

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

CRIMINAL APPEAL NO. AAU 122 of 2016
[In the High Court at Suva Case No. HAC 23 of 2013]

BETWEEN : ILISONI WAQA *Appellant*

AND : STATE *Respondent*

Coram : Prematilaka, JA

Counsel : Mr. K. R. Prasad for the Appellant
: Mr. S. Babitu for the Respondent

Date of Hearing : 08 July 2020

Date of Ruling : 13 July 2020

RULING

- [1] The appellant had been indicted with four others (three of them are appellants in AAU121/2016, AAU 123/2016 and AAU131/2016 and the other is supposed to be dead) in the High Court of Lautoka on five counts of rape [Counts1-5] allegedly committed at Ra in the Western Division contrary to section 207(1) and (2) (a) of the Crimes Decree, 2009 respectively.
- [2] The information consisted of the following counts.

COUNT 1

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of *LV*, without her consent.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 44 (2) and 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and *EPI VAKASILIMI* (as the primary principal participant), on the 23rd day of January 2013 at Ra in the Western Division inserted his penis into the vagina of *LV*, without her consent.

COUNT 3

Statement of Offence

RAPE: Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and *MECIU NACAUCAULEVU* (as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of *LV*, without her consent.

COUNT 4

Statement of Offence

RAPE: Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and *WAISEA VULI* (as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of *LV*, without her consent.

COUNT 5

Statement of Offence

RAPE: *Contrary to Section 44 (2) and Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ILISONI WAQA (as a secondary principal participant) and ***JOPE SERUKALOU*** (as the primary principal participant) on the 23rd day of January 2013 at Ra in Western Division, inserted in his penis into the vagina of ***LV***, without her consent.

- [3] At the conclusion of the trial on 23 May 2016 the assessors' opinion was unanimous that the appellant was not guilty of all counts against him. The learned trial judge had disagreed with the assessors in his judgment delivered on 27 May 2016, convicted the appellant as charged and on 10 June 2016 sentenced him to 10 years and 07 months of imprisonment on the first count and 09 years of imprisonment on all other counts to run concurrently with a period of 08 years of non-parole.
- [4] The appellant's timely notice of appeal only against conviction had been filed in person on 06 June 2016. Thereafter, the appellant had filed amended grounds of appeal against conviction on 21 November 2017. R Vananalagi & Associates had had filed an amended notice of appeal against conviction on 21 March 2019 followed by written submissions on 04 April 2019. The Legal Aid Commission represented the appellant at the leave to appeal hearing. The state had tendered its written submissions on 04 June 2020.
- [5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007

(19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[6] Grounds of appeal urged on behalf of the appellant are as follows.

Ground 1 - The Learned Trial Judge erred in law and in fact when he refused to grant leave to the counsel to cross examine the complainant with regards to her having sexual intercourse with one Amani the night after she alleged to have been raped by the Petitioners by indicating that it is prohibited under Section 130 of the Criminal Procedures Act 2009.

Ground 2 – The Learned trial Judge erred in law and in fact when he refused to grant leave to the counsel to probe into the evidence of Amani during the Defence case regarding him having sexual intercourse with the Complainant the night after she alleged to have been raped by the Petitioners by indicating that it had nothing to do with the issue at hand with this case.

Ground 3 – The Learned Trial Judge erred in law and in fact when he failed to scrutinize and/or analyzed in detail the inconsistencies in the evidence of the complainant even against the witnesses for the prosecution.

Ground 4 – The Learned Trial Judge erred in law and in fact when he failed to scrutinize and/or analyzed in detail the circumstances when the complainant failed to report the alleged incident of rape with the opportunities presented.

[7] The summarized facts relating to the charges against the appellants could be gathered from the summing-up as follows.

29. Prosecution called the Complainant, LV, as their first witness. She is originally from Batiki, Lomaiviti. She was visiting her aunt in Nakorovou village with Jokaveti. First they arrive at Rokovuaka with two men, namely Junior and Robert and Junior's wife. Then her aunt Nani comes to pick her up at Junior's place. On Tuesday the 22nd of January 2013, She comes to Jokaveti's sister, aunty Nani's place in Nakorovou settlement.

30. On 22nd, leaving their two daughters (Kinisi and Mereisi) and son, Meciu (who is also known as Tubuna) behind in their house, aunty Nani and her husband leave for Nausori around 9 a.m. for marketing. After her uncle and aunty had left, around 3 p.m., LV was about to leave the house with her two cousins. Meciu asks her if he could drink grog with her. She agrees and

starts drinking grog with Ilisoni Waqa, Meciu, Vuli, Manu, Suka, Jone and Epi. They come to know each other at the grog session on the same day.

