 of 2018(27 February 2020)]*

*[25] In my view, .....the judgment of the trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act,2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonably be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.”*

- [29] Given the above, and as demonstrated below, we are firmly of the view that the trial Judge had carried out an independent assessment and evaluation of the evidence. In the “Judgment” (Judgment with Summing-up) he had explained the reasons for his decision cogently in line with the requirements under section 237 of the Criminal Procedure Act 2009. The trial Judge’s reasons are based on the weight of the evidence and are capable of withstanding critical examination in the light of the whole evidence adduced at the trial. Our view is not affected by the other issues raised in this appeal which attempt to challenge the trial Judge’s determination, raising issues that would seem to dilute or erase the credibility findings of the trial Judge. Those issues are aptly addressed below - See paragraphs [36] to [42].
- [30] In paragraphs 6 and 7 of the Judgment, the trial judge had considered and made a determination on whether the evidence given by the complainant is reliable and credible, in view of the inconsistencies in the evidence on the complainant’s conduct on her coming out. Having assessed and evaluated the evidence, the trial Judge did not find any inconsistency about the time of the alleged incident of rape has affected the reliability and credibility of her evidence.
- [31] In paragraph 8 of the judgment, the trial Judge, in relation to the issue that the complainant had not provided some details in her statement to the police, had considered the complainant’s explanation on the “missing” details from her statement to the police and had accepted the same.
- [32] In paragraph 9 of the judgment, with regard to the first instance of the first count of Indecently Annoying, the trial Judge had considered the explanation made by the complainant on why she decided not to inform anyone about the incident.
- [33] In paragraph 10 of the judgment, the trial Judge considered the complainant’s explanation on how the accused had approached her when other members of the family were not around.
- [34] In paragraph 11, the trial Judge had considered the complainant’s explanation for the delay in reporting this matter to the police. Her explanation was that, she had informed her husband about all the incidents, but he had not taken any steps. The complainant decided to go to the police in 2018 after she gave birth to her daughter. In paragraph 12 of the judgment, the trial Judge stated:

*“I observed that the complainant was straight, consistency and coherent in giving her evidence regarding all these five incidents. Having carefully considered the complainant’s evidence, I accept her evidence as reliable, credible and truthful evidence. I accordingly, find the prosecution has proven that the accused had committed these five offences as alleged beyond a reasonable doubt. In view of these reasons, I have given reasons to disagree with the unanimous opinion of not guilty given by three assessors.”*

[35] We emphasise that the judgment cannot be taken in isolation, as the summing – up must also be considered, it being an integral part of the judgment in terms of section 237 of the Criminal Procedure Act 2009.

### **Other Issues**

[36] We now consider the other issues raised in this appeal, namely (a) Inconsistencies, contradictions, omissions; (b) Delay in reporting; (c) Fabrications. We are conscious that these issues were raised in the grounds of appeal before the Single Judge, and were disallowed. There is no Renewal Application before us on these grounds / issues. They will be considered nevertheless.

[37] It is alleged that the trial Judge did not consider or analyse the evidence on inconsistencies, contradictions and possible omissions in the complainant’s evidence, which renders the conviction baseless and unsupported by evidence. That the trial Judge did not evaluate and weigh the effects of the inconsistencies and contradictions in the complainant’s evidence.

[38] However, the trial judge had directed the assessors on the inconsistencies, contradictions and omissions in the summing-up at paragraphs 32 and 51-55, as follows:

*“32. You may recall that the complainant said during the cross-examination, that this incident took place when she was pregnant with her first child in 2015. Her child was born on the 13<sup>th</sup> of August 2015. During the evidence-in chief, she said that her child was four months old when this alleged incident of rape took place. However, during the re-examination, she said that this alleged incident took place two months after giving birth to her first child. Moreover, you may recall that she explained that some of the information she stated in her evidence is not recorded in the statement she gave to the police because the officer who recorded it never asked her about them.”*

### **“Contradictions, Omissions and Inconsistencies**

51. You may recall that the complainant said during the evidence in chief that the incident of the forced sexual assault took place four months after she gave birth to her first child. However, during the cross-examination, she said yes to the question posed by the learned counsel for the defence, asking her whether she was pregnant when the accused allegedly penetrated her vagina with his penis. During the re-examination, said this alleged incident of rape took place two months after she gave birth to her first child.

52. Moreover, the complainant explained during the cross-examination that certain information she explained in her evidence have not been recorded in the statement she made to the police. It was because the officer who recorded her statement had never asked her about those information.

53. You are allowed to take into consideration about such omissions and inconsistencies when you consider the credibility of the evidence given by the complainant. However, previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the Court.

54. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person.

55. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.”