31. *After having grog, Manu and Sukaleave the house to catch bat. LV goes to sleep between 1 and 2 a.m. in that same small house but a little bit on top, far from the others, while the grog session was still in progress. Whilst she was lying down, Ilisoni Waqa comes, and asks her if he could have a talk with him. He then joins the other boys. In a short while, he comes back to her and calls the other boys. Ilisoni sits on her legs, holds on to her and ties her hands and legs. She tries to scream but Meciu blocks her mouth. Ilisoni undresses her. All of them undress themselves, take their penises, penetrate her vagina, taking turns. Ilisoni Waqa inserts his penis into her vagina first followed by Vuli, Meciu, Epi, and Jone whilst she was crying.*

32. *They used a lantern to light the grog session. Meciu turned it off and the house turned dark. There was, however, light coming from the moon and Meciu was lighting the match. They were having sexual intercourse with her for 1 – 2 hours. Each of them taking turns not that long.*

33. *Whilst she was crying aunty, Jokaveti's son, Tomu, arrived after 7 a.m., and saw her crying. He asked her, what is wrong? She did not reply. Jone, Vuli, Epi had already left while Ilisoni Waqa and Meciu were still with her when Tomu arrived.*

34. *She left the house in the morning and was staying with one family in a nearby house. On the 23rd January, 2013, the Village Headman came to that house. The lady of the house informed the Village Headman about the incident. Then she reported the matter to the Village Headman, crying. He then called the Police.*

- [8] The appellant had admitted having had consensual sexual intercourse with the appellant and is said to have made in his cautioned interview certain admissions regarding the alleged incident. However, the summing-up and the judgment do not make it clear what those admissions were. He had further said in evidence that the complainant came back to the village after he was released on bail and lived with him for 03 months before he asked her to leave. Defense witness Seru Digo Dave, the Village Headman seems to have substantiated this position.

01st and 02nd grounds of appeal

- [9] The background to the appellant's complaint under the first and second grounds of appeal could be found in paragraphs 23-25 of the judgment and paragraph 39 and 101 of the summing-up. Paragraphs 23-25 of the judgment are given below.

23. Defense Counsel repeatedly cross examined the Complainant, surprisingly without any objection from the Prosecution, on the basis that she went a further step forward and kissed Amani and had sexual intercourse with him. Complainant having accepted that she slept with Amani denied that she had sexual intercourse with him. She displayed her honesty by admitting that she slept with Amani. She had every right to deny that she had sex with Amani. She is not bound to answer in public about her past sexual relationships with people other than the accused in this case. It would have been better if the State Counsel, in the interest of justice, watched not only the interest of the State but also that of the Complainant before it is too late.

24. Amani was called by the Defence, again without any objection, to prove that the Complainant not only slept with him but also had sexual intercourse with her. Court had to intervene to stop Amani from exposing his sexual experience with the Complainant any further as it had nothing to do with the issue at hand in this case.

25. Contention of the Defence Counsel that Complainant's past sexual experience with Amani is relevant to the issue at hand and his application to further question Amani on that basis were refused by this Court in the interest of justice. Even for the purpose of impeaching the credibility of the Complainant, her previous sexual experience with a third person is immaterial in this case as she was entitled in law to suppress her previous sexual experience with others in court whether it predates or postdates the charge.

[10] From paragraph 23 it appears that the defence counsel had in deed cross-examined the complainant repeatedly on her having slept with Amani the day after the incident of rape and suggested that she had kissed and had sexual intercourse with him too. The learned trial judge claims to have intervened when Amani as a defence witness was examined on the same. However, the extent to which Amani had already given evidence when the trial judge stopped him cannot be ascertained without the full appeal record though there is some indication in paragraph 28 of the judgment that Amani had said in evidence that he had indulged in sexual intercourse with the complainant. Therefore, the appellant's real complaint appears to be on the learned trial judge's intervention when Amani gave evidence.

[11] The State argues that section 130 of the Criminal Procedure Code prohibits any evidence of past sexual experience history without leave of court and the trial judge's refusal to grant such leave is justified [see section 130(2)]. The trial judge had refused leave to further question Amani as 'it had nothing to with the issue at hand' and seems to have thought that therefore it was not in the interests of justice either to permit Amani to come out with his alleged sexual experience with the complainant

[see section 130(3)]. The trial judge had been of the view that even to impeach the credibility of the complainant Amani's evidence was not material.

[12] On an analysis of section 130, it appears that the court's discretion to allow (or to grant leave) evidence or put questions to a witness relevant directly or indirectly to the sexual experience of the complainant with a third party other than the accused or the reputation of the complainant under section 130(2), is governed by considerations set out in section 130(3) read with section 130(4) of the Criminal Procedure Code. Therefore, evidence even as to the general disposition or propensity of the complainant in sexual matters would not be considered as being directly relevant and allowed unless such evidence is of direct relevance to the facts in issue or the issue of appropriate sentence and exclusion of it would be contrary to the interests of justice [vide sections 130(3) read with section 130(4)]. However, in terms of section 130(5)(a) leave under section 130(2) is not required *inter alia* for the purpose of giving evidence or putting questions for the purpose contradicting or rebutting the evidence given by a witness relevant directly or indirectly to the sexual experience of the complainant with any other person other than the accused (third party) or the reputation of the complainant in sexual matters. Section 150(5) appears to contemplate a situation after leave is granted where evidence is led or questions are put under section 130(2) [read with sections 130(3) and 130(4)] of past sexual history of the complainant.

[13] As far as the appellant is concerned (as opposed to his co-accused) he had taken up the defense of consensual sexual intercourse with the complainant which is of direct relevance to a fact in issue namely whether the appellant had sexual intercourse with the complainant with her consent. The learned trial judge does not seem to have given his mind to differentiate the appellant's position from the rest of the appellants in disallowing such evidence to be elicited from Amani. The difficulty the trial judge may have faced, perhaps, was that the appellant's counsel defended two other accused whose defense had been a total denial (one of them even took an *alibi* defense) and they had no right to lead evidence of past sexual history of the complainant in terms of section 130 of the Criminal Procedure Act.

- [14] However, whether the trial judge under section 130 of the Criminal Procedure Act had correctly disallowed the evidence of Amani of the complainant having allegedly slept and had engaged in sexual intercourse with him the day after the incident of multiple acts of rape committed by the appellant and his co-accused, in the light of the appellant's defense of consensual sex, could be considered more a question of law mixed with facts.
- [15] Another matter that could also be considered as a question of law is whether Amani's evidence could be regarded as past sexual history of the complainant as referred to in the title to section 130 and whether the prohibition under section 130 extends even to evidence on the sexual experience of the complainant with any other person other than the accused or the reputation of the complainant in sexual matters after the commission of the offence in the information.
- [16] In paragraph 25 of the judgment the learned trial judge had expressed his view on the second matter above as follows

'Contention of the Defence Counsel that Complainant's past sexual experience with Amani is relevant to the issue at hand and his application to further question Amani on that basis were refused by this Court in the interest of justice. Even for the purpose of impeaching the credibility of the Complainant, her previous sexual experience with a third person is immaterial in this case as she was entitled in law to suppress her previous sexual experience with others in court whether it predates or postdates the charge.

- [17] Therefore, although I cannot say at this stage that there is a reasonable prospect of the first two grounds of appeal succeeding in appeal, as a matter of formality I am inclined to grant leave on the above questions of law (though leave is not required for a pure question of law) so that the full court could clarify the legal position on both issues of law.

03rd ground of appeal

- [18] The appellant's complaint is that the learned trial judge had failed to scrutinize and/or analyzed in detail the inconsistencies in the evidence of the complainant and other prosecution witnesses. The trial judge had summarized the issue of inconsistency of the complainant's evidence from paragraphs 14-17 of the judgment.

14. *Defence Counsel contended that Complainant's own previous statements are contradictory to her evidence and, in view of those contradictions, her evidence should be rejected. Their main focus was on the so called contradiction in her previous statement to police, and also to the doctor, where she is alleged to have stated that she was raped by seven people. In Court, she denied having stated to police that she was raped by seven people.*

15. *Director of Public Prosecution has filed the information only against five people. His Counsel says that police had made a mistake in recording her statement.*

16. *Complainant had mentioned Epi's name to police but his name is recorded as 'Levi'. Another name 'Osea' that appears in her statement to police was never transpired at the trial. She stated that names of Manu and Suka were mentioned to police as they also participated in the grog session and not as the ones who raped her. Meci confirmed that Suka was also arrested by police at his house along with him. But Suka was not charged. Therefore, possibility of making mistakes in recording the police statement cannot be ruled out. What is important here is that she had mentioned the names of the accused to police soon after the incident.*

17. *The conditions under which Complainant may have given her previous statements to police and to the doctor are quite understandable. I do not consider those contradictions material so as to affect the credibility of her evidence.*

[19] The judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up because 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 (vide Lilo v State [2020] FJCA 51; AAU141.2016 (13 May 2020), Ferei v State [2020] FJCA 77; AAU073.2019 (11 June 2020), Valevesi v State AAU 039/2016 (22 June 2020), Lasarusa Tikoigiladi v State AAU 138 of 2016 (23 June 2020), Ravulowa v State [2020] FJCA 93; AAU0090.2018 (1 July 2020)] and Prasad & 03 others v State AAU 125.2016 (10 July 2020).