[39] The learned trial Judge dealt with these issues at paragraphs 6, 7 and 8 of the judgment, as follows:

“6. I now turn to determine whether the evidence given by the complainant is reliable and credible. There is a contradiction in evidence of the complainant regarding the time of the offence of Rape took place. During her evidence in-chief, she said the incident of forced sexual intercourse took place four months after her first child’s birth. She gave birth to her first child on 13<sup>th</sup> of August 2015. However, during the cross-examination, the complainant answered “yes” when the learned counsel for the defence asked whether she was still pregnant when this alleged incident of forced sexual intercourse took place. During the re-examination, the complainant then clarified her position, stating that the alleged incident took place two months after she gave birth to her first child.

7. I am satisfied with the clarification given by the complainant about the time of the alleged rape incident. She specifically stated that there was a funeral taking place on the day this alleged incident of Rape took place. She said that she was just 19 years old and was not specified with the time.

*Having considered her evidence and the manner she gave evidence, I do not find this inconsistent nature about the time of the alleged incident of Rape took place has affected the reliability and credibility of her evidence.*

*8. The learned counsel for the defence emphasised the complainant had not provided some details in her statement to the police. The complainant explained that the police officer who recorded the statement did not ask her to give those details. I accept her explanation for not providing those details in her statement.”*

[40] Inconsistencies, contradiction and omissions do occur due to various reasons posing challenges to the conduct of trials and giving of evidence by witnesses. Courts over the years have developed strategies and principles to deal with these issues (omissions, inconsistencies, contradictions and discrepancies) when they occur and raised in appeals. In **Nadin v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015), this Court, at paragraph [13] and [15] made the following observations:

*“[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R. v O’Neill** [1969] Crim.L.R.260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rules could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).”*

*“[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution’s witnesses. As the mental abilities of human beings cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.”*

[41] The appellant had raised the issue of delay in reporting to the police. That there was a delay is not in dispute, however, the trial Judge had properly considered the issue in the summing-up to the assessors, and subsequently in his judgment. In paragraphs 56, 57 and 58 of summing-up, the trial sated as follows:

**“Delay**

*56. You had heard the complainant had reported the matter to the police in 2018 that is three years after the incident of rape. However, she explained in her evidence that she had informed her husband about these incidents, but he did not take any steps. You may recall that the learned*

*counsel for the defence suggested to you to consider the delay in reporting this matter to the police.*

*57. It is a matter for you to consider and resolve. You have to decide whether it was a delay. If so, then you have to determine whether it was a substantial delay. Then you can proceed to determine whether such a delay would affect the reliability and credibility of the evidence of the complainant.*

*58. However, it would be wrong to assume that every person who had been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma that they have faced 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. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise, an immediate complaint does not necessarily demonstrate a true complaint.”*

[42] We consider that on the totality of the evidence, it was open to the trial Judge to have arrived at the guilty verdict. The test to be applied on the issue of delay in making a complaint is described as the “totality of circumstances test”. 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 must 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 would 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.”* See also **State of Andhra Pradesh v M.Madhusu dhan Rao** (2008) 15 SCC 582.

[43] In **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) the State’s appeal was dismissed in that this Court (per Gamalath, JA) found “that the prosecution had not taken any endeavours to explain the reasons for the delay in making the complaint.”

[44] The appellant in his submissions challenged the trial judge’s rejection of the appellant’s assertion that the complainant had fabricated the allegations because she wanted to move out of the accused’s house with her husband, the accused’s eldest son. Because of that there was a fight in 2018. The trial Judge had rejected the contention on the basis that the second defence witness (DW2), Navneel Chand, did not mention in his evidence about the incident, the disturbance caused by the complainant. The appellant submits that the conclusion reached by the trial Judge expressed in

paragraph 5 of the Judgment is not supported by evidence. At paragraph 5 of the judgment the trial Judge stated:

*“5. In his evidence, the accused merely denied the allegations and claimed the complainant made these false allegations as she wanted to move away from the family home with her husband. Because of that intention, she had started to fight in 2018. However, the son of the accused, who gave evidence for the defence, did not mention about such a tumult made by the complainant. He stated that the complainant called him on his phone to inform that the accused had been doing bad things to her and she will report it to the police.”*

[45] The appellant submits that no evidence was elicited from DW2 during the trial and it is improper to draw an inference.

[46] Mr Navneel Chand (DW2)’s evidence is recorded at pages 238 to 241 of the High Court Record.

[47] Below are excerpts from DW2’s evidence from pages 239 and 240.

*“Mr Dayal: I will take you to 31<sup>st</sup> July, 2014 where were you residing at that period?*

*Mr Navneel: I was residing at Yasiyasi, Tavua.*

*Mr. Dayal: Where were you working?*

*Mr. Navneel: I was working in Lautoka.*

*My Dayal: What type of work?*

*Mr Navneel: I was working for A Jan Group and Western Builders.*

*Mr Dayal: During that period of 1<sup>st</sup> July to 31<sup>st</sup> July 2014 can you tell the court did something happen at your residence?*

*Mr Navneel: Yes My Lord: I knocked off around 5 when I reach Tavua at home its 7pm. While I was going then I saw at my house my brother was coming down. When my brother came out in the porch the sister in law also followed him. I saw some actions. I couldn’t hear anything because I had the earpiece on my ears then I took my earpiece out. Then I heard that there is a fight at home then I ran and saw both of them were fighting (My sister in law and my brother) and my sister in law tried to kick my brother.*

*Mr. Tuenuku: My Lord if I may what is the relevance.*

.....

*Mr Dayal: I will rephrase my Lord. Can you yell us how do you know Ashna Anshu?*

*Mr Navneel: She is my sister in law.*

*Mr Dayal: From which year she was your sister in law?*

*Mr Navneel: from 2014*

*My Dayal: Can you tell the Court at any time Ashna complained to you regarding your father?*

*Mr Navneel: No My Lord.*

*Mr Dayal: Can you tell the Court whether any incident she complained to you?*

*Mr Navneel: No My Lord.*

*Mr Dayal: In 2018 where were you working?*

*Mr Navneel: I was working in Niranjans, Suva*

*Mr Dayal: How often do you visit?*

*Mr Navneel: One month and sometimes two months. I come on Friday and go back on Sunday.*

*Mr Dayal: Any complaints by any of your family members during that time?*

*Mr Navneel: No My Lord.*

*Mr Dayal: In 2018 could you tell the Court whether any calls was made to you from your residence?*

*Mr Navneel: Yes My Lord because the day she wanted to report the matter to police that day I receive the call.*

*Mr Dayal: Who called you?*

*Mr Navneel: Ashna Anshu Lata.*

*Mr Dayal: And what did she tell you?*

*Mr Navneel: She told me she wants to report about dad doing this and that so I told he wait for brother let him come from work and then report after discussing with brother that is her husband.*

*Mr Dayal: What was she telling you about?*

*Mr Navneel: She said; "Papa is saying some words" and then I asked what words and she said wrong words that's all.*

*Mr Dayal: Can you tell the Court was there any further questions?*

*Mr Navneel: No after that I told her to wait for brother after discussion then but she called later she told me she has reported the matter*

*No Cross Examination."*

[48] We consider that the submission by the appellant with respect to the evidence of DW2 is misconceived. Further, the interpretation placed by the appellant on the trial Judge's

motive and intention with respect to the appellant's submissions in paragraph [19] above, cannot be sustained.

**Proviso (Section 23(1) of Court of Appeal Act)**

[49] Whether the proviso applies in this case, given the ground of appeal? The appellant's contention is that the lack of cogent reasons has caused a substantial miscarriage of justice. We have held that the trial Judge's reasoning was cogent and complied with the statutory requirements under section 237 of the Criminal Procedure Act 2009. We are also of the view that on the totality of the evidence, and facts and circumstances of this appeal, the trial Judge had fully discharged his duty under law, when he overturned the unanimous opinions of the assessors and giving cogent reasons for his decision.

[50] This case, on the facts, is distinguishable from **Saudromo** (supra), where this Court held (Mataitoga, RJA):

*"[20] This was a case where both the appellant and the complainant gave directly contradictory evidence regarding the alleged acts of rape and sexual assault i.e. "word for word" charged against the appellant. All the other witnesses called by the prosecution relate only to the circumstances surrounding the alleged rape and sexual assault by the appellant. The victim at no stage reported the rape or the sexual assault to anyone. A report was finally made to the police after the appellant's wife confronted the complainant. The other witnesses for the appellant at the trial gave testimony that relate only to the background circumstances. In those circumstances the trial judge should be very careful in the directions it have to the assessors regarding his preference for the evidence of the victim against that of the appellant and how it relates to the burden of proof.*

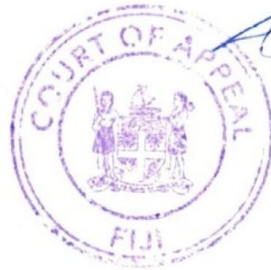
[51] We are not convinced that the principles applied and the conclusions reached in that case apply here. There is no miscarriage of justice. The trial Judge had adequately and appropriately explained his reasons for disagreeing with the assessors, and had discharged his duty under the circumstances.

**(I). Conclusion**

[52] In consideration of the foregoing analysis and discussion the Application for Renewal to Appeal against Conviction is allowed. We hold that the appeal has no merit and ought to be disallowed and dismissed.

**Orders of the Court**

1. *The appeal is dismissed.*



A handwritten signature in blue ink, appearing to read "Isikeli Maitoga", written over a horizontal line.

**Hon. Mr. Justice Isikeli Maitoga**  
PRESIDENT OF THE COURT OF APPEAL

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

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

A handwritten signature in blue ink, appearing to read "Walton Morgan", written over a horizontal line.

**Hon. Mr. Justice Walton Morgan**  
JUSTICE OF APPEAL

**Solicitors**

Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the Respondent