[20] On a perusal of the summing-up, I find that the trial judge had directed the assessors on how the complainant had responded under cross-examination in paragraphs 36-48 and specifically asked them to consider the issue of inconsistency in paragraphs 115 and 116 and directed himself accordingly. He had also drawn their attention to the evidence of PW3 (Tomu Senidave) and PW4 (Saula Madraiayawa). I also find references in the summing-up to most matters of alleged inconsistencies, if not all,

highlighted in the appellant's written submission and therefore they are part of the judgment too.

- [21] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal commented on inconsistencies as follows

*'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).*

- [22] In the circumstances, the appellant has not demonstrated that he has a reasonable prospect of success in this ground of appeal.

04th ground of appeal

- [23] The appellant's argument is basically about the delay in reporting the incident of sexual abuse despite the complainant having had early opportunities to do so. This aspect had not escaped the attention of the learned trial judge. In paragraphs 9-13 under the heading 'Recent compliant Evidence' he had dealt with it in the judgment as follows.

9. *Complainant had not complained to police soon after the incident. Defence Counsel argued that she did not take two opportunities to report the alleged incident because she was never raped. I am unable to accept that contention.*

10. *Complainant in fact complained at the earliest opportunity to the lady (Lice) who invited her to have grog at her house on the 23rd of January, 2013. It was that lady who relayed the incident to Saula, the Deputy Chief of the village, on the 24th. Saula in turn informed the incident to the Rakiraki Police Station in the presence of the Complainant. Complainant herself at the same time reported the matter to Police over the phone. When she was asked why she failed to make a prompt complaint to police, she said that there was no transport, and no mobile phones. Police officers confirmed that there was no motorable road up to Maciu's house situated at the interior part of Nakorovu village. Complainant was taken to the Rakiraki Hospital on the same day where she informed the doctor Alma that she was raped. Her statement was recorded by the Police on the 25th January, 2013.*

11. *Both Saula and Dr. Alma gave evidence and confirmed that they received the relevant information from the Complainant. Both of them are independent witnesses. After this incident was reported to police Saula was*

under pressure to resign from his Deputy Village Headman post at a meeting called by the accused's family in which Seru Digo, the Village Headman, also participated.

12. *Complainant was a total outsider to Nacara Settlement in that night. She had visited her aunt, Losena who is the mother of the 3rd accused for the first time. Jokaveti is Losena's sister. Defence Counsel's contention that she could have complained to Jokavaeti soon after the incident is not tenable. Complainant said that she was scared to go out in the dark. Some of the accused were still inside the house. Reaching Jokaveti's house to complain, crossing a river in the night, after an invasion on her body and soul, seemed nearly impossible.*

13. *Even if she had an opportunity to complain, it would be wrong to assume that every person who has 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 in different ways. Some, in distress or anger, may complain to the first person they see. Others would react with shame, or fear or shock or confusion, do not complain or go to Police or any other authority for some time. It takes a while for self-confidence to re-assert itself.'*

[24] In addition, the learned trial judge had addressed the assessors and himself on the aspect of alleged delay in paragraphs 112-114 of the summing-up. Therefore, it looks to me that the reasoning of the learned trial judge, that there had not been a delay as such in that the complainant had complained at the first suitable opportunity available within a reasonable time and in any event she had explained why she had to wait till 24 January to make the complaint, cannot be faulted.

[25] Therefore, there is substantial compliance with **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) guidelines on how to deal with an allegedly delayed complaint.

‘[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:-

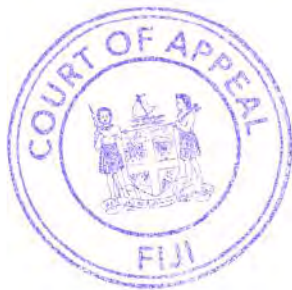
‘The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be 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

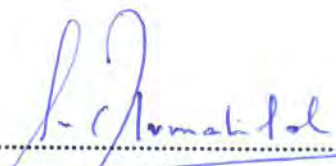
opportunity within a reasonable time or whether there was an explanation for the delay.'

[26] Thus, I do not find a reasonable prospect of success in this ground of appeal.

Order

1. Leave to appeal against conviction is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL